Neutral Citation Number: **[2025] EWHC 2107 (Comm)**

Claim No. CL-2024-000449

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

Date: 8 August 2025

Before:

Peter MacDonald Eggers KC
(sitting as a Deputy Judge of the High Court)

- -

Between:

REGERA S.À R.L

Claimants

– and –

(1) PHILLIP EAN COHEN
(2) MARIA THERESE VALMORBIDA
(3) ZARA SIMON

Defendants

- -

Mr Simon Atrill KC and **Ms Alexandra Whelan** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Mr Hugh Sims KC and **Ms Lucy Walker** (instructed by **The Khan Partnership LLP**) for the **First and Second Defendants**
The Third Defendant was not represented

Hearing date: 7th April 2025
Followed by written submissions on 10th, 15th and 17th April 2025

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Introduction

1. On 1st August 2024, the Claimant commenced this action against the Defendants, each of whom was a guarantor of a loan facility dated 14th June 2021 ("**the Facility Agreement**"), which facility was advanced by the Claimant to Mr Andrew Valmorbida ("**the Borrower**"). The Borrower defaulted under the Facility Agreement. Following the commencement of legal proceedings by the Claimant against the Borrower, they entered into a settlement agreement in April 2024.

2. As the Borrower did not repay the sums due under the Facility Agreement, the Claimant commenced these proceedings against the Defendants under the guarantees contained in the Facility Agreement.

3. On 7th August 2024, the Claimant maintains that the proceedings under the guarantees were served on the Defendants by service on Law Debenture Corporate Services Limited ("**Law Debenture**"), a London-based service of process agent appointed by the Claimant purportedly under the terms of the Facility Agreement.

4. The First and Second Defendants dispute the validity of this service. They maintain that they were not aware of the service of proceedings on Law Debenture until 4th September 2024 and did not receive notice of the appointment of Law Debenture until 11th October 2024.

5. The First and Second Defendants did not file an acknowledgment of service or a defence.

6. On 2nd September 2024, a default judgment was entered against each of the First and Second Defendants in the sum of US$2,749,621.62 plus £10,000.00 (inclusive of costs). The First and Second Defendants were not aware of the entry of default judgments against them until 13th September 2024.

7. The First and Second Defendants apply to set aside the default judgments pursuant to CPR rule 13.2 on the ground that the time for filing an acknowledgment of service has not expired, because the service on Law Debenture was not valid; alternatively under CPR rule 13.3 on the grounds that First and Second Defendants have a real prospect of

successfully defending the Claimant's claim. The Third Defendant was not involved in this application. The claim against the Third Defendant has been resolved.

8. In respect of the First and Second Defendants' applications, I have read the witness statements of Ms Miyen Ho of The Khan Partnership LLP ("**TKP**"), served on behalf of the First and Second Defendants, and the witness statements of Mr Khaled Khatoun of Quinn Emanuel Urquhart & Sullivan UK LLP ("**Quinn Emanuel**"), served on behalf of the Claimant.

9. In disposing of this application, I was confronted with a large number of arguments by reference to documents in bundles comprising approximately 3,500 pages (aside from the bundle of authorities). I was assisted in navigating my way through these documents by the helpful submissions of counsel both in writing and orally. Only one day was allowed for the hearing of this application. As not all of the issues could be aired during the oral hearing, I invited the parties to serve supplementary written submissions after the oral hearing.

Discussions leading towards the Facility Agreement

10. Under the Facility Agreement, the Claimant advanced a term loan facility in the sum of US$33,410,000 to the Borrower, who is the son of the Second Defendant and is an art dealer and collector and film producer based in the United Kingdom.

11. The First and Second Defendants are Australian nationals who travel between residences in Miami Beach, New York City, and Long Island, New York.

12. The Claimant contends that the First and Second Defendants provided personal guarantees under the Facility Agreement, each limited to a maximum amount of US$2,500,000.

13. The Borrower entered into the Facility Agreement in order to borrow funds to settle legal proceedings before the Royal Court of Jersey involving a former business partner. The Borrower (and one of his companies) agreed to a settlement requiring him to pay US$20,500,000 by 14th June 2021. This followed a trial in May 2021 and before judgment was delivered. As it happened, notwithstanding the settlement, in September 2021, the Jersey Court stated that it would issue a judgment because it would be in the

public interest to have the Borrower's dealings exposed. In its final judgment handed down on 30th September 2022 ([2022] JRC 202), the Jersey Court recorded its finding that the Borrower was a "*deliberately dishonest witness*" (para. 185).

14. In his negotiations with the Claimant, the Borrower was advised by Mr Conrad Purcell of Bird & Bird LLP.

15. Under the Facility Agreement, the Borrower provided security for his obligations to repay the loan by pledging in favour of the Claimant artworks of significant value, together with certain intellectual property and other assets. On about 9th June 2021, the Claimant indicated that in addition to the security to be provided by the Borrower, it required a personal guarantee from each of the First and Second Defendants.

16. On 10th June 2021, the First and Second Defendants applied their signatures. However, the accounts relating to the signing of the Facility Agreement given by the First and Second Defendants on the one hand and by the Claimant on the other hand are strikingly different.

17. According to the First and Second Defendants,

    (1) The Claimant exerted "*excessive pressure*" upon the First and Second Defendants and as the deadline of 14th June 2021 loomed, "*pressure increased exponentially upon the Borrower and the First and Second Defendants, with increasingly onerous demands set by the Claimant upon the Borrower with very limited time to properly consider and negotiate. As part of those demands, on or around 9 June 2021 (i.e., the Wednesday before the Settlement Sum deadline on Monday 14 June 2021), the Claimant demanded personal guarantees from the First and Second Defendants, requiring their immediate signatures at short notice. To this end, the First and Second Defendants were forced to seek advice from the same solicitors as the Borrower at short notice over the weekend on 11 June to 14 June 2021*" (Ms Ho's first witness statement, para. 18-19).

    (2) On about 10th June 2021, four days prior to the date of the executed Facility Agreement, the First and Second Defendants were visited at The Connaught Hotel by Mr Simon Chadowitz, the Claimant's agent who had first introduced the Borrower to the Claimant, and who pressurised the First and Second

Defendants to provide their agreement to personal guarantees. They were then asked to affix their respective signatures to a single blank piece of paper that was not physically connected to any other pages or document. The First and Second Defendants placed their signatures on a blank piece of paper without signature blocks, and the signature page attached to the Facility Agreement bearing their signatures was "*not the piece of paper they signed*" (Ms Ho's second witness statement, para. 12-17).

(3) According to Ms Ho's first witness statement (at para. 19.1), "*Solicitors acting for the Borrower were urgently requesting clarity on the documentation requiring signature on 10 June 2021, while the First and Second Defendants were scheduled to catch a flight only several hours later*", and that when the First and Second Defendants placed their signatures, the terms of the Facility Agreement were still subject to negotiation and the First and Second Defendants had not seen the Facility Agreement and had not received any advice in respect of their obligations under the proposed personal guarantees (Ms Ho's second witness statement, para. 16-17 and third witness statement, para. 9-10).

(4) The piece of paper signed on 10th June 2021 by the First and Second Defendants was then used and attached to the Facility Agreement completed on 14th June 2021.

18. According to the Claimant, whilst Mr Chadowitz does recall having a discussion with the Borrower and the First and Second Defendants in their bedroom at the Connaught Hotel, he was not present when they signed the execution pages on 10th June 2021, nor did he witness the First and Second Defendants sign any other document; Mr Chadowitz did not provide any signature pages to the Defendants, nor did he pressurise them; the Borrower, not Mr Chadowitz, brought the execution pages to the Connaught Hotel to be signed by the First and Second Defendants on 10th June 2021 (Mr Khatoun's second witness statement, para. 4-6).

19. On 10th June 2021, Katz & Co (London) LLP sent to the Claimant a Statement of High Net Worth.

20. During the weekend of 11th to 14th June 2021, Mr Andrew Hallgarth of Bird & Bird LLP interacted with the First and Second Defendants by telephone (Ms Ho's third

witness statement, para. 15). The First and Second Defendants deny having formally engaged Mr Hallgarth to advise them and deny that they received adequate advice from Mr Hallgarth (Ms Ho's second witness statement, at para. 19-20). By contrast, Mr Khatoun maintained in his first witness statement (para. 30) that the First and Second Defendants "*received independent legal advice before the Facility Agreement was executed*" and that on 13th June 2021, Mr Hallgarth, described as "*an independent partner at Bird & Bird LLP*", "*provided a letter to Regera by which it was confirmed that Mr Hallgarth had discussed and explained to the Defendants the practical and legal implications of entering into their respective Guarantees …*".

21. There followed correspondence involving the Borrower, Mr Purcell, Mr Hallgarth and others, but not the First and Second Defendants. For example, on 11th June 2021, Mr Hallgarth wrote:

> "*I have spoken at length with Mr Cohen and more briefly with Ms Valmorbida [the First and Second Defendants]. It has proved a more iterative process than might be expected as Mr Cohen has become more familiar with the terms of the document.*
>
> *It is now clear that:*
>
> *A. termination of the Guarantee after 30 months rather than 24 months could be accepted.*
>
> *B. leaving the Events of Default alone could also be accepted as this goes to acceleration of the loan and not immediate recourse to the Personal Guarantors.*
>
> *However, the instructions now are that the Personal Guarantors should neither make any representations nor give any undertakings.*
>
> *In short, the Lender is expected to take its own view on the entry into of the documents and the credit of the Personal Guarantors and their ability to perform and cannot rely on representations or undertakings from the Personal Guarantors.*
>
> *This therefore means that there are two approaches:*
>
> *1. execute a Facility Agreement that omits the Personal Guarantors and execute a separate short guarantee agreement consisting of little more than Clause 19 and the Boiler Plate; or*
>
> *2. amend or replace the Facility Agreement such that the definition of Obligors only includes the Personal Guarantors when used in Clause 19*

(Guarantee and Indemnity), Clause 28 (Events of Default) and in essential boiler plate,

either way, I think all parties will need to sign.

It will also be necessary to also deal with the limit on the duration of the Guarantee and the references to Hamptons Property and the related Hamptons First Ranking Debt and related Permitted Security will need revision. On balance, the Personal Guarantors' position is not unreasonable. They gratuitously assume a risk for the benefit of a well-rewards commercial party. They will not however assume burdens in excess of the assumption of that risk."

22. The terms of the draft Facility Agreement were then the subject of proposed amendments, culminating in an email from Mr William Jones of Beaumont (on behalf of the Claimant) and dated 13th June 2021 (the day before completion of the Facility Agreement), which email circulated on behalf of the Claimant to Mr Purcell, Mr Hallgarth, and the Second Defendant, amongst others, stated that:

"*Each of the sender of this e-mail and the addressees of this e-mail is a party to a Facility Agreement relating to a loan by Regera S.a r.l. (the "Lender") to Andrew Valmorbida (the "FA").*

Further to conversations between the parties and the counsel, each party sending or acknowledging this e-mail, acknowledges that a number of provisions of the FA relating to the Mr Cohen and MV (as defined in the FA) do not reflect the nature of the arrangements whereby Mr Cohen and MV, by reason of familial ties, have agreed on a non-fee paying basis to (i) give certain limited guarantees (in full knowledge and acceptance that such guarantees may be called up to agreed limits in the event of default by the Borrower in respect of his obligations) without having knowledge of the status or commercial activities of the other parties and (ii) security over certain of their assets to secure such guarantee obligations. Accordingly, each party sending or acknowledging this e-mail agrees that this e-mail constitutes a collateral contract to the FA whereby:

1. *that within 14 days they shall execute an amendment to the FA to perfect the changes raised below and such consequential changes as shall be necessary (and the FA as so amended the "Revised FA"); and*

2. *to the extent that there is any conflict between the FA and the terms of the Revised FA, the terms of the Revised FA shall prevail and until the Revised FA is executed, for this purpose, there shall, as between the Lender, Mr Cohen and MV be deemed to be in place a Revised FA reflecting the terms below …*"

23. The Cohen email then detailed further changes to the Facility Agreement in relation to the terms of the personal guarantees required from each of the First and Second Defendants, including a provision that "*Clause 31.2 communications relating to Mr*

Cohen or MV [the First and Second Defendants] shall be sent to an appropriate address they provide to the Lender and monitor with cc. to the Borrower [To be confirmed - but should include both the Miami Beach Property and the New York address plus [specified emails addresses]". The email concluded by stating that "*The below parties will provide their agreement to the foregoing by email confirmation*", and then named amongst others the First and Second Defendants.

24. As the Cohen email states, it proceeds on the basis that it acted as a collateral contract amending the terms of the Facility Agreement. The parties proceeded in this application on the same assumption.

25. Later, on 13th June 2021, Mr Hallgarth replied to Mr Jones's email stating that:

> "*Further to a lengthy call connected with the provision of independent legal advice, it appears that the address of the Miami Beach stated in the 'Cohen E-mail' is incorrect. For all purposes it should be treated as being "100 South Pointe Drive, Town House No. 10, Miami Beach, Florida 33139, USA …*"

26. The above exchange between Mr Jones and Mr Hallgarth on 13th June 2021 was described by the parties as "**the Cohen Email**".

27. At 1651 hours, on 13th June 2021, Mr Hallgarth sent an email to Mr Jones (on behalf of the Claimant) and the Borrower, and others, stating that:

> "*On the instructions of, and on behalf of, Maria Valmorbida and Phillip Cohen, I issue the following confirmation:*
>
> *Maria Valmorbida and Phillip Cohen refer to the facility agreement between Andrew Valmorbida, ourselves, Regera S.a.r.l. and others in connection with a loan of US$32,960,000 (as attached to the letter confirming our receipt of independent legal advice from Bird & Bird LLP) (the "**Facility Agreement**").*
>
> *Conditional upon:*
>
> *1. all parties to that Facility Agreement acknowledging and agreeing to the e-mail of William Jones dated 13 June 2021 timed at 00.31 BST as corrected with respect to an address by the e-mail of Andrew Hallgarth on 13 June 2021 (the "Cohen E-mail") (the text of which was attached to to the letter confirming our receipt of independent legal advice from Bird & Bird LLP);*
>
> *2. the satisfaction of all other conditions precedent to the utilisation of the loan in full; and*

3. the utilisation of the loan in full occurring as contemplated on the morning of 14 June 2021,

Maria Valmorbida and Phillip Cohen release their signatures to the Facility Agreement.

*Maria Valmorbida and Phillip Cohen understand that in addition to the signatures to the Facility Agreement referred to above, the other parties to the Facility Agreement (or their counsel) may hold the signatures of Maria Valmorbida and/or Phillip Cohen in respect of other documents that it was contemplated might be needed (the "**Other Signatures**"). The Other Signatures are **not** released and should be delivered to Andrew Hallgarth immediately since the Facility Agreement as supplemented by the Cohen E-mail sets out and governs any guarantee given to Regera S.ar.l. by Maria Valmorbida and Phillip Cohen.*

I trust that this concludes the involvement of my Clients and me today.

We look forward to confirmation that the utilisation will occur and the draft of agreement that will more fully document the provisions of the Cohen E-Mail."

28. Upon receipt of this email, the Claimant (by Mr Jamie Liew of Fidera Ltd) queried whether the conditional release of the signatures depended on the satisfaction of a condition precedent which the Claimant had waived. Mr Hallgarth replied that he was happy to modify the language of the above email so that it read:

"*Conditional upon:*

…

2. the satisfaction of all other conditions precedent to the utilisation of the loan (each a "CP") in full (or, if a CP is not satisfied, such CP has been either (a) waived unconditionally or (b) waived on conditions that allow for such conditions to be satisfied in a time frame that is reasonable for such CP and conditions) …

Maria Valmorbida and Phillip Cohen release their signatures to the Facility Agreement …"

29. On 14th June 2021, the Facility Agreement was finalised and the loan was advanced to the Borrower placing him in funds to pay the settlement sum due in the Jersey proceedings. The signature page signed by each of the First and Second Defendants was released by Mr Hallgarth and attached to the concluded Facility Agreement, subject to certain conditions.

The terms of the Facility Agreement

30. By the Facility Agreement dated 14th June 2021 (as amended), the Claimant provided a term loan facility of US$33,410,000 to the Borrower, who drew down the advance on the same date. The terms of the Facility Agreement, as amended, included the following provisions:

> "…
>
> ***1. Definitions***
>
> ***1.1*** *In this Agreement:*
>
> *…*
>
> ***Obligor*** *means the Borrower and each Guarantor …*
>
> ***3. Obligors' Agent***
>
> *3.1.1 Each Obligor (other than the Borrower) by its execution of this Agreement irrevocably appoints the Borrower to act on its behalf as its agent in relation to the Finance Documents (the* ***Obligor's Agent****) and irrevocably authorises:*
>
> *(a) the Borrower on its behalf to supply all information concerning itself contemplated by this Agreement to the Lender and to give all notices and instructions, to make such agreements and to effect the relevant amendments, supplements and variations capable of being given, made or effected by any Obligor notwithstanding that they may affect the Obligor, without further reference to or the consent of that Obligor; and*
>
> *(b) the Lender to give any notice, demand or other communication to that Obligor pursuant to the Finance Documents to the Borrower,*
>
> *and in each case the Obligor shall be bound as though the Obligor itself had given the notices and instructions or executed or made the agreements or effected the amendments, supplements or variations, or received the relevant notice, demand or other communication.*
>
> *3.1.2 Every act, omission, agreement, undertaking, settlement, waiver, amendment, supplement, variation, notice or other communication given or made by the Obligors' Agent or given to the Obligors' Agent under any Finance Document on behalf of another Obligor or in connection with any Finance Document (whether or not known to any other Obligor and whether occurring before or after such other Obligor became an Obligor under any Finance Document) shall be binding for all purposes on that Obligor as if that Obligor had expressly made, given or concurred with it. In the event of any conflict between any notices or other communications*

of the Obligors' Agent and any other Obligor, those of the Obligors' Agent shall prevail …

9. Interest

9.1 Calculation of Interest

Subject to Clause 11.1 (Lender's Minimum Return), the rate of interest on the Loan for each Interest Period is 17 % (seventeen per cent) per annum.

