Case No: BL-2020-BHM-000067

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN BIRMINGHAM**
**BUSINESS LIST (ChD)**

**[2023] EWHC 51 (Ch)**

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS
Date: 11th January 2023

**Before**:

**HIS HONOUR JUDGE TINDAL**
**(sitting as a Judge of the High Court)**

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**Between:**

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| **EURO SECURITIES & FINANCE LTD** | **Claimant** |
| **- and –** | |
| **(1) MR STEPHEN BARRETT**<br>**(2) MR MATTHEW BRERETON**<br>**(3) MR JOHN MASON** | **Defendant** |

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**MR J ALDIS** (instructed by Bell Lax Solicitors) for the **Claimant**
**MR S J BRADSHAW** (instructed by Clarkes Solicitors) for the **Defendants**

Hearing dates: 3rd – 5th and 11th January 2023

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# Judgment

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**JUDGE TINDAL:**

## Introduction, Issues and Evidence

1. This case raises interesting legal questions on the attestation (i.e. witnessing) of deeds. It is a preliminary issue in a claim by the Claimant lender whether the guarantee and indemnity of the Defendants they admit signing in September 2008 ('the Guarantee') was validly attested for s.1 Law of Property (Miscellaneous Provisions) Act 1989 ('LPMPA'). If the Guarantee was validly attested as a deed, the Claimant's claim in August 2020 would be a 'claim on a specialty' under s.8 Limitation Act 1980 ('LA') with a limitation period of 12 years, so in time. If not validly attested, the limitation period would be 6 years and the claim out of time unless extended under ss.29-30 LA.

2. The Claimant's Particulars of Claim dated 23rd November 2020 claimed a total of £384,477 plus costs stemming from two different loans and a guarantee each arranged by Mr Weatherer, who was both the Defendants' accountant and the Claimant's sole director (although the Defendants' knowledge of that is disputed).

   2.1 The first loan was the Claimant's loan to the Defendants themselves in September 2003 of €190,000 as partners to purchase a property in Bulgaria ('the Partners' Loan'), of which the equivalent of £140,967 was outstanding in June 2020. At ps.14-17, 20-23 and ps.27(a) of the Particulars, the Claimant contended the limitation period originally expired in 2010 but was extended by part-payments from 2007 and acknowledgements from 2011-7.

   2.2 The second loan was to the Defendants' Limited Liability Partnership, Rhombus Properties LLP ('Rhombus') in September 2008 of £100,000 (the 'Rhombus Loan'). With interest, £240,986 was outstanding in June 2020.

   2.3 The Particulars further contended that by the Guarantee, the Defendants guaranteed and indemnified the Claimant against the Rhombus Loan. The Claimant contended at ps.7-11, 26 and 27(c) of the Particulars that the Guarantee was valid as a deed or in the alternative the Defendants were estopped from denying its validity and so accordingly there was a limitation period of 12 years. In the alternative, the Particulars at p.27(b) contended that if the Guarantee was not a deed and had an original imitation period of 6 years, that was also extended by the acknowledgments from 2011.

   The Particulars contended that liability under both loans was only denied in 2020.

3. The Defendants' Defence dated 4th June 2021 denied the claims. It partly just put the Claimant to proof: over its entitlement to sue over its identity as a Company registered in Delaware USA and over the amounts owing, but it also raised limitation defences:

   3.1 As to the Partners' Loan, the Defence at ps.14-15 and 19-21 stated it was limitation-barred from April 2014 on the basis the alleged 'acknowledgments' of debt from 2011 onwards from the Defendants to Mr Weatherer were in ignorance of his status as the Claimant's director and were sent to him in capacity as the Defendants' and Rhombus' accountant.

   3.2 As to the Rhombus Loan, the Defence at ps.19(b)-(c) and 21-22 stated it was limitation-barred from September 2015 on the same basis.

   3.3 As to the Guarantee, the Defence at ps.6-8, admitted that each of the Defendants signed the Guarantee but stated they otherwise could not recall whether they signed in each other's presence or in the presence of the witness, Ms Money and denied it was properly attested as a deed. At p.18 of the Defence, the Defendants denied estoppel assisted the Claimant and at p.23, the contended the limitation period on it expired in September 2015.

4. At the CCMC on 9th December 2021, DJ Rouine listed these two preliminary issues:

   (i) Whether the Guarantee dated 18th September 2008 was properly executed as a deed and whether it takes effect as a guarantee of the Rhombus Agreement as alleged by the Claimant at ps 7-11 Particulars of Claim.

   (ii) Whether the Defendants are estopped from denying validity of the Guarantee as a deed as alleged by the Claimant at p.26 Particulars of Claim.

   Accordingly, DJ Rouine's order focussed purely on the validity of the Guarantee as a deed i.e. (i) whether the formalities of s.1 LPMPA were complied with; and (ii) whether the Defendants were estopped from denying it. That order left for trial the wider factual questions of the Claimant's standing, acknowledgements on the Partners' Loan and Rhombus Loan, including the Defendants' awareness of Mr Weatherer's link to the Claimant. The trial of those two preliminary issues was listed before me on 3rd January 2023 and at the PTR before me on 2nd November 2022, whilst I permitted a further statement from Mr Weatherer on another point, there was no suggestion the preliminary issue trial should be widened to encompass the Defendants' awareness of Mr Weatherer's link to the Claimant, which is strongly factually contested.

5. Therefore, I accept it would have come as some surprise to the Claimant's Counsel Mr Aldis to see the Skeleton Argument from the Defendants' Counsel Mr Bradshaw allege Mr Weatherer owed the Defendants fiduciary duties for the loans (which had not been pleaded) but had concealed his connection and sole directorship of the Claimant. This was not suggested to be a free-standing allegation of breach of duty, but rather that Mr Weatherer does not 'Come to Equity with Clean Hands' and so the Claimant could not rely on estoppel; or to put it another way, the Defendants were not estopped from denying the validity as a deed of the Guarantee, as their denial would not be 'unconscionable' for that reason. When Mr Aldis objected at the start of trial that adjudicating this unpleaded allegation of breach of fiduciary duty by Mr Weatherer strayed outside the scope of the preliminary issue, Mr Bradshaw replied the allegation was an intrinsic aspect of the Claimant's estoppel argument and could not be separated from it. Sympathetic to the points made by both Counsel, I suggested unless they could agree a way of adjudicating the point, I would have to defer the whole estoppel issue until trial. But I suggested a compromise could be to limit the question to a factual one of whether Mr Weatherer deliberately concealed his connection to the Claimant from the Defendants. Counsel helpfully agreed I could adjudicate whether Mr Weatherer deliberately concealed from the Defendants his role as director and/or agent of the Claimant. In examining this, some findings relevant to the Defendants' knowledge of his role are inevitable, but it at least avoided the fiduciary duty allegation. Yet whether Mr Weatherer was legally an 'agent' of the Claimant is key to the acknowledgment issue that was reserved to trial. So, I will substitute the more neutral and factual term 'representative', which does not detract from the Defendants' unconscionability point.

6. Accordingly at this stage the following issues arise, flowing from s.1(3)(a)(i) LPMPA:

> *"An instrument is validly executed as a deed by an individual if, and only if—*
>
> *(a) it is signed (i) by him in the presence of a witness who attests the signature.."*

I will sub-divide two separate issues which were rolled together into DJ Rouine's first 'formality' issue; and include that Mr Weatherer question as part of the estoppel issue:

6.1 Did all the Defendants sign the Guarantee 'in the presence of a witness' ?

6.2 Did that witness 'attest the signature' on the Guarantee of all of the Defendants ?

6.3 If either answer is 'no', are the Defendants estopped from denying the Guarantee was executed validly as a deed (whether or not Mr Weatherer deliberately concealed from them his role as the Claimant's director and/or representative) ?

7. Central to this case are the witnesses' recollections of events many years ago. This subject has been the topic of considerable judicial attention in recent years:

7.1 As is now commonly done, both Counsel referred me to the observations of Leggatt J (as he then was) in *Gestmin v Credit Suisse [2013] EWHC 3560* at p.22:

> "….*[T]he best approach for a judge to adopt in the trial of a commercial case is…to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely… in the opportunity cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all it is important to avoid the fallacy of supposing because a witness has confidence in his or her recollection and is honest, evidence based on recollection provides any reliable guide to the truth."*

(I note Lord Leggatt (as he now is) recently returned to the topic of witness reliability and demeanour in his recent lecture *'Would You Believe It ?'* https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf)

7.2 *Simetra v Ikon [2019] 4 WLR 112 (CA)* did not refer to *Gestmin*, but it was another commercial case and Males LJ made related observations at ps.48-49:

> *"48….I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of*

> *Robert Goff LJ in The Ocean Frost [1985] 1 Lloyd's Rep 1, 57 is…routinely, cited: 'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.….'.*
>
> *49 It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations…"*

7.3 Martin v Kogan *[2020] F.S.R. 3 (CA)* was a copyright not a commercial case, where both *Gestmin* and *Simetra* were cited, although the Court did say at p.88:

> *"Gestmin* [does not lay] *down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay "The Judge as Juror: The Judicial Determination of Factual Issues" (from The Business of Judging (Oxford, 2000)). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore* [it]*.."*

This is a commercial case, like *Gestmin* and *Simetra.* But there are also gaps in the documentary record, especially in correspondence before 2011, where the comment in *Martin* is especially apposite. With those observations in mind, I turn to the witnesses.

8. The only witness for the Claimant was Mr Weatherer. As he was not present at the signing of the Guarantee, cross-examination focussed on his alleged 'deliberate concealment from the Defendants of his role as director and/or representative of the Claimant'. Consistent with *Gestmin*, Mr Bradshaw focussed on the contemporaneous email correspondence from 2011 to 2020 discussing repayment, almost always with Mr Barrett who dealt with this on behalf of the other Defendants. In assessing Mr Weatherer's credibility, it is helpful to distinguish three aspects of his evidence:

   8.1 Mr Weatherer was convincing as to his *actual role* for the Claimant company at the time. It was a 'venture-capital' type lender for businesses to which banks would not normally lend, although at correspondingly higher rates of interest. The source of the funds (whether his own or other wealthy individuals') and sole shareholder was a Mr Weile. Indeed, the company was registered in Delaware, had an address in Portugal, its Company Secretary agents were initially in the Isle of Man then in the Caribbean. It remains unclear how Mr Weatherer, a partner in a Midlands accountancy firm, came to be its sole director. But I accept he saw himself effectively as the nominee of Mr Weile - the decision-maker. Mr Weile was so synonymous with 'the company' in Mr Weatherer's mind that he sometimes called it his 'client' (e.g. pg.227). This was the understanding of his accountancy firm partner Mr Miner, who was not aware of the directorship.

   8.2 Moreover, Mr Weatherer's evidence that he consistently presented himself as the representative of *the Claimant* was supported by many contemporaneous records (to the extent that the Defendants' argument that he presented himself as *their* representative is hopeless). For example, in January 2013 he wrote to Mr Barrett about the then part-paid 2003 Partners Loan for a Bulgarian property (pg.223):

> *"…[H]aving spoken to Euro Securities in respect of this matter, I have been instructed to inform you of the following….The balance outstanding at the moment…is £130,608. I would be grateful if you could please let me have your thoughts in connection with repaying this outstanding loan which has now gone on for at least 9 years. I am under pressure by the company to get this matter sorted and would be grateful for a schedule from you in respect of repayment of this loan to clear the matter. Euro Securities…. are looking for this loan to be repaid within the next 6 months."* (My underline)

   This is only one of many references to Mr Weatherer as the representative of the Claimant. In 2018 he said to Mr Barrett *'When can we expect payment ?'* (p.263)

8.3 However, that January 2013 letter (pg.223) also shows that Mr Weatherer did not present himself as the Claimant's *director*, as he was. This leads to the most complex aspect of his evidence – whether he ever mentioned it to the Defendants:

8.3.1 Mr Weatherer certainly did not mention his directorship in *any* correspondence with the Defendants I have in the bundle until 2020 (although it is plainly incomplete until 2011). Moreover, as I detail later, before he mentioned it in 2020, Mr Weatherer was evasive about it in correspondence during 2017-2019 after their relationships had soured. In earlier times, he had been close friends with Mr Mason and also the Defendants' accountant (he prepared Rhombus' accounts personally for example in 2010 and 2011). Yet neither they nor Mr Miner were challenged in their evidence that Mr Weatherer never told them he was the Claimant's director. However, Mr Miner withdrew his allegation that he concealed this for their firm's loan from the Claimant as he accepted the lender was different. Nevertheless, as Mr Miner said, all this is concerning from an accountancy professional standards viewpoint. However, the case here against Mr Weatherer is that he 'deliberately concealed' his directorship. I will consider this later but he did deny this, emphasising his modest role as a director and seeing 'the company' as synonymous with Mr Weile, hence referring to it in the third person.

8.3.2 At this stage, although with that context well in mind, I focus on the factual dispute between Mr Weatherer and the one Defendant he says he did tell of his directorship: Mr Brereton. The latter was adamant he was not told, indeed said he *'did not know [Mr] Weatherer was connected in any way'* to the Claimant. However, in February 2003, Mr Brereton wanted a loan from the Clamant for Mr Mason's company and so asked Mr Weatherer *'to make an approach on our behalf'* (pg.150). This not consistent with him 'not knowing Mr Weatherer was connected in any way' with the Claimant. Indeed, in September 2008 (pg.151), Mr Brereton wrote to Mr Weatherer about the Rhombus loan saying:

> *"Your assistance in helping arrange this is much appreciated. In respect of the payment of funds would <u>you</u> like to issue a cheque or a bank transfer ? From recollection <u>you</u> have in the past done a cheque."* (My underline)

This shows Mr Brereton was plainly acknowledging then - at the time of the Rhombus Loan and Guarantee - that Mr Weatherer was not only the Claimant's *representative*, but so closely connected with it that *he personally wrote its cheques*: flatly *inconsistent* with Mr Brereton's evidence. By contrast, Mr Weatherer did not assert (as he could have done) that he verbally mentioned his directorship to Mr Mason, Mr Barrett or Mr Miner. Indeed, whilst in Mr Weatherer's statement, he said he verbally told Mr Brereton of the directorship at the time of the first loan in 2002; in cross-examination, as it was 20 years ago, he was more cautious: saying he 'would have told' him. This would also be more consistent with later evidence, including letters in September 2013 to each Defendant (pg.238-40) saying: *'The company <u>hereby</u> requests the…loan is to be repaid*' (my underline), prompting Mr Barrett to email (pg.242) the other Defendants (classically when his 'guard would be down': see *Simetra*), reporting that he had spoken with Mr Weatherer:

> *"All I could do is re-iterate to him that for my shares of the loans I was doing all that I could to find some funds to repay <u>him</u> [and] that <u>he is not the only significant unsecured creditor</u>…."* (My underline)

8.3.3 Of course, I bear fully in mind all the evidence and Mr Weatherer's undeniable *reticence* in mentioning his directorship to others – as I say, I consider 'deliberate concealment' later. Yet on this specific factual dispute with Mr Brereton, I prefer the evidence of Mr Weatherer. While he cannot recall it precisely, I find on the balance of probabilities he did mention his directorship to Mr Brereton in 2002: doubtless in passing, minimising its significance as akin to a nominee: reflecting his own view that Mr Weile was really 'the company' (even if he did not name him). Indeed, this also explains why Mr Brereton in 2003 asked Mr Weatherer to 'make an approach'. More clearly still, in Mr Brereton's letter in 2008 he and the other Defendants (as indeed evidenced by the 2013 email) effectively *equated* Mr Weatherer with the Claimant, or at the least as *the person within the Claimant* that they were dealing with. Indeed, documents in the bundle until 2011 are incomplete, so we do not know how much clearer Mr Weatherer may have been with them by then.

Therefore, in short, I found Mr Weatherer an honest and broadly reliable witness.

9. I turn to the Defendants' evidence (after Mr Miner withdrew his allegation against Mr Weatherer, he was not really challenged and I have already noted his evidence):

9.1 Mr Brereton, as I have said, not only gave less reliable evidence than Mr Weatherer on discussion of the latter's directorship, his recollection that he *'did not know [Mr] Weatherer was connected in any way'* to the Claimant was contradicted by the contemporaneous documents. Indeed, as Mr Aldis said, as he (and myself on a couple of clarification questions) took Mr Brereton to contemporary documents about the Guarantee, his evidence exemplified how litigation influences 'recollection', as Lord Leggatt said in *Gestmin*. Mr Brereton admitted signing the Guarantee, but accepted he had no recollection of it at all.

9.1.1 Nevertheless, Mr Brereton's statement was adamant that he would not have signed the Guarantee with Mr Barrett and the latter's PA Ms Money. He did not say where Mr Mason was, other than to agree with his statement in which Mr Mason said he never met Ms Money. She like Mr Brereton worked at Rhombus' office at 'Centre Court' in Hall Green. Mr Brereton said he and Mr Barrett were only there together 'on the odd occasion' and it was even more unlikely even they would have been on successive days, as the Rhombus Loan signature page was dated 17th September 2008 (pg.159) and the Guarantee signature page was dated 18th September 2008 (pg.167).

9.1.2 However, in oral evidence, when Mr Brereton was taken to the latter, he accepted the Guarantee was dated 18th September in different handwriting than any of the handwriting on that page or on the Loan document. Indeed, Mr Brereton recognised the handwriting as Mr Weatherer's, who definitely was not with them at the time and must have written it later when he received it. Given that Mr Brereton accepted he himself had written the date 17th September under his signature on the Rhombus Loan document, he accepted he, Mr Barrett, Mr Mason and Ms Money had probably all signed both the Guarantee and the Loan documents on the same day – 17th September 2008 (as all were dated that). Moreover, he said that as the documents had got to Mr Weatherer the following day: 18th September 2008, it was likely all four of them had signed both documents at Centre Court where he and Ms Money worked. Mr Brereton accepted Mr Barrett was more likely to be there with him if it was only one day (and Ms Money was his PA) and it was not far from Mr Mason's home for him to come in.

9.1.3 Indeed, Mr Brereton accepted those Loan and Guarantee documents together would have given the impression to someone who was not present that all four of them signed together at the same time. (I agree - for reasons I explain later in detail as it is fundamental to all three issues in the case). Yet despite having no positive recollection of the circumstances when he signed, Mr Brereton remained adamant that whilst Ms Money was probably there when he signed both documents, all four signatories would not have signed at the same time. Rather, he suggested the three guarantors would have come in separately to Centre Court on 17th September 2008 to sign the documents with Ms Money during that day in a 'busy office scenario', as Mr Bradshaw put it. Mr Brereton's essential reason for this appeared to be that it would have been so rare for all of them to have been in the same room together, that he would have remembered it. However, he has a powerful 'stake in a particular version of events' (as Leggatt J put it in *Gestmin* at p.19), in that he is an intelligent and experienced businessman and in evidence was aware that if found to have all signed the Guarantee together, it would be binding. As Leggatt J added in *Gestmin* at p.22:

> *"It is important to avoid the fallacy of supposing because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

On all the evidence, that is particularly apposite to Mr Brereton's evidence on whether they all signed together, that I find unreliable for three reasons:

9.1.3.1 Firstly, Mr Brereton himself admits the natural impression from the Loan and Guarantee documents is that all four signed together. Following *Simetra*, to find to the contrary, I would need to '*explain why they are not to be taken at face value or are outweighed by other compelling considerations'.* For this, Mr Brereton relies not on *recollection* nor any other *evidence*, but on his *assumptions* in which he has a clear 'stake'.

9.1.3.2. Secondly, the 'busy office scenario' Mr Brereton now puts forward is totally different from what he said in his statement, that in other respects I found inconsistent with other documents.

9.1.3.3 Thirdly, this 'busy office scenario' is not supported by, indeed totally different from, what Mr Barrett and Mr Mason each say.

