



Neutral Citation Number: [2023] EWHC 2698 (Ch)

Case No: BL-2021-002247

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

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 3 November 2023

Before :

Master McQuail

Between :

(1) RICHARD SANDOR FRISCHMANN

Claimants

- and -

(1) VAXEAL HOLDINGS SA
(2) IDM VENTURES LIMITED
(3) CHRISTOPHER SAMUELSON

Defendants

Tim Benham-Mirando (instructed by **Olephant**) for the **Claimant**
Rory Brown (instructed by **Gunnercooke LLP**) for the **Second and Third Defendants**

Hearing dates: 10 and 11 July 2023

Approved Judgment

.....
MASTER McQUAIL

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Master McQuail:

1. This is my judgment on the application dated 1 June 2022 of the claimant, Mr Richard Sandor Frischmann (**Mr Frischmann**), for summary judgment against the second defendant (**IDM**) and the third defendant, Mr Christopher Samuelson (**Mr Samuelson**) (**the SJ Application**). The first defendant has been dissolved, so that IDM and Mr Samuelson are the only extant defendants (**the defendants**).
2. Mr Frischmann seeks summary judgment:
 - (i) for sums said to be due to him from IDM and Mr Samuelson under written loan and guarantee agreements which he says have been assigned to him; and
 - (ii) for the provision of certain information by IDM to which he claims to be contractually entitled under those agreements.
3. There have been filed in support of the SJ Application and concerning other procedural matters:
 - (i) four witness statements of Mr William Castledine of Olephant Solicitors acting for Mr Frischmann; and
 - (ii) two witness statements of Ms Rashmi Dubé acting for the defendants.

Background

4. On 24 October 2018, Mr Frischmann's father, Dr Willem Frischmann (**Dr Frischmann**), advanced £1,000,000 to IDM pursuant to the terms of a facility agreement of that date (**the First IDM Loan**).
5. The purpose of the First IDM Loan was stated to be to support IDM's participation in a joint venture with Britannia's Gold Limited to salvage and recover precious metal cargoes from two identified shipwrecks being: RMS Empress of Britain and SS Laconia.
6. The Final Repayment date was defined as the earlier of the date of successful completion of the first salvage programme or 30 June 2019.
7. Clause 7 provided interest was payable at 20% per annum and was to be paid in addition to principal on the Final Repayment Date.
8. Clause 9(a) provided that:

“[IDM] covenants with [Dr Frischmann] that, from the date of this agreement until all its liabilities under this agreement have been discharged ... it will deliver to [Dr Frischmann] promptly such financial or other information as [Dr Frischmann] may, from time to time, request relating to [IDM] or its business”.
9. Clause 11 provided that amendments to the agreement would only be effective if in writing signed by each party and waivers of any right or remedy under it were only to be effective if in writing by the waiving party.
10. Clause 12 provided that if any part of the agreement were invalid or illegal or unenforceable it be deemed modified to the minimum extent necessary to make it valid, legal or enforceable or deemed deleted and in neither case to affect the rest of the agreement.

11. Clause 15 provided that Dr Frischmann's rights under the First IDM Loan were assignable, IDM's were not.

12. On 24 October 2018 a promissory note was signed by Mr Samuelson for IDM evidencing the advance of £1,000,000 and including an unconditional promise to repay on 30 June 2019.

13. On 23 November 2018, Dr Frischmann advanced a further £165,000 to IDM pursuant to the terms of a facility agreement of that date (**the Second IDM Loan**).

14. The terms of the Second IDM Loan were materially identical to the First IDM Loan, save that the interest rate was 12% and repayment was due on the earlier of successful completion of the first salvage programme or 22 February 2019.

15. On 23 November 2018 a promissory note was signed by Mr Samuelson for IDM evidencing the advance of £165,000 and containing an unconditional promise to repay on 22 February 2019.

16. Also on 23 November 2018, Mr Samuelson provided Dr Frischmann with a guarantee in respect of IDM's liability under the Second IDM Loan (**the Guarantee**).

17. The Guarantee contained guarantee and indemnity covenants and required Mr Samuelson to pay interest compounded monthly from the date of demand at an annual rate of "12% above the base rate of [Dr Frischmann]." The Guarantee was assignable by Dr Frischmann.

18. On 17 March 2019, IDM and Dr Frischmann entered into a further agreement (**the March Agreement**) as follows:

"We refer to the Term Loan Facility agreement dated 24th October 2018 ("the Agreement"), the Promissory Note for £1 million issued thereunder, the subsequent loan of £165,000 and the personal guarantee of Christopher Samuelson covering £165,000. We have raised additional funds and agree to the repayment of £582,500 plus interest of £72,653 making a total payment of £635,260 subject to:

1. The cancellation of the Promissory Note for £1 million and its replacement by a new Promissory Note for £582,500;
2. The amendment of the repayment terms for the £582,500 per the revised Atlantic Subsea Ventures Ltd Shareholders Agreement dated 25th February 2019 whereby IDM Ventures Ltd (IDMV) receives repayment of its loans after James Fisher & Son PLC per Clause 5.2. (see attachment). Your percentage share of the net proceeds received by IDMV becomes 6.85%. (£582,500 equals 34.26% of £1,700,000 and 34.26% of 20% equals 6.85%).
3. That the interest rate for the period of both the £1 million and the £165,000 and for the loan balance outstanding post the repayment of £582,500 be at 15% per annum. The interest of £72,653 is calculated according to this amendment.
4. That the guarantee given by Christopher Samuelson for £165,000 is cancelled.

Please countersign this letter confirming your agreement to the above amendments under the Agreement and letters related thereto. We expect to

make the repayment before 31st March 2019 and have calculated the interest due to that date.”