9.2 Capitalisation of Interest

Interest on each Loan shall be capitalised on the last day of each Interest Period when it shall become Capitalised PIK Interest and added to the outstanding Principal Amount at such time.

Interest shall be calculated on the basis of the actual number of days elapsed in the relevant Interest Period and on the basis of a 360 day year …

19. Guarantee and indemnity

19.1 Guarantee and Indemnity

Each Guarantor irrevocably and unconditionally jointly and severally:

(a) guarantees to the Lender punctual performance by each other Obligor of all that Obligor's obligations under the Finance Documents (including for the avoidance of doubt pursuant to any Upside Sale Arrangement and Royalties Arrangement);

(b) undertakes with the Lender that whenever another Obligor does not pay any amount when due under or in connection with any Finance Document, that Guarantor shall immediately on demand pay that amount as if it was the principal obligor; and

(c) agrees with the Lender that if any obligation guaranteed by it is or becomes unenforceable, invalid or illegal, it will, as an independent and primary obligation, indemnify the Lender immediately on demand against any cost, loss or liability it incurs as a result of an Obligor not paying any amount which would, but for such unenforceability, invalidity or illegality, have been payable by it under any Finance Document on the date when it would have been due. The amount payable by a Guarantor under this indemnity will not exceed the amount it would have had to pay under this Clause 19 if the amount claimed had been recoverable on the basis of a guarantee.

19.2 Continuing guarantee

This guarantee is a continuing guarantee and will extend to the ultimate balance of sums payable by any Obligor under the Finance Documents (including for the avoidance of doubt pursuant to any Upside Sale Arrangement and Royalties

Arrangement), regardless of any intermediate payment or discharge in whole or in part.

19.3 Maximum Amount

Notwithstanding any other provision of this Clause 19 or any other provision of the Finance Documents, the maximum aggregate liability of each Personal Guarantor and the total amount recoverable from each Personal Guarantor (including without limitation, all interest, commission, fees, other charges and all legal and other costs, charges and expenses) under the Finance Documents (including pursuant to the enforcement of any Security Document) shall not exceed $2,500,000 (two million, five hundred thousand dollars) ... [this provision was amended in respect of the First Defendant to be the lesser of US$2,500,000 and "*the sum of (i) the initial utilisation ($32,960,000) less (ii) the sum of the amount of each payment made in respect of the Loan and the amount of each realisation made in respect of any Blue Chip Artwork, any Secured Vehicle and any Property (other than one belonging to Mr Cohen)*"]

19.5 Waiver of defences

The obligations of each Guarantor under this Clause 19 will not be affected by an act, omission, matter or thing which, but for this Clause 19, would reduce, release or prejudice any of its obligations under this Clause 19 (without limitation and whether or not known to it or the Lender) including:

(a) any time, waiver or consent granted to, or composition with, any Obligor or other person;

(b) the release of any other Obligor or any other person under the terms of any composition or arrangement with any creditor of any member of the Group or any other person;

(c) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, any Obligor or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

(d) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of an Obligor or any other person;

(e) any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of a Finance Document or any other document or security including, without limitation, any change in the purpose of, any extension of or increase in any facility or the addition of any new facility under any Finance Document or other document or security;

(f) any unenforceability, illegality or invalidity of any obligation of any person under any Finance Document or any other document or security; or

(g) any insolvency or similar proceedings.

19.6 Guarantor intent

Without prejudice to the generality of Clause 19.5 (Waiver of defences), each Guarantor expressly confirms that it intends that this guarantee shall extend from time to time to any (however fundamental) variation, increase, extension or addition of or to any of the Finance Documents any new Finance Documents and/or any facility or amount made available under any of the Finance Documents for the purposes of or in connection with any of the following: business acquisitions of any nature; increasing working capital; enabling investor distributions to be made; carrying out restructurings; refinancing existing facilities; refinancing any other indebtedness; making facilities available to new borrowers; any other variation or extension of the purposes for which any such facility or amount might be made available from time to time; and any fees, costs and/or expenses associated with any of the foregoing.

19.7 Immediate recourse

19.7.1 Each Guarantor other than the Personal Guarantors waive any right it may have of first requiring the Lender (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or claim payment from any person before claiming from that Guarantor under this Clause 19. Subject to this Clause 19.7.1, this waiver applies irrespective of any law or any provision of a Finance Document to the contrary.

19.7.2 Before claiming from a Personal Guarantor under this Clause 19, the Lender must enforce its rights in respect of the Security granted over the Blue Chip Artworks, the Secured Vehicles and the Properties (other than the Hamptons Property) …

31. Notices

31.1 Communications in Writing

Any communications to be made under or in connection with any Finance Document shall be made in writing.

Clause 31.2 Addresses

[As amended by the Cohen Email]

…

Any communication made or delivered to the Borrower in accordance with this Clause will be deemed to have been made or delivered to each of the Obligors …

31.3 Delivery

31.3.1 Subject to Clause 31.3.2, any communication or document made or delivered by one person to another under or in connection with any Finance Document will only be effective:

(a) if by way of fax, when received in legible form within business hours; or

(b) if by email when actually received or made available in readable form within business hours;

(c) if by way of letter, when it has been left at the relevant address or three Business Days after being deposited in the post (first class postage prepaid) in an envelope addressed to it at that address;

and, if a particular department or officer is specified as part of its address details provided under Clause 31.2 (Addresses), if addressed to that department or officer.

31.3.2 Any communication or document to be made or delivered to the Lender will be effective only when actually received by the Lender and then only if it is expressly marked for the attention of the department or officer identified above (if so identified) ...

38. Borrower Declaration of High Net Worth

(Articles 60H(1) and 60Q of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001)

I confirm that I have received a copy of the statement of high net worth made in relation to me for the purposes of article 60H(1)(d) or article 60Q(c) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

I understand that by making this declaration I will not have the benefit of the protection and remedies that would be available to me under the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974 if this agreement were a regulated agreement under those Acts.

I understand that this declaration does not affect the powers of the court to make an order under section 140B of the Consumer Credit Act 1974 in relation to a credit agreement where it determines that the relationship between the lender and the borrower is unfair to the borrower.

I am aware that if I am in any doubt as to the consequences of making this declaration then I should seek independent legal advice *...*

40. Enforcement

40.1 Jurisdiction of English Courts

*40.1.1 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) or any noncontractual obligation arising out of or in connection with this Agreement (**a Dispute**).*

40.1.2 The parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no party will argue to the contrary.

40.2 Service of Process

40.2.1 Without prejudice to any other mode of service allowed under any relevant law, each Obligor other an Obligor incorporated in England and Wales:

(a) irrevocably appoints Areval [UK Properties Ltd] as its agent for service of process in relation to any proceedings before the English courts in connection with any Finance Document and Areval hereby accepts such appointment; and

(b) agrees that failure by an agent for service of process to notify Borrower of the process will not invalidate the proceedings concerned.

40.2.2 If any person appointed as an agent for service of process is unable for any reason to act as agent for service of process, the Borrower must immediately (and in any event within five days of such event taking place) appoint another agent on terms acceptable to the Lender. Failing this, the Lender may appoint another agent for this purpose …"

31. As evident from a letter dated 14th June 2021 signed by Mr Jones and Ms Pamela Valasuo on behalf of the Claimant and addressed to the Borrower, certain conditions precedent to the Facility Agreement remained which were outstanding at the time of completion of the Facility Agreement; it was agreed that these outstanding items could be converted to conditions subsequent with an extended time frame for delivery. The said letter concluded by stating that the First and Second Defendants "*are requested to countersign this agreement solely for the purposes of acknowledgement but the other parties hereto agree that this letter shall be binding in all respects amongst themselves, notwithstanding the lack of countersignature of either Mr Philip Ean Cohen or Ms Maria Therese Valmorbida*". I do not understand the First and Second Defendants to have countersigned this letter.

32. These conditions subsequent were not satisfied within the said time frame. So, a further extension to the time frame was agreed by a letter dated 5th July 2021. In that letter, the Claimant stated that:

> "…
>
> *5. It was a condition of the CP Conversion Letter that, until such time as a Condition or the Failed Items were satisfied, it or they (as applicable) would be a Condition Subsequent for the purposes of clause 27.13 (Events of Default, Conditions Subsequent) and failure to supply any of the Failed Items or Conditions in accordance with the agreed timescales would result in an Event of Default under and as defined in the Facility Agreement.*
>
> *6. As at the date of this letter (a) the amendment required at Paragraph 3 of this letter, (b) the Conditions and (c) the items marked "Outstanding" in the checklist annexed to this letter (items (a), (b) and (c) together being the "Outstanding Items") remain outstanding.*
>
> *7. An Event of Default has now occurred under the Facility Agreement in respect of the Outstanding Items. Without prejudice to any of its rights under the Finance Documents, the Lender agrees to forbear from taking any further action if all of the Outstanding Items are provided in form and substance satisfactory to the Lender on or prior to the 12th July 2021 or, in the case of the Conditions set out in Paragraph 4 above, 16th July 2021 (or such later date as the Lender may communicate to the parties in writing) …*"

33. Both of these letters dated 14th June 2021 and 5th July 2021 contained the following provision: "*For the avoidance of doubt, no condition precedent under clause 5.1 or clause 5.2 of the Facility Agreement (or any other term of the Facility Agreement or any other Finance Document) or any breach of the term of (or the rights of any party under) a Finance Document or Event of Default is waived, suspended, cancelled, reduced or replaced by any of the terms of this letter and the Lender strictly reserves all of its rights under the Facility Agreement and all other Finance Documents*".

34. I understand that these conditions precedent and conditions subsequent were not satisfied, at least by 5th July 2021.

35. On 12th July 2021, in response to a request by the Claimant that the First and Second Defendants sign the letters amending the Facility Agreement, Mr Hallgarth stated that:

> "*For the avoidance of doubt, Phil and Maria are, as regards the Lender, bound by the existing Facilities Agreement as supplemented by the collateral contract*

established by the exchange of e-mails on the Sunday before utilisation. Each of the other parties, so far as I am aware, has also been made aware of the collateral contract. As was very clear from our discussions, the execution of the Facilities Agreement without an effective modification that took effect ab initio was unacceptable and the signatures to the Facilities Agreement were released on the basis of that collateral exchange.

Although there was a proposed time for documenting the amendments more formally, the changes contemplated by the collateral contract were not so time limited."

The Claimant's claim under the guarantees

36. On 1st October 2021, the Claimant issued a notice of events of default to the Borrower and demanded repayment from the Borrower and copied this notice to the Defendants. Subsequently, the Borrower demanded an account of the Claimant's dealings with and disposal of the assets pledged by the Borrower as security. This also led to an exchange of correspondence which included the Borrower making various allegations against the Claimant. In that letter, the Claimant stated that:

"…

Demand for Repayment

4. As the Borrower is aware, we provided notice pursuant to paragraph 7 of the CS Extension Letter dated 5 July 2021 that the Outstanding Items (as defined therein) had not been provided and that an Event of Default under the Facility Agreement had occurred (the ***Initial Event of Default****).*

5. The Lender agreed to forbear from taking further action if the Outstanding Items were provided by 12th July, 2021 or 16th July 2021 or such later date as the Lender may communicate to the parties in writing. The Outstanding Items were not provided. In particular, the conditions to the Cohen email have not been met and John Valmorbida has failed to provide a duly executed deed of accession to the Facility Agreement and failed to provide the JV Guarantee. Subsequent ***additional*** *Events of Default have also come to light since the date of the Letters including, without limitation pursuant to Clause 27.4 (Other Obligations) and Clause 27.5 (Misrepresentation) (the* ***Subsequent Events of Default****), in respect of the following breaches of the Facility Agreement:*

(a) Clause 12.3.2 - funds have not been paid into a Designated Account, in fact a Designated Account has not yet been set up;

(b) Clause 20.12 (No Misleading Information) - we now have reason to believe that there were some matters of which the Borrower was aware that could reasonably been expected to affect the decision of the Lender

to provide the facility to the Borrower or the terms on which the Facility might be provided …

(d) Clause 23.1 (No art trading and copyright business) - we understand that the Borrower has been receiving proceeds of the Hambleton IP rights personally, rather than through the correct Corporate Obligor …"

37. On 12th June 2023, Quinn Emanuel on behalf of the Claimant wrote to the First and Second Defendants referring to these allegations and also to the facts and admissions which emerged during the Jersey Court proceedings and asked the First and Second Defendants whether they were aware of such matters.

38. On 5th September 2023, the Claimant sent a letter to the First and Second Defendants seeking their consent to the sale of certain Charged Assets to defray the amount owing by the Borrower to the Claimant (then being US$42,914,420.46), although noting that it was under no obligation to obtain their consent.

Legal proceedings brought by the Claimant

39. On 8th September 2023, the Claimant issued proceedings against the Borrower in respect of the funds advanced in the sum of US$42,914,420.46, which by reason of recoveries was reduced to US$31,212,019.46). The Borrower filed and served a defence and counterclaim. These proceedings were purportedly settled by a Settlement Deed dated 11th April 2024. The First and Second Defendants do not accept the validity of the Settlement Deed.

40. By a letter dated 13th October 2023, Quinn Emanuel on behalf of the Claimant informed the First and Second Defendants that they had not engaged with the Claimant since the signing of the Facility Agreement and recommended that they take independent legal advice. Quinn Emanuel later said in that letter that:

"*In view of Mr Valmorbida's failure to repay the Loan, we note that it is now, regrettably, increasingly likely that our client will be required to make demand upon you in respect of your guarantees. That is particularly so given that Mr Valmorbida has not made a single repayment towards the Loan, and has instead determined to expend the resources available to him commencing wasteful litigation. For the avoidance of any doubt, we are instructed to take all available steps to recover the Loan, including enforcing the personal guarantees if required*."

41. By letters dated 11th December 2023, the Claimant made demands under the personal guarantees upon the Defendants as follows (emphasis in the original):

> "…
>
> *5. Pursuant to the Demand Letter, we notified the Borrower that the Outstanding Loan, together with all other fees and expenses due under the terms of the Finance Documents (including costs incurred by the Lender in enforcing its rights under the Finance Documents) had become immediately due and payable and demanded the immediate repayment to the Lender of all such sums on or before 12 October 2021. The Borrower has failed to comply with the demand for payment per the terms set out in the Demand Letter and to repay all outstanding amounts borrowed under the Facility together with any other amounts then outstanding in full on the Final Repayment Date pursuant to Clause 7.1 of the Facility Agreement (the "**Relevant Events of Default**").*
>
> *6. Pursuant to the demand contained in letters dated 7 March 2023 (into which the Borrower was copied) to each of the following Corporate Obligors: AZRV Holdings Ltd, Areval UK Properties Ltd, Aussie Rules Bahamas Ltd, Untitled-1 Copyright Limited and Untitled-1 Holdings Limited (the "**Demanded Corporate Guarantors**") (the "**Corporate Guarantor Demand Letters**"), we demanded repayment of the Outstanding Loan, together with all other fees and expenses due under the terms of the Finance Documents (including costs incurred by the Lender in enforcing its rights under the Finance Documents) on or before 18 March 2023.*
>
> *7. In the circumstances, we are entitled to certain rights and remedies pursuant to Clause 19 (Guarantee and Indemnity) of the Facility Agreement, which include (but are not limited to) requiring you to repay the amount of the Loan, together with accrued interest thereon and all other amounts accrued or outstanding (collectively, the "**Outstanding Loan**"), to us, subject to agreed limits.*
>
> ***Demand for Outstanding Debt***
>
> *8. To date, no payments have been made to the Lender under or in connection with the Finance Documents. The Borrower and the Demanded Corporate Guarantors have failed to comply with the conditions imposed and demands made by the Lender in the Demand Letter and the Guarantor Demand Letters (as applicable) …*
>
> *9. Having enforced our rights in accordance with Clause 19.7.2 of the Facility Agreement **we now hereby demand from you in accordance with all applicable terms of the Finance Documents, the repayment to the Lender in the amount of USD 2,500,000, immediately and in any event before the Expiry Date**. Payment details are set out in Schedule 2. This demand shall continue until such time as all amounts due under or in connection with the Finance Documents are irrevocably and unconditionally discharged and shall remain in full force and effect notwithstanding any revisions, corrections or supplements made by the Lender to the Current Statement or to any other calculations contained in this*

letter and notwithstanding any future statements of accounts or demands provided to any of the Obligors …"

42. In April 2024, the Claimant and the Borrower entered into a settlement, with the Borrower admitting by a letter dated 11th April 2024 in full his liability in the sum of US$31,212,019.46 as of 6th December 2023 (and interest accruing thereafter). The Borrower's counterclaim and his claim for an account were discontinued.