9.2 Mr Barrett's evidence was quite different not only in content but in form to Mr Brereton's. This is not a reference to old-fashioned 'demeanour', but more solid indicators such as internal and external inconsistency and inherent probabilities. I am conscious Mr Barrett was ill a decade or so ago, but in places his evidence was implausible, both on his correspondence with Mr Weatherer and the circumstances of his signing of the Guarantee. On the former, whilst Mr Barrett was not challenged about his evidence that Mr Weatherer did not tell him he was the Claimant's *director*, he was challenged as to whose *representative* Mr Weatherer was. Mr Aldis took him through a similar *Gestmin*-style cross-examination on many of the same emails and letters as Mr Bradshaw had taken Mr Weatherer. This included many examples of him acting unambiguously as the *Claimant's* representative (albeit reticent about his directorship), rather than the *Defendants'*, including Mr Barrett's own 2013 email to the other Defendants calling Mr Weatherer an 'unsecured creditor', possibly even *to him* (pg.242)

> *"All I could do is re-iterate to him that for my shares of the loans I was doing all that I could to find some funds to repay him [and] that he is not the only significant unsecured creditor…."* (My underline)

Mr Barrett stuck implausibly to the line that Mr Weatherer was their 'representative' not the Claimant's - as he plainly was given all the documents. Likewise on signature, even in the face of the Guarantee and Loan documents, unlike Mr Brereton, Mr Barrett made few if any meaningful concessions from his (PD57AC non-compliant) statement that read more like a skeleton argument. Indeed, given that he admitted signing the Guarantee but could not recall the circumstances, what he said about it was less evidence and more speculation. He suggested all three Defendants would have signed the Guarantee in different places and even on different days, despite only having one date on it (pg.167). Whilst in fairness it was not put to him that the Guarantee and Loan were signed at the same time, his evidence on the Loan signature (pg.159) was equally implausible – that he signed it, named it but did not date it as the '8' was odd (despite the evident similarity of handwriting and the difference from everyone else's). Indeed, he also appeared to suggest the Loan was signed at different times despite having the same date of 17th September. All this was despite the fact he had not even mentioned the Loan document in his statement in the first place. Overall, Mr Barrett's evidence struck me as entirely unreliable.

9.3 Mr Mason's evidence, if I may be forgiven a brief point on 'demeanour', was a strange mixture of implausibility and arrogant straight-talking. This included what appeared to be close to a boast by Mr Mason that he had never even read the Guarantee on which he was being sued, even prior to trial. Whilst he then said he was dyslexic, he did not make any reference in his statement to not being able to read the Guarantee, he simply said he had 'seen' it (pg.81 p.3 - as did the other two Defendants' statements: pgs.85 p.3 / pg.93 p.3). Even leaving 'demeanour' to one side, whilst Mr Mason claimed in his statement that he thought it was a standard contract not a deed (pg.82), he is a very experienced businessman who admitted signing many such documents, including one the following month for the Claimant to guarantee a loan to his son (pgs.309-316), which has a different separate witnessing clause for each (named) signature (to which I will return as it took on some indirect significance in legal argument). Moreover, Mr Mason suggested at another stage a guarantee on a loan of £100,000 was not particularly significant to him and would not justify him travelling into Centre Court, which would take him three hours from home. I clarified this with Mr Mason, having checked to find the distance between Centre Court and his home was about 7 miles. This mattered as Mr Mason adamantly denied he signed the Guarantee at Centre Court or ever met Ms Money. Instead, Mr Mason said Mr Brereton probably dropped in the Loan and Guarantee documents to his home for him to sign on 17th September 2008. This followed Mr Brereton's evidence that he signed both documents at the same time on that date; that Mr Mason only came into the office about 12 times over the years; and that Mr Brereton would frequently visit him on his way to or from the office. However, Mr Brereton had not said he took the Loan and Guarantee to Mr Mason on 17th September 2008 – he had said that Mr Mason probably came into the 'busy office' that day. Moreover, Ms Money signed the Guarantee apparently witnessing Mr Mason's signature alongside the two others (pg.167), since unlike the witnessing ('attestation') clause on the guarantee with Mr Mason and his son, there was only one attestation clause here for all three signatories. Therefore, Mr Mason's evidence (and as I will say, Ms Money's recollection) contradicts a contemporary document. Despite all of this, Mr Mason, like the other Defendants, was effectively speculating as said he had no recollection of circumstances in which he admits signing. Mr Mason's evidence struck me as lagely unreliable.

10. Speaking of Ms Money's 'recollection' rather than 'evidence', ironically in a case all about attestation, the Defendants did not call live evidence from the 'attesting' witness. Ms Money left Mr Barrett's employment, but he tracked her down in February 2022 and exhibited a short letter from her (she is now called Mrs Clarke) dated 12th March 2022 (pg.92). I accept she did not wish to give evidence as she is in poor health. But other than explaining her change of name and how she was contacted, her letter simply says she has no memory of the Rhombus Loan or the Guarantee and does not recall signing either document. Yet she added: "*I could not have witnessed the signature of John Mason because I do not believe I have ever met him in person."* However, the weight of that is very limited without a statement of truth and testing under cross-examination. Moreover, if Mrs Clarke cannot remember the signing of the documents, she would not be able to remember who else was there, including whether Mr Mason was. Finally, Mrs Clarke says she does not *believe* she has met him. Yet if she was only in the room with him once briefly when witnessing signatures (which she does not recall), she may well not remember. So, I can place no real weight on her assertion, especially given the unreliability of Mr Mason's evidence (and Mr Barrett's evidence, who also said he did not think she had met Mr Mason and who provided her letter).

**Findings of Fact**

11. Especially given those reservations about the Defendants' evidence, I specifically remind myself the burden of proof is on the Claimant, the Defendants do not have to give any explanation and I must not simply choose the most likely but only make findings of fact on the balance of probabilities - if I cannot do so the Claimant has failed to discharge *its* burden - *'The Popi M' [1985] 1 WLR 948 (HL).* In that case, the Lords held Bingham J (as he then was) was wrong to accept the owners' theory that damage to their ship was caused by a submarine (covered by the ship's insurance) on the basis that whilst it was unlikely, he could rule out the only other explanation - wear and tear (not covered). As the submarine theory was less likely than not, Bingham J should have simply found the shipowners failed to discharge the burden of proving what happened on balance of probabilities. Lord Brandon memorably said at pgs.955-6:

> *"My Lords, the late Sir Arthur Conan Doyle in his book The Sign of Four, describes his hero, Mr. Sherlock Holmes, as saying to the latter's friend, Dr. Watson: "How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth ?"*

> *It is, no doubt, on the basis of this well-known but unjudicial dictum that Bingham J. decided to accept the shipowners' submarine theory, even though he regarded it as extremely improbable. In my view there are three reasons why it is inappropriate to apply the dictum of Sherlock Holmes, to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case of the kind here concerned. The first reason is one which I have already sought to emphasise as being of great importance, namely that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take. The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. That state of affairs does not exist in the present case….The third reason is the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving the event occurred lies has therefore failed to discharge such burden."*

However, Lord Bingham (as he became) - perhaps the greatest judge of recent decades - went on to write the seminal article on fact-finding *'The Judge as Juror'* cited in *Martin* (and 50 other cases according to Lord Leggatt in his recent speech), which influenced the observations of Lord Leggatt in *Gestmin*, Males LJ in *Simetra* and Court in *Martin*. Applying those observations – especially on the relevance of contemporary documents - and of Lord Brandon in the *Popi M*, I turn to my findings of fact. They are relatively brief as I am conscious to try to avoid straying into issues reserved to trial.

12. Mr Weatherer is a partner of a firm of accountants Weatherer Bailey Bragg ('WBB') in Sutton Coldfield, which in 2007 became a Limited Liability Partnership ('LLP'), Weatherer Bailey Bragg LLP. Taking matters out of chronological order for a moment to deal with Mr Miner's intervention into proceedings, he joined WBB in 2005 and planned to buy-in as partner, but owing to a dispute with another partner Mr Bragg, this was not resolved until 2010. WWB's March 2010 accounts show Mr Miner as a partner with Mr Weatherer and a Mr Horsley (pg.103). The balance sheet in those accounts also notes a loan for £175,000 (pg.107) from an unnamed lender. As I said, Mr Miner originally contended that loan was from the Claimant to which Mr Weatherer had failed to disclose his connection. However, in evidence Mr Miner accepted Mr Weatherer had shown the loan of £175,000 was on 12th April 2010 from an Isle of Man company called 'Mantool' (pg.201). I accept in accordance with usual accounting practice for financial year 'accruals', this April 2010 loan was noted in the March 2010 accounts not signed off until October 2010 (pg.105). However, whilst I accept the loan was not from the Claimant, the format of the loan document (pgs.201-208) signed between 12th and 15th April 2010 and the guarantees to Mantool of Mr Weatherer, Mr Horsley and Mr Miner on 15th April 2010 (pgs.209-216) were very similar to those used by the Claimant. Indeed, in fairness to Mr Miner, Mantool's directors were Mr Byers and Ms Elliot, the administrative agents based in the Isle of Man for the Claimant (pg.318) - an indirect connection. I return to the 'set-up' of the Claimant in a moment.

13. Mr Barrett, Mr Brereton and Mr Mason were all long-standing clients of Mr Weatherer at WWB. Indeed, each had known him for many years – Mr Mason for more than 30 years as close friends who used to go on holiday together. Mr Weatherer acted as accountant for many of the Defendants' business ventures, including Rhombus (to which I will return), whose 2010 and 2011 accounts he audited himself (pgs.177-184 and 193-200). Mr Brereton said Rhombus was only one of about 20 business ventures the Defendants had run between them in the period between 2001-2013. Mr Mason largely left the running of any joint businesses (including Rhombus) to Mr Barrett and Mr Brereton – his role with them was mainly that of an investor. Another business Mr Mason invested in run by Mr Brereton and Mr Barrett took on some of Guardian Royal Exchange's loan book, comprising some 2000 loans they negotiated successfully – with only three cases ending in litigation. Whilst Mr Barrett denied knowing every borrower excuse in the book, I am sure he has heard a fair few.

14. Therefore, it is clear that Mr Barrett and Mr Brereton (who had been a commercial lending analyst and broker) were very familiar with commercial lending in their jobs. Indeed, one of their other businesses was the partnership 'Brereton Thurgood Barrett', described in a letter to Mr Weatherer at his accountancy firm from February 2003 as 'consulting financiers' in Birmingham (pg.149). In that case, they approached Mr Weatherer to secure a loan from the Claimant for a company called M&P Food Products Ltd: Mr Mason's separate company. Indeed, I accept Mr Mason was also very experienced as a commercial borrower for his various businesses, even if he was evidently not particularly interested in paperwork and formalities.

15. This shows that by then, Mr Weatherer was wearing two 'hats' for the Defendants. On one hand, he was their long-standing friend and accountant. On the other, he was also arranging funding for their various businesses from the Claimant company. It had been incorporated in Delaware USA in 2001 and its tax returns show that in 2006 (pg.339), its Company Secretary was Homeric Ltd, based in the Isle of Man. As Mr Weatherer said, its administrative functions were run from there by Mr Byers and Ms Elliot, although the Claimant's registered address appears to have been in Portugal for some reason. The 2006 tax return does not name a director, although Mr Weatherer accepts he was one from 2001. The 2007 and 2008 returns (pgs.340-1) still name Homeric Ltd as Company Secretary (albeit by 2007 registered in the Turks and Caicos islands) but also name Mr Weatherer as the sole director, albeit in 2007 placed him in Delaware and 2009 in Cyprus. The same is true for 2009 and 2017 (pgs. 342-343). By 2020 he had a UK address and Homeric were not involved (pg.344).

16. The Delaware tax records for the Claimant company do not disclose the identity of its shareholders. However, I accept the sole shareholder of the Claimant company is Mr Mark Weile. He may have connections with the US as it was registered in Delaware when its Company Secretary was initially based in the Isle of Man and its director in the UK. Mr Miner recalled being told by Mr Weatherer at the time that it was funded by several high-net worth individuals (including, Mr Miner cautiously confirmed, Mr Weile) who would lend to clients to whom normal commercial banks would have no appetite to lend and with higher interest rates to reflect the risk. Indeed, as Mr Mason said, the Rhombus loan in September 2008 was at the height of the 'credit crunch' and he said he was very busy with his various businesses as it was a very difficult time. I come back to the relevance of this for the Loan and Guarantee central to the case.

17. Mr Miner said Mr Weatherer had not told him he was a director of the Claimant but had said it 'took comfort' from WBB's involvement as auditor as part of the lending process. Mr Weatherer said in evidence that he had an agreement with his partners to bill the Claimant for his time. Correspondence he sent out in respect of the Claimant to the Defendants is addressed from him at WBB like that 30th January 2013 letter (pg.223). I have no evidence on the role of a Company Director in Delaware law, but I accept that whilst Mr Weatherer was nominally the Claimant's director, he considered the company as effectively the alter-ego of Mr Weile, who found the money and made the lending decisions, with Mr Byers and Ms Elliot handling the administration. His own role was handling the loans with borrowers. Indeed, I accept Mr Weatherer habitually referred to the Claimant company in the third person and sometimes explicitly as his 'client' (e.g. 31st January 2013 letter pg.227). I accept he did so to Mr Miner and to the Defendants, especially Mr Barrett in their correspondence from 2011 I summarise later. The only documents in the bundle before 2020 which mention Mr Weatherer being the Claimant's director are its Delaware tax documents which the Defendants only obtained once the litigation had effectively begun in 2020.

18. Turning back to the narrative, in April 2002 for one of their businesses, Mr Brereton and Mr Barrett needed a loan of £371,000 to assist two clients in the construction of two residential properties. Mr Mason was not involved at all in this transaction and Mr Barrett seems to have left all relevant matters to Mr Brereton, who successfully arranged the loan repayable in 10 months (pgs.108-113). He had called Mr Weatherer and asked for help in obtaining the loan, who put forward the Claimant company as a potential lender. Mr Weatherer says that he referred to it as 'another client that could possibly help' (not disputed) and that he was its director (very much disputed).

19. As summarised above but elaborated now with relevant contemporaneous documents in order up to 2008, I find on the balance of probabilities that Mr Weatherer did mention his directorship of the Claimant to Mr Brereton. I accept the latter was not doing 'due diligence' into a lender proposed by professional adviser he had known for 12 years and trusted. However, as someone experienced in commercial lending and a careful professional, Mr Brereton is bound to have asked a few questions about the Claimant. Mr Weatherer also knew Mr Brereton well by then and obviously foresaw that he would. Why then would he *suggest* a lender in which he was the director (but not a shareholder with a financial interest) which he intended to conceal ?

20. It is far more likely – and I find, more likely than not - that Mr Weatherer very briefly mentioned to Mr Brereton his directorship of the Claimant, but *minimised* it as something like a nominee director in a company without a shareholding and where he did not make the decisions. This would be consistent with him also referring to Mr Weile (although I accept probably not by name) as his 'client'. After all, Mr Brereton needed this loan, probably because they could not find a loan elsewhere. Therefore, Mr Brereton went to an old and trusted professional friend who suggested a suitable lender with whom he was not just connected, but a *director* of it. If anything, that would have *reassured* Mr Brereton that Mr Weatherer whom they knew well would be fair. Indeed, we are here 20 years later arguing about limitation because Mr Weatherer did not enforce within limitation loans the Defendants do not dispute had previously been due. In any event, the loan was arranged as Mr Brereton later recalled (pg.151) and repaid by January 2003 (pg.109).

21. Meanwhile, in October 2002, with the first loan well under way to being repaid, Mr Brereton approached Mr Weatherer again for another loan from the Claimant for him and Mr Barrett. This time, it was not for a client but for the Defendants' business – the office premises at Centre Court in Hall Green, Birmingham, in part for the newly set-up Rhombus LLP. This was a partnership between the three Defendants (and three companies) employing Ms Money as Mr Barrett's PA which developed commercial and industrial property, including Centre Court but also in Coventry. It was a short-term secured bridging loan for £800,000 repayable in one payment within 21 days (pgs.129-148). Again (indeed perhaps just before the first loan), it was successfully repaid.

22. By February 2003, Mr Brereton and Mr Barrett were fast becoming a regular customer of the Claimant – with two loans successfully paid off in short order. As I mentioned above, this time on 4th February 2003 (pg.149-150) Mr Brereton on behalf of Brereton Thurgood Barrett wrote to Mr Weatherer for a 3 month £250,000 loan from the Claimant for one of Mr Mason's companies. Mr Brereton was frank that it was in cash flow trouble and its overdraft would not suffice as it had been absorbed by a £500,000 investment in a Film Partnership and a £300,000 Extraordinary Tax Charge relating to other businesses. This is a classic example of lending which banks would not touch – indeed it stemmed from 'maxing out' an overdraft. Indeed, Mr Mason was offering a personal guarantee backed by equity in his home and Mr Brereton said '*On behalf of [Mr Mason's company] I would like to apply to Euro Securities..for a 3 month loan….'.*

23. However, Mr Brereton then said '*Please could you make an approach on our behalf'.* In isolation, those words might be thought consistent with him treating Mr Weatherer like his business' *broker*. However, the period until 2011 has many apparent gaps in the documentary record. Mr Weatherer said that loan was taken out and repaid in good time. Yet there is no response from Mr Weatherer, nor any loan documents, still less any guarantee signed by Mr Mason (which might have been thought to be relevant to a case about a guarantee). Moreover, whilst Mr Brereton asked Mr Weatherer to *'make an approach on our behalf'*, he also said *'On behalf of Mr Mason's company I would like to apply'* to the Claimant. In the absence of any surrounding documentary context, I am wary of placing too much weight on those words. Yet even in isolation, they are also consistent with Mr Brereton having been told the previous year of Mr Weatherer's directorship *in the terms I have found he was*. I found 'Mr Weatherer very briefly mentioned to Mr Brereton his directorship of the Claimant but minimised it as something like a nominee director in a company without a shareholding and where he did not make the decisions' that were made by his (probably unnamed) 'client'. Therefore, it would make sense for Mr Brereton in February 2003 to tell the nominee director of the Claimant that he would like to apply to it for a loan and to 'please make an approach' – i.e. to the decision-maker (in fact Mr Weile, even if Mr Brereton did not know his name) *which Mr Brereton knew Mr Weatherer was not*. However, that reading of this contemporaneous document is far from the only reason I have made this finding of fact, for the reasons I summarised above and continue to elaborate below.

24. Between 2003 and 2008, there are clearly other substantial documentary gaps where we do not know what Mr Weatherer (or indeed the Defendants) may have said of relevance to this issue. One gap actually relates to a loan disputed in this litigation – the 'Partners Loan' in September 2003 of €190,000 to purchase a property in Bulgaria, of which equivalent to £140,967 (the claim is in Pounds) was outstanding in June 2020. I should say Mr Aldis confirmed that this preliminary issue on the Guarantee does not relate to that unguaranteed loan, so nothing I say determines the outcome of that claim. We have the unsigned loan document (pgs.301-308) in similar format to the other loans and we have Mr Weatherer's instruction of 26th August 2003 (pg.298) - as 'treasurer' rather than 'director' though nothing was made of this - to the Claimant's bank in the Isle of Man to pay €190,000 to Mr Barrett's account in Bulgaria. However, we have very little if anything else about this loan from 2003. However, the issue is limitation. In April

2007, the Defendants made a part-payment of £90,540 towards the Partners' Loan and on 14th September 2007 made another part-payment of £46,156 so that the balance on that original loan in Euros equivalent to £133,000 was £55,721. I should add, that was the last payment on that loan as annual interest of £6,886 gave a balance of £133,167 by April 2019 (pg.270) and £140,967 by June 2020 (pg.10).

25. Another notable gap in the documentary record is on a guarantee dated 17th January 2006 and signed by Mr Mason. Since it relates to a loan to Mr Barrett from the Claimant in September 2003, it may relate to the Partners' Loan or another loan. In a remarkably informal (albeit written) two-sentence guarantee, it says (pg.299):

> *"In connection with the above loan, I John Howard Mason, hereby agree to personally guarantee the above sum in the event of it not being paid by Stephen Alan Barrett. The loan is incurring an interest rate of 15% gross per annum and will be repaid at the same time as the capital."*

Mr Mason must have noticed the 2008 Guarantee differed, whether he read it or not.

26. Conscious of all those gaps and what the presumably missing documents might have fed into Mr Brereton's understanding of Mr Weatherer's role, I turn to his letter of 12th September 2008 (pg.151) which is the prelude to the Rhombus Loan and Guarantee I am concerned with at this preliminary trial. As I said earlier, Mr Brereton wrote:

> *"Your assistance in helping arrange this is much appreciated. In respect of the payment of funds would <u>you</u> like to <u>issue</u> a cheque or a bank transfer ? From recollection <u>you have in the past done a cheque</u>."* (My underline)

This makes no reference to Mr Weatherer *'making an approach to the Claimant on their behalf'* as Mr Brereton's 2003 letter did. As I noted above, it explicitly refers to <u>Mr Weatherer issuing</u> or 'doing' the Claimant's cheques for previous loans. Mr Barrett also accepted Mr Weatherer had done so (possibly to him personally in 2003) but suggested it did not make him the Claimant's representative. In fact, it clearly made him more than a representative if he was personally issuing its cheques. By 2008 the Defendants had received several from the Claimant *issued by Mr Weatherer*, whom Mr Brereton must therefore have seen not just as its representative but as I put it above 'the person within the Claimant they were dealing with'. There is no suggestion Mr Brereton was at all surprised or concerned by this. In my judgement, along with the later documentation (e.g. in 2013) discussed above, this supports the finding that it is more likely than not he knew Mr Weatherer was the Claimant's (nominee) director.