19. No repayment was made by IDM and no new promissory note for £582,500 was issued.
20. On 26 September 2019 Dr Frischmann emailed Mr Samuelson asking him to call back. Mr Samuelson’s email response on the same day was to the effect that he was dealing with incoming transfers from which Dr Frischmann would “receive repayment of £60,000 plus interest and part of the salvage investment.”
21. On 8 October 2019 Olephant solicitors, who at that stage were acting for Dr Frischmann, wrote demanding payment by IDM of £582,500 plus interest pursuant to the terms of the March Agreement.
22. On 18 June 2020, all of Dr Frischmann’s rights, title, interest and benefits in and to the First and Second IDM Loans and the Guarantee were apparently assigned in writing to Mr Frischmann (**the Assignment**). The Assignment was executed by Mr Frischmann with his own signature “for and on behalf of [Dr Frischmann] by way of a Lasting Power of Attorney” and by Mr Frischmann with his own signature on his own behalf.
23. On 23 June 2020, Olephant, who were by then acting for Mr Frischmann wrote to Mr Samuelson enclosing written notice of the Assignment to the defendants in the form of notice dated 18 June 2020 again signed by Mr Frischmann once on behalf of Dr Frischmann and once on his own behalf.
24. The notice of Assignment included these words:

“Notice of assignment
“We refer to the Term Loan Facility Agreement dated 24 October 2018 for the loan of £1,700,000 and the Term Loan Facility Agreement dated 23 November 2018 for the loan of £165,000 made by Dr Wilem Frischmann to IDM Ventures Limited (the "Debts"), as well as the personal guarantee given by Christopher Samuelson on 23 November 2018 (together the "Assigned Documents").
“On and with effect from 18 June 2020 the Assignor assigned to Mr Richard Frischmann (the "Assignee") all its rights, title, interest and benefits in and to the Assigned Documents and the Debts. All future correspondence, dealings, deliveries and payments in respect of the Assigned Documents or the Debts should be made to the Assignee.”
25. The letter enclosed a statutory demand of Mr Samuelson for an amount calculated due from him under the Guarantee. The amount outstanding under the Second IDM Loan at that date was £196,382.83.
26. Mr Samuelson says he did not receive the statutory demand.
27. IDM has paid nothing to Dr Frischmann or Mr Frischmann.
28. On 14 August 2020, Mr Samuelson made a payment of £70,000 to Mr Frischmann. The reasons for the payment are in dispute. Mr Frischmann’s position is

that it was part-payment under the Guarantee. Mr Samuelson's position is that it was an "ex gratia" payment.

29. No other sum has been paid by Mr Samuelson, either to Dr Frischmann or Mr Frischmann.

30. On 15 January 2021 Mr Samuelson emailed Jan Mugerwa at Olephant explaining that he would be making a payment to "your client account" as soon as he was in receipt of funds from one of a number of transactions, none related to the matter of salvage.

31. A further demand based on the First and Second IDM Loans and the Guarantee was sent to Mr Samuelson by Olephant on 15 January 2021.

32. On 5 February 2021 Mr Samuelson sent an email to Jan Mugerwa enclosing a spreadsheet showing an account of IDM's funds with Finsbury Trust. It showed incoming funds in the form of Dr Frischmann's advances and three payments of £100,000 made by one Rosemary Ellis in January, April and May of 2019. The spreadsheet does not show incoming funds that would have enabled the payment envisaged by the March Agreement to be made on 31 March 2019. The spreadsheet shows that IDM's balance of funds with Finsbury Trust was zero by mid-December 2019.

33. On 9 March 2021 Olephant sent a lengthy letter to Mr Samuelson complaining about the sums said to be outstanding and asking detailed questions about the spreadsheet that had been sent.

34. In an exchange of WhatsApp messages in May to June 2021, Mr Samuelson sent Mr Mugerwa one on 25 May that read as follows: "You will receive my reply by Tuesday next week and a part payment. I have been very busy bringing in money."

35. On 10 June 2021 Mr Samuelson wrote a long letter to Olephant explaining, inter alia, that the payment of £70,000 was made as part payment of "my personal obligation to Dr Frischmann." This letter stated that "Dr Frischmann knew full well that his funds were at risk and repayment was dependent on the successful salvage of the [Empress of Britain] first and the planned salvage of other targets thereafter." That is the first mention in any written document that repayment might be conditional upon salvage.

36. That letter goes on "If Richard Frischmann forecloses on IDMV, IDMV will fold and there will be no repayment apart from the £165,000 that I guaranteed." And concludes "Turning to my personal guarantee of the £165,000 of which I have already paid £70,000 in good faith, I will repay the balance as soon as I have sufficient funds to do so."

37. Olephant on behalf of Mr Frischmann has made a number of requests for information under clauses 9(a) of the First and Second IDM Loans: In particular a request was made on 22 October 2021 (**the Information Request**).

38. The present proceedings were issued on 20 December 2021.

39. On 3 November 2022, the defendants agreed to a Consent Order (**the November 2022 Order**) pursuant to which they were to provide:

- “(i) an update to the Statement [of IDM’s funds with Finsbury Trust, sent on 5 March 2021] together with confirmation if Finsbury Trust and Corporate Service Ltd has handled all incoming and outgoing payments for [IDM] to date;
- (ii) a statement of [IDM]’s financial position at 4 November 2022
- (iii) copies of [IDM]’s accounts (filed, audited, unaudited, management or otherwise) if any from the date of the First IDM Loan ... ie 24 October 2018 to date;
- (iv) a financial forecast for [IDM] including as to the joint venture with Britannia’s Gold Ltd.”

40. Mr Castledine’s third witness statement complains that it is not clear that what has been provided by IDM and Mr Samuelson amounts to compliance with the November 2022 Order. He says that: without satisfactory explanation it is not clear that documents that have been supplied amount to compliance with paragraph (ii); that no accounts have been supplied as required by paragraph (iii) and that IDM and Mr Samuelson have failed to provide any financial forecast as required by paragraph (iv) on the basis that no forecast is presently possible, notwithstanding that that position must have been known to them at the time they agreed to the Consent Order.

The Issues

41. The defendants have raised a series of defences. They have said:

- (i) the Assignment was not effective;
- (ii) no notice of Assignment has been given;
- (iii) the claim was compromised by the March Agreement;
- (iv) there was a collateral agreement that repayment was conditional upon salvage;
- (v) on its true construction the Assignment was not effective to assign the Guarantee;
- (vi) the obligation in the Guarantee to pay interest at 12% above Dr Frischmann’s base rate is meaningless because Dr Frischmann has no base rate.