43. On 28th June 2024, Quinn Emanuel on behalf of the Claimant wrote separate letters to each of the First and Second Defendants referring to the correspondence issued by the Claimant in respect of the Borrower's indebtedness and their obligations under the personal guarantees, and seeking the First and Second Defendant's confirmation by 12th July 2024 that they will pay the sums due within 30 days, failing which the Claimant intends to commence proceedings without further reference to them.

44. The First and Second Defendants have not paid the sums demanded by the Claimant.

45. By a letter dated 31st July 2024, the Claimant wrote to the Borrower and the First and Second Defendants, and others, with reference to the Facility Agreement purporting to appoint, pursuant to clause 40.2.2 of the Facility Agreement, a replacement agent (Law Debenture) for the service of process in place of Areval UK Properties Ltd ("**Areval**"), who had been appointed under clause 40.2.1(a) of the Facility Agreement but was dissolved on 13th June 2023. The letter stated that:

"…

*3. Pursuant to clause 40.2.1(a) of the Facility Agreement, each Obligor appointed Areval UK Properties Ltd (**Areval**) to act as its agent for service of process in relation to any proceedings before the English courts in connection with any Finance Document.*

4. Areval was dissolved at Companies House in England and Wales on 13 June 2023 and can therefore no longer act as agent for the service of process for any Obligor.

*5. We are writing to inform you that the Lender has therefore exercised its right pursuant to clause 40.2.2 of the Facility Agreement to appoint another agent for the service of process for each Obligor and has appointed Law Debenture Corporate Services Limited (of 8th Floor, 100 Bishopsgate, London EC2N 4AG) (**Law Debenture**) to act as agent for the service of process under the Facility Agreement in connection with*

each Finance Document for each of the Borrower, PC, MV, ZS and each Corporate Obligor. Law Debenture has accepted such appointment …"

46. According to Mr Khatoun's first witness statement (para. 107) and his second witness statement (para. 15), this letter was sent by email to the addresses specified in clause 31.2 of the Facility Agreement and to the First and Second Defendant's New York and Miami Beach addresses, and the letter sent to the New York address was tracked and signed for. The United States Postal Service ("**USPS**") confirmed that the letter to the Miami Beach address was "*left with an individual at the address*" on 13th August 2024 (although the USPS confirmation does not refer to the precise terms of the Miami Beach address).

47. According to Ms Ho's first witness statement (para. 51), the First and Second Defendants did not receive notice of the appointment of Law Debenture until 11th October 2024. There is a USPS confirmation of the letter having been left at the Miami Beach address on 8th October 2024.

48. On 1st August 2024, the Claimant commenced the current proceedings by issuing a Claim Form against the Defendants seeking the payments due under the personal guarantees issued by the Defendants.

49. On 7th August 2024, at 3.31 pm, Quinn Emanuel on behalf of the Claimant purported to serve these proceedings on the Defendants by service on Law Debenture, a London-based process service agent appointed by the Claimant purportedly under the terms of the Facility Agreement. That day, at 3.58 pm, Law Debenture replied stating that they have "*accepted service of process on behalf of Ms Zara Simon, Mr Philip Ean Cohen and Ms Maria Therese Valmorbida*". According to Mr Khatoun's first witness statement (para. 110) and his second witness statement (para. 15), a letter was sent by email, courier and first class mail to the email addresses and the New York and Miami Beach addresses listed in clause 31.2 of the Facility Agreement.

50. On 23 August 2024, Quinn Emanuel, on behalf of the Claimant, filed certificates of service of the proceedings upon Law Debenture on 7th August 2024 (Mr Khatoun's first witness statement, para. 111).

51. On or around 4th September 2024, according to Ms Ho's first witness statement (at para. 46-47), the First and Second Defendants received the Claimant's letter dated 7th August 2024 at their residential addresses in Florida from Quinn Emanuel and were not aware that any agent was purportedly appointed to accept service of process on either of their behalf before 4th September 2024 (the First and Second Defendants state that they were not aware of the Claimant's letter dated 31st July 2024 appointing Law Debenture until 11th October 2024) (Ms Ho's first witness statement, para. 51).

The First and Second Defendants' Defences

52. The First and Second Defendants have not yet pleaded a defence to the claim made against them by the Claimant under the personal guarantees contained in the Facility Agreement. However, exhibited to Ms Ho's first witness statement is a draft Defence and Counterclaim and exhibited to Ms Ho's second witness statement is a revised draft Defence and Counterclaim, each in excess of 30 pages.

53. Ms Ho in her first witness statement, at para. 65-66, and her second witness statement, at para. 79, summarises the First and Second Defendants' defences to the claim, including:

(1) The First and Second Defendants' release of their signatures to the Facility Agreement was expressly conditional upon "*the satisfaction of all other conditions precedent to the utilisation of the loan in full (each a "CP") or if a CP is not satisfied, such CP has been either (a) waived unconditionally or (b) waived on conditions that allow for such conditions to be satisfied in a time frame that is reasonable for such CP and conditions*". As stated in the Claimant's letter to the Borrower dated 1st October 2021, the Borrower did not meet nor satisfy the conditions precedent to the Facility Agreement and the Claimant did not waive any condition precedent. Further, these conditions precedent were not waived unconditionally or waived on condition that they would be satisfied in a reasonable time frame (see the letters dated 14th June 2021 and 5th July 2021). Therefore, the First and Second Defendants did not agree to nor execute the Facility Agreement and are therefore not liable under any purported personal guarantees.

(2) That part of the Facility Agreement relied on by the Claimant against the First and Second Defendants should be set aside on the grounds of misrepresentation and/or economic duress in that the Borrower and the First and Second Defendants were misled about the Claimant's true intentions, namely that the parties (including the Claimant and the Borrower) would act in each other's mutual interests to enable the repayment of the principal loan sums advanced through the orderly sale and realisation of the Borrower's assets and by jointly developing a business generating substantial profit for their mutual benefit, and to this end would be part of a partnership-like joint venture and the vulnerable position of the Borrower was manipulated by the Claimant to extract the guarantees on false pretences. The representations are set out at para. 29.1-29.4 of the draft amended Defence and Counterclaim and are alleged to have induced the First and Second Defendants (para. 34).

(3) Amendments effected to the Facility Agreement, without the knowledge and consent of the First and Second Defendants, operated completely to discharge the First and Second Defendants from their obligations as guarantors, namely (a) the extension of the time frame for delivery of the conditions subsequent on 5th July 2021, which extension was prejudicial to the First and Second Defendants because it heightened the risk of default by the Borrower and reliance on the personal guarantees given by the First and Second Defendants, and (b) the amendment made by Farrer & Co's email dated 18th June 2021 by which the Claimant unilaterally inserted or sought to impose a new term which reduced the value limit on acquisitions not requiring a pledge from US$1,000,000 to US$100,000, which restricted the Borrower's ability to acquire and dispose of artwork and other assets and made it more likely that the Borrower would be unable to perform his payment obligations under the Facility Agreement.

(4) The Claimant was not entitled to make any demand under the guarantees before 14th December 2023 on a true construction of clause 19.7.2 of the Facility Agreement, because it was required to complete, but had not completed, an enforcement of assets, or at least not on an arms-length basis, and any guarantee liability is now released.

(5) The First Defendant's personal guarantee was limited to the lesser of US$2.5 million and "*the sum of (i) the initial utilisation ($32,960,000) less (ii) the sum of the amount of each payment made in respect of the Loan and the amount of each realisation made in respect of any Blue Chip Artwork, any Secured Vehicle and any Property (other than one belonging to Mr Cohen)*". It remains unclear as to the proper value of each realisation made by the Claimant in respect of the Blue Chip Artwork, Secured Vehicle, and Property sold.

(6) The Second Defendant's personal guarantee was conditional upon the realisation of a deposit for a property known as Clarendon Lodge. This was stipulated on 9th June 2021 as a result of the Claimant's expressed discomfort over the equity deposit made by the Borrower in Clarendon Lodge, pledged to the Claimant as security for the loan. That sum was realised in April 2022, with further security taken over a Hermes Trunk given by the Second Defendant to the Borrower, and so the Second Defendant's personal guarantee should have been extinguished or at least reduced as at the date of that property sale.

(7) The Claimant breached its warranties or duties to the First and Second Defendants as guarantors, including in particular in realising the secured assets to themselves or affiliated entities at an undervalue.

(8) The Claimant has in any event failed to provide sufficient explanation or evidence in relation to the debts purportedly owed by the Borrower, and consequently, the First and Second Defendants. Therefore, the First and Second Defendants claim an account.

(9) The First and Second Defendants shall contend that there was an unfair relationship between the Claimant and the Borrower under section 140A of the Consumer Credit Act 1974 and seek orders under section 140B of the 1974 Act.

(10) The Facility Agreement, and the personal guarantees therein, are unenforceable pursuant to section 105(7) of the Consumer Credit Act 1974 in that they did not comply with the form and content prescribed by the Consumer Credit (Guarantees and Indemnities) Regulations 1983 ("**the Guarantee Regulations**"), article 60H of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) ("**the 2001 Order**"), and the

Consumer Credit Sourcebook, Appendix 1 ("**CONC App**"), para. 1.4.6 and 1.4.7.

54. There is also an issue as to whether or not the First and Second Defendants received proper independent legal advice prior to their (conditional) execution of the Facility Agreement. However, the position in this respect is unclear, given that Bird & Bird LLP acted for the Borrower and also acted for the First and Second Defendants over the weekend of 12th and 13th June 2021.

Entry of Default Judgments

55. On 2nd September 2024, the Claimant entered a default judgment against each of the First and Second Defendants in the sum of US$2,749,621.62 plus £10,000.00 (inclusive of costs), as no acknowledgment of service had been filed and no defence had been served by the First and Second Defendants.

56. On 13th September 2024, the First and Second Defendants received notice of the default judgments entered against them (Ms Ho's first witness statement, para. 68).

57. The First and Second Defendants have applied for an order setting aside the default judgments pursuant to CPR rule 13.2 or, alternatively, CPR rule 13.3.

The Application to set aside the Default Judgments under CPR rule 13.2

58. The First and Second Defendants apply to set aside the default judgments pursuant to CPR rule 13.2 on the ground that the time for filing an acknowledgment of service has not expired, because the service on Law Debenture was not valid.

59. CPR rule 13.2 provides that:

> "*The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because -*
>
> *(a) in the case of a judgment in default of an acknowledgment of service, any of the conditions in rule 12.3(1) and 12.3(3) was not satisfied;*
>
> *(b) in the case of a judgment in default of a defence, any of the conditions in rule 12.3(2) and 12.3(3) was not satisfied; or*
>
> *(c) the whole of the claim was satisfied before judgment was entered*."

60. The conditions referred to in CPR rule 13.2 include those set out in CPR rule 12.3(1):

> "*(1) The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered—*
>
> *(a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and*
>
> *(b) the relevant time for doing so has expired*."

61. A relevant aspect of this application is whether the requirements of CPR rule 6.11 were complied with. CPR rule 6.11 provides that:

> *"(1) Where –*
>
> *(a) a contract contains a term providing that, in the event of a claim being started in relation to the contract, the claim form may be served by a method or at a place specified in the contract; and*
>
> *(b) a claim solely in respect of that contract is started, the claim form may, subject to paragraph (2), be served on the defendant by the method or at the place specified in the contract.*
>
> *(2) Where in accordance with the contract the claim form is to be served out of the jurisdiction, it may be served –*
>
> *(a) if permission to serve it out of the jurisdiction has been granted under rule 6.36; or*
>
> *(b) without permission under rule 6.32 or 6.33.*"

The First and Second Defendants' submissions

62. Mr Hugh Sims KC and Ms Lucy Walker, on behalf of the First and Second Defendants, submitted that, as the proceedings have not been validly served in accordance with the Civil Procedure Rules and the time for filing an acknowledgement of service has not yet fallen due, the default judgments should be set aside pursuant to CPR rule 13.2(a) for the following reasons:

> (1) The Court must set aside the default judgments against the First and Second Defendants pursuant to CPR rule 13.2(a) because judgment was wrongly entered, as the condition in CPR rule 12.3(1) - that the time for filing an acknowledgment of service had not yet expired - was not satisfied (*Shiblaq v Sadikoglu* [2004] 2 All ER (Comm) 596, at para. 20-24 and 27).

(2) The Claimant purported to serve the First and Second Defendants by serving proceedings on Law Debenture, a process service agent appointed under clause 40.2 of the Facility Agreement. In so doing, the Claimant relied on CPR rule 6.11 that permits service by a contractually agreed method (Mr Khatoun's first witness statement, para. 158).

(3) The Claimant's reliance on CPR rule 6.11 presupposes that the First and Second Defendants are each a party to the Facility Agreement. If the First and Second Defendants were not parties to the Facility Agreement, then the Claimant cannot rely on CPR rule 6.11. It follows that if the Court is satisfied that the First and Second Defendants are not parties to the Facility Agreement, or at least if the Court is satisfied that at a trial of this matter the First and Second Defendants have a real prospect of successfully showing that they were not party to the Facility Agreement, then the Court must set aside the default judgments against the First and Second Defendants.

(4) Even if the Claimant was entitled to rely on CPR rule 6.11 and serve proceedings by a method agreed under the Facility Agreement, then service under CPR rule 6.11 was still defective and the Claimant cannot rely on the same.

(5) Although it is acknowledged that valid service on a process service agent may be effective and the Courts will aim to uphold contractual clauses permitting service of proceedings on a process service agent (see for example, *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2018] EWHC 974 (Comm); *DVB Bank SE v Isim Amin Ltd* [2014] EWHC 2156 (Comm)), a party effecting service under a contractual provision must look to satisfy the terms of the contract to prove valid and effective service. In this case, the process service agent originally appointed under clause 40.2 of the Facility Agreement was dissolved and so, on 29th July 2024, the Claimant purporting to exercise its power under clause 40.2.2 of the Facility Agreement appointed Law Debenture as replacement process service agent and purportedly gave written notice of this appointment to the First and Second Defendants by letter dated 31st July 2024. The purported appointment of Law Debenture was undertaken by the Claimant unilaterally, notification of which was not validly given to the First and Second Defendants in accordance with the requirements of the Facility Agreement. The

Facility Agreement, as amended by the Cohen email, expressly provided that for the purposes of clause 31.2, communications to the First and Second Defendants must be sent to specified postal addresses in both New York and Miami Beach, as well as to two specified email addresses for the Second Defendant. The Claimant's original evidence was that the letter providing notification of the appointment of Law Debenture was sent by email and by post only to the First and Second Defendants' Miami Beach address and, contrary to the notice requirements in the Cohen email, was not sent to the New York address (Mr Khatoun's first witness statement, para. 107.2). That evidence, as supported by the USPS delivery notes, stated that the letter was delivered to the Second Defendant at an unspecified address within a Miami Beach Zip Code on 13th August 2024 and to the First Defendants on 8th October 2024 (after an unsuccessful attempt at delivery on 9th August 2024). However, the Claimant's later evidence asserts that the letter dated 31st July 2024 was also sent to the First and Second Defendants' New York City address by first class mail International Tracked and Signed on 1st August 2024 (Mr Khatoun's second witness statement, para. 15), but the tracing information records only that the letter was delivered to a sorting office on 8th August 2024 and handed to a "*Delivery partner*" thereafter. There is no evidence as to whether and when the notice of appointment of Law Debenture was received at the New York City address.

(6) The absurd result is that proceedings were supposedly served on the First and Second Defendants at Law Debenture on 7th August 2024 in circumstances where the First and Second Defendants did not even know that Law Debenture had been appointed as process service agent and the Claimant did not know whether the First and Second Defendants had received notification of the change of process service agent and did not wait to find out before purporting to serve proceedings.

(7) If the commercial purpose of a process service agency clause is to provide efficiency and certainty between the parties such that the clause cannot be defeated by the unilateral action of one party (*Cargill International Trading Pte*

Ltd v Uttam Galva Steels Ltd [2018] EWHC 974 (Comm), para. 25), that same principle of certainty must apply in the present circumstances.

(8) The process service agency clause represents a bargain between the parties and the Court should focus on the efficacy of the contractual provisions between the parties (*Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), para. 16). The Claimant should have ensured, but failed to ensure, that a valid notice of the appointment of Law Debenture was given to and received by the First and Second Defendants before serving proceedings.

(9) The Claimant contends that the First and Second Defendants had no power of veto over the appointment of Law Debenture and that the Facility Agreement contained no requirement for the Claimant to inform the First and Second Defendants, or the Borrower, of the appointment under clause 40.2.2 of the Facility Agreement. If that is correct, clause 40.2.2 is an unfair contract term for the purposes of Part 2, Consumer Rights Act 2015, as it creates a significant imbalance between the rights of the parties and is unfair, and is therefore unenforceable.