27. To summarise, I have found on the balance of probabilities that at the time of the Claimant's first loan to Mr Brereton and Mr Barrett in 2002 'Mr Weatherer very briefly mentioned to Mr Brereton his directorship of the Claimant, but minimised it as something like a nominee director in a company without a shareholding and where he did not make the decisions' that were made by his (probably unnamed) 'client'. However, even if I am wrong about that, given the gaps in the documentary record between 2002 and September 2008 (and doubtless many other verbal conversations too) I infer on the balance of probabilities that by the time Mr Brereton wrote that letter in 2008, he must have been aware that Mr Weatherer, regularly issuing the Claimant's cheques, was not just its representative, but its director (or at least, one of its officers). Given that Mr Brereton was partners with Mr Mason and Mr Barrett in Rhombus from 2002, telling him but not the others was not Mr Weatherer 'deliberately concealing' from them either, even if as his old friends they may have initially have been surprised. Doubtless, they would have been less surprised (and certainly they would have realised) with loan after loan having cheques issued by Mr Weatherer but decided upon by 'his client' (even if not named as Mr Weile). In any event, as I have noted, by 2013 (pg.224), Mr Barrett was calling Mr Weatherer their 'creditor', apparently to his face.

28. Indeed, even if Mr Brereton and the other Defendants were *not aware* by 2008 that Mr Weatherer was the Claimant's director – and even if he really 'should' have told them as their accountant and friend - that does not mean he *deliberately concealed* it, the issue I am asked to decide. As I have said, I accept Mr Weatherer genuinely saw himself as akin to Mr Weile's nominee and the latter as synonymous with 'the company'. I accept that he genuinely felt (many would say, wrongly) that he did not need to mention his directorship. Moreover, as he also personally issued the Claimant's cheques, I accept Mr Weatherer's evidence that on the balance of probabilities he was not *deliberately concealing* his directorship from the Defendants at least up until the time of the Rhombus Loan and Guarantee in 2008. If he had wished to conceal his directorship, it would have been easy enough for him to make arrangements for others such as Mr Byers and Ms Elliot to issue the cheques or arrange bank transfers without any obvious input from him, such as a signature as would be on a cheque. Indeed, the fact that Mr Brereton and Mr Mason knew Mr Weatherer's handwriting (each recognised it on the Guarantee) reinforces that he would not have issued cheques if trying to conceal his directorship from any of the Defendants up until 2008.

29. Therefore, on all the evidence (including later) in *2008 at the time of the Rhombus Loan and Guarantee* I find on the balance of probabilities that Mr Weatherer had not 'deliberately concealed' from *any* of the Defendants that he was a *director* of the Claimant (still less its *representative* which would have been blatantly obvious from the issuing of the cheques). Whether he 'deliberately concealed' it later, I will consider later. Having considered what Mr Brereton's September 2008 letter (pg.151) tells me about the parties' conduct and understanding prior to it, I now turn to its actual subject – the Rhombus Loan which also led to the Guarantee; and how they were signed.

30. Mr Weatherer was not present at the signing by the Defendants so can only be of limited assistance with what he did and thought at the time. I have found the evidence of Mr Barrett entirely unreliable, Mr Mason's largely unreliable and Mr Brereton's partially unreliable. So given *Popi M*, *Gestmin*, *Simetra* and *Martin* the contemporary documents themselves (especially the Guarantee and Loan) are especially important evidence of how they were signed. As Males LJ said in *Simetra* at p.49:

> *"…[W]here there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations…"*

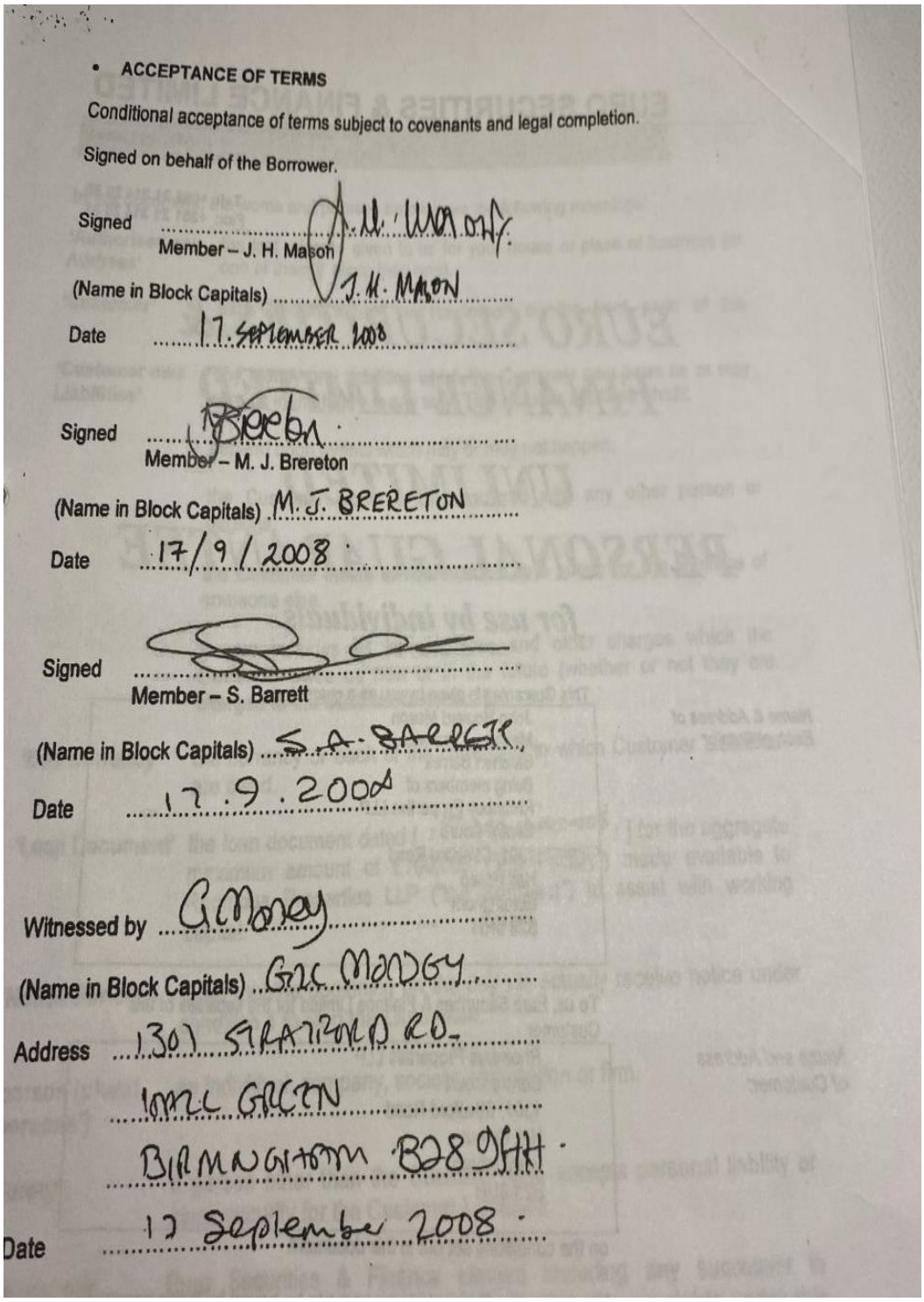
Given the difficulties with the Defendants' evidence I have described, in this case the safest course is to consider what inference should be drawn on the balance of probabilities from the contemporary documents taken at face value and/or from to the known or probable facts; and then consider whether the Defendants' evidence leads me to reach the same or a different conclusion. That is not the same as reversing the burden of proof, which remains on the Claimant on the balance of probabilities, although it seeks to prove that by the contemporary documents and inferences from them not eyewitness evidence. This does not require the Defendants to *prove* anything but given the difficulties with their evidence it involves focussing *first* on the documents. Moreover, once I have provisionally reached my conclusion on the documents and the witness evidence on the balance of probabilities, I will test it in another way by running through five different factual scenarios which Counsel in closing submissions teased out of the Defendants' evidence. This is not to choose which is the least unlikely or even most likely – the error in *Popi M* - but to assist me to reach my final conclusion on the balance of probabilities as to how the Guarantee was signed.

31. Before turning to the Loan or Guarantee documents, I go back to Mr Brereton's letter (pg.151). I find in September 2008, he called Mr Weatherer to request a loan to Rhombus Properties LLP of £100,000. Doubtless having checked with Mr Weile, Mr Weatherer agreed as the Defendant had previously repaid loans and made payments on the Partners' Loan up to 2007. Once this was agreed, on (Friday) 12th September 2008 Mr Brereton wrote to Mr Weatherer confirming the borrower details would be Rhombus Properties LLP at the Centre Court address. As I have discussed, he also asked whether it would be paid by cheque or bank transfer. Mr Brereton concluded *'Thanks Alan, I will call you later in the week to arrange the details'* (perhaps as it was typed and posted/faxed on Friday 12th September, but was dictated earlier in the week).

32. The timing is relevant because the Loan is dated (Wednesday) 17th September and on instructions from Mr Weatherer, Mr Aldis did not challenge Mr Brereton's (and Mr Mason's) recollection that handwriting on the Guarantee dating it (Thursday) 18th September was Mr Weatherer's and I find on the balance of probabilities it was. That is a remarkably quick turn-around, especially since the borrower details were only provided on the Friday (by post and fax) and the documentation could only have been sent out by post (as Mr Weatherer says it was and I accept) that day. That means on the balance of probabilities the earliest the Defendants would have had a hard copy of the Loan and Guarantee paperwork to sign would have been Monday 15th September. Yet the Loan document was dated 17th September and Mr Weatherer must have had both documents back by the 18th September to date the Guarantee that day. Given the shortness of time, the documents show the Loan and Guarantee must have been signed between 15th and 17th September. In fact, just touching on the Defendants' evidence, Mr Brereton and Mr Mason both accepted the Loan and the Guarantee would probably have been signed on 17th September. Whilst Mr Barrett suggested it might not have been, given that he could not recall and was speculating, I find on the balance of probabilities the Loan and Guarantee were both signed by all on 17th September 2008.

33. I turn next to the Rhombus Loan document (pgs.152-159). The loan was to the partnership, Rhombus Properties LLP rather than the partners personally, so provided for a separate guarantee. The loan was for £100,000 repayable in a single payment after 12 months with 12% compound interest but withholding tax at 20% so 9.6% pa. So, it was for a longer term than some of their other loans, but at the same if not a slightly lower rate of interest (their first loan in 2002 had been at 12% net interest).

34. This is a photograph of the signature page of the Loan document (pg.159):



• ACCEPTANCE OF TERMS

Conditional acceptance of terms subject to covenants and legal completion.

Signed on behalf of the Borrower.

Signed ..... Member – J. H. Mason

(Name in Block Capitals) J. H. MASON

Date 17. SEPTEMBER 2008

Signed ..... Member – M. J. Brereton

(Name in Block Capitals) M. J. BRERETON

Date 17/9/2008

Signed ..... Member – S. Barrett

(Name in Block Capitals) S. A. BARRETT

Date 17.9.2008

Witnessed by G Money

(Name in Block Capitals) GAIL MONEY

Address 1301 STRATFORD RD.

HALL GREEN

BIRMINGHAM B28 9HH

Date 17 September 2008

As Mr Bradshaw pointed out, the Loan document did not purport to be signed as a deed so did not need to be witnessed (indeed, even signed) to be legally effective. Nevertheless, in 'belt and braces' fashion, it set out rubric for the three partners to sign, name and date and for a witness to sign, name, date and give an address. This was a perfectly straightforward document to sign, especially for experienced business-people.

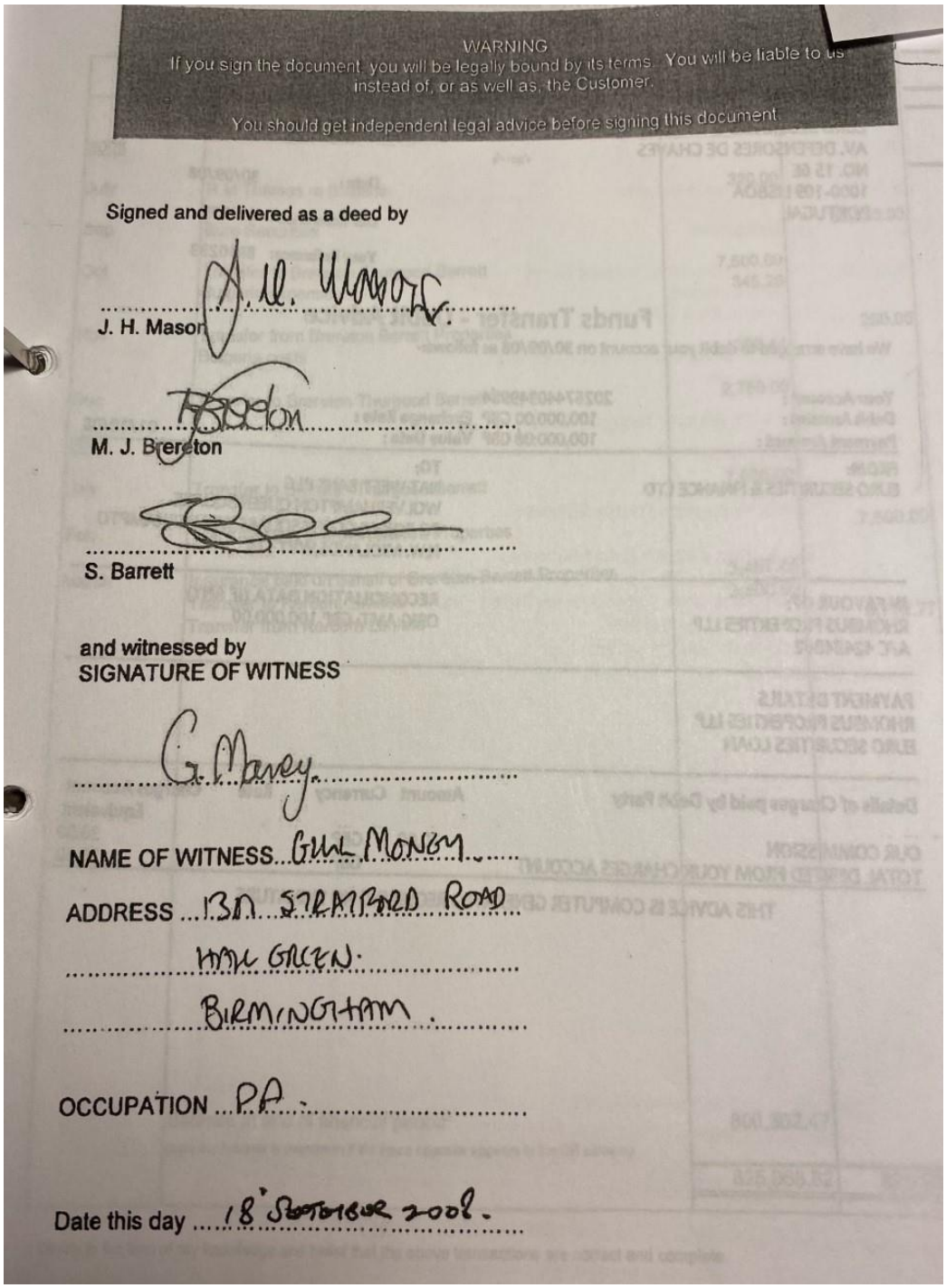
35. Again, turning briefly to the Defendants' evidence, Mr Brereton accepted he had signed, named and dated his part. Whilst Mr Barrett said that he had signed and named his part, he did not accept he had dated it because the '8' was on its side. However, the obvious inference is that he wrote the date and made a slight slip. Given that handwriting is different from everyone else's (including Mr Weatherer's) it is difficult to see who else would have dated Mr Barrett's part. Mr Mason accepted signing his part but did not know whether he had named and dated it. He confirmed he was not saying it was not his handwriting, but rather that he did not know whether it was his or not. However, given its 'spiky' form clearly resembles his signature (compare those of Mr Brereton, Mr Barrett and Ms Money), the obvious inference is it was his writing.

36. Turning back to the Loan document, the obvious inference is the Defendants each signed, named and dated on 17th September 2008 'witnessed by' Ms Money *in each case*. She did not suggest or annotate she had 'witnessed' some signatures not others. Moreover, the verb 'witnessed' presupposes that she was present and observed all the signatures being made. As I discuss later, 'to witness' something ordinarily means to 'observe', 'watch' or 'see' it (as in 'eyewitness') and indeed in a 1940s case it was held whilst a blind person may be 'present' at the signing of a will, they cannot 'witness' it. However, if A 'witnesses' B signing, the natural inference is that A is 'present' (leaving aside the complications of 'witnessing' through remote technology, which is not suggested here). Furthermore, Ms Money gave the 'address' (which did not specify 'home' or 'office') as 1301 Stratford Road – i.e. Centre Court. The obvious inference is the signing took place there on 17th September, as Mr Brereton accepted was probable.

37. I now turn to the Guarantee (pgs.160-7). It specified the three Defendants as the 'guarantors' and the 'customer liabilities' being guaranteed as the loan (plus interest) to Rhombus Properties LLP of £100,000, which it stated was 'to assist with working capital' (pg.161). However, Mr Weatherer there appears to have written in that the Loan document was dated 18th September 2008 in the same handwriting in which Mr Brereton and Mr Mason agreed he dated the signature page. Clauses 8.1-8.2 stated:

> *"You will be bound by this Guarantee from the time that you sign it, even if …someone else was supposed to sign…If this Guarantee is signed by more that one person as guarantor, each of you is liable to us individually as well as jointly. Your individual liability will not be affected by the fact that any guarantee or security given by any other guarantor is not valid or cannot be fully enforced."*

38. This is a photograph of the signature page of the Guarantee (pg.167):



WARNING
If you sign the document you will be legally bound by its terms. You will be liable to us instead of, or as well as, the Customer.

You should get independent legal advice before signing this document

Signed and delivered as a deed by

J. H. Mason

M. J. Brereton

S. Barrett

and witnessed by
SIGNATURE OF WITNESS

NAME OF WITNESS GILL MONEY

ADDRESS 130 STRATFORD ROAD
HALL GREEN
BIRMINGHAM

OCCUPATION PA

Date this day 18 SEPTEMBER 2008.

This is very different from the very brief informal guarantee Mr Mason signed in 2006 (pg.299). It also differs from a guarantee Mr Mason and his son signed for his son's loan from the Claimant in October 2008 (pg.316), where <u>each</u> of their two signature clauses had a printed name with a similar 'witnessing' (i.e. 'attestation') clause (pg.316), where it would have been quite possible for Mr Mason and his son to sign and to be witnessed by their common witness in different locations or even different days.

39. Whilst the Defendants complained they were given no signing instructions for their Guarantee signature sheet (pg.167), Mr Mason had guaranteed loans from the Claimant before. Mr Brereton and Mr Barrett were regular personal borrowers from it and indeed very experienced in commercial lending. Therefore, the Defendants' complaints ring extremely hollow. Mr Weatherer was not dealing with inexperienced personal borrowers who need post-it notes to show them where and how to sign a document. For commercial borrowers of the Defendants' experience, a fairly quick scan of the signature page of the Guarantee (pg.167) would itself provide five implicit instructions:

    39.1 Firstly, the guarantors should sign above their names as printed, but had no need to write their names or to date their signature individually (unlike on the Loan).

    39.2 Secondly, those signatures should be 'witnessed by' the 'witness', which as discussed ordinarily means 'observing', 'watching' or 'seeing' them being signed - rather than 'recognising them as the usual signature' or even 'being present'. Indeed, the implicit instruction to 'witness' the signatures was *more specific* than in the more common wording for an attestation clause 'signed in the presence of'.

    39.3 Thirdly, the same person should witness all three signatures, since there was space for only one witness' details. That one witness could not truthfully sign if they had not 'witnessed' all three signatures being done, at least without expressly annotating when signing (eg. by saying 'I did not witness Mr Mason's signature')

    39.4 Fourthly, not only was there only space for one witness' details, there was only one 'witnessing' (attestation) clause. The three guarantors were to 'sign and deliver' the Guarantee 'as a deed' which was to be 'witnessed by' the witness. So, unlike the format of other joint deeds such as Mr Mason's guarantee with his son (pg.316), what was implicitly requested to be 'witnessed' was not *the separate signatures* of each of the three guarantors - possibly at different times and places – but rather *their joint signing together*. Indeed, it does not say 'each witnessed by' but 'and witnessed by': i.e. the joint signing was 'witnessed'.