Summary Judgment

42. The test for summary judgment is set out in [15] of Lewison J (as he then was)’s judgment in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch):

- “(i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;
- “(ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- (iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;
- “(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- “(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary

judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No.5) [2001] EWCA Civ 550;

“(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

“(vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

43. As Cockerill J explained in *King v Stiefel* [2021] EWHC 1045 (Comm) at [21-22]:

“21.The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

“22.So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up.”

44. In *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 which concerned the identical test for applications to amend, Asplin LJ explained at [41-42] that:

“41.For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid*

Products Ltd v Patel [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No. 3)* [2003] 2 AC 1.

“42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon.”

45. The evidential burden is on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. If credible evidence is adduced in support of the application then the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof is not high. As the notes to the White Book 2018 24.2.5 emphasise:

"the Court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it".

46. The other limb of the summary judgment test must also not be overlooked, that there is "no other compelling reason [for] a trial".

Validity of Assignment

47. Section 136 of the Law of Property Act 1925 provides:

(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor:

Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

- (a) that the assignment is disputed by the assignor or any person claiming under him; or
- (b) of any other opposing or conflicting claims to such debt or thing in action;

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.

48. Section 7(1) of the Powers of Attorney Act 1971 provides:
“If the donee of a power of attorney is an individual, he may, if he thinks fit –
(a) execute any instrument with his own signature, and (b) do any other thing in his own name, by the authority of the donor of the power; and any instrument executed or thing done in that manner shall ... be as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor or, as the case may be, as if done by the donee in the name of the donor”.
49. Mr Benham-Mirando for Mr Frischmann submits that the 1971 statute makes clear that the execution of the document by Mr Frischmann as attorney is as effective as if it had been duly executed by Dr Frischmann personally.
50. He goes on to say that, if the Assignment does not satisfy the requirements for a statutory assignment, it would still take effect as an equitable assignment, and would still give Mr Frischmann the right to sue the obligors. He relies upon *Chitty on Contracts* (34th ed) at [22-004] and on *Smith & Leslie, The Law of Assignment* (3rd ed.) [11.173-11.179]. In both cases the authors refer to the judgment of Lord Macnaghten in *William Brandt's Sons v Dunlop Rubber* [1905] AC 454 where he said that “[t]he statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree”.
51. Additionally he says that in the case of *Technocrats International Ltd v Fredic Ltd (No. 1)* [2004] EWHC 692 (QB) [57], Field J referred to the same passage from the *William Brandt* case and explained that for there to be an effective equitable assignment all that is needed is some transaction that sufficiently manifests an intention by the owner of an identified chose in action to assign it to another. In the case before him the Judge concluded that assignments signed by the assignor’s wife with his authority, although not statutory assignments, were plainly such transactions. The Judge went on to doubt that there was any need for consideration to support the equitable assignment of a chose in action.
52. On the consideration question Mr Benham-Mirando further relies upon *Smith & Leslie* at [13.90-13.95] and the conclusion of the authors that the better view is that consideration is not required for the assignment of a chose in action whether legal or equitable. The authors attribute confusion or controversy on the question to the existence of cases where consideration is required because of an additional rule, such as the case where the assigned chose is not in present existence or the assignor has not done everything necessary to transfer title to the assignee in which case the transaction can only be rescued if there is a promise supported by consideration. That is said to be the explanation for the requirement of consideration in the Australian case of *Olson v Dyson* (1969) 120 CLR 365 (HC Australia) which turned on the fact that the assignor had failed to satisfy the South Australian equivalent of s.136, but had also failed to assign in equity because he had not done everything necessary to transfer title to the assignee.
53. He says also that according to *Chitty* at [22-034] “the better view seems to be that an actual assignment of an existing chose in action does not require consideration

provided the assignor has done everything necessary according to the nature of the property to transfer the title to it.”

40. Mr Benham-Mirando relies upon the case of *Holt v Heatherfield Trust* [1942] 2 KB 1 as English High Court authority for the proposition that an equitable assignment does not require consideration. In that case the defect in the assignment was a failure to give notice so that the assignment was not statutory but equitable and Atkinson J held that consideration was not necessary.

55. If necessary, Mr Benham-Mirando relies upon the case of *Walker v Bradford Old Bank* (1884) 12 QBD 511 where it was held that the obligor was not entitled to take the point that an assignment was voluntary and therefore an invalid equitable assignment. He says that that proposition applies here and the defendants are barred from complaining that there was no consideration, that would be a matter only between assignor and assignee.

56. The defendants’ primary argument is that the Assignment is ineffective and void because it is not in writing under the hand of Dr Frischmann, as required by the words of s.136 Law of Property Act 1925.

57. Mr Brown relies on the discussion of the section in *Chitty*. In a footnote to the section itself which is set out in [22-007] *Chitty* states:

“in view of the specific references to signature by an agent in ss.40 and 53 of the same Act (cf. Law of Property (Miscellaneous Provisions) Act 1989 s.2(3)), it would seem that signature by an agent is here insufficient, at any rate if he signs his own name: see *Wilson v Wallani* (1880) 5 Ex. D. 155.”

58. He points out that *Chitty* at each of [22-008] and [2-016] refers to the requirement for an effective assignment to be under the hand of the assignor.

59. Stephen J in *Wilson* at pp. 163-164 explained that to hold that the statute permitted signature by an agent would be to rewrite its terms. Mr Brown points out that that view is confirmed by three more recent cases:

(i) *Curran v Newpark Cinemas* [1951] 1 All ER 295 (CA), 299F-H where Jenkins LJ said:

“the sub-section does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment under the hand of the assignor”;

(ii) *Technocrats* where Field J concluded that the words of s.136 do not allow for the possibility of someone other than the assignor signing in the assignor’s name in a statute which makes specific provision for signature by an agent in case where it is intended that that be permitted; and

(iii) *Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd* [2017] EWHC 67 (TCC) where O’Farrell J approved at [28] *Chitty*’s summary of the requirements for a valid assignment including that it be signed by the assignor.