(10) The Facility Agreement is a regulated credit agreement within the meaning of article 60B(3) of the 2001 Order and the Claimant is not authorised and regulated by the Financial Conduct Authority ("**the FCA**") for credit regulated activity (Mr Khatoun's first witness statement, para. 249). The Claimant relies on the exemption in article 60H of the 2001 Order having regard to the nature of the borrower (the High Net Worth exemption or "**the HNW Exemption**"). However, the conditions attaching to the application of the HNW Exemption in article 60H(1)(c) and (d) were not satisfied in that the Facility Agreement did not include a declaration made by the Borrower that he forwent the protection and remedies available under a regulated credit agreement and a statement in relation to the income or assets of the borrower, both of which complied with rules made by the FCA. CONC App, para. 1.4.6 and 1.4.7 stipulate that the declaration and statement "*must have the following form and content*". As a result, the Facility Agreement was not enforceable pursuant to section 26(1) of

the Financial Services and Markets Act 2000 and the Consumer Credit Act 1974.

(11) Separately, a guarantee given in relation to a regulated credit agreement must adhere to the requirements set out at section 105 of the Consumer Credit Act 1974, including the form and content prescribed by the Guarantee Regulations made thereunder. The guarantee provisions at clause 19 of the Facility Agreement do not conform with the requirements of the Guarantee Regulations, in particular omitting the statutory heading and signature box wording required to be shown in a regulated guarantee (regulation 3(1) of the Guarantee Regulations). These requirements are mandatory (the decision in *Campbell v Tyrrell* [2022] EWHC 423 (Ch); [2022] GCCR 20019 is distinguishable). As a result, the personal guarantees are not enforceable against the First and Second Defendants without a Court Order pursuant to section 105(7) of the 1974 Act.

(12) If the guarantees are unenforceable, the entry of default judgments are matters of enforcement and so should be set aside (*Madison CF UK v Various* [2018] EWHC 2786 (Ch); [2018] GCCR 16199, para. 4, 9, 24, 25). Clause 19.5(f) - which preserves the guarantors' obligations notwithstanding "*any unenforceability, illegality or invalidity of any obligation of any person under any Finance Document or any other document or security*" - does not affect the position, for various reasons, including that the loan agreement and the personal guarantees are each independently unenforceable, and because clause 19.5(f) is inconsistent with the Consumer Credit Act 1974 and so void pursuant to section 173(1) (*Wood v Capital Bridging Finance Limited* [2015] EWCA Civ 451; [2015] GCCR 13013, para. 31, 36).

(13) Insofar as it is argued by the Claimant that clause 40.2 of the Facility Agreement is severable from the remainder of the agreement for the purposes of enforcement, it has been held that arbitration clauses, which are separable from the main contract, cannot be used to circumvent a consumer's rights and protections enshrined in domestic law and upon which a domestic court is best placed to adjudicate (see *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297; [2023] 2 All ER 569, para. 149-154). Clause 40.2 must be approached in the same way.

63. I understand that the First and Second Defendants had also argued, but no longer argue, that as they do not reside within the jurisdiction (they reside in the United States), the requirements of CPR rule 6.11 have not been complied with as no application was made for permission to serve the proceedings out of the jurisdiction or upon an agent under CPR rule 6.12 and, if no permission is required, the requirements of CPR rule 6.34 have not been complied with in that the claim form did not contain a notice stating the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction (Mr Khatoun's first witness statement, para. 162). Assuming that the argument were maintained, I would have rejected it, given that the contractual method of service - if valid and validly complied with - required service on Law Debenture within the jurisdiction and not outside the jurisdiction and no application was required under CPR rule 6.12 in circumstances where CPR rule 6.11 applied.

The Claimant's submissions

64. Mr Simon Atrill KC, who appeared with Ms Alexandra Whelan, on behalf of the Claimant submitted that there is no basis for the Court to set aside the default judgments under CPR rule 13.2, because the First and Second Defendants were properly served under CPR rule 6.11 and the time for filing their acknowledgements of service has expired for the following reasons:

(1) CPR r 6.11 provides for service of the claim form via a contractually agreed method. The Facility Agreement provides for a contractually agreed method of service: clause 40.2.1(a) provides that the First and Second Defendants (being an "*Obligor*" as defined) appointed Areval as agent for service of process in relation to any proceedings before the English courts in connection with any "*Finance Document*" (including the Facility Agreement). Clause 40.2.2 provided that if Areval was unable to act as an agent for the service of process for any reason, the Borrower was obliged to appoint another agent within five days, failing which the Claimant may appoint another agent for this purpose.

(2) Areval was dissolved on 13th June 2023 (Mr Khatoun's first witness statement, para. 106) and was therefore unable to act as agent for service of process as of this date. The Borrower was required to appoint a replacement agent within five days, but did not do so (Mr Khatoun's first witness statement, para. 106).

Therefore, pursuant to clause 40.2.2, on 29th July 2024, the Claimant appointed Law Debenture as agent (within the jurisdiction) for the service of process on the First and Second Defendants. As of this date, the Claimant was contractually entitled to serve the claim form on Law Debenture (within the jurisdiction) in its capacity as agent for the First and Second Defendants.

(3) On 7th August 2024, the Claimant effected service of the claim form on the First and Second Defendants via Law Debenture.

(4) The First and Second Defendants argue that it would be unfair and unreasonable for the Court to deem service on Law Debenture to have been effective because the First and Second Defendants did not know about the appointment until around 4th September 2024 of the replacement agent and did not consent to it. These points may be relevant to delay for the purposes of CPR rule 13.3(1), but they are irrelevant to the issue of valid service under CPR rule 13.2. The acknowledged purpose of contractual provisions appointing an agent for service, and setting a procedure for appointing a replacement, is to provide a "*speedy and certain means of service*"; and the Court will construe such clauses in line with that purpose and avoid a construction which allows the party to be served to deprive the clause of its intended benefit (*Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2020] EWHC 2145 (Comm), para. 11). Where service is effected in accordance with the contractually prescribed method, the First and Second Defendants are precluded from contending that good and sufficient service has not taken place (*Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), para. 16)). That is so, even if they did not know of, or consent to, the appointment (*DVB Bank SE v Isim Amin Ltd* [2014] EWHC 2156 (Comm), para. 5-6).

(5) The Claimant was under no contractual obligation to inform the First and Second Defendants of the appointment of Law Debenture or to obtain their consent to that appointment. Indeed, pursuant to clause 40.2 of the Facility Agreement, the First and Second Defendants consented to the Claimant appointing an agent on their behalf in the circumstances stipulated in the Facility Agreement. The First and Second Defendants have not identified any breach of

contract in relation to the appointment of Law Debenture. Even if the Claimant had been under an obligation to inform the First and Second Defendants (which is not accepted), that obligation was plainly satisfied by the emails and letters dated 31st July 2024 and 7th August 2024. It would not be unjust or unreasonable for an agent to be appointed in these circumstances. Further, the Claimant cannot have been required to ensure that the First and Second Defendants received notification, because clause 3.13 of the Facility Agreement provides for deemed receipt where notice is required. In any event, the First and Second Defendants' evidence that they only became aware of Law Debenture's appointment on around 4th September 2024 is unsatisfactory.

(6) The First and Second Defendants argue that the Claimant cannot rely on CPR rule 6.11 (and therefore had to rely on CPR rules 6.12 and 6.33(2B)(b)) because the First and Second Defendants are not party to the Facility Agreement. This argument confuses the issue of service and that of the merits of the First and Second Defendants' defence. To invalidate service on the ground that the First and Second Defendants are not a party to the Facility Agreement, the First and Second Defendants would need to prove they were not party to the agreement. It is not enough to show that there is a real prospect of success of proving this at trial. That is the test which applies to an application under CPR rule 13.3(1); it does not apply to an application under CPR rule 13.2. The First and Second Defendants have not established that they were not party to the Facility Agreement.

(7) The First and Second Defendants argue that clause 40.2 of the Facility Agreement is unreasonable and unenforceable under the Consumer Rights Act 2015 or other associated legislation governing unfair contract terms. This is a last minute attempt to keep an application under CPR rule 13.2 alive. This further argument should be rejected, because the First and Second Defendants appear to be relying on section 62(1) of the Consumer Rights Act 2015 which provides that an unfair term of a consumer contract is not binding on the consumer and, by section 62(4), a term is unfair if "*contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer*". In making this

assessment, the Court must take into account the nature of the subject matter of the contract, all the circumstances existing when the term was agreed, and the other terms of the contract (or a contract on which it depends) (section 62(5)). As explained in *Chitty on Contracts* (35th ed., 2025), at para. 41-310, "*the starting point is the criterion of "significant imbalance", but this is then qualified by the need to ensure the evaluation of all interests involved (under the requirement of good faith)*". Schedule 2 of the Consumer Rights Act 2015 provides a list of terms which may be regarded as unfair. Clause 40.2 is not an unfair term. It does not fall within the scope of any of the terms at Schedule 2. As the First and Second Defendants accept, clauses appointing agents for service are commonly enforced (*Banco San Juan Internacional Inc v Petróleos de Venezuela SA* [2020] EWHC 2145 (Comm); *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), para. 16; *DVB Bank SE v Isim Amin Ltd* [2014] EWHC 2156 (Comm), para. 5-6). The Court has recognised that these are standard clauses, which provide a straightforward method of service and preclude a party from disputing valid service where service is effected pursuant to a method agreed by that party. Clause 40.2 of the Facility Agreement fulfils this function, as it appointed Areval as the First and Second Defendants' agent for service and provides that if Areval is unable to perform that role, the Borrower or then the Claimant are to appoint a replacement. Without this provision, the Claimant would have had to serve the claim form on the First and Second Defendants out of the jurisdiction, which is a far less speedy and certain method of service. If clause 40.2 did not permit the appointment of a replacement agent, it would be useless in the event that Areval could not perform its role (as in fact happened). It is not unfair for clause 40.2 to set down a process which ensures that service can be effected in a straightforward manner within the jurisdiction even if the original agent is unable to perform its role and the Borrower refuses to appoint a replacement, and which ensures that the party to be served cannot frustrate that purpose. The issue of the First and Second Defendants' awareness or lack of awareness of the appointment is a matter to be considered under CPR rule 13.3(1). Notably the First and Second Defendants do not say that they were unaware of Areval's dissolution or the Borrower's failure to appoint a replacement agent.

(8) The Facility Agreement has substantially complied with the requirements of article 60H of the 2001 Order and CONC App, para. 1.4.6 and 1.4.7. There is no requirement that compliance should meet a stricter standard (*Davis v Burton* (1883) 11 QBD 537; *Campbell v Tyrrell* [2022] EWHC 423 (Ch); [2022] GCCR 20019; *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2021] EWCA Civ 688, [2021] Bus LR 1407, para. 39-40).

(9) Even if the Facility Agreement and the personal guarantees therein are unenforceable pursuant to section 105(7) of the Consumer Credit Act 1974 and the Guarantee Regulations, the Claimant's reliance on clause 40.2.1(a) of the Facility Agreement, and CPR rule 6.11, is not an act of enforcement (*McGuffick v Royal Bank of Scotland* [2009] EWHC 2386 (Comm); [2010] 1 All ER 634, para. 67-81). Furthermore, as with jurisdiction and arbitration agreements, clause 40.1 is severable from the remainder of the Facility Agreement and so if the loan agreement and the personal guarantees are unenforceable, that does not affect clause 40.1, given that its purpose is to facilitate the speedy resolution of disputes in the English Courts by ensuring that defendants (especially those resident out of the jurisdiction) cannot create delay and obstruction at the initial stage of service (*DVB Bank SE v Isim Amin Ltd* [2014] EWHC 2156 (Comm), para. 5; *Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2020] EWHC 2145 (Comm), para. 11; *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2018] EWHC 974 (Comm), para. 25-30).

(10) In any event, the Claimant would be entitled to apply for and obtain an order to enforce the Facility Agreement pursuant to section 28A of the Financial Services and Markets Act 2000.

Determination of the application under CPR rule 13.2

65. The First and Second Defendants' principal arguments in support of their application under CPR rule 13.2 are that:

(1) They were and are not a party to the Facility Agreement (being a matter to be determined at trial) and so if there is a real prospect of the First and Second Defendants successfully arguing that they are not a contracting party, service

effected under clause 40 of the Facility Agreement, in accordance with CPR rule 6.11, is of no effect.

(2) The purported appointment of Law Debenture under clause 40.2 of the Facility Agreement was not effective because the notifications required under clause 31.2 were not provided. The First and Second Defendants were not aware of the appointment until after the purported service of the claim form on Law Debenture on 7th August 2024.

(3) Clause 40.2.2 of the Facility Agreement is an unfair contract term for the purposes of Part 2 of the Consumer Rights Act 2015 and so is not binding on the First and Second Defendants.

(4) The Facility Agreement, and the personal guarantees therein, are unenforceable pursuant to section 105(7) of the Consumer Credit Act 1974 and the Guarantee Regulations by reason of non-compliance with article 60H of the 2001 Order and CONC App, para. 1.4.6 and 1.4.7.

66. I shall address each of these arguments in turn. However, before doing so, I should address the question of the burden and standard of proof. It was common ground during oral argument that the burden is on the Claimant to prove that service of the Claim Form on Law Debenture amounted to valid service on the First and Second Defendants.

67. The question of the standard of proof is, at least to my mind, more complex. During the hearing, reference was made to the standard of proof being that of the balance of probabilities. In fact, I believe that both parties accepted that this was the applicable standard of proof.

68. Indeed, this is the standard of proof adopted by Butcher J in *YA II PN Ltd v Frontera Resources Corporation* [2021] EWHC 1380 (Comm). In that case, the issues were whether service had been effected at an address specified in an order granting permission to serve and whether any service was valid in accordance with US law. Butcher J found that there had been no valid service in accordance with the order, but if that was wrong proceeded to consider the impact of US law. In the course of his judgment, Butcher J considered the standard of proof and said at para. 26-28:

"*26. I turn to the first of the three issues which I have set out above, namely the standard to which YA II must show that there was service in accordance with the law of the country where service was to be effected.*

27. In my judgment, YA II must establish this on the balance of probabilities. A judgment in default of acknowledgement of service is dependent on there having been an obligation on the defendant to acknowledge service, which itself presupposes valid service. If the claimant wishes to have the benefit of a default judgment it must show that it is entitled to it by proving that there was such valid service. If there is any dispute about it, this must entail that the claimant shows it on the balance of probabilities. Judgment should not be entered against a defendant on the basis simply of an arguable case - even a good arguable case - falling short of a showing on the balance of probabilities that it was served. Moreover, in relation to issues of whether service was validly effected, the facts should be capable of relatively straightforward ascertainment.

28. This conclusion that the appropriate standard of proof is, in the context of an application to set aside a judgment in default, that the claimant must show valid service on the balance of probabilities, is the same as that reached in Estate of Michael Heiser v Islamic Republic of Iran [2019] EWHC 2074 (QB) by Stewart J (at paragraphs 213-216). It was the approach of Colman J in Shiblaq v Sadikoglu, loc cit, first judgment paragraphs 20-24, and second judgment paragraphs 3-28. It was also, as it seems to me, the approach of Langley J in Credit Agricole Indosuez v Unicof Ltd [2002] EWHC 77 (Comm), especially paragraphs 8, 10-13. I also consider that it is consistent with the approach adopted in Société Générale v Goldas Kuyumculuk Sanayi [2017] EWHC 667 (Comm) at paragraphs 34-36 by Popplewell J in relation to the issue of whether claim forms had been validly served in Dubai within the time for doing so."

69. It therefore appears plain that the standard of proof applicable to establishing the validity of service for the purposes of an application under CPR rule 13.2 is that of the balance of probabilities, at least where issues relating to service are not matters which themselves are to be determined at trial.

70. In the present case, however, where the First and Second Defendants' objection to the validity of service purportedly effected pursuant to CPR rule 6.11 is an issue, indeed a central issue, which is to be determined at any trial, it may be said that the standard of proof based on the balance of probabilities is too demanding. In this case, the First and Second Defendants object to the validity of service on Law Debenture pursuant to clause 40.2 of the Facility Agreement on the grounds that the Facility Agreement is not binding on them. This is an issue to be determined at trial.

71. In these circumstances, it may be said that the standard of proof should be based on the Claimant establishing a good arguable case that the Facility Agreement is binding on

the First and Second Defendants. What such a standard of proof entails in the context of applications contesting the Court's jurisdiction, including where the asserted basis of jurisdiction relates to the existence of a relevant contract, has been discussed in a number of recent decisions (see *e.g. Kaefer Aislamientos SA de CV v Atlas Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514; *Clifford Chance LLP v Société Générale SA* [2023] EWHC 2682 (Comm), para. 79). There is, however, this difference between applications contesting jurisdiction and applications to set aside default judgments: in the case of the former, if the claimant discharges the burden of proof, the action will proceed, but in the case of the latter, if the claimant discharges the burden of proof, the action will rest with the maintenance of the default judgments. The objection might rightly be made in those circumstances that the defendant will be at a disadvantage if the standard of proof is less than that of the balance of probabilities. In this context, I particularly have in mind how limb (iii) of the approach adopted in jurisdictional challenges should be applied, if at all, to applications to set aside default judgments (*cf. Kaefer Aislamientos SA de CV v Atlas Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 WLR 3514, para. 80).