    39.5 Finally, this is reinforced by the implicit instruction that all three signatures should be made/witnessed on the same day, as there was only space for one date. However, in fairness it is not disputed that Mr Weatherer filled in the date of 18th September 2008 (pg.167), as he did earlier in the Guarantee on the date of the loan (pg.161). Nevertheless, the fact the Defendants left the Guarantee undated does not mean any of them signed on different days (especially given the Loan document), it simply means they left Mr Weatherer to fill in the date of 'delivery'

40. In my judgement, the natural and obvious inference is all the Defendants as guarantors and Ms Money as their witness *all signed together*: (i) from the appearance and terms of the Guarantee alone; (ii) if not, from the Guarantee and Loan together; or (iii) if not, from both the Guarantee and Loan with the surrounding undisputed and probable facts:

40.1 Even just looking in isolation at the Guarantee dated by Mr Weatherer on receipt, for the reasons discussed above, in the absence of any annotation such as to indicate that Ms Money did not 'witness' some of the signatures or 'witnessed' them all separately, the natural inference is she 'witnessed' - i.e. observed - them all. Indeed, the fact the three Defendants signed the Guarantee under *'signed and delivered as a deed'* and Ms Money signed under *'and witnessed by'* and provided her name and the address (even if undated) without making any annotations or qualifications, means the obvious inference is that she witnessed – i.e. observed – the *joint signing* by all three guarantors. Moreover, as well the natural inference from the appearance of the Guarantee itself, that would be the obvious way to sign it (even if not an implicit instruction). As I discuss later, the purpose of attestation (i.e. witnessing) is to limit scope for disputes (such as here) about the circumstances in which a deed is signed, including who even signed it. The advantage of a joint signing by guarantors and witness is that not only the *witness* sees all the guarantors signing, but *they* see each other as well – they are all 'witnesses'. This also means they can ensure it is done correctly by the others, to reduce the risk of it not being accepted by the lender. Furthermore, there would be an obvious disincentive for any of the guarantors to have signed this Guarantee separately: especially first. Clauses 8.1-2 of the Guarantee quoted above had the effect that if the guarantors signed separately, the first to sign would be *immediately* bound individually for the whole sum guaranteed, even if one or both others did not then sign. So, it was not only in all of the guarantors' interests to sign together, it was also in all of their interests to be witnessed doing so together and for the witness to sign in all of their presence. That would mean it could be confirmed that all four signed together, just in case any guarantor later sought to escape their joint liability. Therefore, a joint signing by the three Defendants as guarantors, all watched by Ms Money as their witness, was not only the natural inference from how they signed the sheet without annotation or qualification, it was the natural method of signing which the Claimant would expect and the Defendants would adopt, even if they left dating of 'delivery' to Mr Weatherer.

40.2 Even if I am wrong, the Guarantee need not be read in isolation. The conclusion that all the Defendants and Ms Money signed together is reinforced by the signatures on the Loan, all dated 17th September. There would be no logical reason for them all to sign the Loan on one date and the Guarantee on another and indeed both Mr Brereton and Mr Mason accepted it was probable each had signed both documents on 17th September. That is the obvious inference for Mr Barrett as well, whether or not he wrote in the date. So either: (i) they all signed on the same date but not in the same place as Mr Mason says; (ii) they all signed on the same date in the same place but not together as Mr Brereton says; or (iii) they all signed on the same date, in the same place and together as the Claimant invites me to infer and as Mr Brereton (and Mr Bradshaw) accept would be the natural inference of the documents in the absence of the Defendants' contrary evidence.

40.2.1 (i) is both unlikely and inconsistent with the Guarantee for the reasons just given, but also inconsistent with the Loan document, as again Ms Money did not suggest she had not 'witnessed' Mr Mason's signature and gave the address in both documents as Centre Court. It is also unlikely there would have been enough time to get signatures in different locations and get it back to Mr Weatherer by the next day.

40.2.2 (ii) is Mr Brereton's 'busy office scenario' of all signing at Centre Court the same day but not together. This was feasible on 17th September, provided Ms Money had control of the documents and 'witnessed' all the signatures being made. Again, she gives no indication she did not and if she had not, that would contradict what she signed on both the Loan and Guarantee and getting it back to Mr Weatherer by 18th September. However, just because it is feasible does not mean it is probable. It would not only involve at least one guarantor 'jumping first', or even just not being present to see their signatures were effective. It would also leave that latter responsibility to Ms Money, who would be the least familiar with 'deeds' and due execution which if she got the requirements wrong would risk a problem with the formalities and a delay in receiving the funds. It would also allow more scope for debate later about who signed, when and witnessed by who. If all the Defendants were signing on the same day in the same place anyway, it was far easier to sign together.

40.2.3 For those reasons, not only the most likely scenario but the scenario which is more likely than not is that all three signed together and Ms Money truly 'witnessed', i.e. observed them all doing so and then signed herself to say so whilst they were all still present. Whilst Mr Barrett normally worked in Shropshire, there would be a good reason for him to come to Birmingham to sign a Loan and Guarantee. Mr Brereton was there anyway and Mr Mason was only a very short distance away. It would have been straightforward for Ms Money as Mr Barrett's PA to have arranged a few minutes on 17th September for all three guarantors to be in the office, to sign together to know it had been done properly and sent back promptly.

40.3 Even if I am wrong about that as well, this interpretation is not only most consistent with the Guarantee and Loan but also other known and probable facts:

40.3.1 Firstly, the short timescale indicates how keen the Defendants were to get this loan arranged quickly. It was for £100,000 to provide working capital to Rhombus. There is not the same candid explanatory letter as for Mr Mason's company's 2003 loan, but as Mr Mason admitted, September 2008 was at the height of the credit crunch. (Indeed, I note it was the same month as the collapse of Lehman Brothers). It was a time when bank lending to businesses contracted and many of them were desperate for money. The Defendants would have had very few options for working capital - by then desperately needed. Whilst Mr Mason would have been busy with his various businesses (as indeed would the other Defendants), he would hardly have been too busy to travel 7 miles into his partnership's office to sign forms to keep it afloat. As Mr Mason eventually accepted, a £100,000 loan and guarantee would have not been a problem if it meant achieving that. If Mr Mason did indeed only visit Centre Court 12 times ever as he and Mr Brereton said, this was a very good reason to be one of 12 times he travelled the short distance into the office: to ensure all the paperwork was in order and sent back quickly to Mr Weatherer to avoid any delay in receiving the funds. Likewise, all three would have been keen to ensure the same thing. The quickest and surest way to release the funds would be all to sign at Centre Court when together.

40.3.2 Another reason it is more likely than not the Defendants were more than happy to gather together at Centre Court on 17th September to expedite the loan was that in context it was a very good deal (pgs.152-159). It was for £100,000 repayable in a single payment in 12 months compound interest at 12% gross but withholding tax at 20% so 9.6% pa. Therefore, it was for a longer term (and a single payment) than some of their other loans but at the same if not slightly lower rate of interest (their first loan in 2002 was 12% net). Here was a reasonable loan, from a trusted lender, run by a trusted professional friend which could keep their business afloat at a time when few banks were lending at all. They would have jumped at the terms, even with a guarantee. Certainly, they would have wanted to adopt the quickest and simplest method to sign and send back the paperwork in good order – all to witness it together to ensure it was done properly. Mr Barrett and Mr Brereton would have wanted to avoid any problems with paperwork and any risk of the Claimant backing out.

40.3.3 In particular, Mr Mason's involvement was crucial as the key investor and borrower who had known Mr Weatherer for many years and who had guaranteed Mr Barrett's personal loan in the past. Mr Brereton and Mr Barrett would have known if there was a problem with his execution, Mr Weatherer may not accept the Guarantee. The easiest way to avoid that was to ensure Mr Mason was present to ensure everything was done properly to avoid either of them 'carrying the can' and indeed delay. Moreover, Mr Mason would have been keen to avoid mishaps, not least because in the Credit Crunch, he needed other funds from the Claimant: e.g. the loan to his son a month later.

41. So, my provisional conclusion is the natural inferences from the contemporaneous documents and known and probable facts are: (1) the Loan and Guarantee were both signed by each of the Defendants on 17th September – as Mr Brereton and Mr Mason think probable; (2) that Ms Money witnessed (i.e. observed) all their signatures being made and signed to say so, most likely at Centre Court – as Mr Brereton thinks probable; and (3) all four actually did so and signed together – as the Defendants and Ms Money deny. I turn to whether the denials cause me to reach a different conclusion.

42. In short, even in the light of the Defendants' evidence, I reach the same conclusions on the balance of probabilities for the following reasons relating to each witness (linking my observations about the evidence at the start of this judgment to my other findings – although Mr Miner's evidence was not in fairness said to be relevant to this issue).

42.1 I found Ms Money's account in her letter (which has not been properly put into evidence and not been tested in cross-examination) to be unreliable. She confessed she had no recollection of the circumstances of signing the Loan or Guarantee in 2008 but said *"I could not have witnessed the signature of John Mason because I do not believe I ever met him in person."* However, that is intrinsically unconvincing as she would not necessarily remember 'meeting' him if all she did was watch him signing some forms and witness it 14 years ago. It also flatly contradicts her own signatures on both the Guarantee and Loan saying she witnessed the signatures, without any exclusion of Mr Mason. Her account is entirely unreliable as inconsistent with contemporary documents.

42.2 Mr Mason's evidence I found largely unreliable. I leave aside his odd demeanour in evidence, which the authorities consistently say is an unreliable guide to truth. As I described, I found various strands of his evidence simply implausible, including that he would not have travelled the very short distance to Centre Court from home to sign the paperwork. Instead, Mr Mason suggested Mr Brereton would have brought the documentation to his home, but Mr Brereton suggests it is probable they all signed it at Centre Court. Moreover, just like Ms Money's account, Mr Mason's assertion that she did not witness his signatures is inconsistent with her signing two contemporary documents saying she had done.

42.3 Mr Barrett's evidence I found entirely unreliable. He was implausible in insisting Mr Weatherer was not even the Claimant's representative when he had described him in a 2013 email as their 'creditor'. Mr Barrett was also implausible in speculating they had all signed the Loan and Guarantee documents on different days and in different places when all had signed the Loan the same day and there would have simply been no time to have done that. It was telling that neither Mr Brereton nor Mr Mason who followed Mr Barrett adopted his speculation on that issue. Moreover, in Mr Barrett's legal-argument-filled statement, he added at p.14 that he would have expected a lender not to release the funds until they had checked the documents had been correctly executed. However, other than the date that Mr Weatherer added, they had been.

42.4 Mr Brereton's evidence was more measured than that of the other Defendants. He made sensible concessions in relation to signing the Loan and Guarantee on 17th September, that all the Defendants were probably at Centre Court and that he had signed in Ms Money's presence. However, he was totally adamant that all three Defendants did not sign together in her presence. Yet, he accepted that was the natural inference from the documents for someone who had not been there. However, his denial is ultimately unconvincing for three main reasons:

42.4.1 Firstly, Mr Brereton's other evidence in his statement that he was not aware Mr Weatherer was 'connected in any way' to the Claimant is inconsistent with contemporaneous documents, up to 2008 and after it, as I have discussed (and continue to discuss afterwards below) Indeed, I also preferred Mr Weatherer's evidence that he had told Mr Brereton of his directorship in 2002. Since I accept Mr Brereton was a genuine witness, this undermines the reliability of his memory.

42.4.2 Secondly, Mr Brereton's concessions in oral evidence led him to put forward an entirely different account than Mr Barrett had and Mr Mason later did. Indeed, it was also quite different from his own account in his statement, which had not suggested this 'busy office scenario' where all three Defendants and Ms Money had signed at different times and not together on 17th September at Centre Court. Moreover, as I have discussed, that is inconsistent with what the Loan and Guarantee suggest: a joint signing all together. Indeed, it is also inconsistent with inherent probabilities and known and probable facts – especially that he would have signed the Guarantee first (in for work as normal at his own office) which would have bound him personally, without ensuring the others executed the deed in the right way too. Mr Brereton is very experienced in commercial lending and Mr Weatherer described him as very careful and diligent – an impression he gave in his evidence. I do not accept he would have risked being left exposed as the only effective signatory to a guarantee for £100,000 because the partners were 'too busy' to meet.

42.4.3 Finally, Mr Brereton's account is not recollection – he cannot remember – it is speculation. So it cannot outweigh natural inferences from contemporary documents. Given *Simetra,* to accept his account

> '[I would have to] *explain why they are not to be taken at face value or are outweighed by other compelling considerations'.* Mr Brereton himself accepts that at face value the contemporary documents are inconsistent with what he is saying. Yet, he proceeds from his unshakeable belief that 'he would have remembered them all being together' to a conclusion they 'could not have been all together', even though it is 14 years ago, they would have only been together for a few minutes, the contemporary documents suggest they were all together and he cannot remember what happened anyway. Ultimately, it is clear Mr Brereton cannot accept what he recognises to be the natural inference from the documents because he knows it means the deed is valid and enforceable. That is genuine, it is human, but it is no basis to reject what the documents show at face value.

42.5 Indeed, the main reason why ultimately none of the Defendants' 'evidence' can rebut the natural and obvious inferences from contemporary documents is that it is really not 'evidence' of what happened at all, since none of them can remember. It is *speculation* and frankly wishful thinking because each of them have a 'stake in a particular version of events' as Lord Leggatt put it in *Gestmin*, although tellingly not even in the same versions as each other.

For those reasons, my final findings of fact on the execution of the Guarantee is that I find on the balance of probabilities: (1) the Loan and Guarantee were both signed by each of the Defendants on 17th September; (2) that Ms Money witnessed (as in observed) all their signatures and signed to say so, most likely at Centre Court and (3) all four actually signed the Guarantee and Loan *together*.

43. I can very briefly test my conclusion in a different way by running through in ascending order of likelihood the five different factual scenarios (re-ordered and lettered):

43.1 Scenario E stems from Mr Barrett's evidence. It is that the three Defendants signed on different days in different places with Ms Money not meeting Mr Mason. As I have discussed above, this is flatly contradictory with all the contemporary documents, implausible within the tight timescales, unsupported by the other Defendants and not even Mr Barrett says he remembers it happening. It is completely unrealistic, I reject it and say no more about it in this judgment.

43.2 Scenario D stems from Mr Mason and Mr Barrett's evidence. It is they all signed both documents on 17th September - but all in different places and Mr Mason did not meet Ms Money. This is almost as contradictory with the contemporaneous documents given her signatures on them. Moreover, if Mr Barrett signed in Shropshire, Mr Weatherer would not have received it the next day. This scenario is completely unrealistic, I reject it and say no more about it in this judgment.

43.3 Scenario C stems from Mr Mason and Mr Brereton's evidence. It is that all signed on 17th September: Mr Brereton and Mr Barrett at Centre Court, each witnessed by Ms Money (as Mr Brereton accepted and indeed, she was Mr Barrett's PA); but Mr Mason signed at home with Mr Brereton as he speculated (but did not recall). This is slightly less contradictory with the contemporary documents, but would still mean Ms Money signed to say she had 'witnessed' Mr Mason's signature when she had never met him. Moreover, Mr Brereton does not suggest this happened. It is also unrealistic Mr Weatherer would have had the paperwork back the next day. So, I reject this scenario (but I do consider it briefly later on).

43.4 Scenario B stems from Mr Brereton's evidence: the 'busy office scenario'. It is that all the Defendants signed on 17th September at Centre Court individually 'witnessed' by Ms Money, but not together and she signed to say so the same day. This is feasible but not consistent with the Guarantee where all three guarantors signed (implicitly together) 'witnessed by' her. Moreover, it is unlikely as it would have exposed the first guarantor signing to a risk and each would have wanted to ensure the others signed properly to avoid that or any delays in much-needed funds. Furthermore, this scenario was not supported by Mr Mason or Mr Barrett, Mr Brereton could not actually remember it (so his recollection was incomplete) yet it stemmed from his lack of recollection of signing together. It is also a version of events in which he (and the other Defendants) have vested interests, making it less credible. I reject it but do consider it again later.

43.5. Finally, Scenario A is what I have found happened on the balance of probabilities On 17th September 2008, probably at Centre Court, all three guarantors signed the Loan and Guarantee together, 'witnessed by' (i.e. observed by) Ms Money who then signed to say so in all their presence. This scenario is the most consistent with the contemporary documents, the inherent probabilities and common-sense.

I stress I find Scenario A happened on the balance of probabilities, it is not a '*Popi M'* 'least unlikely scenario', but one I accept was more likely than not on all the evidence.

44. Finally, on the Guarantee point, on 18th September 2008, I accept Mr Weatherer received the completed Loan and Guarantee paperwork and as Mr Barrett said, checked it had been completed correctly, which it had although the date needed to be entered, which he did. I accept that on the face of the documents, for the reasons I have given, Mr Weatherer probably assumed all the guarantors and Ms Money had signed in each other's presence, although he cannot recall that. Indeed, I also find that if he had not been reassured the Guarantee was properly executed, he would have sent it back to the Defendants for re-signature; and such was their need for money in the Credit Crunch, they would have re-signed it, making it clear they signed in each other's presence. It would have been a small price to pay for a much-needed injection of money at a very difficult time when if the Claimant had backed out, Rhombus would have had few alternatives. In any event, as Mr Weatherer was satisfied the Guarantee had been executed properly and delivered as a deed by all the Defendants and witnessed by Ms Money, he arranged for a bank transfer of the £100,000 on 1st October 2008 (pg.168). Weeks later the Claimant loaned to Mr Mason's son each guaranteed (pg.316)

45. I finally turn to my remaining findings of fact about 2008-2020. This is a long period but I can take it very quickly, as my findings only relate to the 'deliberate concealment' issue which I have already partly dealt with and which is a fall-back argument on Estoppel. Indeed, it is important that my findings of fact on this later period are brief because they pose a risk of trespassing on trial and creating inadvertent issue estoppel. For example, I simply note that no payment was made on the Partner's Loan in September 2008 or thereafter, but interest continued to accrue up to 2019 (pg.270). I also note WWB's various credits and debits with Rhombus in 2009 (pg.169-74). I have already addressed WWB's 2010 accounts and the £175,000 loan from Mantool which Mr Miner accepted was not from the Claimant (pgs.185-191, 201-216), where the guarantee used by Mr Weatherer to sign himself is the same as in this case (pg.216).

46. I also noted Mr Weatherer prepared Rhombus' accounts in 2010 and 2011. As Mr Miner said, it was seemingly contrary to good accountancy practice for Mr Weatherer to audit accounts in a business which was in debt to a company of which he was a director (but that is a matter for a professional regulatory body, not the Court). However, all I am deciding is if Mr Weatherer deliberately concealed his directorship and I find on the balance of probabilities that in fact he did not do so from 2008-2016:

46.1 I have already made my findings on 'deliberate concealment' as at the date of the Rhombus Loan and Guarantee in 2008. No particular points were made about 2009, but reliance was placed by the Defendants on Rhombus 2010 accounts. However, Mr Weatherer did not prepare those until September 2011 (pgs.175-184 esp. pg.180). In August 2011, Mr Barrett had emailed Mr Weatherer to discuss repayment of the loans and Mr Weatherer stated he *'looked forward to receiving his suggestions'* (pg.219). Again, by that stage at the latest, Mr Barrett as well as Mr Brereton were treating Mr Weatherer as the Claimant's representative and the person within it to negotiate with. Yet they were perfectly happy for the same person to prepare Rhombus' accounts. Even if Mr Weatherer should have formally disclosed his directorship of the Claimant to Mr Barrett as a matter of good accountancy practice, it is difficult to see it would have made any difference. Certainly, I do not accept that Mr Weatherer deliberately concealed it.

46.2 Mr Weatherer prepared Rhombus' 2011 accounts in January 2013 (pgs.192-200 esp. pg.196). By then, there had been no payment on the Partners' Loan since 2007 (pg.270) and no payment on the Rhombus Loan at all (pg.262). In January 2013, Mr Barrett emailed Mr Weatherer (pg.222) to say the Bulgarian market (for the Partners' Loan) was very flat and that Rhombus was likely to be liquidated after the bank's receivers sold Centre Court (its only asset for its own loan as Mr Brereton accepted), but offered to 'sell' its tax losses to the Claimant. This is what prompted Mr Weatherer's letter about the Partners' Loan on 30th January 2013 I quoted near the start of this judgment (pg.223):

> *"…[H]aving spoken to Euro Securities in respect of this matter, I have been instructed to inform you of the following….I am under pressure by the company to get this matter sorted and would be grateful for a schedule from you in respect of repayment of this loan to clear [it]. Euro Securities…. are looking for this loan to be repaid within the next 6 months."* (My underline)

It also prompted Mr Weatherer's letter on Rhombus on 31st January 2013 (pg.227-8). In this, he referred to the Claimant as his 'client' which was not interested in using Rhombus' tax losses and invited repayment of the then balance of £134,371 (resending a copy of the Guarantee, which Mr Barrett did not query). There was no suggestion that any of this made it inappropriate to handle Rhombus' tax affairs itself – indeed Mr Barrett bought them up as I said and again it is difficult to see disclosure of directorship would make any difference.