60. Mr Brown goes on to submit that the assignment would not be rescued by equity because there was no consideration provided by Mr Frischmann to the purported assignor. He says in reliance on *Glegg v Bromley* [1912] 3 K.B. 474, 491 per Parker J; *McNulty v HMRC* [2012] UKUT 174 (TCC), [45] per Arnold J that if there is no

consideration, there can be no equitable assignment. He relies also upon the Australian case of *Olsson v Dyson*.

Validity of Assignment - Analysis and Conclusions

61. I am satisfied that the authorities to which Mr Brown referred me mean that an effective assignment under section 136 requires that it be in writing and under the hand of the assignor and that the Assignment here signed by Mr Frischmann as the assignor's attorney does not satisfy that requirement. In view of the authorities from *Wilson* onwards I do not accept that the wording of the 1971 statute should be treated as rewriting the 1925 statute, in the absence of any express reference to the earlier statute.

62. The question then is whether there was any transaction effective as an equitable assignment.

63. As Dr Frischmann's appointed attorney Mr Frischmann has by the Assignment itself manifested his intention as Dr Frischmann's agent to assign Dr Frischmann's rights under the First and Second IDM Loans and the Guarantee to himself. All that is necessary has been done by Dr Frischmann's agent, who has his authority. The only difficulty is that the statute has not been complied with.

64. I reject Mr Brown's submission that the cases to which he referred require that there must be consideration to support a valid equitable assignment of an existing chose in action. *Glegg v Bromley* concerned the proceeds of an action for defamation, so the assignment was of future property and could only operate as a contract to assign when that property came into existence and therefore required consideration. *McNulty v HMRC* concerned the striking out of a bankrupt's appeal against tax assessments on the basis he had no *locus standi* to bring the appeal. The learned Judge concluded that the spoken words relied upon could not amount to a legal assignment and that there was no consideration, which he implicitly concluded would have been necessary for a valid equitable assignment. There does not appear to have been full argument about the nature of a right of appeal against liability to tax assessments, whether it was in the nature of a chose in action at all, rather than a remedy, or even whether it was capable of assignment at all. It also does not appear that the learned Judge was referred to the case law to which I have been taken distinguishing between assignments of future property and of existing choses in action.

65. The choses in action the subject of the Assignment were in existence at its date and, on the basis of the *Technocrats* and *Holt* decisions to which I have referred, I conclude that consideration is unnecessary to support a valid equitable assignment of them.

66. Even if that is not right, it is clear from *Walker v Bradford* that it is not open to the defendants as obligors and strangers to the assignment to impugn it.

67. This line of defence is one of law. I am satisfied that I have available all the necessary evidence to determine it and that the parties have had a proper opportunity to address it. There is nothing that points to the existence of other material that would be available at trial which would make a difference to my reasoning or conclusion. For the reasons I have explained I conclude that the Assignment was a good equitable assignment of the IDM Loans and the Guarantee, and even if it were not that it would

not be open to the defendants to argue the contrary. Accordingly, the defendants have no real prospect of success on this line of defence.

Notice

68. The defendants' next line of defence is that although they say at [13.2] of the Re-Amended Defence that they "admit receipt of a letter purporting to give notice of the alleged assignment; nevertheless, [they] cannot plead to whether or not they were given notice of "the Assignment" as no assignment was enclosed with the letter of 18 June 2020 and [they] are not aware if any assignment was in fact executed."

69. It is said in the witness statement of Ms Dubé that notice of the assignment was not received and "it is now far too late to do so for the purposes of the Claimant's summary judgment application".

70. Mr Benham-Mirando submits that:

- (i) IDM and Mr Samuelson have admitted that they received a letter of 18 June 2020 which states clearly that an assignment of the Loans and the Guarantee had taken place;
- (ii) the defendants' argument appears to be that because they were not provided with the Assignment itself, the notice was in some way not valid;
- (iii) [16.47] of *Smith & Leslie* explains that to comply with s 136 what is needed is to convey the fact that there has been an assignment of the debt in writing but that there is no need to provide proof of the assignment; and
- (iv) as to equitable assignments, [13.79] of the same work explains: "no particular words are required so long as the debtor or assignee is given to understand in plain and unambiguous terms that the interest has been made over to the assignee."

71. The extent of the defendants' argument appears to be that if they are correct that the Assignment was not effective then no notice of assignment can have been given.

Notice - Analysis and Conclusion

72. The notice dated 18 June 2020, which Mr Samuelson admits he received, conveys in writing the fact of the Assignment and makes it plain to a recipient, whether IDM or Mr Samuelson, that the Loans and the Guarantee had been made over to Mr Frischmann. There is no legal requirement that an obligor is to be provided with a copy of the Assignment itself. I conclude that the letter of 18 June 2020 would have amounted to a good notice had section 136 been complied with and was a good notice of the equitable assignment which I have concluded is what had taken place.

73. This defence relies upon a question of construction of the notice of assignment dated 18 June 2020. I am satisfied that I have available all the evidence needed to determine it and that the parties have had a proper opportunity to address it. There is nothing that would put a trial judge in a different and better position to determine the construction question. For the reasons I have explained I conclude that the notice of assignment was a good notice of Dr Frischmann's equitable assignment of the IDM Loans and the Guarantee to Mr Frischmann. Accordingly, the defendants' have no real prospect of succeeding in this defence.

Guarantee Assignment Issue

74. Mr Samuelson says that Mr Frischmann has no standing to sue him because Dr Frischmann's rights under the Guarantee were never assigned to Mr Frischmann.

75. This defence relies on the fact that Recital B to the Assignment states that "[Dr Frischmann] is the obligee of a £165,000 ... guarantee given by the Borrower on 23 November 2018 (Guarantee)". The "Borrower" is defined as IDM.

76. The operative provisions of the Assignment are as follows:

(i) Clause 1 defined "Guarantee" as "any guarantee, indemnity or other obligation of any kind in respect of the obligations of [IDM] to [Dr Frischmann] under or in connection with the [First or Second IDM Loans]". That definition plainly encompasses the Guarantee.

(ii) Clause 2(c) assigned the "Guarantee", so defined, to Mr Frischmann.