72. Accordingly, I shall apply the standard of proof based on the balance of probabilities, having regard to the evidence currently available. I do this having regard to the decision in *YA II PN Ltd v Frontera Resources Corporation* [2021] EWHC 1380 (Comm) and also having regard to the position adopted by the parties at the hearing of this application.

(1) Are the First and Second Defendants parties to the Facility Agreement?

73. The First and Second Defendants contend that they are not parties to the Facility Agreement having regard to (a) the circumstances of how they signed the Facility Agreement and (b) the basis on which they agreed to "*release*" their signatures, namely that the release was conditional upon "*the satisfaction of all other conditions precedent to the utilisation of the loan in full (each a "CP") or if a CP is not satisfied, such CP has been either (a) waived unconditionally or (b) waived on conditions that allow for such conditions to be satisfied in a time frame that is reasonable for such CP and conditions*".

74. As regards the circumstances of how they signed the Facility Agreement, the First and Second Defendants' account surrounding their purported execution of the Facility Agreement are set out in Ms Ho's second witness statement (para. 11-17) and third witness statement (para. 9-10). The First and Second Defendants' case is that they did not intend legally to be bound by the Facility Agreement as the agreement was still subject to amendment and there was no single, authoritative version of the Facility Agreement existing at the point of signature (*R (on the application of Mercury Tax Group & Anor) v. HM Revenue & Customs Commissioners* [2008] EWHC 2721 (Admin); [2009] STC 743, para. 38-39; *Bioconstruct GmbH v Winspear* [2020] EWHC 0007 QB, para. 126.6-126.7).

75. The First and Second Defendants contend that if they did not sign the Facility Agreement, then in any event, the requirements of section 4 of the Statute of Frauds Act 1677 pertaining to the guarantee were not satisfied.

76. The Claimant's evidence offers a different version of events (Mr Khatoun's second witness statement, para. 4-6).

77. As regards the basis on which their signatures were released, the First and Second Defendants' case is that the conditions for the release of the signatures were not satisfied, because the relevant conditions precedent were not satisfied or were not waived unconditionally or waived on condition that they would be satisfied within a reasonable time frame. Indeed, as I understand it, the Claimant's case is that the conditions precedent were not satisfied (see the letters dated 14th June 2021 and 5th July 2021). Therefore, it is argued, the First and Second Defendants did not agree to nor execute the Facility Agreement and are therefore not liable under any purported personal guarantees.

78. In answer to this argument, the Claimant maintains that the conversion of the conditions precedent into conditions subsequent fell within one of the exceptions and moreover Mr Hallgarth in his email dated 12th July 2021 accepted that the signatures had been released.

79. I am unable to dismiss the First and Second Defendants' arguments given the nature of their allegations and the evidence provided. I do not consider that I am in any position to resolve these issues based on the evidence currently available other than to conclude

that the Claimant has not satisfied me that the Facility Agreement is binding on the First and Second Defendants so that service on Law Debenture is to be treated as service on the First and Second Defendants.

80. In these circumstances, based on the evidence currently available, I find that the Claimant has not discharged the burden of proof on the balance of probabilities that the Facility Agreement is binding on the First and Second Defendants. This is an issue which should be tried.

(2) Was notification of the appointment of Law Debenture sufficient?

81. Clause 40.1 provides that the disputes between the parties will be submitted to the exclusive jurisdiction of the English Court.

82. Clause 40.2 then provides that each Obligor (other than an English company) appoints (irrevocably) Areval as its agent for service of process in respect of proceedings before the English Court (which has consensually been endowed with exclusive jurisdiction) and agrees that any failure by Areval to notify the Borrower of the service of process will not invalidate such proceedings.

83. Pausing there, it will therefore be noted that the term "*Obligor*" in the Facility Agreement embraces both the Borrower and each guarantor, including the First and Second Defendants. Accordingly, the First and Second Defendants have appointed Areval irrevocably as their service of process agent. Moreover, there is a provision that the Obligors agree that the failure of Areval to inform the Borrower of the service of process cannot be relied on as a reason to undermine the process served. No reference is made to the failure of the service of process agent to notify the Obligors who are not the Borrower, such as the First and Second Defendant. However, this is because the Borrower is appointed as the Obligors' Agent pursuant to clause 3 of the Facility Agreement. Further, there is no provision that requires process to be effectively served only if the service of process agent informs the First and Second Defendants of such service.

84. The commercial purpose of such provisions was described by Popplewell J in *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2018] EWHC 974 (Comm), para. 25-29, as follows:

"*25. It is convenient to start in this case with the commercial purpose of section 22.2(b). Provisions for the irrevocable appointment of English agents for service are common in international agreements providing for English jurisdiction. Their purpose is to provide a clear and certain method by which proceedings in England can be progressed, and to avoid: (i) the delay which may be involved in formal methods of service abroad; (ii) disputes about permissible methods of service; (iii) disputes about whether service has occurred in accordance with permissible methods of service; and (iv) the possibility of a defendant seeking to use service as an issue to delay or frustrate the efficient and effective pursuit of the claim in the agreed jurisdiction …*

27. A service of suit clause often provides for the appointment of the service agent to be irrevocable. This is because the purpose of the clause would be frustrated if the party were able to revoke the agency the moment a dispute arose.

28. In this context, irrevocable is used in a different sense from that which arises in the law of agency, as between agent and principal. An agent derives his authority from the principal, and save in very limited circumstances, such authority can always be revoked by the principal, even where, as between them, the authority is expressed to be irrevocable (see Bailey and another v Angove's Pty Limited [2016] WLR 3179). However, the service agent is not usually party to the agreement which contains a service of suit clause. The concept of irrevocability, when used in such a clause, is intended to connote irrevocability as between the principal and his contractual counterparty. It is not intended to connote irrevocability as between the principal and his agent.

29. If the service of suit clause is to serve its purpose, it must not be capable of being frustrated by the simple expedient of terminating the service agent's actual authority. It operates as an agreement that whatever the position vis-à-vis the service agent itself, the agreement between the two counterparties is that service on that person shall be effective service, and that agreement cannot be revoked or withdrawn unilaterally."

85. The important provision in the Facility Agreement is clause 40.2.2, which provides that:

"*If any person appointed as an agent for service of process is unable for any reason to act as agent for service of process, the Borrower must immediately (and in any event within five days of such event taking place) appoint another agent on terms acceptable to the Lender. Failing this, the Lender may appoint another agent for this purpose*."

86. Clause 40.2.2 therefore provides for a mechanism whereby the irrevocably appointed service of process agent who can no longer act as such is to be replaced by an agent appointed by the Borrower within five days, and failing such appointment, by the appointment made by the Claimant as the Lender. If such an appointment is made by the Borrower, the Borrower is acting on behalf of the guarantors pursuant to clause 3 of the Facility Agreement. It follows that if the Borrower fails to make the appointment,

and the Claimant steps forward and makes the appointment, the appointment is effectively made on behalf of the Obligors.

87. There is no provision which requires the service of process agent, whether the originally appointed agent (Areval) or the replacement agent, or the Borrower or the Claimant to notify the guarantors (including the First and Second Defendants) of any service of process. Such service will be effective if the relevant proceedings are served on the originally appointed agent (Areval) and thereafter any replacement agent (in this case, Law Debenture) (*Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch), para. 16).

88. Nor is there any provision - at least no express provision - which requires the appointment of a replacement service of process agent to be notified to the First and Second Defendants. It seems to me that if there is such an appointment, there should be notification of that appointment to the Borrower, because a principal should be made aware of who its appointed agent is and because the Claimant's power to appoint arises only if the Borrower fails to make such an appointment. However, I do not consider that there is any requirement to extend such notification to the First and Second Defendants, given that the Borrower is the Obligors' Agent and by clauses 3.1.1(b) and 3.1.2 any notification given by the Claimant to the Borrower is treated as notification to the First and Second Defendants themselves.

89. In this case, notification of the appointment of Law Debenture was provided to the Borrower and the First and Second Defendants. Although the First and Second Defendants have questioned the adequacy of notice provided to them, no question has been raised as to the adequacy of notice provided to the Borrower.

90. In these circumstances, based on the evidence currently available to me, I find that the Claimant has discharged the burden of proof based on the balance of probabilities on this ground. Accordingly, the First and Second Defendants are not entitled to succeed in their application under CPR rule 13.2 on this ground.

(3) Is clause 40.2.2 an unfair term under the Consumer Rights Act 2015?

91. By section 61(1), Part 2 of the Consumer Rights Act 2015 applies to a contract between a trader and a consumer (as defined in section 2 of the Consumer Rights Act 2015).

92. The First and Second Defendants are consumers and the Claimant is a trader within the meaning of the Consumer Rights Act 2015 (Ms Ho's second witness statement, para. 80). I did not understand this to be in dispute. Mr Atrill KC on behalf of the Claimant was prepared to accept that the First Defendant was a consumer for the purposes of this application.

93. Section 62(1) of the Consumer Rights Act 2015 provides that "*An unfair term of a consumer contract is not binding on the consumer*". Sections 62(4)-(5) provide that:

> "*(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*
>
> *(5) Whether a term is fair is to be determined -*
>
> *(a) taking into account the nature of the subject matter of the contract, and*
>
> *(b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends*."

94. The First and Second Defendants contend that they had no power of veto over the appointment of Law Debenture and that the Facility Agreement contained no requirement for the Claimant to inform the First and Second Defendants, or the Borrower, of the appointment under clause 40.2.2 of the Facility Agreement; if that is correct, clause 40.2.2 is an unfair contract term for the purposes of Part 2, Consumer Rights Act 2015, as it creates a significant imbalance between the rights of the parties and is unfair, and is therefore unenforceable.

95. The Claimant contends that in making an assessment of any unfairness, the Court must take into account the nature of the subject matter of the contract, all the circumstances existing when the term was agreed, and the other terms of the contract (or a contract on which it depends) (section 62(5)); clause 40.2 is not an unfair term; Schedule 2 of the Consumer Rights Act 2015 provides a list of terms which may be regarded as unfair and service of process clauses do not fall within the scope of any of the terms at Schedule 2. Further, it is argued, clauses appointing agents for service are standard provisions and are commonly enforced and have not been treated as unfair (*DVB Bank SE v Isim Amin Ltd* [2014] EWHC 2156 (Comm), para. 5-6; *Bank of New York Mellon,*

London Branch v Essar Steel India Ltd [2018] EWHC 3177 (Ch), para. 16; *Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2020] EWHC 2145 (Comm)). Without this provision, the Claimant would have had to serve the claim form on the First and Second Defendants out of the jurisdiction, which is a far less speedy and certain method of service. Clause 40.2 is not unfair because it imposed a process which ensures that service can be effected in a straightforward manner within the jurisdiction even if the original agent is unable to perform its role and the Borrower refuses to appoint a replacement, and which ensures that the party to be served cannot frustrate that purpose.

96. I confess that I have considerable concerns about the fairness of clause 40.2.2 of the Facility Agreement in the context of a consumer contract, even if the Court has in the past considered such service of process provisions to be fair in the context of a contract between commercial parties. My concerns are as follows:

(1) Clause 40.2 regulates the service of process upon the Obligor, meaning the Borrower and the guarantors, and not upon the Claimant as lender.

(2) Although the guarantors - the First and Second Defendants - are or should have been aware by reason of the terms of the Facility Agreement - that Areval was appointed as their service of process agent, the mechanism for the appointment of a replacement agent could operate without any notice being given to the guarantors.

(3) If, as in this case, Areval was no longer able to carry out its functions as a service of process agent, the power of appointing a replacement was limited to the Borrower and, failing any appointment by the Borrower, the Claimant; the contractual mechanism did not require the guarantors to be involved in the process, even by way of receiving notifications of the appointment. Accordingly, a replacement agent could have been appointed without the guarantors being made aware of such appointment. Of course, if steps were taken to inform the guarantors of the appointment of a replacement agent, the unfairness of the term might be mitigated or circumvented, but that does not mean that the term itself was not unfair. It is the potential for unfairness which

is the governing consideration (*Chitty on Contracts* (35th ed., 2025), para. 41-314).

(4) Circumstances could therefore arise where proceedings could be served on a replacement agent, in this case Law Debenture, on behalf of the First and Second Defendants, without the First and Second Defendants ever being made aware of such an appointment. This could lead to the entry of default judgments against the guarantors without the guarantors being aware of the service of process in the first place. Of course, such default judgments could be set aside, but I do not consider that is an answer to the unfairness of the term.

(5) Absent clause 40.2.2, on the facts of this case where the appointed service of process agent, Areval, was no longer able to accept service, legal proceedings would have to be served on the First and Second Defendants directly so that they would become aware of such proceedings (*Chitty on Contracts* (35th ed., 2025), para. 41-312).

(6) The fact that the Claimant as lender, a company resident in Luxembourg, is not exposed to the same risks as regards the service of process as the guarantors indicates to me that clause 40.2.2 creates an imbalance in the parties' legal rights and obligations.

(7) The significance of the imbalance resides in the fact that proceedings might otherwise be validly served on the guarantors, with the risk of entry of default judgments against those guarantors. The Claimant faced no such risk.

97. Therefore, having regard to the nature of the Facility Agreement, and the guarantors' obligations thereunder, and all of the circumstances of the case, I consider that the First and Second Defendants are correct in their submissions on this ground.

98. Section 63(1) provides that "*Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts* ***that may be regarded as unfair*** *for the purposes of this Part*" (emphasis added). I do not consider that the fact that a service of process term is not included within the list of terms in Schedule 2 of the 2015 Act which might be unfair means that the term cannot be unfair.

99. I read CPR rule 6.11 as applying where there is a relevant contractual provision as to service which is binding on the defendant. Accordingly, as clause 40.2.2 is not binding on the First and Second Defendants pursuant to the Consumer Rights Act 2015, the clause cannot be relied on to validate service of the proceedings on them.

100. I should make it clear that this conclusion does not mean that clause 40.1 and clause 40.2.1 of the Facility Agreement are unfair and are not binding on the First and Second Defendants insofar as they were parties to the Facility Agreement.

(4) Enforceability under Consumer Credit legislation

101. The First and Second Defendants contend that the Facility Agreement is a regulated credit agreement within the meaning of article 60B(3) of the 2001 Order and, as the Claimant is not authorised and regulated by the FCA for credit regulated activity, in order to be an enforceable agreement, the HNW Exemption in article 60H of the 2001 Order must apply. If it does not apply, then the Facility Agreement is not enforceable pursuant to section 26(1) of the Financial Services and Markets Act 2000 and the Consumer Credit Act 1974.

102. Thus far, there is, as I understand it, no dispute between the parties. The point in issue is whether the declaration and statement contained in clause 38 of the Facility Agreement complied with the requirements of CONC App, para. 1.4.6 and 1.4.7.

103. The First and Second Defendants submitted that the HNW Exemption is not applicable because the requirements of article 60H(1)(c) and (d) were not satisfied in that the Facility Agreement did not include in clause 38 of the Facility Agreement a declaration made by the Borrower that he forwent the protection and remedies available under a regulated credit agreement and a statement in relation to the income or assets of the borrower, both of which complied with rules made by the FCA. It is argued that the declaration and statement in clause 38 of the Facility Agreement had to comply strictly with those requirements as CONC App, para. 14.6 and 1.4.7 provide that the declaration and statement "*must have the following form and content*". As a result, the Facility Agreement was not enforceable. Further, it is argued, that the guarantee in clause 19 of the Facility Agreement did not conform with the mandatory requirements of the Guarantee Regulations, in particular omitting the statutory heading and signature box wording required to be shown in a regulated guarantee (regulation 3(1) of the Guarantee

Regulations). As a result, the personal guarantees are not enforceable against the First and Second Defendants without a Court Order pursuant to section 105(7) of the 1974 Act. It follows, argue the First and Second Defendants, that the entry of default judgments are matters of enforcement and so should be set aside. Clause 19.5(f) does not affect the position, for various reasons, including that the loan agreement and the personal guarantees are each independently unenforceable.

104. The Claimant contends that the Facility Agreement has substantially complied with the requirements of article 60H of the 2001 Order and CONC App, para. 1.4.6 and 1.4.7, and that is sufficient for these purposes. Even if the Facility Agreement and the personal guarantees are unenforceable pursuant to section 105(7) of the Consumer Credit Act 1974 and the Guarantee Regulations, the Claimant's reliance on clause 40.2.1(a) of the Facility Agreement, and CPR rule 6.11, is not an act of enforcement. Further, clause 40 is severable from the remainder of the Facility Agreement and so if the loan agreement and the personal guarantees are unenforceable, that does not affect clause 40, given that its purpose is to facilitate the speedy resolution of disputes in the English Courts by ensuring that defendants (especially those resident out of the jurisdiction) cannot create delay and obstruction at the initial stage of service. In any event, the Claimant would be entitled to apply for and obtain an order to enforce the Facility Agreement pursuant to section 28A of the Financial Services and Markets Act 2000.