46.3 Those negotiations over the two loans continued throughout 2013 (pgs.232-5). However, in September 2013 the 5-year anniversary of the Rhombus Loan and Guarantee and 10-year anniversary of the Partners' Loan, Mr Weatherer's tone on repayment briefly hardened. On 23rd September, he wrote the same letter to Mr Barrett (pg.238), Mr Brereton (pg.239) and Mr Mason (pg.240) stating the six months since his January letter had elapsed and *'the company hereby requests'* the loan be repaid within 30 days and threatening legal action on the guarantee. As I noted near the start, this prompted a phone call between Mr Barrett and Mr Weatherer (pg.241) the former reported to Mr Brereton and Mr Mason in the email where he referred to Mr Weatherer as a 'creditor' (pg.242-3). This shows that even if Mr Weatherer did not mention it, he was hardly 'deliberately concealing' his directorship at this stage and the idea that he was 'deliberately concealing' that he was the Claimant's representative is simply hopeless. Mr Barrett made proposals on raising funds including selling property (pg.245).

46.4 This situation continued in the same vein in 2014-2016. In 2014 Mr Barrett simply kept emailing him to update him on potential property sales to repay the loan e.g. in March 2014 (pgs.248-9) and Mr Weatherer gave an updated balance of £165,236 for the (guaranteed) Rhombus Loan and £141,344 for the Partners' Loan (i.e. the Bulgaria loan) (pg.251). Mr Barrett emailed with little to update (save his poor health) in May 2014 (pg.252) and August 2014 (pg.253). In September 2015, on the 7th anniversary of the Rhombus Loan and Guarantee (which is when the Defendants now say limitation expired on it but they did not do so at the time) and 12th anniversary of the Partners' Loan, Mr Weatherer chased Mr Barrett (pg.254) saying he was getting pressure on the loans and later gave updated balances of £183,416 for the Rhombus Loan and £148,119 for the Partners Loan and Mr Barrett said they were looking at individual solutions (pg.257). In November 2016, Mr Weatherer again chased Mr Barrett who again responded in similar vein with plans to sell properties etc (pg.258).

46.5 Accordingly, it could not have been clearer from 2008 to 2016 that Mr Weatherer was acting as the Claimant's *representative*. It went further, as previously having issued cheques himself, he was now considered by the Defendants effectively as their creditor. It is true he did not specifically mention his directorship but given all of this context, I find he did not 'conceal' it, at least 'deliberately', especially given my finding he also told Mr Brereton he was the director briefly in 2002.

47. However, as I indicated at the start, from 2017 to 2019, Mr Weatherer was at times evasive – not about being the Claimant's representative, which was obvious – but about being its director, at times when he might have been expected to mention it but did not. In September 2017– the 14th anniversary of the Partners' Loan and 9th anniversary of the Rhombus Loan and Guarantee, Mr Barrett asked for some information on loans relating to Mr Mason, which appears to relate to a HMRC investigation into his tax affairs. Mr Weatherer replied on 25th September 2017 (pgs.317-8) listing various lenders, including Mantool. However, Mr Weatherer said the Claimant's 'directors' had initially been Mr Byers and Ms Elliot but no further business had been done with them since April 2009 and that to find out more its current 'directors' would need to be contacted. However, as Delaware Tax records from 2017 show (pg.343), Mr Weatherer was still the Claimant's director at that point. In cross-examination, he suggested he meant 'directors' in terms of the people running the administrative side of the Claimant, which was not himself. I do accept that this is genuinely what he meant, but nevertheless, Mr Weatherer here did 'deliberately conceal' his directorship of the Claimant. However, this genuinely reflected how he saw himself more as the Claimant's representative and those running its administration as its directors, just as I accept he had told Mr Brereton back in 2002. It was plainly poor accountancy practice and it was 'concealment' of his directorship and apparently 'deliberate' as I have said, but it was not *dishonest*. I return to whether it was 'unconscionable' in Equity later on.

48. In 2018, the HMRC tax investigation into Mr Mason continued and on 15th August 2018, there was a meeting between Mr Weatherer, a WBB colleague, Mr Mason and Mr Barrett (pgs.319-335). HMRC were still investigating Mr Mason's involvement in loans from the Claimant and other lenders and had become concerned that WBB had misled them (this has not been alleged against Mr Weatherer himself). Despite these very uncomfortable questions, Mr Weatherer did not bring up his directorship of the Claimant to flag up a potential conflict of interest. However, again whilst this is poor accountancy practice, I do not accept this was 'deliberate concealment' from Mr Mason and Mr Barrett who after all had previously called him their 'creditor'. Indeed, sure enough, within a few weeks, Mr Weatherer was chasing Mr Barrett again for repayment of the Rhombus Loan and Guarantee to the Claimant (pg.263) and Mr Barrett replying to indicate Rhombus had an admission of blame for the earlier undervalue sale of Centre Court which could possibly cover debts (pg.266).

49. In 2019, relationships changed between the parties and they headed towards litigation:

49.1 Rhombus (which had earlier entered a CVA) was restored to the Register by the Court on 24th January 2019 (pg.267) to pursue that claim about Centre Court. At the same time, presumably concerned by WBB's handling of his tax affairs, Mr Mason's solicitors sent WBB a letter of claim for professional negligence. Mr Mason contends this is what prompted a more aggressive claim for repayment by Mr Weatherer (pg.82), but all he appears to have done on 30th April 2019 (pgs.269-71) is to demand some monthly repayment given he had not heard anything further since November 2018 and the Partners' Loan was by then up to £133,167. Mr Weatherer again chased it relatively gently in May 2019 (pg.271).

49.2 If there was a turning-point in this case in 2019, it was from the Defendants. They had not challenged the loans were due or asked any questions about the Claimant throughout nearly over 15 years into the Partners' Loan and over 10 years into the Rhombus Loan and Guarantee. Yet suddenly in May 2019, Mr Barrett asked for the company details of the Claimant as he could not find it on the Delaware register (pg.272). Initially, Mr Weatherer seemed to ignore this, asking for an update on repayment (pg.273). However, Mr Barrett pressed and Ms Parsons from WBB (it seems the witness to Mr Mason's guarantee with his son back in 2008) sent him some details in August (pg.274). There was some discrepancy between company numbers which I say now is a matter for trial.

49.3 What is relevant now is what happened when Mr Barrett raised it (pg.275). In Mr Weatherer's response on 15th August 2019 (pg.276), he was firm in not engaging with this and on 27th August chased a response saying the Claimant could call in the loan and he was trying to help (pg.277). However, Mr Barrett still pressed for more company details (pg.278). That day, Mr Weatherer wrote an uncharacteristically aggressive response purporting to set out the Claimant's standing to sue and its corporate details. But he did not mention as he could have done that he was its director (pg.279). This is rather different to the 2017 and 2018 instances. In this email, Mr Weatherer effectively tiptoed around questions of his *formal* directorship which had nothing to do with whom he considered the 'directors' to be *practically*. But when the Defendants' solicitors wrote to him in September 2019 calling him the Claimant's 'agent' (pg.281) in his response in January 2020 (pgs.285-290), he finally 'clarified' he was its director (pg.286). So, there was brief 'deliberate concealment', but Mr Weatherer soon came clean.

50. Therefore, save for those limited and qualified findings of 'deliberate concealment' of his directorship by Mr Weatherer in 2017 and 2019, I reject that allegation against him. Indeed, it is telling that even after Mr Weatherer 'clarified' his directorship in January 2020, it did not provoke any real reaction or accusation in the Defendants' solicitors' correspondence in early 2020. Indeed, rather than continuing to push the Claimant's corporate identity and allege 'deliberate concealment' by Mr Weatherer of his directorship, the Defendants' solicitors changed tack to take the much more simple limitation point in their letters in March and May 2020 (pg.295-297). Mr Weatherer then sent final statements on the loans in June 2020 (pgs.336-338) confirming the balance of the Partners' Loan was £140,967 and the Rhombus Loan (and so the Guarantee) was £240,996. In August 2020, the Claimant then issued this claim (pg.5).

**Did the Defendants sign the Guarantee in the 'presence of a witness' ?**

51. Before I go back to Victorian case-law on 'attestation', I remind myself that this case concerns interpreting a modern statute: s.1(3) Law of Property (Miscellaneous Provisions) Act 1989 ('LPMPA'). The modern approach to statutory interpretation was summarised by Lord Hodge in *R(O) v SSHD [2022] 2 WLR 343 (SC)* at ps.29-31:

> *"29 The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': Black-Clawson International Ltd v Papierwerke [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context (R v DETR, Ex p Spath Holme [2001] AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."__*

*30 External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty….But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.*

*31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in Spath Holme 396, in an important passage stated: "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House….Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."*

52. With that in mind, I turn to s.1 LPMPA (as amended) so far as material, not just s.1(3):

***"1 Deeds and their execution***.

*(1) Any rule of law which— (a) restricts the substances on which a deed may be written; (b) requires a seal for the valid execution of an instrument as a deed by an individual; or (c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed, is abolished.*

*(2) An instrument shall not be a deed unless— (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.*

*(3) An instrument is validly executed as a deed by an individual if, and only if— (a) it is signed— (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and (b) it is delivered as a deed…"*

*(4) In…(2) and (3) above "sign", in relation to an instrument, includes making one's mark on the instrument and "signature" is to be construed accordingly.*

*(4A) (3)…applies [to an] instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual…."*

However, the crucial aspect of s.1 LPMPA in this case is s.1(3)(a)(i) which I repeat:

*"(3) An instrument is validly executed as a deed by an individual if, and only if— (a) it is signed (i) by him in the presence of a witness who attests the signature…"*

53. The first issue I am consider is the proper interpretation of the first half of s.1(3)(a)(i) LPMPA: namely the meaning of a deed being *'signed by [an individual] in the presence of a witness'*. In seeking 'the meaning of the words Parliament used' as Lord Reid put it in *Black-Clawson*, a helpful starting point is the ordinary meaning of those words. The word 'signed' in s.1(3)(a)(i) is defined by s.1(4) to include 'making a mark'. However, the phrase 'in the presence of' and the word 'witness' are not defined by s.1. They are not synonymous with each other. One can be 'present' at an event without being a 'witness' to it. I mentioned earlier a case where a blind person was held to be unable to be a 'witness' signing of a will. As I discuss later, s.9 Wills Act 1837 differs from s.1(3) LPMPA, but amongst other requirements, it requires a testator to sign a will *'…in the presence of two or more witnesses present at the same time…'* The case was *In The Estate of Gibson [1949] P 434*, when Pearce J said at p.436-7:

*"There is no direct authority on the capacity of a blind man to witness a will. The normal meaning of "attesting" is testifying or bearing witness to something and the normal meaning of "witness" is one who is a spectator of an incident or one who is present at an incident. Is mere presence, without the faculty of sight, enough to constitute a witness for the purposes of s. 9 of the Wills Act, 1837 ? ….In*

*the light of common sense, and without any authority, I should be inclined to hold that for the purposes of the Act, a "witness" means, in regard to things audible, one who has the faculty of hearing, and in regard to things visible, one who has the faculty of seeing. The signing of a will is a visible matter. Therefore, I think that a will is not signed "in the presence of" a blind person, nor is a blind person a witness for the purposes of the section…."*

However, it is important to be clear about the weight I place on *Gibson*. I do not say an earlier case on a different statute defines the meaning of a later one, but rather that it clarified the meaning of ordinary words or phrases which a later statute used. For similar reasons, the signing of a deed is a visible matter. The ordinary meaning of being a 'witness' to the signature in a deed is not just to be 'present' at it - but asleep or engrossed in watching television (to pick extreme examples to make the point) - but to 'observe', 'watch' or 'see' the signature(s) being made. Moreover, the signature on the deed should be 'witnessed' in that sense, rather than 'recognised as the usual signature'. A 'witness' need not be familiar with the party's signature: the role is to 'witness' it.

54. However, as Lord Hodge said in *R(O)* at p.29, 'the meaning of the words Parliament has used' depends on their meaning not just in isolation, but in their statutory context:

54.1 In relation to s.1(3)(a)(i) LPMPA and the meaning of *'signed by [an individual] in the presence of a witness',* that witness must be able to 'attest the signature' under the other half of s.1(3)(a)(i) (which I will come back to in much more detail, but I paraphrase for now as 'signing to confirm witnessing the signature'). Likewise, a party can 'sign by direction' in the presence of two attesting witnesses under s.1(3)(a)(ii) LPMPA. In either case, the point of 'witnessing' the signature is to be able to 'attest' to that on the deed. That is consistent with a witness not just being present for the signature, but also actually observing, watching or seeing it, so they can sign to confirm ('attest') that they did so. However, it is not necessary for the witness to be familiar with the 'usual signature' of the party (after all, it can just be their 'mark' under s.1(2) LPMPA), nor even to know them. s.1 LPMPA makes no requirement as to identity of the witness, or their connection or otherwise with the signatory or the deed itself. It is unlike s.9 Law of Property Act 1969 of Western Australia which states that a witness cannot be a 'party to the deed' (considered in the important Western Australian case of *Netglory v Caratti [2013] WASC 364* to which I return later).

54.2 Lord Hodge in *R(O)* p.30 also said that 'external aids' such as Law Commission reports can shed light on a statutory provision's 'mischief' it was intended to address and its 'purpose'. I was taken (and will return to) the Law Commission report from 1987 that led to the enactment of the LPMPA. At ps.2.12-14, the report noted the pre-LPMPA law on attestation and referred to *Gibson* for one of the two requirements of attestation (I return to the other) as it being *'necessary for the witness actually to observe the event'*. This is another reason to look to *Gibson* for assistance with s.1(3). The report recommended 'formalising present practice' for attestation of deeds - signatures being witnessed and attested by at least one person - but avoiding additional complications: e.g. other requirements for wills, precluding parties from being witnesses (as in Western Australia), or prescribing particular attestation clauses that could be written wrongly etc. This is entirely consistent with the interpretation of *'signed by [an individual] in the presence of a witness'* as a witness being present and observing signatures being made, but not necessarily being familiar with the signatory or signature. For good measure, it is also consistent with the more recent Law Commission report from 2019 which considered that 'in the presence of a witness' means physical as opposed to remote presence, so deeds cannot be witnessed remotely.

54.3 Finally, this is consistent with the purpose of s.1(3)(a)(i) LPMPA summarised by Pill LJ in *Shah v Shah [2001] 3 WLR 31 (CA)* at p.29 (again, to which I return):

> *"[T]he requirement for attestation is integral to the requirement for signature in that the validity of the signature is stipulated to depend on the presence of the attesting witness. I also accept attestation has a purpose in that it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed…..It gives some, but not complete, protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation. It gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary. A person may aver in opposition to his own deed that he was induced to execute it by fraud, misrepresentation or…duress…the attestation requirement is a safeguard."*

Again, that is consistent with the interpretation of s.1(3) as requiring the witness not just to be present but to observe the signing and to attest it for those reasons. Tellingly, Pill LJ did not suggest a witness' role was to *identify* the signature.

55. I therefore turn to examining my findings of fact against this interpretation of 'a deed being *'signed by [an individual] in the presence of a witness'* under s.1(3)(a)(i):

55.1 My finding of fact on the balance of probabilities as to the circumstances of the execution of the Guarantee by the Defendants is summarised in my 'Scenario A': on 17th September 2008, probably at Centre Court, all three guarantors signed the Loan and Guarantee together, 'witnessed by' (i.e. observed by) Ms Money who then signed to say so in all their presence. This was entirely compliant with this part of s.1(3)(a)(i) and I accept the Claimant has proved validity of the Guarantee in that respect. Indeed, were this my finding of fact, Mr Bradshaw accepted that.

55.2 However, my conclusion in this respect would be the same even if I am wrong about my findings of fact and the Guarantee had actually been executed in the circumstances of what I have called 'Scenario B': Mr Brereton's 'busy office scenario' where all the Defendants *separately* signed on 17th September 2008 at Centre Court, each individually witnessed (i.e. 'observed') by Ms Money but not together and she signed to say so the same day. Whilst as Mr Bradshaw submitted, this raises more complex issues on 'attestation', he did not dispute this scenario still involved each Defendant signing *'in the presence of a witness'*.

55.3 However, Mr Bradshaw would dispute that this would apply to 'Scenario C': all signed the Guarantee and Loan on 17th September: Mr Brereton and Mr Barrett at Centre Court, each witnessed by Ms Money, but Mr Mason signed at home with Mr Brereton. If so, Mr Brereton and Mr Barrett would still have signed the Guarantee *'in the presence of a witness'*. Moreover, Mr Mason would have signed at home 'in the presence of' and observed by *Mr Brereton* (although the latter does not say that happened). Of course, Mr Brereton is a party to the deed, which would rule him out as a witness in Western Australia and in the common law of attestation of deeds: *Seal v Claridge (1881) 7 QBD 516*. However, as the Law Commission report specifically considered including such a requirement in s.1(3) and did not do so, Parliament cannot have intended (in the sense in *R(O)* p.31) to include implicitly a prohibition from old case-law it did not explicitly mention and which the Law Commission report leading to the statute considered but decided against. Statutes are not generally limited by previous case-law, they frequently wish to alter it – as indeed did s.1(1) LPMPA with the 'sealing' of deeds. Of course, Mr Brereton did not 'attest' Mr Mason's signature, but that goes to the second formality issue relating to 'attestation', to which I now turn.

**Did Ms Money 'attest the signature' on the Guarantee of all of the Defendants ?**

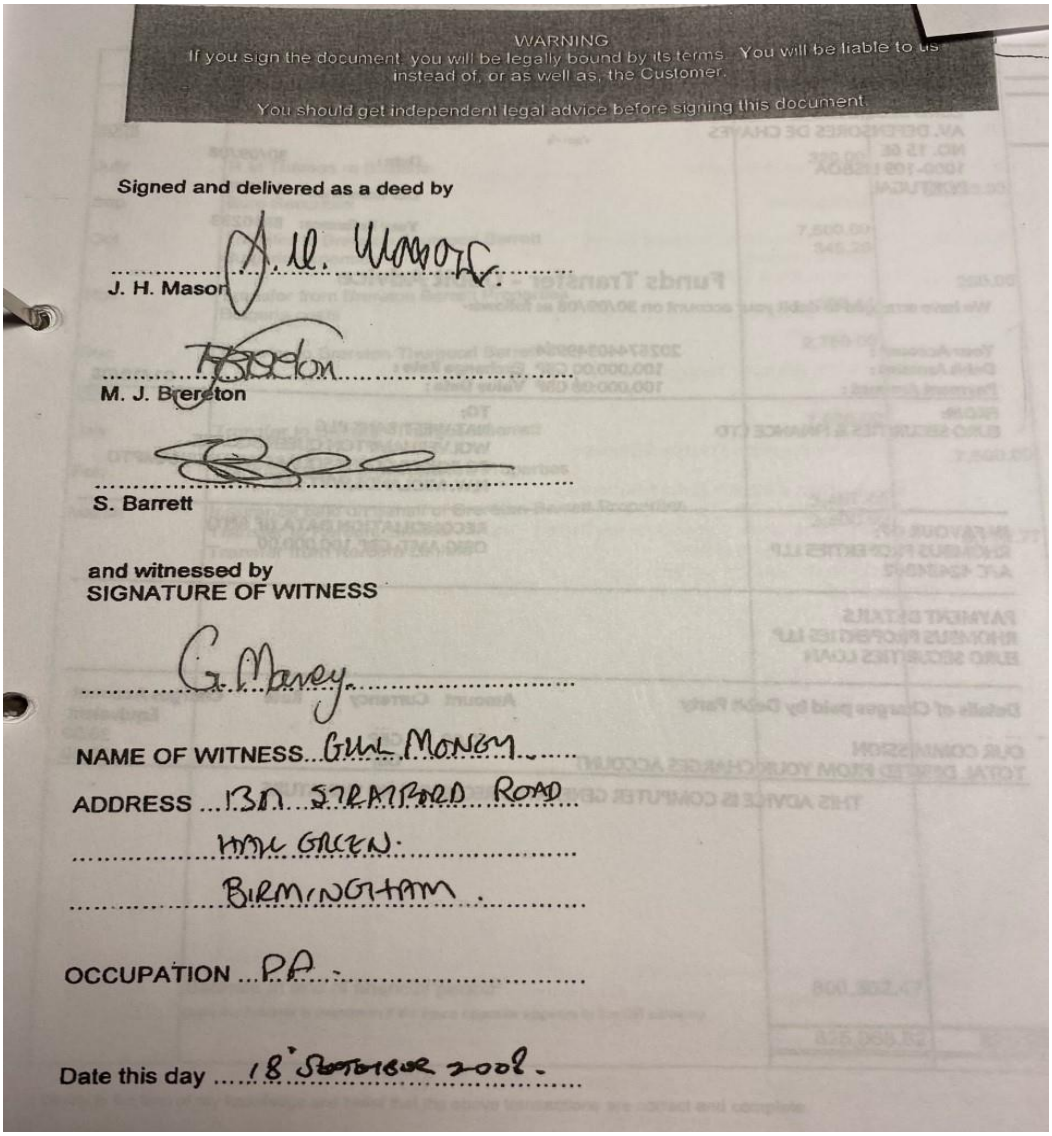
56. This issue stems from the second half of s.1(3)(a)(i) LPMPA: whether the 'witness' in whose presence the individual 'signed', *'attests the signature'*. Again, turning first to the ordinary meaning, 'signature' is an ordinary word and in any event, is defined by s.1(4) LPMPA to include the party simply making a mark. This issue hangs on the meaning of 'attestation': not an ordinary word and not defined by the LPMPA. Indeed, there is no real clue as to the meaning of 'attest' anywhere in that short statute.