77. Mr Benham-Mirando relies on [10.54ff] of *Lewison, The Interpretation of Contracts* (7th ed) for the proposition that in the case of an inconsistency between the recitals and the operative part of a contract, the operative part prevails. He says therefore that, even if Recital B of the Assignment on its true construction, was not referring to the Guarantee, that would not matter, because the Guarantee was clearly assigned to Mr Frischmann by virtue of Clause 1 the Assignment's definition of the Guarantee.

78. Secondly, he says, on its true construction Recital B of the Assignment was referring to the Guarantee:

(i) recital A deals with the facility agreements (the First and Second IDM Loans). Recital B was plainly intended to deal with something different, which could only be the Guarantee;

(ii) a mistake has evidently occurred in that Recital B refers to the Guarantee having been given by the "Borrower" in circumstances where IDM had given no guarantee and the only guarantee that was given was by Mr Samuelson;

(iii) Schedule 1 to the Assignment contains an agreed form of Notice of Assignment. That Notice includes the Guarantee within its definition of "Assigned Documents", and expressly refers to it as "the personal guarantee given by [Mr Samuelson] on 23 November 2018"; and

(iv) it would be a nonsense for IDM to give a guarantee in respect of its own obligation.

79. Mr Benham Mirando relies on the well-known passage in the judgment of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, [22-25] and submits that it is clear that something has gone wrong in the language of Recital B; and clear what a reasonable person would have understood the parties to have meant. I am invited to conclude that the Recital should be construed as if the mistaken reference to the "Borrower" was a reference to Mr Samuelson.

80. Mr Brown says that the lack of any reference to Mr Samuelson by name in the Assignment means that the Assignment cannot be read as including the Guarantee. He says that using the content of a recital or, here, an Appendix, to cut down or qualify clear words of the operative part of the contract is not permissible and for that proposition relies upon [10.41] of *Lewison*. He says that this is the sort of construction argument that should not be subject to determination at the summary stage but only at

trial, where other evidence of the assignor and the assignor's instructions for the drafting of the Assignment might be available.

Guarantee Assignment – Analysis and Conclusion

81. In my judgment the clear words of the Clause 1 definition of matters covered by the Assignment plainly include the Guarantee. To the extent necessary, for the reasons relied upon by Mr Benham-Mirando, I would conclude that Recital B contains an obviously mistaken reference to the “Borrower” capable of correction by construction to include express reference to Mr Samuelson, who was the only provider of a guarantee capable of being that which was referred to by that Recital. I do not accept that the content of the Appendix should be rejected as an aid to construction of the operative part of the agreement where it clarifies what might otherwise be unclear.

82. Again this defence relies upon a construction argument, which is capable of determination at this summary stage, when there is no evidence that relevant material admissible on the construction question rather, possibly, than evidence of Dr Frischmann's subjective intention would be available at trial such as to give this defence any real prospect of success.

83. I conclude that the Assignment was effective to assign the Guarantee to Mr Frischmann.

Interest

84. The defendants plead in their re-Amended Defence that the interest provision in the Guarantee is unenforceable because it refers to interest at “12% above the base rate of [Dr Frischmann]” and Dr Frischmann, as an individual, had no “base rate”.

85. Mr Benham-Mirando says that the fact that Dr Frischmann has no “base rate” does not make clause 4.1 of the Guarantee too uncertain to be enforceable. It simply means that the interest rate under the Guarantee is 12% (compounded monthly) rather than anything higher.

86. He relies on *Chitty* at [4-186] and [4-190] as explaining that, the court will make considerable efforts to give meaning to apparently meaningless phrases. The Guarantee itself provides at clause 12 that any unenforceable provision be deemed modified to the minimum extent necessary or, if that is not possible, for its deletion.

Interest – Analysis and Conclusions

87. I accept Mr Benham-Mirando's submission that the meaning to be given to the words of the Guarantee are that the interest rate is to be 12%. That is the natural meaning of the words used where Dr Frischmann has no base rate. Further to the extent that a modification is necessary to the Guarantee, the minimum modification is to omit the reference to “the base rate of Dr Frischmann.”

88. This line of defence is again one of construction, which is suitable for determination at this stage. I conclude that the defendants have no defence with a realistic prospect of success on this interest argument.

Compromise

89. The defendants contend that the March Agreement compromised Dr Frischmann's rights against the defendants under the First and Second IDM Loans and the Guarantee. The March Agreement is in writing, pre-dates the alleged Assignment, and is signed by Dr Frischmann and Mr Samuelson (also for IDM).

90. Mr Benham-Mirando says that this argument was raised for the first time in the proposed re-amendments to the defence and in a supplemental note provided 2 hours before this application was last listed, implicit in that is that I should be sceptical about the line of defence.

91. Mr Benham Mirando says that it is trite law that a variation or compromise must be supported by consideration. He says that a right is not varied by a compromise until the promise has been performed and so the consideration has to be actual payment. Lord Atkinson in *Morris v Baron and Co* [1918] AC 1 explained at 35:

“There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in *Peytoe's* case ((1611) 9 Rep. 77b , 79b). If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made.”

92. He says that it was only upon actual payment that the terms of the March Agreement would have become operative. There was no such payment and so the March Agreement is unenforceable on its own terms. He relies upon the following:

(i) the language used is that IDM agreed to “repayment” and “making a payment” which refer to the act of paying. It was not framed in terms of a promise to pay in contrast with the promissory notes which provide that IDM “unconditionally promise to pay”.

(ii) the terms of the March Agreement provided for payment within 14 days (by 31 March 2019). In other words, payment in short order was anticipated. That demonstrates the importance of actual payment. Dr Frischmann was bargaining for actual payment in the near future in exchange for giving up the rights he had under the original agreements.

(iii) it does not make sense that Dr Frischmann would exchange a promise to receive payment (under the First and Second IDM Loans and the Guarantee) for a mere promise to receive payment without the benefit of a Guarantee. That could have been of no benefit to him. The benefit must have been actual payment in 14 days time and until actual payment was made no rights would be given up.