105. Article 60H of the 2001 Order provides that:

> "*(1) A credit agreement is an exempt agreement for the purposes of this Chapter if -*
>
> *(a) the borrower is an individual,*
>
> *(b) the agreement is either -*
>
> *(i) secured on land, or*
>
> *(ii) for credit which exceeds £60,260 ...*
>
> *(c) the agreement includes a declaration made by the borrower which provides that the borrower agrees to forgo the protection and remedies that would be available to the borrower if the agreement were a regulated credit agreement and which complies with rules made by the FCA for the purposes of this paragraph,*

(d) a statement has been made in relation to the income or assets of the borrower which complies with rules made by the FCA for the purposes of this paragraph,

(e) the connection between the statement and the agreement complies with any rules made by the FCA for the purposes of this paragraph (including as to the period of time between the making of the statement and the agreement being entered into), and

(f) a copy of the statement was provided to the lender before the agreement was entered into."

106. CONC App, para. 1.4.6 provides that:

"*The declaration for the purposes of articles 60H(1)(c) and 60Q(b) of the Regulated Activities Order must have the following form and content-*

"*Declaration by high net worth borrower or hirer*

(articles 60H(1) and 60Q of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001)

I confirm that I have received a copy of the statement of high net worth made in relation to me for the purposes of article 60H(1)(d) or article 60Q(c) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

I understand that by making this declaration I will not have the benefit of the protection and remedies that would be available to me under the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974 if this agreement were a regulated agreement under those Acts.

*I understand that this declaration does not affect the powers of the court to make an order under section 140B of the Consumer Credit Act 1974 in relation to a credit agreement where it determines that the relationship between the lender and the borrower is unfair to the borrower.**

I am aware that if I am in any doubt as to the consequences of making this declaration then I should seek independent legal advice".

**This section should be omitted in the case of a consumer hire agreement*"

107. Clause 38 of the Facility Agreement provided that:

"***38. Borrower Declaration of High Net Worth***

(Articles 60H(1) and 60Q of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001)

I confirm that I have received a copy of the statement of high net worth made in relation to me for the purposes of article 60H(1)(d) or article 60Q(c) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

I understand that by making this declaration I will not have the benefit of the protection and remedies that would be available to me under the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974 if this agreement were a regulated agreement under those Acts.

I understand that this declaration does not affect the powers of the court to make an order under section 140B of the Consumer Credit Act 1974 in relation to a credit agreement where it determines that the relationship between the lender and the borrower is unfair to the borrower.

I am aware that if I am in any doubt as to the consequences of making this declaration then I should seek independent legal advice"

108. The First and Second Defendants submitted that the heading in clause 38 of the Facility Agreement, "***Borrower Declaration of High Net Worth***", does not comply with CONC App, para. 1.4.6 because the heading required was "***Declaration by high net worth borrower or hirer***".

109. Without considering the authorities, my initial impression is that there is no meaningful difference, whether in content or form, between the wording of the heading in clause 38 and the wording of the heading in CONC App, para. 1.4.6.

110. CONC App, para. 1.4.7 provides that:

"*A statement of high net worth for the purposes of articles 60H(1)(d) and 60Q(c) of the Regulated Activities Order, and CONC 1.2.10R, must have the following form and content:*

*"**Statement of High Net Worth***

(articles 60H(1) and 60Q of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 /CONC 1.2.10R*)

I/We (insert full name) ..... of (insert address and postcode) ..... confirm that I am/we* are a person qualified to make a statement of high net worth under rules made by the Financial Conduct Authority, by virtue of the fact that*

.....

...

**Delete as appropriate*."

111. The First and Second Defendants submitted that the statement of high net worth made by Katz & Co (London) LLP on 10th June 2021 did not contain the correct heading for the statement and the opening paragraph of the statement of high net worth was incorrect. The heading of the Katz & Co letter stated "*Statement of High Net Worth of Andrew Valmorbida*" and the first paragraph of the letter stated that "*We Katz & Co (Chartered Accountants) of the above address confirm that we are qualified to make a statement of high net worth under rules made by the Financial Conduct Authority as we are a firm which is a member of the Institute of Chartered Accountants in England and Wales, by virtue of the fact that in our opinion,* ***Andrew Valmorbida*** *... is an individual of high net worth because ...*".

112. Again, without consideration of the authorities, I consider that the heading and opening paragraph of the Katz & Co letter substantially complies with CONC App, para. 1.4.7.

113. There are in fact two versions of the Katz & Co letter dated 10th June 2021, each on a different letterhead. One refers to the Claimant as the lender, but the other refers to "*Internationales Bankhaus Bodensee AG*" as the lender. There is no explanation why there are two such letters. Assuming that both letters were issued on 10th June 2021 and prior to the Facility Agreement, and assuming that there is no other relevant evidence, I do not consider that this is an issue of non-compliance in and of itself.

114. The question is whether the failure of the declaration and statement to comply strictly with the verbatim requirements of the "*content and form*" of CONC App, para. 1.4.6 and 1.4.7 is sufficient on its own to render the Facility Agreement and the guarantees in clause 19 unenforceable.

115. In support of its contention that substantial compliance with CONC App was sufficient, the Claimant relied on the decision of the Court of Appeal in *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2021] EWCA Civ 688, [2021] Bus LR 1407. In that case, the relevant legislation (Landlord and Tenant Act 1954) required the tenant to execute a declaration "*in the form or substantially in the form*" set out in a specified statutory instrument. At para. 39, the Court said that "*a declaration will be "in the form or substantially in the form" prescribed if the declaration as a whole fulfils all the essential purposes of the prescribed form and that, despite the use of apparently mandatory language, Parliament is not to be taken to have*

insisted on an interpretation which is contrary to commercial sense". I do not consider that this decision can stand as authority that substantial compliance is sufficient for the purposes of CONC App, given that the relevant statutory instrument in *TFS Stores Ltd v The Designer Retail Outlet Centres* expressly permitted a declaration "*substantially in the form*" of the requirements of that statutory instrument. However, the Court of Appeal did indicate, at least as I understand it, that if Parliament had intended an un-commercial interpretation, the language requiring precise compliance should be clear and unambiguous. Failing such clarity and lack of ambiguity, one should interpret the requirements of the relevant legislation, in this case CONC App, in a manner which is consistent with, and not contrary to, commercial sense.

116. The Claimant also relied on the decision in *Campbell v Tyrrell* [2022] EWHC 423 (Ch); [2022] GCCR 20019, which concerned the question whether an exemption for business use in respect of regulated credit agreements under section 16B of the Consumer Credit Act 1974 applied, as the legislation then stood. Section 16B(1) applied where the credit exceeded £25,000 and the agreement was entered into by the debtor "*wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him*". Section 16B(2) created a presumption: "*If an agreement falling within subsection (1) includes a declaration made by the debtor ... to the effect that the agreement is entered into by him wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him, the agreement shall be presumed to have been entered into by him wholly or predominantly for such purposes*". Pursuant to section 16B(4), the Consumer Credit (Exempt Agreements) Order 2007 (SI 2007/1168) was made and provided that a declaration for the purposes of section 16B(2) "*shall - (a) comply with Schedule 3* …". Article 6 of Schedule 3 to the 2007 Order provided that: "*A declaration for the purposes of article 6 must have the following form and content* …".

117. In *Campbell v Tyrrell*, it was common ground that the business purposes declaration in the relevant loan agreement signed by Ms Campbell with Goldcrest Finance Ltd failed strictly to comply with the requirements of the 2007 Order, because the words "*or predominantly*" were omitted after the word "*wholly*". Ms Campbell submitted that this omission was fatal to the efficacy of the declaration so that the presumption did not arise, because whilst section 16B(2) uses the words "*to the effect that* …", the wording

of the 2007 Order was mandatory in that a declaration for the purposes of section 16B(2) "*shall - (a) comply with Schedule 3* …", and such a declaration "*must have the following form and content*". It was argued that it would be a startling outcome if the absence of the words "*or predominantly*" within a declaration given for the purposes of a loan agreement under section 16B(1) had the effect of transforming the loan agreement from an exempt agreement into a regulated agreement. HH Judge Hodge QC addressed the question of statutory construction as follows:

"*47. In my judgment, where a loan agreement is entered into wholly, rather than predominantly, for business purposes, then a declaration to that effect sufficiently satisfies the requirements of s.16B(2), so as to give rise to the presumption arising under that sub-section, even though the words "or predominantly" have been omitted. That conclusion is supported by the authorities cited by Mr Connolly [counsel for Goldcrest], even though none of them is directly in point.*

48. In The Chiltern Railway Company Limited v Patel [2008] EWCA Civ 178, Lord Neuberger MR said (at paragraph 12):

> *Of course, the statutory requirements in relation to a notice or a declaration could be so clearly and unequivocally expressed that strict compliance would be required and that any deviation, however insignificant, from those requirements would render a purported notice or declaration invalid. Sometimes, indeed, although it conflicts with common and commercial common sense, this may be the result because it is correct as a matter of law. However, this is not such a case.*

49. Even where, on the face of the statute, strict compliance might seem to be required, some slight degree of flexibility may be permissible. Mr Connolly cites, by way of example, the case of Davis v Burton (1883) 11 QBD 537, where the relevant statute provided that a bill of sale should be "in accordance with the form in the schedule." With his characteristic disdain for technicalities, Sir Baliol Brett MR said (at page 540):

> *That must mean that every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it.*

Fry LJ said the same (at page 541):

> *The meaning of s. 9 is that every bill of sale which is not substantially 'in accordance with the form in the schedule', shall be void.*

Admittedly those observations were obiter, because the actual decision was that the bill of sale was void, as it was not made in the form given in the schedule. But they show that statutory requirements in relation to the form of a document must be clearly and unequivocally expressed before strict compliance will be required and any deviation, however insignificant, operate to render the document invalid.

As Mr Connolly points out, a document does not need to be "word perfect" in order to comply with the statutory requirements."

118. HH Judge Hodge QC then proceeded to interpret section 16B and the 2007 Order having regard to their purpose and concluded that where a loan is taken out wholly, rather than predominantly, for the purposes of a business carried in by the debtor, a business purposes declaration is valid even though it omits the redundant words "*or predominantly*", so that presumption in section 16B(2) was not lost.

119. The approach to construction which the learned judge adopted was consistent with that adopted by the Court of Appeal in *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2021] EWCA Civ 688, [2021] Bus LR 1407.

120. In interpreting CONC App, I have in mind GEN 2.2.9 of the FCA Handbook which provides that "*Unless the context otherwise requires or unless otherwise stated in a particular sourcebook or manual, where italics have not been used, an expression bears its natural meaning (subject to the Interpretation Act 1978)*". I do not, however, consider that this means that the Court should not have regard to the purpose of the legislation in interpreting statutory provisions.

121. In my judgment, the Claimant has discharged the burden based on the balance of probabilities that the Facility Agreement and the guarantees therein are not unenforceable, based on the evidence currently available to me, in circumstances where the legislation is not unambiguously clear that, unless the strict verbatim requirements of CONC App, para. 1.4.6 and 1.4.7 are complied with, otherwise substantial compliance would render the Facility Agreement as non-compliant. The closest that the relevant language comes to a "*word perfect*" requirement is that para. 1.4.6 and 1.4.7 provides that the declaration and statement "*must have the following form and content*". However, that is the same language used in *Campbell v Tyrrell*, where the Court considered that substantial compliance was sufficient.

122. In reaching this conclusion, of course, I am not making a summary determination which would prevent the First and Second Defendants from advancing these important arguments at trial.

123. On this ground, therefore, I am not sufficiently convinced that the Facility Agreement, including the guarantees in clause 19, are unenforceable under Consumer Credit legislation, as to justify upholding the First and Second Defendants' application under CPR rule 13.2 on this ground. Therefore, I find that on the basis of the evidence currently before the Court the Claimant has established on the balance of probabilities that the Facility Agreement and the guarantees are not unenforceable pursuant to Consumer Credit legislation.

124. Had I come to a different conclusion, there were additional arguments as to the effect of the contract being unenforceable, which should be addressed.

125. The first such issue is whether the mere fact that a contract is unenforceable means that a party can or cannot commence and serve legal proceedings with a view to obtaining a court order enforcing the contract. The Claimant relied on the decision in *McGuffick v Royal Bank of Scotland* [2009] EWHC 2386 (Comm); [2010] 1 All ER 634, para. 77-81, where Flaux J held that steps taken by a creditor seeking to obtain payment under a regulated consumer credit agreement are not acts of enforcement, such as demanding payment, issuing a default notice, threatening legal action, instructing a third party to demand payment or otherwise to seek to procure payment, or bringing proceedings; they are at best acts preparatory to enforcement. The act of enforcement, on this analysis, is therefore the making of a court order or the entry of judgment requiring payment, including the entry of default judgment (*Madison CF UK v Various* [2018] EWHC 2786 (Ch); [2018] GCCR 16199, para. 4, 25).

126. However, the First and Second Defendants referred me to the FCA Guidance on Guarantor Loans: Default Notices (FG 17/1), at para. 2.6-2.7:

> "*2.6 As noted in GC16/7, we do not consider that 'enforcement of security' is limited to obtaining a court judgment. In our view it is clear from the structure of the CCA, and relevant case law, that enforcement can include exercising some forms of 'self-help' remedy relating to security if the remedy is sufficiently coercive.*
>
> *2.7 A guarantee is enforced in the FCA's view if, following breach of the agreement by the borrower:*
>
> - *the lender demands payment by the guarantor, or*

- *the lender takes payment from the guarantor by using a continuous payment authority (CPA) or direct debit mandate that was previously provided and without at least appropriate prior notification to the guarantor*."

127. For what it is worth, clause 40 - which regulates jurisdiction and service of process - is headed "*Enforcement*". However, clause 1.2.1(n) provides that "*Section, Clause and Schedule headings are for ease of reference only*".

128. If I had held that the First and Second Defendants succeeded on the matter of unenforceability under the Consumer Credit legislation, I would have been inclined to hold that they also succeeded in their argument that the service of process with a view to obtaining a court order requiring payment under the guarantees in the Facility Agreement was also an act of enforcement.

129. The second supplementary issue was whether clause 40.2 was severable from the remainder of the Facility Agreement, even if the Facility Agreement and guarantees in clause 19 are unenforceable, in the same way that a jurisdiction or arbitration agreement might be in cases where the main contract was argued to be void or invalid. This argument was advanced by the Claimant, I think, in response to a question I raised during the hearing. In any event, I do not consider that clause 40.2 can be severed from an agreement which is unenforceable pursuant to Consumer Credit legislation, because that legislation is concerned with the unenforceability of the regulated credit agreement as a whole and any provision, including one as to service, would plainly impact any rights that a consumer might otherwise have (*Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297; [2023] 2 All ER 569, para. 149-154).

130. In any event, I do not consider that the First and Second Defendants are entitled to relief under CPR rule 13.2 on this ground.

Conclusion

131. The First and Second Defendants are entitled to have the default judgments set aside pursuant to CPR rule 13.2, because the Claimant did not establish that service of process on Law Debenture was validly made on the First and Second Defendants for the following reasons:

(1) The Claimant did not discharge the burden of proving on the balance of probabilities, at this interlocutory stage, that the First and Second Defendants were parties to the Facility Agreement.

(2) In any event, clause 40.2.2 of the Facility Agreement is unfair within the meaning of section 62 of the Consumer Rights Act 2015 and so is not binding on the First and Second Defendants.

132. As mentioned above, these findings are not intended to restrict the parties' arguments which might be deployed at trial. They are made to dispose of the application under CPR rule 13.2.

The Application to set aside the Default Judgments under CPR rule 13.3

133. If the First and Second Defendants' application under CPR rule 13.2 had not succeeded, they applied for an order for the setting aside of the default judgments pursuant to CPR rule 13.3, which provides that:

> "*(1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –*
>
> *(a) the defendant has a real prospect of successfully defending the claim; or*
>
> *(b) it appears to the court that there is some other good reason why –*
>
> *(i) the judgment should be set aside or varied; or*
>
> *(ii) the defendant should be allowed to defend the claim.*
>
> *(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly*."

134. The First and Second Defendants bear the burden of establishing that they have a real prospect of successfully defending the claim.

135. CPR rule 13.3 refers to two express matters which the Court must address in order to dispose of an application to set aside a default judgment, namely (1) the merits of the defendant's defence in the sense of whether the defendant has a real prospect of success in defending the claim and (2) whether the defendant made the application to set aside

the default judgments promptly. The first of these matters is one of the jurisdictional requirements that must be satisfied before the Court considers exercising a discretion to set aside the default judgment (the other - alternative - jurisdictional requirement is whether it appears to the Court that there is some other good reason to set aside the default judgment or to allow the defendant to defend the claim). The merits of the defendant's defence are also a matter to consider in the exercise of the discretion granted under CPR rule 13.3.

136. However, the exercise of the discretion under CPR rule 13.3 must be undertaken together with a consideration of the factors identified by the Court of Appeal in *Denton v TH White Ltd (Practice Note)* [2014] EWCA Civ 906; [2014] 1 WLR 3926, because it has been held that an application to set aside a default judgment is an application for relief from sanctions, as the default judgment is entered by reason of the defendant's non-compliance with the Civil Procedure Rules in not filing an acknowledgment of service or serving a defence. The *Denton* approach is a three-stage approach to disposing of an application for relief from sanctions and requires the Court to:

(1) Identify and assess the seriousness and significance of the failure to comply with the relevant rule, practice direction or court order which engages CPR rule 3.9. If the non-compliance is neither serious nor significant, it is unlikely that the Court would need to proceed to the second and third stage.