57. Given that ambiguity, it is particularly helpful and indeed legitimate to go back to the 1987 Law Commission report, which at p.2.13 in recommending that 'a signature on a deed should be witnessed and attested by at least one person' added this footnote:

> *"'Attestation' involves more than simply witnessing the execution of the deed; it also includes the subscription of the witness' signature following a statement (attestation clause) that the document was signed or executed in his presence (Re Selby-Bigge [1950] I All E.R. 1009). It is necessary for the witness actually to 'observe' the event (….Gibson…). These two requirements are essential as they preclude the necessity for later requiring parol evidence regarding the execution of the document, which would lead to great difficulties after a long lapse of time when there is the possibility that one or more of the parties may have died."*

I have already referred to the relevance of *Gibson* to the first aspect of s.1(3)(a)(i) *'signed…in the presence of a witness'*. *Selby-Bigge* was another will case which held the clause in a will which referred to the witnesses 'attesting' the testatrix's signature was valid as it necessarily included a reference to the witness not only observing it but also 'subscribing' it i.e. signing it to say they had done. Hodson J in *Selby-Bigge* referred to dictionaries defining 'attest' as 'bearing witness' or 'affirming the truth' of something (similar to the definition of 'attest' Pearce J gave in *Gibson*), but he stressed in law it also implied the act of writing/signing by the witness. The Law Commission (including such legal luminaries as Beldam J, as he then was; and Professor Brenda Hoggett, now better known as Lady Hale) therefore summarised the two requirements of 'attestation' as (i) *'witnessing the execution of the deed'*, in the *Gibson* sense of *'observing the event'* (which I have already addressed); and (ii) *'subscription* (i.e. writing) *of the witness' signature following a statement (attestation clause) that the document was signed…in his presence'* in the sense discussed in *Selby-Bigge*. It also explained its purpose being to avoid oral evidence about execution much later.

58. Mr Bradshaw submitted the attestation of the Guarantee by Ms Money in this case did not comply with the requirements of 'attestation' in s.1(3)(a)(i). I repeat the page again:



WARNING
If you sign the document you will be legally bound by its terms. You will be liable to us instead of, or as well as, the Customer.
You should get independent legal advice before signing this document.

Signed and delivered as a deed by

J. H. Mason

M. J. Brereton

S. Barrett

and witnessed by
SIGNATURE OF WITNESS

G. Money.

NAME OF WITNESS GILL MONEY

ADDRESS 130 STRAFFORD ROAD
HOLL GREEN
BIRMINGHAM

OCCUPATION PA

Date this day 18th SEPTEMBER 2008.

Mr Bradshaw essentially made three arguments why there was no valid 'attestation':

58.1 Firstly, the attestation clause was invalid because it did not confirm that any guarantor had 'signed in the presence of a witness' as the Law Commission said.

58.2 Secondly, in any event, the attestation clause was invalid as it was insufficiently clear from it that Ms Money had witnessed all the Defendants' signatures. (Mr Bradshaw deployed this point under estoppel, but I prefer to address it now because it actually relates to whether the formalities of s.1(3)(a)(i) were met).

58.3 Thirdly case-law on the meaning of 'attestation' (distilled in the *Netglory* case in Australia) does not just require the party to sign in the witness' presence, but also for the witness to sign in the party's presence, that he argued Ms Money did not.

59. I can deal with the first point briefly, since as I have already discussed the attestation clause 'witnessed by'(at least in the absence of any contrary indication) presupposes Ms Money was present. This point reads too much into the Law Commission report which made it clear at p.2.14 it was not prescribing any particular attestation clause and nor indeed does s.1 LPMPA. In my respectful opinion, all the report meant was that the 'attestation clause' had to confirm a valid attestation, not that that clause explicitly had to use any particular words. Indeed, *Selby-Bigge* which the report refers to for that proposition was itself a case about words being read into an attestation clause. In *Selby-Bigge*, the two witnesses to the testatrix's signature signed this clause: 'Signed by the testatrix in our presence and attested by us in the presence of her and each other'. Hodson J held that was valid compliance with the Wills Act 1837 which required witnesses to 'attest' and 'subscribe' because 'attestation' presupposed 'subscription'. Likewise, here Ms Money signing to say she 'witnessed' the signatures presupposed that she was 'present' at them, as 'witnessing' is *more specific*, as explained in *Gibson*. Indeed, I have found as a fact Ms Money was indeed 'present' in Scenarios A and B. For good measure, this is consistent with other authority on attestation. In *Selby-Bigge,* Hodson J noted *Burdett v Spilsbury (1843) 8 ER 772*, where the Lords held witnesses to a will who 'signed as a witness' validly 'attested', as Lord Lyndhurst said at p.801:

> *"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness."*

Similarly, 'attest the signature' in s.1(3)(a)(i) only requires a 'witness' to the party signing in their presence to 'sign as a witness' in order to 'attest'. Ms Money here did.

60. Mr Bradshaw's second point (albeit transported here from 'estoppel') I need to deal with at slightly more length. He articulated it helpfully in his Skeleton Argument:

> *"Of itself s.1(3) is silent as to whether a single witness may attest multiple signatures by a single signature of his or her own, as is purportedly done in the Guarantee. Absent such statutory constraint, HM Land Registry's Practice Guide 8 on the Execution of Deeds states as follows at section 2.1.2:*
>
> > *We look to see that a witness has signed the deed, that their signature clearly records the witnessing of the signing of the deed by the individual concerned... The same witness may witness each individual signature, but each signature should be separately attested, unless it is absolutely clear by express wording on the face of the attestation that the witness is witnessing both or all signatures in the presence of the named signatories.*
>
> *The Defendants submit that this interpretation is not only correct as a matter of policy, but is necessarily correct.*

> *As set out in the line of authority referred to in Netglory, the rationale behind attestation has, since the Statute of Frauds 1677, been that the witness is confirming by his or her attestation that the person executing the deed actually did so (Netglory, paragraphs 130, 134, 137, 140, 142, 144). Where a single witness attests the making of one signature, there is no ambiguity about what is being attested to. Nor indeed is there any ambiguity if two witnesses attest, as is required by s.1(3)(a)(ii) LP(MP)A 1989 where a deed is executed at the direction of a person (e.g. where that person cannot physically sign the deed). The two witnesses are attesting to a single event. By contrast, where one witness purports to attest two or more signatures executing a deed, it is quite unclear and ambiguous, unless the very specific wording alluded to by HMLR's practise guidance is adopted, as to what is being attested to. The attestation might equally well relate to just one of the signatures, in which case it would be impossible to say which of the signatures comprised proper execution of the deed. Accordingly, the Defendants submit that a deed with multiple signatures purportedly attested by a single witness cannot, without further clear wording that is not present in this instance, be on its face a properly executed deed."*

61. I need not (yet) turn to *Netglory,* since I am prepared to assume for the sake of *this* argument that '*the rationale behind attestation [is] that the witness is confirming by his or her attestation that the person executing the deed actually did so'.* The Land Registry guidance gives a range of suggested wordings for attesting multiple signatures, but it says *'Signed as a deed by A and B in the presence of X'* is not acceptable as it not clear that both A and B have signed in the presence of the sole witness X, whilst *'Signed as a deed by A and B <u>both</u> in the presence of X'* is acceptable. Mr Bradshaw also argued the Claimant could and should have used the same pro-forma for the Guarantee in September 2008 that it used for Mr Mason and his son's guarantee in October 2008 (pg.316), providing for a similar witness attestation as the Guarantee, but separately under each guarantor signature. I accept that it is probably a better precedent for multiple-signatory guarantees as it avoids this argument. However, it notably goes further than the simpler 'acceptable' clause in the Land Registry guidance where the addition of the word 'both' turns an attestation clause they will not accept into one that they will. One can always add verbiage to precedents to avoid arguments, but as Hodson J said in *Selby-Bigge* at 1010G, skilled practitioners prefer to simplify.

62. In any event, the question is not which is the best precedent for a multiple-signatory, single-witness deed attestation clause. It is whether this one complied with s.1(3)(a)(i): *"…it is signed by him in the presence of a witness who attests the signature…"* in that the clause attested multiple signatures collectively rather than the individual signatures separately. Perhaps since many clauses in these circumstances would follow the Land Registry template, I was not taken to any authority on this specific point. It does not appear to be addressed in *Emmet & Farrand on Title (2022)* at p.20.015 on attestation. Neither is it addressed explicitly in *'Formation and Variation of Contracts' (2018)* by Prof. Cartwright at p.7-11. But in a footnote, he mentioned comments of Geraldine Andrews QC (then co-author of Law on Guarantees and now Andrews LJ) at ps.11-12 of *Darjan v Hurley [2012] 1 WLR 1782 (HC)* (a case about a lease signed as a deed):

> *"11 Mrs Hurley also raises a point in respect of the lease itself, namely, that it was not validly executed as a deed and thus it fails to comply with the requirements of section 1(3)(a)(i) [LPMPA]. On Mrs Hurley's evidence, the lease was not 'signed by her in the presence of a witness who attested the signature'. The signature which appears below hers on the lease was appended by an unidentified individual on some subsequent occasion. The only signatures that she saw on the lease at the time when her husband asked her to sign it were those of two directors of Darjan (…in the space for the landlord to sign), and there was nobody present to witness it. Indeed, that was a point that she made to her husband at the time, when expressing her disquiet about signing the document.*
>
> *12 I observe that no one appears to have witnessed Mr Hurley's signature on the lease either. Although Darjan would not necessarily have known that the signature below Mrs Hurley's was not that of an attesting witness, the absence of a witness to Mr Hurley's signature appears to have been overlooked by everyone. On the face of the lease, it does not appear to be possible to interpret the signature of the unidentified person as an attestation of the signatures of both the Hurleys. Thus, the deficiency in the execution of the lease as a deed is manifest, and it does not comply with requisite statutory requirements."* (My underline).

Andrews LJ (as she now is), with her vast experience in this field, plainly there thought the issue was not whether one witness *can in principle* attest collectively multiple party signatures, but whether it was *possible on the face of that deed* to interpret them as having done so (finding it was not). By contrast, on the face of this deed it is entirely possible: that is just how I have interpreted Ms Money's signature on this Guarantee.

63. However, as I was not addressed on *Darjan*, in fairness, I will consider the issue as one of statutory interpretation of s.1(3)(a)(i) LPMPA. In my judgment, Ms Money signing under 'and witnessed by', itself under the three signatures of the three guarantors, themselves under 'signed and delivered as a deed by' was a valid 'attestation' of all three signatures, which complied with s.1(3)(a)(i) LPMPA for three reasons:

63.1 Firstly, primacy should be given to the actual words of s.1(3)(a)(i) LPMPA, since as Lord Hodge said in *R(O)* at p.29: "*They are the words which Parliament have chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."* As Mr Bradshaw fairly says: "*Of itself s.1(3) is silent as to whether a single witness may attest multiple signatures by a single signature of his or her own".* I agree: *'a witness who attests the signature'* does not mandate Land Registry-style 'explicit multiple attestation'. Moreover, as Mr Aldis said, the Land Registry's requirements are just its statement of best practice: it is entitled to 'gold-plate' the statute and has. In interpreting the LPMPA, although I was not addressed about it, I am entitled to have regard to s.6 Interpretation Act 1978: "*In any Act, unless the contrary intention appears….(c) words in the singular include the plural…"* I have already explained in answering the first argument why I consider that an attestation clause where a witness signs to say they have 'witnessed' the signature of a party 'signing and delivering as a deed' implies (in the sense in *Selby-Bigge*) they were 'in their presence' at that time – for similar reasons as in *Gibson*. If that is true of one 'signature', given s.6 Interpretation Act, in the absence of contrary intention in s.1(3)(a)(i) LPMPA, it is true of more than one signature. So, if a witness signs 'witnessed by' under three signatures in a deed, that witness clearly 'attests' *all three signatures*. If Parliament had intended (in the sense discussed in *R(O)* p.31) to *require* Land Registry-style 'explicit multiple attestation' by a witness of multiple party signatures, it would have made clear its 'contrary intention' to s.6 of the 1978 Act. It could have done so in a number of ways, but the clearest way would have been to provide that "*An instrument is validly executed as a deed by an individual if, and only if— (a) it is signed— (i) by him in the presence of a witness who attests the signature* <u>*or that individual's signature if there is more than one*</u> [perhaps then adding] <u>*individual signing*</u>*."* Parliament did not take that course and '*a witness who attests the signature'* can include 'a witness who attests the signatures' without needing any particular form of words to do so.

63.2 Secondly, as Lord Hodge said in *R(O)* at p.29: "*A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections."* Interpretation of s.1(3)(a)(i) LPMPA as permitting a witness to 'attest the signature' of more than one 'individual' by signing under 'witnessed by' under all the individuals' signatures is consistent with s.1(2) and (3) together:

> *"(2) An instrument shall not be a deed unless— (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it…..; and (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.*
>
> *(3) An instrument is validly executed as a deed by an individual if, and only if (a) it is signed (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and (b) is delivered as a deed"*

As I have underlined, s.1(2) LPMPA makes it clear an instrument may be signed as a deed by multiple parties who are making it and may be a deed if validly executed by one or more of them. This is the reason why s.1(3) LPMPA refers to the requirements of execution for an individual – i.e. a single individual or one of several: ss.1(2)-(3) envisage that a deed may be signed by multiple 'individuals'. However, Parliament has not provided that such a deed must be "*…signed…. by him in the presence of a witness who attests [that individual's] signature."* Although Parliament envisaged several parties making a deed, it did not prescribe any particular form of 'attestation' in those circumstances (even if the Land Registry, to avoid arguments, has done so). Therefore, if someone is a valid 'witness' to several signatures on a deed, he can validly attest them *collectively*.

63.3 Thirdly, though this is not specifically considered in the 1987 Law Commission report, it does describe the 'mischief' which attestation addresses, namely precluding the necessity for oral evidence after a long lapse of time, but it also chose not to prescribe any particular attestation clause. Mr Bradshaw seeks to re-introduce by the back door a requirement the Law Commission shut out the front. It is always possible for clever lawyers to find subtle ambiguities, but on the face of the Guarantee Ms Money plainly attested she had 'witnessed' all the signatures (that is what I have found happened), which addresses the purpose of attestation noted in *Netglory*: for the witness to *'confirm by attestation the person executing the deed actually did so'.* Here, she confirmed that the persons executing it did so.

64. I turn to examining my findings of fact against this interpretation of 'a deed being *'signed by him in the presence of a witness who attests the signature'* under s.1(3)(a)(i) LPMPA (with apologies for a degree of repetition from earlier in the judgment):

64.1 My finding of fact on the balance of probabilities as to the circumstances of the execution of the Guarantee by the Defendants is summarised in my 'Scenario A': on 17th September 2008, probably at Centre Court, all three guarantors signed the Loan and Guarantee together, 'witnessed by' (i.e. observed by) Ms Money who then signed to say so in all their presence. This was entirely compliant with this part of s.1(3)(a)(i) because Ms Money 'attested the signature(s)' of all three by doing so. The Claimant has proved validity of the Guarantee in that respect too.

64.2 Indeed, my conclusion in this respect would be the same even if I am wrong about my finding of fact and the Guarantee had actually been executed in the circumstances of what I have called 'Scenario B': Mr Brereton's 'busy office scenario' where all the Defendants *separately* signed on 17th September 2008 at Centre Court, each individually witnessed (i.e. 'observed') by Ms Money but not together and she signed to say so the same day. Whilst I address in a moment Mr Bradshaw's argument about Ms Money attesting 'at the same time', on the face of the deed, Ms Money was still attesting that she had 'witnessed' all the signatures, whether or not she signed herself in the presence of all the guarantors.

64.3 However, I do accept that in 'Scenario C', Ms Money would have only 'witnessed' the signatures of Mr Brereton and Mr Barrett, not of Mr Mason and whilst Mr Brereton witnessed the signature of Mr Mason, he did not 'attest'. Therefore, in Scenario C, there would be no valid actual attestation in relation to Mr Mason (although I come back to whether he is estopped from denying it later) However, this does not invalidate Ms Money's valid attestation of the separate signatures of Mr Brereton (which he conceded) and Mr Barrett (which I find). However, Parliament did not intend total invalidity against multiple parties due to invalidity against one: having envisaged multi-party deeds in s.1(2) LPMPA, it said an instrument can be a 'deed' if validly executed by *one or more* of its parties. Likewise, in s.1(3) LPMPA, Parliament provided requirements for the validity of a deed in relation to an *individual*. As Mr Aldis observed, this reading is consistent with the Law Commission's recommendation that invalidity against one party should not invalidate the whole at p.2.15 (which the Guarantee also specifically says in contractual terms at p.8.2). So, only Mr Mason would benefit.

65. However, with Mr Bradshaw's third argument, all the Defendants may benefit if it is correct. He submitted that just as existing case-law such as *Selby-Bigge* and *Gibson* is a legitimate aid to construction of the words and phrases Parliament later used in s.1(3)(a)(i), so too is earlier Victorian case-law on 'attestation' which he submitted required that to be done by the witness *in the presence of the signatory*. Of course, in Scenario A, I have found that is precisely what happened on the balance of probabilities – i.e. that they all (including Ms Money) signed in each other's presence and that is the short answer to this subtle point. However, in the event I am wrong to find that all four signed together, then I accept that Ms Money did not attest in the presence of all the signatories in Scenario B and Scenario C (although, again the issue of estoppel arises).

66. Moreover, this is an important issue of statutory interpretation on which I have heard full argument from experienced and skilful Counsel and where the authorities do not all speak with one voice. *Emmet & Farrand* set out its view on the debate at p.20-015:

> *"According to the Law Commission's Consultation Paper on Electronic Execution (dated 21 August 2018) Chapter 4—the current law is that: "The signature of the witness must also be affixed at the time of execution" (para.4.53) with a footnote (70) citing appellate court authority: Wright v Wakeford [1803-13] All E.R. Rep. 589, 591. Also added was this comment: "In the Australian case of Netglory Pty Ltd v Caratti [2013] WASC 364 at [148] to [169], following an extensive survey of English authorities, the court concluded that attestation must be contemporaneous with execution by the signatory". Unfortunately, these authorities were not drawn to the attention of the judge in Wood v Commercial First Business Ltd [2019] EWHC 2205 (Ch), where Mr James Pickering (sitting as a Deputy Judge of the High Court) misconstrued s.1(3) of the 1989 Act as follows: "the proper interpretation is that while there is a requirement for the person executing the deed to sign in the presence of a witness, it is not a requirement for the witness to sign in the presence of the person executing the deed (or indeed of anybody else)." However, the statute does not require the witness to "sign" but to "attest" and does so in the present tense. Accordingly, the better view must be that, in practice and in law, witnesses attest signatures on instruments by signing attestation clauses at the time."*

Unsurprisingly, Mr Bradshaw commends this analysis to me with Scenarios B and C. (In fairness, he accepted it would not arise on Scenario A which I have found proved).