93. If it were determined that there was simply a promise by IDM to pay £635,260 under the March Agreement, this was merely a promise to do what it was already contractually obliged to do and so infringes the rule in *Foakes v Beer* (1894) 9 App Cas 605:

(i) *Chitty* says this at [6-127]:

“A counter-promise by the debtor to pay only part of the debt provides no consideration for the accord, as it is merely a promise to perform part of an existing duty owed to the creditor. And the actual payment is no satisfaction under the rule in *Pinnel's Case* that “Payment of a lesser

sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole”. This rule was approved by the House of Lords in *Foakes v Beer*.”

(ii) at the time of the March Agreement, the First IDM Loan (of £1,000,000) was not due but the Second IDM Loan (of £165,000) was. *Chitty* says at [6-138]:

“Consideration for a creditor’s promise to accept part payment of a debt in full settlement can be provided by the debtor’s doing some act that they were not previously bound by the contract to do. For example, payment of a smaller sum at the creditor’s request before the due day is good consideration for a promise to forgo the balance, since it is a benefit to the creditor to be paid before they were entitled to payment, and a corresponding detriment to the debtor to pay early.”

94. Accordingly, he submits there is only a sufficient benefit to found consideration for a variation, when there is actual earlier payment (rather than the mere promise of earlier payment). Since no actual payment was made under the March Agreement, it is unenforceable.

95. Further it is apparent that Mr Samuelson did not consider that he was bound by the March Agreement. He made a personal payment of £70,000 on 14 August 2020, which he would hardly have done had he considered his Guarantee was released. In his letter of 10 June 2021, Mr Samuelson wrote: “Turning to my personal guarantee of the £165,000 of which I have already paid £70,000 in good faith, I will repay the balance as soon as I have sufficient funds to do so.” That statement would make no sense if the March Agreement were enforceable. That letter makes no reference to the March Agreement at all.

96. Mr Brown points out that the March Agreement was originally relied upon by Olephant when acting for Dr Frischmann in October 2019.

97. Mr Brown points out also that there would be no difficulty with Dr Frischmann suing on the Agreement for the £635,260, subject to any defences available. However, that is not what has happened Mr Frischmann rather than Dr Frischmann has brought the claim and the claim is based on loan agreements which the defendant say have been compromised and a guarantee that has been released, which is impermissible, see the discussion in *Foskett on Compromise* (9th Ed.) [6-01-6-02].

98. Mr Brown says that the Compromise is a complete answer to the claim and to the summary judgment application.

99. In the claimant’s Re-Amended Reply the answer to the defence of Compromise avers a lack of consideration for the compromise and reserves the right to rescind the March Agreement for fraudulent misrepresentation but does not plead any particulars of the alluded to misrepresentation.

Compromise – Analysis and Conclusion

100. Since a case on misrepresentation is not pleaded by Mr Frischmann, it is not relevant to the present application and therefore my consideration of the question of the enforceability of the March Agreement.

101. While it may be inferred that Dr Frischmann's initial instructions to his solicitors must have been that he considered that the March Agreement was an effective compromise and it was on that that he wished to pursue the defendants, that cannot affect whether, as a matter of fact and law, there was or was not a binding compromise reached by the March Agreement. Accordingly, the fact that Olephant relied upon it in their letter of 8 October 2019 is not material either.

102. What is more instructive is Mr Samuelson's conduct. His making a part payment under the Guarantee is inconsistent with the March Agreement being effective or him believing it to be so. His promise to pay the balance under the Guarantee in his 10 June 2021 letter is similarly inconsistent. Mr Samuelson's failure at any time before his Re-Amended Defence to refer to the March Agreement in answer to Olephant's pursuit of payment is also surprising.

103. I conclude from the cases to which I have referred that actual payment of total sums in excess of sums already due on an earlier date than that total would be contractually due to be paid in full would be sufficient consideration to make enforceable a compromise of the obligations of IDM to pay further sums in accordance with the terms of the First and Second Loan Agreements, since payment on an earlier date may be good consideration for a compromise. However, if it was a term of the March Agreement that there be actual payment on that earlier date the compromise would not be rendered enforceable unless that payment were made on the agreed earlier date.

104. By contrast if the consideration for the March Agreement was simply IDM's promise to pay on an earlier date the compromise would be enforceable.

105. The question then is whether there is a realistic prospect of the defendants succeeding in arguing that on the true construction of the March Agreement Dr Frischmann was accepting merely a binding promise to pay early so that the compromise was enforceable, as opposed to stipulating for receipt of an early payment, which did not occur.

106. Construing the words of the March Agreement I conclude that by its terms Dr Frischmann contracted for actual early payment of the sum of £632,500 on 31 March 2019. The language used is the language of actual payment and in the circumstances, where the variation intended to IDM's obligations by the March Agreement was as to the time of payment and the release of the Guarantee, a mere promise of early payment 14 days hence would be of no sensible benefit to Dr Frischmann so as to provide satisfaction. That construction and only that construction is consistent with Mr Samuelson's subsequent actions and statements, which are consistent only with no enforceable compromise having come into existence, because no payment was made.

107. It is also notable that by the terms of the March Agreement, no consideration moved from Mr Samuelson for the release of his Guarantee.

108. I conclude that there is no realistic prospect of Mr Samuelson satisfying a trial Judge that the March Agreement amounted to an enforceable compromise of Dr Frischmann's rights under the First and Second IDM Loans or the Guarantee, once the

31 March 2019 passed without payment being made. There is no material to point to the availability at trial of evidence which would affect this construction issue.

Collateral Agreement

109. This defence is set out at paragraphs 36-41 of the Re-Amended Defence, dated 8 March 2023, as I understand it the defence would have been pleaded in the Amended version of the Defence served on 14 February 2023, but practical difficulties prevented that happening. The defence is a claim that Dr Frischmann and the defendants entered into an oral collateral agreement that Dr Frischmann would not enforce the terms of the First and Second Loans or Guarantee until successful salvage occurred thus engaging promissory estoppel or forbearance in equity. The defendants say that this is sufficient to defeat the summary judgment application because the Court would need to hear oral evidence from the parties' witnesses to determine whether the collateral agreement existed.

110. This defence would require the Court to accept that there were collateral promises, representations or assurances by Dr Frischmann that he would not take steps to enforce his formal contractual rights and which had contractual force.

