



Neutral Citation Number: [2019] EWHC 1503 (Comm)

Case No: CL-2019-000110

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

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

Date: 14/06/2019

Before :

MR JUSTICE BUTCHER

Between :

AMC III PURPLE B.V.
- and -
AMETHYST RADIOTHERAPY LIMITED

Claimant

Defendant

Hannah Brown QC (instructed by **Enyo Law LLP**) for the **Claimant**
Alex Barden (instructed by **Latham & Watkins (London) LLP**) for the **Defendant**

Hearing dates: 5 June 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BUTCHER

Mr Justice Butcher :

Introduction

1. This is an application by the Claimant, AMC III Purple B.V., for summary judgment in respect of certain aspects of its claim relating to two written agreements under which it lent certain sums to the Defendant, Amethyst Radiotherapy Ltd. Those two agreements are: (i) a mezzanine facility agreement dated 7 May 2014 (the “MFA”), as amended by an addendum dated 21 April 2015; and (ii) a supplemental loan agreement dated 21 April 2015 (the “SLA”).
2. Specifically, the Claimant contends that it is entitled to summary judgment in relation to:
 - (i) Its claim for a declaration that there have been “Events of Default” under each of the MFA and the SLA as a consequence of: (a) the Defendant’s failure to pay interest under the MFA on 31 December 2018; (b) the Defendant’s failure to pay interest due under the MFA on 31 March 2019; (c) the Defendant’s failure to repay the principal sum of €4 million that it borrowed under the SLA either by the “Repayment Date” (21 April 2018) or at all; and (d) the Defendant’s failure to pay interest of approximately €1.127 million due under the SLA.
 - (ii) An order that the Defendant pay sums due to the Claimant in respect of outstanding but unpaid interest under the MFA.
 - (iii) An order that the Defendant pay the principal and interest outstanding under the SLA.
3. The Claimant contends that its entitlement to summary judgment can be readily demonstrated by reference to the contractual documents. The Defendant, by contrast, contends that it is important to consider the background to those documents and the relations between the parties in more detail, and that when this is done, it will be seen that the appropriate disposal of the Claimant’s application is that the application for summary judgment should be dismissed. The Defendant has also issued a cross-application for the present proceedings to be stayed pending the outcome of an ICC Arbitration which has been commenced in Cyprus, or alternatively, if the court is minded to order summary judgment in favour of the Claimant, for enforcement of that judgment to be stayed pending the resolution of the ICC Arbitration.

Factual Background

4. The background to the MFA and the SLA is the subject of a lengthy witness statement of Mr Goldenberg on behalf of the Defendant. The Claimant’s witness statements say that much of the contents of Mr Goldenberg’s witness statement is not accepted but, save in certain limited respects, do not contradict it. Accordingly, I consider that the Defendant has a reasonable prospect of establishing at trial, should there be one, that Mr Goldenberg’s evidence insofar as not contradicted accurately sets out the factual background. I will proceed on this basis, and what follows is a summary of Mr Goldenberg’s factual account.

5. As described by him, the Defendant is a joint venture company, which was incorporated in Cyprus in 2014 and changed its name to its current name on 18 March 2014. Its original shareholders (the “Original Shareholders”) were a Cypriot company, Panourania Trading Ltd, and an Israeli company, Exclusive Golden Care Limited. The purpose of the Defendant company was to operate radiotherapy centres. The underlying business operations had previously been conducted through three partnerships under Cyprus law. These partnerships transferred all their rights and obligations to the Defendant in May 2014.
6. By 2013 the Original Shareholders and those that controlled them were looking to expand this business, which already had substantial conventional debt, by way of some sort of long term partnership with an investor. As a result, starting in October 2013, they began discussions with representatives of the Accession Mezzanine Capital Group of companies (the “AMC Group”). Companies in the AMC Group provide mezzanine finance, which may be described as a hybrid of debt and equity.
7. As a result of these discussions it was agreed that a company in the AMC Group would receive a warrant for 5% equity in the Defendant. It did not pay a commercial price for this, but instead it was agreed that another AMC Group company would provide a €21 million mezzanine facility for seven years. In the contractual documents which were entered into in May 2014, the Claimant was to be the Lender and was to provide the mezzanine facility in three tranches under the MFA, while the equity interest was allotted to a separate entity, namely Accession Mezzanine Capital III LP. This entity was later replaced in the arrangements by Accession Mezzanine Capital III (Jersey) Ltd. I shall refer to both as “the AMC III Fund”. There was also a Shareholders’ Agreement (the “SHA”) governed by Cypriot law. The SHA recorded that the Lender was a wholly owned subsidiary of the AMC III Fund. Under it, furthermore, the Defendant was described as “the JVC”, explicitly indicating, as the Defendant says, the joint venture nature of the arrangement. AMC III Fund had the right to appoint a CFO of the Defendant, and a role in appointing its CEO, as well as being under an obligation to ensure that the Defendant was run in the best interests of the company.
8. Under the MFA, an “Equity Contribution” was required from the Original Shareholders, which was to be made by way of loans from the shareholders or an associated company, Grevanit Ltd, and subordinated to the MFA. The terms of those loans (the “Original Shareholder Loans”) were that they were unsecured, at a 6% interest rate, rising to 8% on default, and were for an initial term of 36 months. Payments under “shareholder loans” were, by clause 21.30 of the MFA, subordinated to the MFA. This was given effect by a Sponsor Undertaking.
9. The SHA and the MFA contained provisions permitting the AMC Group companies’ interests to be bought out. There was a right to pre-pay the borrowing; and Put and Call Options for the purchase by the Original Shareholders of AMC III Fund’s equity interest based on an agreed formula. In the event of an essential breach of obligations, the innocent party would be entitled to exercise an Early Put/Call Option.
10. By early 2015 the parties had agreed a detailed Business Plan, involving the construction or acquisition of 13 additional centres by the end of 2018, and adding additional linac (ie linear accelerator) machines to specific existing centres.