(2) Consider why the non-compliance occurred.

(3) Evaluate all the circumstances of the case, including the matters referred to in CPR rule 3.9, namely (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and orders. Such an evaluation enables the Court to deal justly with the application.

137. The fact that the discretion to be exercised under CPR rule 13.3 having regard to the approach adopted in *Denton* was confirmed by the Court of Appeal in *FXF v English Karate Federation Ltd* [2023] EWCA Civ 891; [2024] 1 WLR 1097. The issue before the Court was whether the three-stage test described in *Denton* should be applied by the Court when it is considering whether to set aside a default judgment under CPR rule

13.3. The Court of Appeal concluded that the *Denton* approach should be applied. Sir Geoffrey Vos MR said at para. 59-68:

"*59. I hope that I have now dealt with all the truly relevant authorities. I have done so at some length, because they show a difference of approach that requires resolution by this court. As Birss LJ explained in argument, there are really three categories of case: (i) cases where the rule or order expressly provides for the sanction that will apply on non-compliance (e g failure to file witness statements on time), (ii) cases where the rule does not expressly state the sanction which applies for non-compliance, but permission of the court is needed to proceed (e g failure to file a notice of appeal on time), and (iii) cases where a further step is taken in consequence of the non-compliance, such as the entry of a default judgment (as in this case) or the striking out of a claim for non-attendance at trial …*

61. This case falls squarely into Birss LJ's third category, and I shall, therefore, concentrate on that category, and particularly on applications to set aside default judgments …

63. In my judgment, the Denton tests do, as I have said, apply to applications to set aside default judgments under CPR r 13.3. There are a number of reasons for this …

66. Thirdly, the Denton tests are actually peculiarly appropriate to the exercise of the discretion required once the two specific matters mentioned in CPR r 13.3 (merits and delay in making the application to set aside) have been considered. The first two tests focus attention on the delay in complying with the requirements of CPR r 15.2, which provides that "a defendant who wishes to defend all or part of a claim ***must*** *file a defence", and the third test brings into consideration all the circumstances of the case including the two critically important stated factors. What we said at para 34 in Denton bears repetition:*

> *"Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated."*

67. Fourthly, as I indicated at para 51 above, Gentry actually provides an example of how the exercise under CPR r 13.3 and the application of the Denton tests ought to be undertaken. The merits are dealt with first at para 28. Next, the delay in making the application to set aside is dealt with at para 29–35. I turned then to consider the Denton tests, dealing with the pre-judgment delay and the excuses for it at para 36, and "all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]" at para 37. In some—perhaps many—cases, additional factors included in the

overriding objective (or even other relevant factors) will need to be considered at this stage when the court is exercising its discretion. The relevant factors are not closed. What is critical, however, I can repeat once again for yet further emphasis, is the need to focus on whether the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, and the need to enforce compliance with rules and orders …"

138. I should make it clear that I was not referred to the *Denton* requirements during the hearing of the application.

The First and Second Defendants' submissions

139. Mr Sims KC on behalf of the First and Second Defendants submitted that they have a real prospect of successfully defending the claims against them and the Court should exercise its discretion pursuant to CPR rule 13.3(1)(a) or (b) to set aside the default judgments for the following reasons:

(1) The Court's discretionary power to set aside a default judgment is expressed to be unconditional, the purpose being to avoid injustice.

(2) The First and Second Defendants never became party to the Facility Agreement, either because (i) the circumstances of their signatures on a single piece of paper later attached to the Facility Agreement meant that they were not legally bound as parties to the Facility Agreement, or (ii) their signatures to the Facility Agreement were never released.

(3) Without prejudice to the First and Second Defendants' primary contention that they did not become party to the Facility Agreement, they have the following alternative defences:

(a) The guarantee obligations under the Facility Agreement should be set aside on the grounds of economic duress and the reprehensible behaviour of the Claimant and/or due to the Claimant's misrepresentations on the basis that the Borrower and the First and Second Defendants were misled about the Claimant's true intentions, and the vulnerable position of the Borrower was manipulated by the Claimant to extract the guarantees on false pretences.

(b) Material amendments to the Facility Agreement were made which were prejudicial to the First and Second Defendants and discharged them from their obligations under the guarantees in the Facility Agreement (*Holme v Brunskill* (1878) 3 QBD 495).

(c) The Claimant was not entitled to make any demand before 14th December 2023 on a true construction of clause 19.7.2 of the Facility Agreement, because it was required first to complete, but had not completed, an enforcement of assets, or at least not on an arms-length basis, and any guarantee liability is now released.

(d) The First Defendant's personal guarantee was limited to the lesser of US$2.5 million and "*the sum of (i) the initial utilisation ($32,960,000) less (ii) the sum of the amount of each payment made in respect of the Loan and the amount of each realisation made in respect of any Blue Chip Artwork, any Secured Vehicle and any Property (other than one belonging to Mr Cohen)*". The realisation values of the artwork, property and other security assets realised by the Claimant remains unclear and accordingly the value of the First Defendant's personal guarantee cannot properly be ascertained.

(e) The Second Defendant's personal guarantee was conditional upon the realisation of a deposit for Clarendon Lodge. That sum was realised in April 2022, with a further security taken over a Hermes Trunk. As such, the Second Defendant's personal guarantee should have been extinguished or at least *pro tanto* reduced as at the date of that sale.

(f) The Claimant breached its warranties or duties to the First and Second Defendants as personal guarantors, including in particular in realising the secured assets to themselves or affiliated entities at an undervalue.

(g) The Claimant has failed to provide a sufficient explanation or evidence in relation to the debts purportedly owed by the Borrower, and consequently, the First and Second Defendants, and so they claim an account.

(h) The relationship between the Borrower and the Claimant arising out of the Facility Agreement is an unfair relationship for the purposes of section 140A of the Consumer Credit Act 1974 and orders under section 140B are sought.

(4) The First and Second Defendants acted as promptly as possible upon discovering that the default judgments had been entered against them. Having received copies of the default judgments under cover of letter dated 13th September 2024 from the Claimant's solicitors, the First and Second Defendants sought to instruct English solicitors and approached TKP on 14th September 2024; those instructions were formalised and confirmed on 24th September 2024; thereafter, TKP then sought to source and instruct Counsel, which involved some delay as their first choice of leading counsel was not available, which then led to the instruction of Mr Sims KC, which required the provision of "*several thousand pages of correspondence and documentation*"; leading counsel then prepared the draft defence and application; there was further delay when the First Defendant suffered a serious accident on 7th November 2024, which required the First Defendant to undergo four hours of surgery in New York on 9th November 2024; TKP were also in active correspondence with solicitors at Bird & Bird LLP requesting the release of files relating to the First and Second Defendants, but no copies of the files held by Bird & Bird LLP have been received (Ms Ho's first witness statement, para. 67-75 and second witness statement, para. 84-91). The application was issued on 13th November 2024.

(5) In the interim, the Claimant had the benefit of confirmation from the First and Second Defendants by their solicitors' letter dated 9th October 2024, at the Claimant's request, that "*they are not taking steps to dissipate assets*", dissipation meaning "*the deliberate making away with assets so as to frustrate the enforcement of a future judgment or to put assets out of the reach of a judgment*".

The Claimant's submissions

140. Mr Atrill KC submitted on behalf of the Claimant that:

(1) The Court should refuse to exercise its discretion to set aside the default judgments due to the First and Second Defendants' failure to make their applications promptly. The First and Second Defendants delayed making their application to set aside the default judgments for over two months and no satisfactory explanation has been given.

(2) Even though the First and Second Defendants had an initial call with TKP on 14th September 2024, the day after becoming aware of the default judgments, and instructions were prepared on 24th September 2024, this ignores the fact that TKP were well apprised of the matter having acted for the Borrower from April 2023 until February/March 2024. and they had been in contact with the First and Second Defendants from at least May 2023.

(3) Even though the delay arose due to the difficulty of instructing leading counsel, counsel availability is not a relevant factor, as CPR rule 13.3 imposes a duty to act promptly upon the defendant personally. It was for the First and Second Defendants to identify and instruct counsel with appropriate availability. In any event, the First and Second Defendants' evidence is too vague, as there is no explanation why it was necessary to instruct leading counsel, why it was impossible to find someone with availability, or, indeed, when leading counsel was in fact instructed. It is said that the delay arose from the need to provide "*extensive*" instructions and thousands of pages of documentation to counsel. No details are given as to when counsel was instructed or how long he required, and therefore no indication is given as to the amount of delay caused. It is difficult to see how a significant amount of time could have been required given that the draft Defence and Counterclaim is largely a copy and paste of the Borrower's defence and counterclaim.

(4) There is insufficient evidence of the accident and surgery which befell the First Defendant.

(5) No explanation is given as to how the requests made of Bird & Bird LLP caused a delay. In fact, it is clear that it did not, as the applications and draft Defence and Counterclaim were prepared and filed without the benefit of these files.

(6) Taken together, the First and Second Defendants' explanation for a delay of over two months is that it took time for them to instruct solicitors (with whom they already had a relationship) and to instruct leading counsel taking into account issues of availability, the time for leading counsel to prepare the documents, and the time for them to approve those documents. That explanation is unsatisfactory. That is particularly so, when the delay is considered against the background of the First and Second Defendants' longstanding knowledge of the allegations and their complete failure to engage until default judgments were granted against them and their own promise made on 27th September 2024 to file the applications by 11th October 2024.

(7) On the evidence, it is clear that the First and Second Defendants were well aware that claims might be made against them and they were considering their position for over a year before any claims were served upon them. The First and Second Defendants chose not to engage with the Claimant until default judgments were entered against them. Even then, having instructed solicitors and informed Quinn Emanuel on 27th September 2024 that they would file the applications to set aside default judgments by 11th October 2024, the First and Second Defendants sought an extension at the last minute without providing any proper explanation for the further delay, and then failed to serve those applications for over a month. The First and Second Defendants have used the extra time afforded by their delay to come up with as many defences as possible, without regard to merit.

(8) The Court should decline to exercise its discretion to set aside the default judgments on the ground of delay alone (and even if the First and Second Defendants have a real prospect of successfully defending the claim).

(9) In any event, the First and Second Defendants cannot establish that they have a real prospect of successfully defending the claim. In this respect, the Court should have regard to the following considerations:

(a) The original draft Defence and Counterclaim raises at least eight separate defences to what is, in reality, a simple claim under a loan agreement to enforce personal guarantees in circumstances where the

Borrower has admitted the liability in full and has not paid the sums due. The First and Second Defendants then serve an amended draft Defence and Counterclaim pleading entirely new defences (bringing the total to at least eleven). Their aim is clearly to introduce as much complication, and further delay, as possible. Their approach reveals a lack of confidence in their defences, particularly given the First and Second Defendants have been considering their defences since at least May 2023.

(b) The First and Second Defendants rely on the allegations made by the Borrower in his own defence. The Borrower no longer maintains these allegations, having admitted his liability in full and discontinued his counterclaim.

(c) In order to make good most of the factual allegations on which they rely, the First and Second Defendants would need evidence from the Borrower; that is untenable in circumstances where the Borrower no longer maintains these allegation and has undertaken not to assist the First and Second Defendants by clauses 3.4 and 3.5 of the Settlement Deed agreed between the Borrower and the Claimant.

(d) Many of the defences rely on the proposition that the First and Second Defendants were unsophisticated individuals who did not receive proper legal advice, did not understand the Facility Agreement, and were pressured into providing the Guarantees, and are not computer literate. This is not supported by the documents and is implausible, especially as the First Defendant describes himself as a "*private equity investor*" with more than "*40 years of investment banking and financial advisory experience*" (Mr Khatoun's first witness statement, para. 126).

(e) The weakness of the First and Second Defendants' position is underscored by the fact that the Third Defendant admitted her liability, then filed a defence putting the Claimant to proof as to quantum but did not raise the points made by the First and Second Defendants, and then

accepted a Part 36 offer pursuant to which judgment was entered in favour of the Claimant in 90% of the sum claimed.

(10) As regards each of the defences advanced by the First and Second Defendants,

(a) They were plainly parties to the Facility Agreement. The Claimant takes issue with the factual account as to the First and Second Defendants' signature of the Facility Agreement. Further, the conditions for the release of the signature were satisfied.

(b) The HNW Exemption under article 60H of the 2001 Order is applicable so that the Facility Agreement and the guarantees are enforceable.

(c) As regards the defence that the First and Second Defendants were discharged by reason of the amendment of the Facility Agreement, the amendment said to have been made on 18th June 2021 was never made (Mr Khatoun's second witness statement, para. 23-25). In any case, clause 19.5 of the Facility Agreement provides that "*The obligations of each Guarantor under this Clause 19 will not be affected by an act, omission, matter or thing which, but for this Clause 19, would reduce, release or prejudice any of its obligations under this Clause 19 ... including ... any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of a Finance Document or any other document or security ...*".

(d) As regards the defence based upon misrepresentation, this defence has no real prospect of success, because (i) it relies on representations allegedly made to the Borrower which he no longer maintains, (ii) it is vague and embarrassing for want of particulars and no details are pleaded as to when, by which individual, and in what terms these representations were made by the Claimant to the Borrower or as to when, and in what terms these representations were conveyed by the Borrower to the First and Second Defendants, (iii) the pleaded representations are not representations of present fact, (iv) the Borrower and the First and Second Defendants are estopped (by agreement and/or

by representation by clauses 4, 20 and 35 of the Facility Agreement) from contending that the alleged representations were made and/or that they relied upon them.

(e) As regards the defence based on economic duress, this defence is not properly pleaded, not least because it is unclear which party is said to have been subject to economic duress (the Borrower and/or the First and Second Defendants); there is no particularisation of the demands allegedly made; there is no real prospect of establishing that the demands were illegitimate (*Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40; [2023] AC 101). The evidence shows that this was a case of a straightforward commercial negotiation.

(f) As to the defence based on a failure to comply with clause 19.7.2 of the Facility Agreement, the evidence is that the Claimant enforced its rights prior to making the demands on the First and Second Defendants, the Claimant did not obtain any security over the properties and, as such, had no such rights to enforce (Mr Khatoun's first witness statement, para. 186-195).

(g) As to the alleged cap on the First Defendant's liability, the applicable limit is US$2,500,000 pursuant to clause 19.3 of the Facility Agreement and the lesser limit does not apply on the facts.

(h) The factual basis underpinning the defence relating to the Clarendon Road property is incorrect.

(i) The defence based on alleged breaches of duty by the Claimant in dealing with the Borrower's assets suffer from three problems: (i) the pleas suffered from a want of particulars, (ii) there is no real prospect of success in the case that the Claimant sold any assets at an undervalue, and (iii) these defences to go quantum, not liability.

(j) The claims for an account and orders under section 140B of the Consumer Credit Act 1974 are repetitions of defences advanced by the Borrower.

(11) If, contrary to the Claimant's position, the Court is minded to exercise its discretion to set aside the default judgments, it should only do so on condition that the First and Second Defendants make a payment into Court of the judgments.

Determination of the application under CPR rule 13.3

141. The Court has a discretion pursuant to CPR rule 13.3 to set aside a default judgment if the First and Second Defendants have a real prospect of successfully defending the claim.

Do the First and Second Defendants have a real prospect of defending the claim?

142. In evaluating the prospects of the First and Second Defendant successfully defending the claim, the task is to determine whether the defences raised by the First and Second Defendants are only "*fanciful*" or more than that (*Khan v Edgbaston Holdings Ltd* [2007] EWHC 2444 (QB), para. 15). If on the evidence available the Court has reached the view that the prospects of successfully defending the claim in reality exist and transcend any fanciful hope of success, then the requirements of CPR rule 13.3 are satisfied.

143. I have in mind the comments made by Potter LJ in *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] CP Rep 51, where it was said that the meaning of "*real prospect of successfully defending the claim*" in the context of CPR rule 13.3 was the same as that used in respect of an application for summary judgment under CPR rule 24.2. Potter LJ however also said that "*although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely round of resistance to summary judgment under CPR 24.2*".

144. In *AMRA Leasing Limited v DAC Aviation (EA) Limited* [2022] EWHC 1718 (Comm), Jacobs J said at para. 37:

> "*An important question on such an application, therefore, is whether the defendant has established that it has a "real prospect" of successfully defending*

the claim. This means more than a merely arguable case. The distinction between a real and fanciful prospect of success is that the defence sought to be argued "must carry some degree of conviction" (see ED&F Man Liquid Products Ltd v Patel at [8]). The notes to CPR 13.3 in the White Book describe the "major consideration" on an application to set aside as being whether the defendant has shown a real prospect of successfully defending the claim or some other good reason why the judgment should be set aside."

145. In my judgment, the First and Second Defendants have established a real prospect of success in their defence of the claim under the personal guarantees contained in the Facility Agreement, because at least on the evidence there are serious issues to be addressed as to whether the Facility Agreement is binding on the First and Second Defendants, having regard to (a) the circumstances in which their signatures were provided, (b) the release of those signatures, and (c) representations said to have been made which induced them to agree to be guarantors, and as to whether the Claimant was entitled to present a demand under the guarantees. I also consider that the First and Second Defendants have a real prospect of succeeding in their arguments on the enforceability of the Facility Agreement and the guarantees under Consumer Credit legislation, even though I have concluded above that the First and Second Defendants are not entitled to rely on this point in support of their application under CPR rule 13.2.