111. Mr Frischmann and Dr Frischmann have been chasing the defendants for payment since the autumn of 2019. The first time that there was any suggestion that Dr Frischmann might not expect payment before salvage occurred was in Mr Samuelson's June 2021 letter. The first time a case that there was a collateral agreement was raised was some days before the hearing of this application first listed on 23 February 2023.

112. Mr Benham-Mirando says that if such an agreement existed it would have been an obvious point for Mr Samuelson to have raised in correspondence and to have pleaded in his original Defence dated 13 December 2022.

113. Mr Benham-Mirando says that the claimed collateral agreement is inconsistent with Mr Samuelson's repeated statements in answer to Olephant's correspondence that he would be in a position to pay the sums due soon because funds would be available from the successful conclusion of some other transaction or transactions, for example in his letter of 15 January 2021 and 10 June 2021.

114. He says that Mr Samuelson has produced no contemporaneous documentary evidence in support of this pleaded case.

115. In addition the argument is inconsistent with the contemporaneous documents:

- (i) the First and Second IDM Loans provide for repayment on the earlier of successful salvage and a specific date and the respective promissory notes included unconditional promises to pay on those dates;
- (ii) the parties formalised the First IDM Loan, the Second IDM Loan, the Guarantee, the promissory notes and the March Agreement in writing. Against that background it is extraordinary that there should have been a fundamental but undocumented collateral agreement;
- (iii) both IDM Loans contained 'formality' clauses in relation to both amendments and waivers which required signed writing.

116. Mr Benham-Mirando relies upon: *MWB v Rock Advertising* [2019] AC 119 for the proposition that no-oral modification clauses prevent oral variations. In that case, Lord Sumption explained at [16] that if estoppel is to operate, there would need to be an unequivocal representation that the variation is valid notwithstanding its informality and something more is required than just an informal promise itself. He says that assertions in this respect are unparticularised and do not overcome that hurdle.

117. As to the Guarantee the collateral agreement makes no sense at all. The purpose of the Guarantee was to induce the making of the Second IDM Loan. It would have been of no benefit to Dr Frischmann if it could not be enforced unless and until there was a successful salvage outcome.

118. Mr Benham- Mirando says that the collateral agreement defence is unconvincing, is not fully particularised, is unsupported by evidence establishing its factual basis which meets the merits test is implausible and not supported by the contemporaneous documents; and therefore, has no realistic prospect of success.

119. Mr Brown says that a triable issue is raised because the court cannot determine whether a collateral agreement existed without hearing oral evidence from the parties and that Mr Samuelson's pleading of his case in this respect verified by a statement of truth is uncontradicted.

Collateral Agreement -Analysis and Conclusion

120. The Re-Amended Defence refers to the Collateral Agreement being made, repeated and reaffirmed over the course of least 20 meetings at Dr Frischmann's office. The dates of the meetings are not pleaded and nor is it pleaded who was present at these meetings or what the contractual words used were, contrary to the requirements of CPR 16PD 7.4. Although Mr Samuelson has signed the statement of truth verifying the pleading, he has put in no witness statement detailing the conversations in which he claims the collateral agreement was reached or explaining how such agreement fits with the clear words of the First and Second IDM Loans and their references to payment at set dates or on earlier salvage. Nor has he explained how any such collateral agreement would make sense alongside the Guarantee. Nor, again, is there any explanation how any collateral agreement fits with the March Agreement; if there was to be no enforcement until successful salvage why would the parties agree that there should be any payment on 31 March 2019?

121. Mr Samuelson has produced no contemporaneous documentary evidence to support his case or even subsequent documentary evidence, apart from the hint in his 10 June 2021 letter, evidencing his belief in or reliance upon any such collateral agreement earlier in time than the proposed amendments to the Defence in February 2023.

122. Mr Samuelson's promises that payments would be made from the proceeds of other transactions is entirely inconsistent with the claimed collateral agreement.

123. I fully accept that I must not conduct a mini-trial at this summary stage, but on analysis of the material that does exist I am unable to accept that there is any degree of conviction in Mr Samuelson's assertion that he reached a collateral agreement with Dr Frischmann as he contends. There is no documentary material supportive of a prima

facie case that his assertion, which is impermissibly unparticularised, is correct. There is nothing in the evidence before me now that leads me to conclude that there will be evidence available at trial which would substantiate Mr Samuelson's case on the existence of a collateral agreement.

124. I accordingly conclude that the collateral agreement defence has no realistic prospects of succeeding at trial.

Conclusion on the Defences to the Money Claims

125. I have concluded that there is no realistic prospect of the defendants successfully defending Mr Frischmann's money claims on any of the bases advanced. There is no other compelling reason why any or all of those defences need to be disposed of at trial. Accordingly I will give judgment against IDM for the sums loaned pursuant to the First and Second IDM Loans plus contractual interest and against Mr Samuelson for the sum the subject of the Guarantee (with credit to be given for the August 2020 payment of £70,000) plus contractual interest since the demand on 15 January 2021.

Information

126. Mr Frischmann seeks summary judgment on his claim for contractual disclosure pursuant to clause 9 of each of the First and Second IDM Loans.

127. Mr Benham-Mirando relies upon the explanation of Colman J in *Formica Ltd v Exports Credits Guarantee Department* [1994] CLC 1078, at 1084, that the Court has jurisdiction to grant a mandatory injunction for disclosure pursuant to a contractual term and determine any issue of contractual construction at the interim stage on summary judgment principles.

128. He says that clauses 9(a) of each of the First and Second IDM Loans are widely drawn and under their terms IDM covenants to provide financial information. Mr Frischmann has acknowledged that the information is only to be provided if it is reasonably requested, and if it relates to Mr Frischmann's position as a creditor.

129. Mr Frischmann has made a number of requests for information under those provisions, including the Information Request and on 3 November 2022, IDM and Mr Samuelson agreed to the November 2022 Order but have allegedly failed to comply in a number of respects as set out by Mr Castledine.