11. In January 2015, there was a meeting in Vienna about how to finance this. The AMC Group was represented by Mr Franz Hörhager and Mr Chris Buckle. Mr Buckle indicated that AMC Group companies would be willing to put in more funds, but were concerned that the Defendant should not become “overleveraged”. As a result it was agreed that a company in the AMC Group would take an additional 15% shareholding at a nominal price. On the Defendant’s evidence, it was agreed that this was in consideration of the making of a loan on substantially the same terms as the Original Shareholder Loans. This was done by way of the €4 million Supplemental Loan entered into on 21 April 2015, and documented in the SLA.
12. The Defendant’s evidence is that, since those arrangements were put in place, there have been substantial disputes about the running of the Defendant and the utilisation of the funding. In particular, Mr Goldenberg’s evidence is that (i) between January 2016 and July 2016, and from January 2017 to date, AMC III Fund has not appointed a CFO; (ii) AMC III Fund insisted on the replacement of the existing CEO in late 2015, but refused to approve the terms of a new appointment until January 2017; and (iii) AMC III Fund vetoed expenditure on the acquisition and construction of new centres and linacs. According to the Defendant’s evidence, this has greatly stunted the planned expansion of the Defendant.
13. Discussions have been conducted about an exit for the AMC Group companies, involving the repayment of the lending and a payment for the equity stake. No deal was reached, and by autumn 2018 the Defendant arranged a refinancing which would permit it to pay off the lending and pay an amount in respect of the equity. According to the Defendant’s evidence, however, the relevant AMC Group companies have repeatedly blocked that refinancing.
14. On 28 December 2018 the Defendant threatened the AMC Group with arbitration. On 15 February 2019 the Defendant sent a “cease and desist” letter to AMC III Fund and to the Claimant, amongst others, intimating formal action. On 19 March 2019 a formal Notice of Dispute under the SHA was sent. Arbitration was commenced by the Defendant and the Original Shareholders against AMC III Fund under the SHA on 9 May 2019.

Summary Judgment: the MFA claims

15. The Claimant’s application insofar as it relates to the MFA is (i) for a declaration that there have been Events of Default thereunder; and (ii) for unpaid interest under the MFA, the precise details of which I will explain in due course.
16. The MFA contains the following terms of relevance:
 - (1) Sums lent under the MFA fall due to be repaid on the Termination Date, to wit 7 May 2021: clause 6.
 - (2) Clause 22.1 which stipulates that “each of the events or circumstances set out in clause 22 is an Event of Default (save for clause 22.30 (Acceleration))”.

- (3) One of the events or circumstances set out in clause 22 is that in clause 22.2, namely when “An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place at and in the currency in which it is expressed to be payable unless: (a) its failure to pay is caused by administrative or technical error or a Disruption Event; and (b) payment is made within 2 Business Days of its due date.”
- (4) By clause 1.1, a “Finance Document” includes the MFA itself.
- (5) By clause 1.6, “A Default (other than an Event of Default) is continuing if it has not been remedied or waived in writing and an Event of Default is continuing if it has not been waived in writing, in each case to the satisfaction of the Lender.”
- (6) Pursuant to sub-clause 10.2(a), the Defendant, as Borrower, is obliged to pay interest on sums advanced under the MFA (a) at the rate of the “Cash Pay Margin”, being 7% per annum, (b) on each “Cash Interest Payment Date”, namely 31 March, 30 June, 30 September and 31 December of each year.
- (7) Pursuant to sub-clauses 10.3 and 10.5 of the MFA, in the event of non-payment of interest due on a “Cash Interest Payment Date”, interest would accrue at a default rate of 9% per annum, compounded at the end of each “Cash Interest Period”.
- (8) By clause 27.6, “All payments to be made by the Borrower under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim.”