67. Whilst Mr Aldis referred me to another part of *'Formation and Variation of Contracts'* on deed formalities, Professor Cartwright was less certain in this debate at p.7-11:

> *"It was held in Wood v Commercial First Business Ltd that, although there is a requirement for the person executing the deed to sign in the presence of the attesting witness, it is not a requirement of the [LPMPA] for the witness to sign the attestation in the presence of the person executing the deed (or indeed of anybody else). This decision was based on the wording of the [LPMPA], although there are old cases which held that, at common law, the signature of attestation should form part of the execution of the deed, and therefore should be contemporaneous with the attested signature. However, the decision opens up the possibility of a time-lag between the (witnessed) execution of the deed and the signature by the attesting witness and even, perhaps, the witnessing of a deed remotely by video-link technology if the document which the witness has seen being signed over a video-link has to be sent to the witness for later (physical) signature. The Law Commission has said that, although it would be open for a court to decide that remote or virtual witnessing would satisfy the statutory requirements, they are not persuaded that parties can be confident that the current law would allow for a witness viewing the signing on a screen or through an electronic signature platform, without being physically present. Until this is clarified either by the courts at a higher level, or by legislation, parties should continue to use only physically-present witnesses, and are best advised to ensure that the attesting witness adds his signature immediately."* (Footnotes omitted)

I should say immediately the 'time lag' concern is a valid one, but in *Wood* the judge (Mr Pickering - now KC sitting as a Deputy High Court Judge) held a witness did not have to be in the physical presence of a signatory in order to *attest* because he did not consider there was any such requirement in s.1(3) LPMPA. He was not concerned with the separate issue of what 'signing in the presence of a witness' means (explicitly part of s.1(3)(a)(i)). Nothing he said throws into doubt the Law Commission's analysis that 'the presence of a witness' there means 'physical presence' (whether the First-Tier Tribunal case Prof. Cartwright referred to was right to do so is a different issue). The issue does not arise in this case either and I say no more about it, other than to note s.9 Wills Act 1837 has been amended specifically to provide that 'presence' of the testator or the witnesses for wills from 2020-2024 can include video conferencing.

68. I set out Mr Pickering KC's full analysis on this in *Wood*, even though it is not binding on me, as I respectfully could not improve upon it. (Original underline):

> *"42. As outlined above, it is Mrs Wood's case that in order for a deed to have been validly executed: (1) the person executing the deed must have signed in the presence of a witness, (2) the witness must have attested that signature, and (3) the witness must have so attested in the presence of the person executing the deed. In short…both the person executing the deed and the witness must have not only signed but they must have so signed in the presence of the other.*
>
> *43. The Assignees accept propositions (1) and (2) above but not (3). It is their position that while the person executing the deed must of course sign in the presence of the witness, the witness need not sign in the presence of the person executing the deed.*
>
> *44. The relevant requirements for the proper execution of a deed are contained in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 ("LP(MP)A 1989"). This provides: "(3) An instrument is validly executed as a deed by an individual if, and only if — (a) it is signed — (i) by him in the presence of a witness who attests the signature; or (ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and (b) it is delivered as a deed."*
>
> *45. I was told by both counsel that there was no direct authority on the point. I was, however, invited by counsel for the Assignees to consider and contrast the above wording of section 1(3) of the LP(MP)A 1989 with the wording of section 9 of the Wills Act 1837 which requires certain acts of a witness to be carried out "in the presence of the testator". I did find the above comparison of some use but I have to say that in my view by far the most significant comparator appears within section 1(3) itself. Indeed, as can be seen, section 1(3)(a)(i) provides that the person executing the deed must do so "in the presence of a witness who attests the signature". By contrast, however, there is no such wording in relation to the witness. In short, therefore, while for the person executing the document there is a clear requirement that he or she signs "in the presence of a witness", for the witness there is no such express additional requirement.*
>
> *46. Counsel for Mrs Wood urged me to take into account policy considerations and in particular invited me to consider Law Commission Working Paper No. 93 1985: Transfer of Land. Formalities for Deeds and Escrows At*

*paragraph 3.2 it described aims for having formalities for deeds as follows: "(a) Cautionary: that is, trying to ensure that the maker does not enter into the transaction without realising what he is doing; (b) Evidential: providing evidence that the maker did enter into a transaction, and evidence of its terms…" On this basis, so it was submitted, it is obvious that those drafting the LP(MP)A 1989 must have intended not only that the person executing the deed must sign in the presence of a witness but also that the witness must sign in the presence of the person executing the deed.*

*47. While I understand the policy implications of the above submission, it seems to me plain that if those drafting the LP(MP)A 1989 had wanted it to be a requirement that the witness should sign in the presence of the person executing the deed, it would have been very easy for that to be expressed. Indeed, section 1(3) could have been drafted to read that: "an instrument is validly executed as a deed by an individual if, and only if (a) it is signed (i) by him in the presence of a witness who attests the signature in the presence of the individual executing the deed …" As can be seen, however, while the first reference to "in the presence of" does appear in s.1(3), the second (and underlined) reference does not. Those drafting clearly chose to include the words "in the presence of" in relation to the person executing the deed but chose not to include those same words in relation to the witness. It is unlikely that this was an accidental omission.*

*48. Overall, given what seems to me to be the clear wording of section 1(3) , I find that the proper interpretation is that while there is a requirement for the person executing the deed to sign in the presence of a witness, it is not a requirement for the witness to sign in the presence of the person executing the deed (or indeed of anybody else)."*

Respectfully this is a classic exercise in statutory interpretation. Consistent with the (later) guidance of Lord Hodge in *R(O),* it affords primacy to the actual words of s.1(3) LPMPA over 'external aids' such as the 1985 Law Commission report which led to s.2 LPMPA to which Mr Pickering KC was referred. In any event, there is nothing to the contrary in the more relevant 1987 report leading to s.1 LPMPA. As I said, p.2.13 of the 1987 report stated two requirements of attestation of deeds: witnessing signature and signing of an attestation clause. There is no suggestion of a third requirement that the latter needed to be in the presence of signatories. Nor do *Emmet* or Prof Cartwright refer to any case on the LPMPA that holds there is such a requirement.

69. However, as they both do fairly point out, in *Wood* Mr Pickering KC was not referred to any authority at all on 'attestation', including pre-LPMPA English authority, helpfully summarised in *Netglory* by Edelman J (then in the Supreme Court of Western Australia, now a Justice of the Australian High Court – the equivalent of our Supreme Court). *Netglory* was an extreme case on the facts where Edelman J (at ps.148-9) found the supposed 'witness' (who had previously been in jail) attested seven years after the signature. Again, whilst not binding on me, I set out his analysis in full at ps.151-169, but for ease of reference, I keep the footnote numbers but omit the citations:

> "***5.3 Attestation must be contemporaneous with the signature witnessed…***
>
> *151 As I explained above, in* ***Wright v Wakeford****70 one question was the effect of subsequent attestation of a deed purportedly made under a trust power for the sale of land. That trust power required attestation by two or more credible witnesses. At first instance, the Lord Chancellor considered 'the question, whether an attestation, not contemporaneous, but subsequent, would do'. He said that he had 'a very strong opinion, that a subsequent attestation would not do'.71 The reason for this was that the execution of the power, by deed, was a limitation upon the use so that unless the limitation arose at the time of the use then it could not arise at all. In other words, if the limitation were not valid at the time, it could not subsequently become valid.*
>
> *152 The Lord Chancellor then directed a case for the Court of Common Pleas, where a majority of the Court (Sir James Mansfield CJ dissenting) held that the attestation was required to be contemporaneous.72*
>
> *153 In a joint judgment, Heath, Lawrence and Chambre JJ held 'the attestation required to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing ... such being the usual and common way of attesting the execution of all instruments requiring attestation'.73 Their Lordships did not confine themselves to the circumstance that the party to be bound had died at the time of subsequent attestation.*
>
> *154 This decision was followed two years later by Lord Ellenborough CJ in* ***Doe v Peach****.74 In that case, the attestation was invalid because it was not expressed to extend to the act of signature. The Chief Justice confined his remarks to the circumstance in which the subsequent attestation by the witness sought to cure the defect in circumstances in which the party had died. Delivering the opinion of the Court, the Chief Justice said:*

> *We think that [the defect in attestation] is not cured by the second attestation made after the death of one of the parties. It is not necessary to enter into the question at what precise time an attestation must be made; but it seems difficult, if not impossible, to say, that an attestation subsequent to the death of one of the parties should give an operation to their act, which it had not during the life of the parties. And upon this point also the case of Wright v Wakeford is an authority.75*

*155 Again, in **Doe v Pearce**,76 a power was found to be invalid because the attesting witness did not attest the sealing as well as the signing. Serjeant Copley argued that a subsequent oral attestation by the witness was competent. But Gibbs CJ held that it was impossible to distinguish the case from **Wright v Wakeford**. The power was held to be invalid.*

*156 My research suggests that modern authority concerning the timing of the statutory requirement of attestation is very limited. However, as a matter of principle, the approach of the majority in **Wright** should be preferred in the interpretation of s 9 of the Property Law Act for five reasons.*

*157 **First**, this interpretation is consistent with the authority which preceded s 9 in cases which involved a requirement of attestation under other statutes and powers, including the leading case of **Wright**. As I have explained above, the decision in **Wright** was approved by the House of Lords in the watershed case of **Burdett v Spilsbury**,77 which considered the requirement for written signature of an attesting witness.*

*158 The assumption of contemporaneous attestation is also embodied in **Roberts v Phillips**,78 (which was described by the Privy Council as having 'invariably been followed'79): 'it should be subscribed by the witnesses in the presence of the testator; ie that they should subscribe their names upon the will in his presence'.*

*159 The passage on attestation in the leading work, Norton on Deeds, is also premised upon the assumption that attestation (including signature) is contemporaneous with witnessing: 'Attestation means that one or more persons are present at the time of the execution for that purpose (ie for the purpose of attesting the execution) and that as evidence thereof they sign the attestation clause ''*

*160 Section 9 was enacted against, and ought to be interpreted as incorporating, this historical understanding of the meaning of attestation.*

*161* ***Secondly****, there is little reason to deny validity to a purported deed where the attesting witness signs after the party who was witnessed has died, as in* ***Doe v Peach,*** *but, at the same time, to permit the attesting witness to sign at any time, possibly many years later, when the party whose signature was witnessed is still alive. Many years after the event the living party might have little or no memory of the event.*

*162* ***Thirdly****, s 9 of the Property Law Act sought to create uniformity of the requirements for creation of a deed. Parliament cannot have intended to do so in a manner which would undermine the purposes of attestation. If subsequent signature by an attesting witness were permitted then at least one of the purposes of the formality of written signature could be easily defeated.*

*163 One purpose of the attestation requirement in s 5 of the Statute of Frauds 1677 29 Car 2 was the goal of avoidance of fraud including by a written signature from an attesting witness. This purpose would be undermined if an alleged witness could simply sign the deed, many years later, even immediately before litigation or possibly even in the witness box.*

*164* ***Fourthly****, s 9 of the Property Law Act was introduced to provide 'a simple and uniform method for execution of a deed and [to] dispense with the necessity for sealing, indenting and formal delivery'.*

*165 The intended simplicity of the formality in s 9 would be significantly undermined if the signature of an attesting witness were required (as explained above) but that signature could be affixed at any time after the transaction.*

*166 The consequent complications undermining the intended simplicity of s 9 might be expressed as a series of questions. How could a person wishing to rely upon the deed recall if the deed had been witnessed, especially after the passage of many years? How could any suspected witness be located without any subscription of his or her name? What would be the status of the purported deed which had not satisfied the requirement of signature but might do so in the future? Could a purported deed be invalid due to the absence of an attesting signature but subsequently become valid at an unknown point in time when the attesting witness signs? If so, would the cause of action accrue only when the deed became valid? Would the limitation period run only from that point in time so that the running of time might be indefinitely postponed ? How could that point in time be determined if the attesting witness did not date his or her signature ?*

> *167* ***Fifthly****, although contemporary authority on this point is slim, one modern reference touching on the issue of timing occurred in* ***Edwards v Skilled Engineering Pty Ltd****.82 In that case, Priestley JA (with whom Kirby P and Meagher JA agreed) considered whether initials or 'a very stylized signature' was sufficient attestation. In finding that it was, Priestley JA said "formalities necessary for the execution of the deed are on the face of the deed complied with'*
>
> *Netglory relied upon the decision in* ***Reid Murray v David Murray Holdings Pty****. That decision does not support Netglory's submission. In that case, the affixing of the corporate seal of the company to be bound by the deed was not within the express authority of the directors. But the affixing of the seal was subsequently ratified by the directors. The issue was whether there had been proper delivery of the deed…..There was no issue concerning attestation…."*

I very respectfully make seven observations on *Netglory* and on this issue generally.

70. Firstly, Edelman J in *Netglory* summarised the Victorian cases as establishing a rule that *'attestation must be contemporaneous with the signature witnessed',* but strictly the actual rule was that '*attestation ought to make a part of the same transaction with the signing and sealing'*. At the time, for a deed to be validly executed, it needed to be (in the famous phrase) 'signed, sealed and delivered' as well as attested. As Edelman J explained earlier in *Netglory* at ps.128-130, one leading case on attestation was *Wright*, which concerned a sale of land where there was a defective attestation because the witnesses had only attested the sealing and delivery not the signing and such 'partial attestation' was held defective. 20 years later the witnesses had purported to attest the signing but the Lord Chancellor at first instance said *'attestation, not contemporaneous, but subsequent would not do'*. However, he directed consideration by the Court of Common Pleas. The majority of that Court agreed, but for slightly different reasons:

> *'The attestation required to constitute a due and effectual execution of the power, ought to make a part of the same transaction with the signing and sealing ... such being the usual and common way of attesting the execution of all instruments requiring attestation…and not an attestation to be written at a distance of time after all the parties had testified their assent and approbation."* (My underline)

So, the Court were saying an 'attestation written at a distance of time' was not 'part of the same transaction with the signing and sealing', as opposed to insisting attestation be 'contemporaneous' as such, as the Lord Chancellor had. There is a subtle difference.

71. Following *Wright*, in *Peach* there was again a defective attestation not covering the signing and a later attempt by the witnesses to cure it. Unsurprisingly the Court followed *Wright* and as Edelman J quoted in *Netglory*, Lord Ellenborough in *Peach* said it was *'not necessary to enter into the question at what precise time an attestation must be made'* but suggested attestation after a party's death was too late. In *Pearce,* there was again a defective attestation (this time sealing not signing) and a later attempt to cure (this time by oral attestation), but in a three-line judgment, Gibbs CJ followed *Wright*. As Edelman J noted in *Netglory* at ps.131-6, in *Burdett* the Lords approved *Wright* but held (as I noted above) where the witnesses had simply attested as witnesses that was valid (as there was no 'partial attestation' as in *Wright, Peach* and *Pearce*) and so the 'later curing attestation' point did not arise. I come back to *Roberts* in a moment, but all these other cases either followed or endorsed *Wright* on later attempts to cure defective attestation and its *ratio* that attestation had to *'make a part of the same transaction with the signing and sealing'* rather than 'contemporaneous' as such.

72. Secondly however, in *Netglory* Edelman J plainly considered attestation '*making a part of the same transaction with the signing and sealing'* in *Wright* was synonymous with it being *'contemporaneous with the signature attested'*, especially as 'sealing' had been abolished (as it was here by s.1(1) LPMPA). I respectfully agree, given the word Edelman J used (following the Lord Chancellor in *Wright*) was 'contemporaneous', not 'simultaneous'. Whilst it is wrong to read judgments of even a judge as internationally-respected as Edelman J like statutes, the ordinary meaning of 'contemporaneous' is two events occurring in the 'same period of time'. When the judges in *Gestmin*, *Simetra* and *Martin* refer to 'contemporaneous' or 'contemporary' documents, they mean those from the same period of time as an event, not just precisely simultaneous with it. So, I respectfully consider the 2018 Law Commission report at p.4.53 noted in *Emmet* slightly glossed *Netglory* as requiring attestation 'at the time of execution': Edelman J's test was 'contemporaneous with the signature attested'. Attestation '*making a part of the same transaction with the signing'* is very likely to need to be 'in the same period of time' i.e. 'contemporaneous' with it. If so, that fulfils the purposes of attestation both 'cautionary' and 'evidential' as the 1985 Law Commission report put it, namely: (i) to protect the signatory and other parties with formalities as Pill LJ said in *Shah*, (ii) to avoid fraud and evidence a party did execute as Edelman J said in *Netglory;* and (iii) to reduce the need for oral evidence later as the 1987 Law Commission report said.

73. Thirdly, neither *Netglory*, nor any case cited in it or to me, require the attestation of *deeds* 'in the presence of the signatory'; and neither would it further those statutory purposes. Edelman J's 'contemporaneous' test in *Netglory* does not require that and whilst he mentioned *Norton on Deeds* in 1928 stating such a requirement, it is not clear whether it related to *wills*, since that is an express requirement of s.9 Wills Act 1837. Indeed, the only case Edelman J cited in *Netglory* suggesting attestation must be in the presence of a *testator* was *Roberts* which was actually a will case under that statute. Yet with that model before it in 1989, Parliament did not choose to require the same for deeds in s.1 LPMPA, indeed the Law Commission report at p.2.12 stated it wished to avoid the additional complications of will attestation. Doubtless simultaneous signature and attestation is often convenient, as discussed in my findings of fact. Mr Pickering KC in *Wood* focussed on the statutory wording, but my answer on the cautionary and evidentiary purposes of attestation is what matters about the witness' signature is that it evidences the signatory's one, not vice-versa. Signature of a witness in the presence of a signatory offers little additional evidence of execution, or protection against fraud or undue influence etc. Indeed, *requiring* it would *encourage* disputes and oral evidence - as here: whether Ms Money validly attested had I accepted the 'busy office scenario'.

74. Fourthly, therefore Mr Pickering KC's analysis in *Wood* is not '*per incuriam*' and I agree with him attestation in the presence of the signatory is not required by s.1(3) LPMPA. True, *Emmett* at p.20-015 notes s.1(3)(a)(i) requires the witness not to 'sign' but to 'attest the signature' - in the present tense. However, 'signing' is implicit in 'attesting': *Selby-Bigge* and the present tense features throughout s.1(3) LPMPA:

> *"An instrument is validly executed as a deed by an individual if, and only if (a) it is signed (i) by him in the presence of a witness who attests the signature…and (b) is delivered as a deed."*(My underline)

*Emmet*'s emphasis at p.20-015 on the present tense of 'attests' proves too much, as all three elements of execution in s.1(3) - a witnessed signature, attestation and delivery – are in the present tense. Yet, as *Emmet* itself observes at p.20-005, whilst 'delivery' of a deed can be unilateral upon signature, it can also be by physical delivery to the other party to the deed, which by definition happens later. Indeed, *Emmet* then emphasises:

> *"….[C]hronologically delivery is the last requirement of a deed. If anything, whether signing or sealing or the filling in of material blanks, comes after, then the deed must be redelivered: Tupper v Foulkes (1861) 9 CB (Ns) 797."*

75. Fifthly, this practical fact that in execution delivery comes last, means that whilst the present tense of 'attests the signature' in s.1(3) LPMPA does not *require* the witness to attest in the presence of the signatory, the present tense of 'is delivered as a deed' does *prevent* 'retrospective re-attestation' (for want of a better phrase) of an already-delivered deed. In other words, if Parliament intended (in the sense explained in *R(O)* at p.31) to permit such 'retrospective re-attestation', it would have chosen to word s.1(3)(b) as "*is (or has previously been) delivered as a deed."* The fact Parliament did not do so suggests it must have intended to prevent such 'retrospective re-attestation' under s.1(3)(a)(i) LPMPA. This is probably because it would lead to the problems Edelman J noted in *Netglory* at ps.162-6 – supporting his view the Western Australian Parliament intended 'contemporaneous' attestation. The solution to defective attestation is not 'retrospective re-attestation', but either re-delivery (*Tupper)* or if dispute ensues potentially estoppel (*Shah).* So, in this way, s.1(3) LPMPA achieves a similar outcome to *Wright* and the following cases which disallowed such 'retrospective re-attestation'.

76. Sixthly, it is therefore unnecessary, and in my judgement also inappropriate, to interpret 'attests' in s.1(3)(a)(i) LPMPA by reading-in Victorian cases on attestation, as Edelman J in *Netglory* did with 'attested' in s.9 Law of Property (Western Australia) Act 1969:

> *"9(1) Every deed whether or not affecting property (a) shall be signed by a party to be bound thereby; and (b) shall be attested by at least one witness not being a party to the deed but no particular form of words is required for the attestation.*
>
> *(2) It is not necessary to seal any deed except in the case of a deed executed by a corporation under its common or official seal.*
>
> *(3) Formal delivery and indenting are not necessary in any case…."*

Unlike s.1(3) LPMPA, s.9 contains no explicit requirement for 'delivery' at all or for the signature to be in the presence of a witness; and there is a specific requirement the witness not be a party to the deed that s.1(3) does not contain. Given the difference in language, we should not be surprised that different approaches are taken to ensure effective execution of deeds and to avoid the practical problems and frustration of statutory purpose with attestation years after the event Edelman J discussed in *Netglory.* Having removed 'delivery' and 'sealing', to do so, the Australian statute placed most of weight its weight on 'attestation', pointing the way for Edelman J in *Netglory* to read in older case-law. By contrast, s.1(3) LPMPA provides a more intricate statutory code for 'execution' where there is much less 'room' to read-in those older authorities.