146. In reaching this conclusion that the First and Second Defendants have a real prospect of successfully defending the claim, I do not have to review each and every defence advanced by the First and Second Defendants, provided that I am satisfied that at least one of those defences has a real prospect of success and is sufficient on its own to defend the claim. I do not therefore propose to conduct an analysis in this judgment of each of the defences advanced in any detail.

147. I do, however, make the following observations.

148. First, the majority of the defences - especially defences based on the circumstances in which the First and Second Defendants signed the Facility Agreement and the alleged misrepresentations relied upon - require an assessment of evidence, both documentary and oral evidence - and it is not possible to dispose of these defences at this interlocutory stage. I would add that I do not accept the Claimant's submission that the representations relied upon in the draft amended Defence and Counterclaim, at para. 29, in support of the defence based on misrepresentation are not representations of

present fact; I consider those representations of intention are representations of present fact (*Edgington v Fitzmaurice* (1885) 29 Ch D 459, 479-480, 482-483). On the other hand, I do not consider that the defence based on the amendments of the Facility Agreement is likely to overcome clause 19.5. That said, I do not propose that the First and Second Defendants should be restricted in how they choose to plead their defences by anything I might say in this judgment or that the Claimant should be restricted in how it responds to any defence.

149. Second, although there may be instances where the draft amended Defence and Counterclaim is not fully particularised, I am reluctant to dispose of a defence having regard to a draft statement of case on that ground alone, unless it were clear that there was no real prospect of success in respect of the pleaded defence. For the purposes of the present application, the particulars were in my view sufficient.

150. Third, the fact that the Borrower has admitted his liability is not a consideration which I think carries much weight, especially where there may be various other factors contributing to the Borrower's decision to settle with the Claimant. Indeed, the First and Second Defendants should be able to defend the claim without being restricted by the Borrower's own stance, not least because there are material differences between the position of a borrower and a guarantor, and in this case given the possible significance of the relationship between the Borrower and the First and Second Defendants. That is not to say that the Borrower's stance may not be relied on by the Claimant, for example, for evidential purposes. The mere fact that the Borrower has contractually bound himself not to assist the First and Second Defendants - if that is in fact the effect of clauses 3.4 and 3.5 of the Settlement Deed - is also not a consideration which carries much weight, as the First and Second Defendants may well be able to furnish the evidence required from other sources, including their own evidence.

151. Fourth, whether the First and Second Defendants were sophisticated individuals and the relevance of any such consideration is a matter best left to trial.

152. Fifth, the decision made by the Third Defendant in respect of the Claimant's claim is again not a matter which I consider carries much weight in assessing the First and Second Defendants' prospects of success.

Was the application made promptly?

153. Given that I have decided that the First and Second Defendants have a real prospect of successfully defending the claim, the Court has a discretion whether or not to set aside the default judgments.

154. CPR rule 13.3(2) provides that "*In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly*".

155. It is obvious therefore that whether or not the application was made promptly is a significant consideration to be taken into account in exercising the discretion made available under CPR rule 13.3.

156. In *Standard Bank plc v Agrinvest International Inc* [2010] EWCA Civ 1400; [2010] CLC 886, Moore-Bick LJ compared CPR rule 13.3 with the position in the pre-CPR era and said at para. 22:

> "*The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in r. 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognised in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial*."

157. Mr Atrill KC referred me to the commentary in the White Book, at para. 13.3.3, and the decision in *Khan v Edgbaston Holdings Ltd* [2007] EWHC 2444 (QB), where it was indicated that a delay of several months is likely to mean that the application was not made promptly. At para. 13-14, HH Judge Peter Coulson QC said that, as Simon Brown LJ noted in *Regency Rolls Ltd v Murat Carnall* [2000] EWCA Civ 379,

"*… a delay of 30 days was regarded as being unreasonably long in all the circumstances, and the judgment was not set aside. A different result occurred in Hart Investments Ltd. v. Fidler [2006] EWHC 2857 (TCC), where the TCC judge concluded that a delay of 59 days was "very much at the outer edge of what could possibly be acceptable". One of the factors considered by the judge in that case was that the defendant had not had the benefit of legal advice during the relevant period, although the most important reason for the setting aside of the default judgment was the real prospect that the defendant had of successfully defending the claim*."

158. In *Regency Rolls Ltd v Murat Carnall*, Simon Brown LJ said at para. 45:

"*At first blush it might be thought that any inappropriate delay whatever on the part of an applicant would require that he be found not to have acted promptly. Yet such a construction would carry with it the Draconian consequence that, even if he had a good, perhaps compelling, reason for not having attended the trial, and a reasonable - perhaps, indeed, excellent - prospect of success at trial, the court would still be bound to refuse him a fresh trial. I would accordingly construe 'promptly' here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances …*"

159. I also note that in *Gentry v Miller (Practice Note)* [2016] EWCA Civ 141; [2016] 1 WLR 2696, referred to by the Court of Appeal in *FXF v English Karate Federation Ltd*, the Court of Appeal held that the application was not made promptly after a two month delay, albeit in circumstances where the applicant had not explained the reasons for the delay. At para. 28, 34-35, Vos LJ said:

28. The first question is whether the insurer has shown that it has a real prospect of successfully defending the claim. That was quite rightly not disputed by Andrew Hogan, counsel for the claimant. It is to be noted, however, that the insurer adduced no evidence that the claim was fraudulent until 10 February 2014. It seems only to have started investigating the matter after Keoghs were instructed on 12 November 2013. The period for such an investigation may not, in itself, be unreasonable (two months including the Christmas period), but there has been no explanation whatsoever as to why the insurer took so long either to instruct solicitors or to commence the investigation. The starting point none the less is that the insurer has satisfied CPR r 13.3(1). I must turn then to consider the promptness of the application under CPR r 13.3(2)…

34. … After the default judgment, on 22 August 2013, the insurer made a CPR Pt 36 offer, which seems to confirm that it realised proceedings were on foot. At that stage, it could have inquired at court what orders had been made, but did not do so. On 19 and 23 September 2013, the insurer was sent costs schedules "ahead of the upcoming application hearing". It still did nothing; it did not even inquire what the "upcoming hearing" was about. In my judgment, by that time, at the very latest, the insurer could with reasonable diligence have obtained a sufficient

knowledge of the default judgment to have enabled it to apply to the court to set it aside. The court cannot ignore that insurers are professional litigants, who can properly be held responsible for any blatant disregard of their own commercial interests. This insurer had known since April 2013 that it was at risk of proceedings being commenced and being served on its insured, yet it did nothing to ensure its position was protected.

35. On this analysis, the relevant period of delay is, at the least, from 19 September (almost a month after the insurer made its CPR Part 36 offer) to 25 November 2013, a period of more than two months. The insured cannot, in the context of the history I have described, be regarded as having made its application to set aside the default judgment promptly. CPR r 13.3(2) enjoins the court to have regard to that lack of promptness in exercising its discretion as to whether or not to set aside the judgment …"

160. In the present case, a short chronology of the events leading to the application to set aside the default judgments is as follows:

(1) On 1st August 2024, the Claim Form was issued.

(2) On 7th August 2024, the proceedings were purportedly served on Law Debenture.

(3) On 2nd September 2024, default judgments were entered against the First and Second Defendants.

(4) On 13th September 2024, the First and Second Defendants became aware of the default judgments.

(5) On 27th September 2024, TKP wrote to Quinn Emanuel stating that they had been instructed to act on behalf of the First and Second Defendants. In that letter, it was said that:

> "*Our clients dispute the Claimant's claim in its entirety and have engaged Counsel to assist with preparing an Application on behalf of each of the First and Second Defendants to Set Aside the Default Judgments by 11 October 2024.*
>
> *As you will be aware, this timeframe is reasonable given the complex background of this Claim and our clients' position as elderly individuals who reside out of the jurisdiction*"

(6) On 11th October 2024, TKP again wrote to Quinn Emanuel stating that:

> "*As you are aware, our clients are preparing an application in the above proceedings to stay execution of and set aside the Judgments in Default against them ("**Set Aside Application**"). You are also aware that they have instructed Counsel to prepare a draft Defence.*
>
> *Without waiver of privilege, we have today spoken at some length with our clients as to your client's proceedings, and they are fully engaged in these proceedings. Unfortunately, due to the unavailability of Leading Counsel, our clients anticipate that they will not be in a position to file and serve their Set Aside Application until at least 25 October 2024.*
>
> *We would be grateful for your confirmation that the Claimant will not take any enforcement action until after 25 October 2024. We note in this respect that your client has the benefit of express confirmation from our client that they are not dissipating their assets and do not intend to do so, as they are intent on challenging the Judgments in Default entered against them and proceeding with the litigation proceedings*."

(7) On 11th October 2024, the First and Second Defendants' evidence is that they first became aware of the Claimant's letter dated 31st July 2024, by which the Claimant appointed Law Debenture as the First and Second Defendants' replacement service of process agent. This is plainly an important consideration as far as the current applications under CPR rule 13.2 and 13.3 are concerned.

(8) On 25th October 2024, Mr Sims KC was instructed by the First and Second Defendants (according to a chronology served by the First and Second Defendants).

(9) On 7th November 2024, the First Defendant suffered an injury which required surgery on 9th November 2024.

(10) On 13th November 2024, the application to set aside the default judgments was issued. The application was supported by a witness statement made by Ms Ho of TKP in accordance with CPR rule 13.3(3).

161. Accordingly, there was a period of 2 months (or 61 days) between the First and Second Defendants becoming aware of the entry of default judgments and the application to set aside those default judgments being issued.

162. The Claimant submitted that it is also relevant to consider that TKP were well apprised of the matter having acted for the Borrower from April 2023 until February-March 2024 and had been in contact with the First and Second Defendants from at least May 2023.

I regard such matters as being of limited relevance in circumstances where it is the entry of default judgments to which the application is to respond so that any prior history, although it might inform the applicant of what needs to be done, the promptness of the applicant's response must be assessed principally by reference to the default judgments being brought to the applicant's attention.

163. The starting point for considering the promptness of the applicant's response must be the date on which the applicant became aware that the default judgments had been entered or could have been made so aware had the applicant acted with reasonable diligence (*Gentry v Miller (Practice Note)* [2016] EWCA Civ 141; [2016] 1 WLR 2696, para. 33). In the present case, I do not consider that there was any reason why the First and Second Defendants should have been made aware of the default judgments - which were entered on 2nd September 2024 - prior to 13th September 2024, when they became aware of the default judgments.

164. In the present case, the following considerations speak in favour of the application having been made promptly:

(1) The First and Second Defendants, being resident abroad, took reasonably quick steps to instruct TKP. Immediately on their instruction, TKP informed Quinn Emanuel that an application to set aside the default judgments was to be made and that the First and Second Defendants intended to defend the claim.

(2) TKP informed Quinn Emanuel that the application was to be made by 11th October 2024, and after experiencing difficulty in instructing leading counsel, by "*at least*" 25th October 2024. That said, TKP did not update Quinn Emanuel after 25th October 2024, when the application was not served by that date.

(3) An important component of the First and Second Defendants' application was understanding how Law Debenture had been appointed as a service of process agent on their behalf. According to their evidence, the First and Second Defendants were not aware of the Claimant's letter dated 31st July 2024 until 11th October 2024. Accordingly, assessing the promptness of the application from this date would be justified.

(4) Once leading counsel was instructed, it seems that the work towards preparing the application began. That involved the formulation of a draft defence and counterclaim and a witness statement in support of the application. This would have been a substantial task. I note the number and substantial nature of a number of the defences.

(5) The First Defendant's injury, albeit less than a week before the issue of the application, sensibly explains the reasons why the application was not filed a few days earlier than it was.

(6) It has been said that "*a delay of 59 days was "very much at the outer edge of what could possibly be acceptable"*." This would suggest that the lapse of 61 days between becoming aware of the default judgments and the making of the application is within an acceptable margin (however, *cf. Gentry v Miller (Practice Note)* [2016] EWCA Civ 141; [2016] 1 WLR 2696, para. 28, 34-35 referred to above).

165. The major consideration against the application being treated as having been made promptly is the reasons for the difficulty in instructing leading counsel to prepare the application. As I understand it, Mr Sims KC was not instructed until 25th October 2024. I do not doubt that there were difficulties, but I do not know precisely what they were. The Claimant submitted that the availability of counsel is not a relevant consideration. I do not agree. The making of an application to set aside a default judgment requires an analysis of the circumstances leading to the filing of the default judgment and the basis on which any application is to be presented, which involves a consideration of the evidence and the legal grounds for the application. As counsel is very likely to present the application ultimately in court, it seems to me whether TKP could instruct counsel is a consideration to be taken into account.

166. In any event, I do not regard this consideration as one which militates against concluding that the application was made promptly or with reasonable celerity. If the application was not made promptly, the delay beyond what a prompt application required was not substantial.

167. In these circumstances, I consider that the application was made promptly and, if it was not, the degree of delay was not sufficient to cause me to exercise the discretion available under CPR rule 13.3 against granting the relief sought, which I now consider.

The exercise of discretion under CPR rule 13.3

168. I now approach the exercise of the discretion under CPR rule 13.3, noting that in so doing I am to apply the *Denton* approach, bearing in mind that any order made setting aside the default judgment is in reality the grant of relief from sanctions.

169. For this purpose, I therefore consider the following matters:

(1) The merits of the First and Second Defendants' defence to the Claimant's claim under the guarantees.

(2) Whether the application was made promptly by the First and Second Defendants.

(3) The seriousness and significance of the First and Second Defendants' failure to comply with the requirement to file an acknowledgment of service or serve a defence.

(4) The reasons for the non-compliance.

(5) All of the circumstances of the case, including (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, practice directions and orders.

170. As regards the merits of the First and Second Defendants' defence, I can say no more than that, based on the evidence currently available to me, the First and Second Defendants have a real prospect of successfully defending the claim. I am not in a position to evaluate the merits of the defences beyond this. The fact that a defendant has a real prospect of successfully defending a claim is, of course, not a matter which will entitle the defendant to relief. It is nevertheless an important consideration and if there are no other matters which rendered it unjust to set aside the default judgment, the Court should normally accede to such an application.

171. As regards the promptness of the application, I have addressed this above. In my judgment, the application was made promptly, but if it was not, the delay was not substantial.

172. As regards the seriousness and significance of the First and Second Defendants' failing to acknowledge service or serving a defence in accordance with the requirements of the Civil Procedure Rules, such non-compliance is of course serious and significant given that the consequence of such non-compliance is the entry of a default judgment. However, in circumstances where the evidence of the First and Second Defendants were not aware of the service of proceedings on Law Debenture until 4th September 2024, by which time the default judgments were entered, the non-compliance was an unwitting one on the part of the First and Second Defendants. In this regard, the non-compliance is not concerned with the delay in making the application to set aside the default judgments (*Gentry v Miller (Practice Note)* [2016] EWCA Civ 141; [2016] 1 WLR 2696, para. 25).

173. That brings me to the next consideration, namely the explanation for the non-compliance. As mentioned, the First and Second Defendants were not aware of the default judgments prior to 13th September 2024. Accordingly, there was no deliberate decision or negligent error on the part of the First and Second Defendants in not filing an acknowledgment of service or serving a defence.

174. Pausing there, the circumstances are such that I would have exercised my discretion to set aside the default judgments.

175. There is nothing else in the circumstances which militate against the exercise of the Court's discretion in this way. In so deciding, I have had regard to:

(1) The need for litigation to be conducted efficiently and at proportionate cost. Apart from the costs associated with the current application, I do not consider that the setting aside of the default judgments will impact the ability of the parties to litigate this dispute efficiently and at proportionate cost.

(2) The need to enforce compliance with rules, practice directions and orders is of course an important consideration. However, where the First and Second Defendants were not aware that they had to file an acknowledgment of service

or serve a defence prior to the entry of the default judgments, I do not think that the keeping of the default judgments in place would serve any need to emphasise the importance of complying with the Civil Procedure Rules.

176. For these reasons, I would have exercised the Court's discretion to set aside the default judgments entered against the First and Second Defendants under CPR rule 13.3, had they not succeeded in their application under CPR rule 13.2.

The Claimant's application for a conditional order

177. The Claimant submitted that if the default judgments are to be set aside, it should be on condition that the First and Second Defendants pay the judgment sum into court pursuant to CPR rule 3.5(1).

178. CPR rule 3.5(1) provides that "*The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol*".

179. As explained above, I do not consider that the First and Second Defendants failed to comply with the Civil Procedure Rules in not filing an acknowledgment of service or serving a defence without good reason. They did not comply with the requirements of the Civil Procedure Rules, because they were not aware that proceedings had been served until after the default judgments were entered.

Conclusion

180. For the reasons explained above, I allow the First and Second Defendants' applications to set aside the default judgments entered against them on 2nd September 2024 pursuant to CPR rule 13.2.

181. Had I dismissed the application under CPR rule 13.2, I would have allowed the application to set aside the default judgments under CPR rule 13.3.

182. I am very grateful to all counsel for their very helpful written and oral submissions. I will address consequential issues separately.