130. Mr Frischmann seeks summary judgment for the provision of the balance of the information sought by way of the Information Request that is:

(i) An explanation, giving a reasonable amount of detail, of each transaction recorded in the updated Statement which was provided pursuant to the November 2022 Order, to be supported by documentation establishing the fact, nature and reason for each such transaction, and:

(a) in the case of outgoing payments, documentation establishing the terms on which the relevant payments were made and the nature of the consideration actually provided by the recipient; and

(b) in the case of incoming payments, documentation establishing the terms on which the relevant payments were made and the nature of the consideration provided in return.

(ii) An explanation, giving a reasonable amount of detail, as to how IDM's financial performance to date compares to its budgets and forecasts, and the reasons for any deviations from the same and the steps IDM has taken or intends to take in relation to such deviations.

(iii) An update, giving a reasonable amount of detail, on IDM's business, including in relation to the joint venture with Britannia's Gold Ltd and the funding of the same.

131. Mr Benham-Mirando submits that this is all "financial or other information ... relating to [IDM] or its business"; that it is reasonably requested given the lack of clarity as to IDM's position ascertainable from the documents provided so far and that it plainly relates to Mr Frischmann's position as a creditor.

132. IDM has by its Re-Amended Defence put Mr Frischmann to proof on three matters:

- (i) whether Mr Frischmann is Dr Frischmann's assignee;
- (ii) whether the Information Request was sent in a contractually compliant manner; and
- (iii) whether the information requested is information to which Mr Frischmann is entitled under the First and Second IDM Loans.

133. The first point has been addressed earlier in this judgment.

134. As to the second point Mr Benham-Mirando submits that IDM engaged with Mr Frischmann's information requests without comment on the manner in which they were made and has accordingly waived any right to and/or is estopped from contending that the requests were invalid for want of compliance with clause 13 of the First and Second IDM Loans.

135. In any event he says that the Information Request was sent in a contractually compliant manner:

- (i) the address for IDM given in both the First and Second IDM Loans was 50 Town Range, Gibraltar.
- (ii) Clause 13 of both the First and Second IDM Loans provided that "[e]ach notice or other communication under this agreement shall be in writing and shall be given by being left at or sent by post or fax to [IDM] or to [Dr Frischmann] at their respective addresses set out above ... Any such notice or communication shall be deemed to have been given in the case of post two days after being put in the post ..."
- (iii) the Information Request was sent by post to IDM at 50 Town Range, Gibraltar.

136. As to the third point he says:

- (i) it is accepted by Mr Frischmann that IDM was obliged to provide only information
 - (a) reasonably requested; and
 - (b) relevant to his position as a creditor of IDM.
- (ii) by its Re-Amended Defence IDM has pleaded the more restrictive implication, that IDM was obliged to provide only such information "as was necessary and proportionate and relevant to Dr Frischmann's standing as

lender”. Mr Frischmann says that there is no basis for implying such a restriction. It does not satisfy the test of necessity for an implied term: *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 at [7];
(iii) No positive case is put that any information has been unreasonably requested or is irrelevant to Mr Frischmann’s position as creditor of IDM where the loaned monies were covenanted to be spent with a specific purpose. The requests seek information that goes to how IDM’s business is progressing and how it has spent the money loaned; both of which are material in understanding whether the terms have been complied with and which are relevant to Mr Frischmann’s position as a creditor.

137. As to the point that the relief sought is a mandatory injunction, Mr Benham-Mirando says that this means that the grant of relief is discretionary, but it is well-established that final mandatory injunctive relief will generally be granted unless it would be “out of all proportion to the requirements of the case, and would operate with extreme harshness on a defendant” quoted with approval at [52] of *SDI Retail Services Ltd v The Rangers Football Club Ltd* [2018] EWHC 2772.

138. Mr Brown’s submissions in relation to the claim for disclosure of information focussed upon the conduct of Mr Frischmann and his lawyers in suggesting in correspondence and by the terms of the Re-Amended Reply that they might in the future plead fraud or misrepresentation by the defendants but have not actually done so. He said that this was not a simple debt claim but a campaign to mount a fraud allegation, which has rumbled on in the background for some time without an open and particularised plea of wrong-doing being made.

139. Mr Brown said that pleading of such allegations of wrongdoing should happen before disclosure. He relied upon [368] of the judgment of Cockerill J in *King v Stiefel* [2021] EWHC 1045 quoting the judgment of Warby J in *Duchess of Sussex v Associated Newspapers* [2020] EWHC 1058 at [59]. Those passages make clear that a party cannot avoid giving required particulars of misconduct by saying that they will be given at disclosure.

Provision of Information – Analysis and Conclusions

140. I am satisfied, for the reasons already given, that Mr Frischmann is Dr Frischmann’s assignee. I am satisfied also, for the reasons submitted by Mr Benham-Mirando, that the defendants have no realistic prospect of succeeding in any argument that the Information Request was not sent in a contractually compliant manner or that the information now sought is not reasonably requested and relevant to Mr Frischmann’s position as IDM’s creditor and therefore is not information to which Mr Frischmann is entitled under the terms of First and Second IDM Loans.

141. Mr Frischmann seeks disclosure as a matter of contractual entitlement, not pursuant to the rules of court. To the extent that he is entitled to contractual disclosure that entitlement is independent of any disclosure made pursuant to the process now governed by CPR PD57AD.

142. The principle that particulars of wrong-doing must be pleaded before disclosure referred to in the *King v Steifel* and *Duchess of Sussex* cases is of limited, if any, relevance to Mr Frischmann’s application. He has not presently pleaded any relevant

type of wrong-doing and would not be able to use the PD57AD disclosure process as a fishing exercise to obtain disclosure going beyond his pleaded case. Also, he would risk being unable to obtain either consent or permission to amend to plead any form of wrong-doing in advance of disclosure without putting forward a properly particularised case. The principle does not afford the defendants any defence to the contractual claim for information.

143. Although I am being asked to make what amounts to a mandatory injunction, it is one to enforce compliance with a contractual term binding on the defendants and enforceable by Mr Frischmann and there is nothing disproportionate or harsh in my doing so. There is no other compelling reason why this issue should proceed to trial. I will therefore make an order that the defendants provide the balance of the information sought by the Information Request.

Judgment

144. This Judgment will be handed down remotely and without attendance on 3 November 2023 with consequential matters dealt with either by agreement or at a hearing to be fixed on a later date.