77. Therefore, unlike with that Australian statute, in my judgement it is impermissible to read into 'attests the signature' in (or the rest of) s.1(3) LPMPA a requirement from pre-LPMPA case-law that 'attestation must be contemporaneous with the signature attested'. As Lord Hodge said in *R(O)* at p.29, legislative intention primarily stems from the words Parliament chose and citizens and advisers should be able to rely upon them. I respectfully add they should not need to research Victorian case-law on attestation to do so. Whilst Edelman J in *Netglory* did not refer to what in England is called the '*Barras* principle' on interpretation, in *Belhaj v DPP [2018] 3 WLR 435 (SC)* Lord Sumption at ps.19-20 explained that even where Parliament reuses ambiguous language that has previously received a clear judicial interpretation, there is only a presumption that Parliament intended to adopt that meaning, which can be rebutted by the particular statutory language and context. One way of looking it is that the open language of the Western Australian statute permitted that presumption to work, but with s.1(3) LPMPA it is rebutted. The 1987 Law Commission report which led to the enactment of s.1 LPMPA summarised the effect of two previous cases (i.e. *Gibson* and *Selby-Bigge*) on 'attestation', so that summary and those cases summarised are legitimately 'external aids' to interpret 'attest' in s.1(3) LPMPA in the sense discussed in *R(O)* at p.30. However, given the Law Commission effectively ignored Victorian authorities on 'attestation' because it was seeking to modernise the law on deeds, the assistance to be derived from them in interpreting s.1(3) LPMPA is quite limited.

78. Seventhly, of course I may be wrong and 'attest the signature' in s.1(3)(a)(i) LPMPA may include a requirement for the witness' '*attestation to be contemporaneous with the signature witnessed'*. However, if so and the witness attests on the same day as the signature witnessed (as I have found on all the scenarios Ms Money did), then on any reasonable view, that is 'contemporaneous' or indeed 'part of the same transaction with the signing'. That would still be the case even if the witness does not sign in the actual presence of the signatory party, or effectively simultaneously with them (which I found on balance of probabilities Ms Money did in Scenario A). If the signature and attestation are the same day, none of the legitimate concerns of Edelman J in *Netglory* and of the judges in the Victorian cases he cited, about what Prof Cartwright called a 'time lag' in attestation of several years or even after a party's death, would apply. Attestation the same day would be perfectly consistent with its purposes set out in *Netglory* to '*confirm the person executing the deed actually did so'* and in *Shah* at p.29:

> *"[T]he requirement for attestation is integral to the requirement for signature in that the validity of the signature is stipulated to depend on the presence of the attesting witness. I also accept attestation has a purpose in that it limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed…..It gives some, but not complete, protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation. It gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary. A person may aver in opposition to his own deed he was induced to execute it by fraud, misrepresentation or..duress..The attestation requirement is a safeguard."*

79. Therefore, I am entirely convinced of three conclusions on this issue about attestation:

79.1 In s.1(3) LPMPA, 'attest the signature' requires a 'witness' who was present and observed the signature of the party to attest by signing the deed as a witness but not any particular form of words. Ms Money did that here on any of the scenarios.

79.2 s.1(3) does not require the witness to 'attest' in the presence of the original signatory, as rightly held in *Wood*. Even if it does, on my findings Ms Money did.

79.3 Even assuming that s.1(3) LPMPA does require the witness to '*attest contemporaneously with the signature witnessed',* that is satisfied if the witness attests on the same day, which is what Ms Money did on all the scenarios. I need not explore the outer boundary of 'contemporaneous' any further here.

Therefore, for all those reasons, I am satisfied the deed was properly attested.

**Are the Defendants estopped from denying the Guarantee was executed validly ?**

80. It follows from the first two issues that I have found the Guarantee was in fact validly executed as a deed. On my findings of fact that all three guarantors and Ms Money signed together on 17th September (i.e. 'Scenario A'), Mr Bradshaw accepted that. On Mr Brereton's 'busy office scenario' ('Scenario B'), Ms Money witnessed all of the signatures in the guarantor's presence and then attested by signing as a witness under all their signatures contemporaneously I find that valid execution. However, on 'Scenario C' where Mr Brereton and Ms Barrett signed, witnessed by Ms Money who contemporaneously attested, then the Guarantee would be effective against them but not against Mr Mason. Only in that situation (or if of course I am wrong about my other conclusions), does estoppel come into play. So, I deal with it relatively briefly.

81. The leading case on estoppel in this field is *Shah*, where as in this case, the defendants signed a guarantee in deed form. Pill LJ explained the relevant facts at p.8:

> *"Each* [defendant] *signed the deed at the appropriate place and the signature of an attesting witness, the same signature in each case, appears at the appropriate place. The attesting signature is that of…*[a man who]*… had an office in the same building as the defendants. The document was brought to him by the defendants' secretary after it had been signed by them. The judge found that the signature of the attesting witness was added to the document shortly after it had been signed by the parties to the document but not in their presence."* (My underline)

Especially in the light of the analysis I have just set out about *Netglory* and *Wood*, it is important not to misconstrue the facts in *Shah*. The parties signed first not in the presence of the witness, then the deed was taken to the witness, who then signed also not in their presence. As I have underlined, the witness was not in the parties' presence when they signed. Therefore, the deed was in fact invalid under s.1(3)(a)(i) LPMPA, although it was 'valid on its face' notwithstanding the absence of the name and address of the witness, which are not statutory requirements of s.1 LPMPA (*Shah* p.13).

82. In *Shah*, the Court held the defendants were estopped from denying the validity of the guarantee as a deed. Pill LJ noted that in *Yaxley v Gotts [2000] Ch 162 (CA)*, a case on s.2 LPMPA, Beldam LJ (who had served on the Law Commission committee whose reports led to the LPMPA) had accepted in principle that a party can be estopped from denying a statutory requirement was not met. As Pill said at ps.20-21, 30 and 33:

> *"20. Beldam LJ stated, at p 191, that "The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it."*
>
> *21. In my judgment, that statement of Beldam LJ, reflecting Kok Hoong [1964] AC 993 is, with respect, an accurate statement of the law of England and Wales. The court is entitled to consider the particular statutory provision, its purpose and the social policy behind it when deciding whether an estoppel is…allowed….*
>
> *30. I have….come to the conclusion there was no statutory intention to exclude the operation of an estoppel in all circumstances or in circumstances such as the present. The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be*

*present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature. Failure to comply with the additional formality of attestation should not in itself prevent a party into whose possession an apparently valid deed has come from alleging that the signatory should not be permitted to rely on the absence of attestation in his presence. It should not permit a person to escape the consequences of an apparently valid deed he has signed, representing that he has done so in the presence of an attesting witness, merely by claiming that in fact the attesting witness was not present at the time of signature. The fact the requirements are partly for the protection of the signatory makes it less likely that Parliament intended that the need for them could in all circumstances be used to defeat the claim of another party*

*31 Having regard to the purposes for which deeds are used and indeed in some cases required, and the long-term obligations which deeds will often create, there are policy reasons for not permitting a party to escape his obligations under the deed by reason of a defect, however minor, in the way his signature was attested. The possible adverse consequences if a signatory could, months or years later, disclaim liability upon a purported deed, which he had signed and delivered, on the mere ground that his signature had not been attested in his presence, are obvious. The lack of proper attestation will be peculiarly within the knowledge of the signatory and…will often not be within the knowledge of the other parties.*

*33….[T]he delivery of the document…..involved a clear representation that it had been signed by the third and fourth defendants in the presence of the witness and had accordingly been validly executed by them as a deed. The defendant signatories well knew that it had not been signed by them in the presence of the witness, but they must be taken also to have known that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended it to be relied on as such and it was relied on. In laying down a requirement by way of attestation in s.1 of the 1989 Act, Parliament was not in my judgment excluding the possibility that an estoppel could be raised to prevent the signatory relying upon the need for the formalities required by the section…"*

83. By contrast, in *Actionstrength v IGE [2003] 2 AC 541 (HL)*, the Lords held that an oral guarantee in violation of s.4 Statute of Frauds could not give rise to an estoppel. Lord Walker endorsed the Defendants' submission on the Statute of Frauds at p.53:

> *"To treat the very same facts as creating as an unenforceable oral contract and as amounting to a representation (enforceable as soon as relied on) that the contract would be enforceable, despite section 4….would be to subvert the whole force of the section as it remains in operation, by Parliament's considered choice, in relation to contracts of guarantee…."*

However, Lord Walker specifically distinguished *Shah* at p.51:

> *"In Shah the delivery of an apparently valid deed constituted an unambiguous representation of its nature. In the present case, by contrast, what passed between the parties did not amount to an unambiguous representation there was an enforceable contract, or that St-Gobain would not take a point on the Statute."*

Lord Clyde agreed but also re-articulated the elements of such estoppel at p.34:

> *Without entering into questions of the categorisation of different classes of estoppel, some recognisable structural framework must be established before recourse to the underlying idea of unconscionable conduct in the…circumstances The framework here should include the following elements: that Actionstrength assumed St-Gobain would honour the guarantee; that assumption was induced or encouraged by St-Gobain; and that Actionstrength relied on that assumption."*

84. In *Briggs v Gleeds [2015] Ch 212 (HC)*, *Shah* was also distinguished by Newey J (as he then was) in holding that pension scheme members (who had not signed any deed) were not estopped from denying that a deed signed by employers was not validly attested as the signatures had not been witnessed as there was no attestation clause. Newey J gave a number of reasons for distinguishing *Shah* at p.43:

> *43 In the end, I have concluded that estoppel cannot be invoked where a document does not even appear to comply with the 1989 Act on its face or, at any rate, cannot be so invoked in the circumstances of the present case…..:*
>
> *(i) To state the obvious, Parliament has decided that, for an individual validly to execute a deed, he must sign 'in the presence of a witness who attests the signature'. That requirement has an evidential purpose: as Pill LJ noted in Shah.*
>
> *[I]t 'limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed' and 'gives some, but not complete,*

*protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation'. As Pill LJ further noted, the requirement also 'gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary'. The Law Commission thought, too, that the need for attestation would 'emphasise to the person executing the deed the importance of his act'…..*

*(ii) Fulfillment of Parliament's and the Law Commission's objectives would be undermined, potentially to a serious extent, if estoppel could be invoked in circumstances such as those in the present case.*

*(iii) Shah v Shah shows, of course, that a person can sometimes be estopped from denying due attestation. The document with which the court was concerned in that case appeared, however, to be valid. Accordingly, Pill LJ said that failure to comply with the formality of attestation should not in itself prevent a party into whose possession 'an apparently valid deed' has come from alleging that the signatory should not be permitted to rely on the absence of attestation in his presence. He also spoke of 'an apparently valid deed' in the next sentence.*

*(iv) The 'deeds' at issue in the present case are not 'apparently valid'. It can be seen from each document that it was not executed in accordance with the 1989 Act. This distinction from Shah v Shah is a significant one. If estoppel can be invoked in relation to documents that are not 'apparently valid', the documents cannot necessarily be taken at face value. [A]s far as possible, however, it should be clear on the face of the document whether or not it has been validly witnessed…. That is especially so since the validity of a deed can matter for many years, and those considering 'deeds' long after they have been executed may well have no personal knowledge of the circumstances in which they were executed and access to little or no contemporary correspondence.*

*(v) If estoppel were available in circumstances such as those in the present case, a party to a 'deed' who had not himself executed the document in accordance with section 1….could choose whether or not the document should be treated as valid. If it turned out to be in his interests to disavow the document, he could do so. If, on the other hand, the document proved to be advantageous to him, he could invoke estoppel.*

*To take an example close to the facts of the present case, if a 'deed' provided for a pension scheme to become money purchase rather than final salary, an employer*

*who had signed without having his signature witnessed could wait and see whether the change was, in the event, beneficial to him.*

*(vi) Section 1 of the 1989 Act was in part designed to achieve certainty. It could, however, have the opposite consequence if estoppel were available in circumstances such as those in the present case. The effectiveness of a 'deed' that had not, on the face of it, been validly executed could be left in doubt."*

85. There are three relevant distinctions between *Shah* and *Briggs,* which can be fitted into the estoppel framework Lord Walker and Lord Clyde gave in *Actionstrength* of unambiguous representation; inducement of assumption/reliance; and unconscionability (which the Claimant here deploys as a 'shield' to the Defendants' limitation argument):

85.1 Firstly, as Newey J pointed out in *Briggs*, *Shah* involved an 'apparently valid deed', which as Lord Walker agreed in *Actionstrength*, amounted to an 'unambiguous representation' that it was a valid deed. By contrast, in *Briggs*, it was obviously not 'an apparently valid deed' as it was clearly not attested. Likewise, there was no 'unambiguous representation' in *Actionstrength* either.

85.2 Secondly, in *Shah*, as Pill LJ said at p.33, the signatories knew the 'apparently valid deed' was not actually valid but must have known the other party would assume it was valid. They intended it to be relied on and it was: as a guarantee. As Lord Clyde put it in *Actionstrength*, that plainly amounted to an inducement to the other party to the guarantee in *Shah* to assume the guarantee was a valid deed and they did rely on that assumption. By contrast, in *Actionstrength* and in *Briggs* there was no such assumption and no such reliance by the other party. Indeed, more fundamentally in *Briggs*, unlike in *Shah*, it was the party who had not validly executed which was trying to argue estoppel against the other parties from denying an effective variation of the pension scheme to the detriment of the members. In other words, it was being deployed as a sword rather than a shield.

85.3 Thirdly, in *Shah*, it was (implicitly) unconscionable for the signatories to deny the validity of the deed when they had encouraged the belief the deed was valid. By contrast in *Briggs* it was not only not unconscionable for the innocent members of the scheme to deny execution, it would have been (implicitly) unconscionable to give the party who had not validly executed the choice about it.

86. On the first of those three issues, Mr Bradshaw submitted that the Guarantee here was not 'apparently valid' because a deed featuring one attestation clause where one witness attests multiple signatures is not valid. As I explained above, that seemed to me to go to the statutory requirements of 'attest' under s.1(3)(a)(i) LPMPA and so I addressed it above. I noted that in *Darjan* the principle is that where it is 'possible to interpret the signature as an attestation of all the signatures' then the deed is 'apparently valid' and it was in this case. In any event leaving *Darjan* aside, I went on to find that the attestation clause in this case where Ms Money explicitly 'witnessed' all three signatures was consistent with the wording of 'attest the signature' in s.1(3)(a) LPMPA especially given the singular includes the plural under the Interpretation Act 1978; consistent with the statutory setting of the provision, especially s.1(2) LPMPA and indeed the external aids such as the Law Commission report and the statutory purpose of attestation within s.1(3) LPMPA as discussed in *Shah*. Accordingly, the 'attestation' was apparently valid'. For the purposes of estoppel, for the same reasons, in language of *Actionstrength* at p.51 and *Shah* at p.13, unlike in *Briggs*, the 'delivery' of the Guarantee here (both in law by the signature and in practice by posting it to Mr Weatherer) constituted an unambiguous representation by the Defendants of the fact that it was a valid deed.

87. On the second issue, as Mr Aldis submitted in detail in his Skeleton at ps.42-9, the Defendants admit that they signed the Guarantee. If they did not sign in the presence of Ms Money or if she did not attest 'in their presence' or 'contemporaneously', this was something they could control and they would know but the Claimant would not. Nevertheless, they presented the 'apparently valid' deed to the Claimant without disclosing any failure to follow the implicit instructions in the deed. In doing so, they must have known that Mr Weatherer on behalf of the Claimant would assume the deed had been validly executed and I have found that is what he did assume. This is the reason he did not query it at the time. I have also found that had he done so, such was the Defendants' need for funds, they would have re-executed it. In detrimental reliance on that assumption of a valid guarantee, Mr Weatherer released the funds to Rhombus. The Defendants accepted and spent those funds, without ever raising any problem with the validity of the deeds for over a decade, after limitation had expired and indeed after the main debtor Rhombus had gone into liquidation. Therefore, the elements Lord Clyde discussed in *Actionstrength* of inducement, assumption and reliance (indeed substantial detriment) are all established for the Claimant.

88. Thirdly, on unconscionability, like *Shah* and unlike *Briggs*, this case is one of a party who failed to validly execute a deed seeking to rely on their own failure to follow the clear implicit instructions in it, despite being three extremely experienced business-people. Moreover, whilst I do not consider they give rise in this case at least to any distinct legal principle, the cases of *Webb v Spicer (1849) 13 QB 886* and much more recently *Promontoria v Hancock [2021] EWHC 259 (Ch)* support the view that where a party has taken the benefit of a deed, it is often unconscionable for him to refuse to take its burdens because he did not execute it properly. It is highly relevant to the Defendants' 'unconscionability' that the Defendants as partners in Rhombus took the benefit of the Guarantee in inducing the loan even if they failed to execute it properly. Moreover, without getting drawn into whether the Defendants have 'acknowledged' the Rhombus Loan under ss.29-30 LA, it is undeniably true the Defendants are seeking to take advantage of the indulgence the Claimant gave them with their requests for time to repay the Rhombus Loan which, according to the Defendants, has given them a limitation defence. All that together unquestionably shows that it would be plainly unconscionable for the Defendants to deny the validity of the Guarantee. (I need not make any finding on Mr Aldis' point about the Defendants' 'bad faith').

89. Weighed against all this, even on the assumption it is relevant to 'unconscionability', it does not seem to me that Mr Weatherer's modest 'deliberate concealment' of his directorship of the Claimant in 2017 and 2019 mitigates the Defendants' unconscionable denial of the validity of the Guarantee. In either case, it was long after limitation had expired on the Defendants' case this was an invalid deed and so the limitation period was only 6 years. Indeed, in 2017 I have accepted Mr Weatherer's 'deliberate concealment' reflected his own genuine view that he was not practically the 'director' of the Claimant in the sense that others handled the administrative issues he was being asked about. Whilst I was more critical of his evasion in 2019, this was after the relationship between the parties had deteriorated, not so much because of Mr Mason's professional negligence claim, but because Mr Barrett had suddenly, after over a decade, started raising technicalities about the loans. In any event, within a short period, Mr Weatherer openly accepted he was a director of the Claimant. Indeed, even were I to consider that he had 'deliberately concealed' that throughout, that would not mean it was not 'unconscionable' for the Defendants to dent the validity of the Guarantee, as Mr Weatherer was in no way to blame for any defective execution of it.

90. Finally, for that same reason, I cannot see how the 'clean hands' maxim helps the Defendants. As discussed in *UBS v Kommunale Wasserwerke [2017] 2 CLC 584 (CA)* by a very strong majority of (now) Lords Briggs and Hamblen at p.171:

> *"…The key part of it, which dates back to the 18th Century, is that that the misconduct or impropriety of the claimant must have 'an immediate and necessary relation to the equity sued for', and that it must be shown that the claimant is seeking 'to derive advantage from his dishonest conduct in so direct a manner that it is considered unjust to grant him relief'…This is one of those multi-factorial assessments to be conducted by the trial judge, with which an appellate court will be slow to intervene, unless the judge's conclusion was clearly wrong, or based upon some evident failure of analysis."*

Even if one ignores the Defendants' own 'unconscionability' and focusses solely on Mr Weatherer's 'deliberate concealment' of his directorship in 2017 and 2019, it is completely irrelevant to the equitable estoppel the Claimant seeks to establish. That was effectively established at the latest when the 6-year period expired, if not earlier. In any event, Mr Weatherer clarified his directorship in early 2020 and the Defendants seemed entirely unperturbed. Even if one assumes Mr Weatherer 'deliberately concealed' his directorship throughout – contrary to my findings of fact –for the same reasons, it is irrelevant to the basis on which it seeks to establish estoppel: unambiguous representation, assumption of validity, reliance and unconscionability. Nor is Mr Weatherer seeking to derive any advantage for the Claimant from any misconduct. It is Defendants who seek to do that with this rather opportunistic argument. In those circumstances, if I had found the Claimant needed an estoppel against any or all of the Defendants, I would have upheld it. As it is, it is academic. The Claimant has established the Guarantee is a valid deed and s.8 LA applies so the claim on it is in time That concludes my judgment on this preliminary issue.