17. It is common ground between the parties that:

- (1) The Defendant failed to pay the sum of €295,544.55 that was – questions of potential set-off apart – due in respect of interest by 31 December 2018;
- (2) The Defendant failed to pay the sum of €296,407.07 that was – questions of potential set-off apart – due in respect of interest by 31 March 2019;
- (3) The Defendant did pay the sum of €295,544.55 that was due by 31 December 2018, together with further interest due at the default rate pursuant to sub-clauses 10.3 and 10.5 of the MFA, on 1 April 2019.

18. The sum of €296,407.07 has not been paid. On or about 15 May 2019 the Defendant’s solicitors wrote to the Claimant’s solicitors saying that the Defendant had a sum of about €1 million in an account, which had been advanced under Tranche B of the MFA, and requested authorisation to pay the outstanding interest from this amount. They added: “Plainly, if your client is unwilling to permit our client to make that payment there can be no basis for the complaint of a failure to pay.” On 20 May 2019 the Claimant’s solicitors replied saying that the Defendant could, if it chose to, in fact pay the sum of interest from the amount in the account, though that might be a breach of the MFA because by clause 3.1(b) of the MFA, as amended, the Defendant was to apply all amounts borrowed by it under “Tranche B, towards financing the development of three radiotherapy centres, subject to the Borrower Board of

Directors' approval and [the Claimant's] consent". For appropriate consideration to be given to the Defendant's proposal, the letter continued, certain further information was needed; but the Claimant was not obliged to consent.

The claim for a declaration

19. I consider that there is no arguable defence to the claim for a declaration that there have been Events of Default under the MFA, in the non-payment of the 4th quarter 2018 and 1st quarter 2019 interest payments on time. Each non-payment constituted an Event of Default. Neither has been waived in writing by the Claimant.
20. As I understood it, the Defendant raised three issues as defences to this aspect of the claim. I will consider them in turn, but I found that none constituted an arguable defence to the claim in question.
21. The first was a contention that the Defendant had not been under an obligation to make the interest payments because it was entitled to set off, by way of equitable set-off, various claims which it says that it has against the Claimant for the conduct of the AMC Group which are set out in Section D of its draft Defence and which include failing to put forward appropriately qualified CFOs, failing to approve a CEO, and failing to approve expenditure on projects to expand the Defendant's business.
22. The short answer to this is that, even assuming that the Defendant has claims which it can bring of that sort against the Claimant, it is not entitled to set them off against any interest payments falling due under the MFA and not entitled to make a deduction from those payments because of such cross-claims. That is the effect of clause 27.6 of the MFA. The way in which that clause is drafted, in terms of the calculation and making of payments under the Finance Documents, does not lend itself, unlike some other clauses which have been considered in the authorities, to an argument that it is only sums which are "due" against which there can be no set off and if there can be an equitable set-off the sums are not due (see Derham on the Law of Set Off (4th ed) para. 5.99). In any event, I consider that the purpose and effect of clause 27.6 is to preclude the application of an equitable set-off as well as a legal set off. I regard this conclusion to be supported by the decision in Credit Suisse International v Ramot Plana OOD [2010] EWHC 2759 (Comm), which considered a "no-set-off" clause in identical terms to that in the MFA. I also consider that it is supported by the decision of the Court of Appeal in Caterpillar (NI) Ltd v John Holt & Co. (Liverpool) Ltd [2013] EWCA Civ 1232, and in particular Longmore LJ's analysis at paragraphs [35]-[38] including his dismissal of the argument that the clause which he was considering precluded only legal and not equitable set-offs. As Longmore LJ said: "the average businessman who was told that a clause of this kind applied to legal set-offs but not equitable set-offs would hardly be able to contain his disbelief". I consider that the clause in the MFA is a clause of the "kind" that Longmore LJ was there referring to.
23. The second suggested defence is a contention that the Claimant has failed to permit a refinancing of the sums due under the MFA (and SLA), and that as a result it cannot complain of non-payments thereunder. This is not just put as a set-off, and insofar as it is relied on in that way it falls foul of the point which I have considered above, but also as what may be called a Mackay v Dick point, after the well-known case reported

at (1881) 6 HL 251. The argument is that the Claimant has effectively prevented performance of the Defendant's obligations, and in the result cannot complain about their non-fulfilment. In my judgment Ms Brown QC was correct to say that Mackay v Dick, and the principle which is referred to by the name of that case, have no application here. Payment of sums under the MFA is not an obligation which is expressly or impliedly stipulated, or would be expected, to be dependent on cooperation by the lender as to the implementation of alternative financing possibilities for the borrower.

24. The third suggested defence is that the Claimant has failed to permit the payment of these interest amounts out of the sum which the Defendant holds in its account, as part of the Tranche B drawdown. As to this, it did not appear from the material before me that the Claimant was in a position to prevent the use of those funds; nor that it was asked for agreement to use those funds for the payment of the fourth quarter 2018 interest; nor that there has actually, at least to date, been a refusal by the Claimant to accept that payment of the outstanding interest in respect of the first quarter 2019 from those funds will not be a breach of the MFA. In any event, I do not consider that the Claimant is under any obligation to agree to the use of these funds for the payment of interest under the MFA, given the terms of clause 3.1(b) (as amended).

Money claim for interest under the MFA

25. As I have already explained, the sum due in respect of interest for the fourth quarter 2018 has now been paid. That does not mean that its non-payment does not constitute an Event of Default, but does mean that there is now no claim for a money judgment in respect for that sum.
26. The Claimant claims, however, that there should be an order for the payment of the outstanding first quarter 2019 interest. In this regard, it is to be noted that the application for summary judgment does not refer to this amount, as opposed to that in respect of the fourth quarter 2018 which has now been paid. Nevertheless, it was made clear in Mr Twigden's Second Witness Statement, of 7 May 2019, and in the draft order which was annexed to the Claimant's Skeleton Argument, that summary judgment was being sought in respect of the amount of the first quarter 2019 interest. I consider that the Defendant knew that that was being sought and has been able to deal with the application for summary judgment in respect of that amount.
27. I do not consider that there is any arguable defence to the claim for summary judgment in the amount of the outstanding interest relating to the first quarter 2019. I have already explained why I do not consider that there is any arguable defence to the claim that there was an Event of Default constituted by this non-payment. The same reasons explain why there is no defence to the claim for an order to pay the relevant amount.

Summary Judgment: the SLA Claims

28. The second main aspect of the Claimant's application for summary judgment is for a money judgment in respect of the principal and interest under the SLA. There is also

an application for a declaration that there has been an Event of Default under the SLA.

29. I have already briefly referred to the circumstances in which the SLA was agreed.

30. The terms of the SLA include the following:

(1) By clause 2.1, “The [Claimant] will lend to the [Defendant] up to €4,000,000 (the **Facility**).”

(2) By clause 4.1, “The [Defendant] will repay the loan in full (together with all other amounts due but unpaid under this Agreement) on the date falling 36 months from the date of this Agreement (the **Repayment Date**).”

(3) By Clause 6:

“6.1 The [Defendant] will pay interest on the Loan at the rate of 6% per annum.

...

6.3 Interest on the Loan will be paid on the Repayment Date.

6.4 Interest on any unpaid amount will accrue on the same basis but at a rate 2% per annum higher than the rate specified in clause 6.1 above. Unpaid interest will be compounded and added to the Principal Amount.”

(4) By clause 7, which was entitled “Events of Default”

“7.1 Each of the matters listed in the rest of this clause 7 is an event of default (**Event of Default**)

(a) the [Defendant] fails to pay any amount payable by it under this Agreement in the manner stipulated;

(b) the [Defendant] breaches any term of this Agreement

...

Consequences of an Event of Default

7.2 If an Event of Default has occurred and is continuing, the [Claimant] may at any time, by giving notice to the [Defendant]:

(a) terminate the Facility (thereby reducing the Facility to zero);

(b) demand repayment of all or any part of the Loan and payment of any other amounts accrued under this Agreement; and/or

(c) declare that all or any part of the Loan is repayable, and any other amounts accrued under the Agreement are repayable, on demand by the [Claimant] at any time.

7.3 Notwithstanding the occurrence of an Event of Default, but without prejudice of (sic) the rights of the [Claimant] under clause 7.2, the [Claimant] agrees that it shall only apply proceeds recovered from the [Defendant] in repayment of the Loan after all amounts outstanding under the EUR 21,000,000 mezzanine facility agreement dated 7 May 2014 between the [Defendant] and the [Claimant] have been repaid in full.”

(5) By clause 8.1: “Each payment to be made by the [Defendant] under this Agreement will be made in full, without any set-off or deduction.”

31. The following matters are not in issue: (a) no amounts were paid under the SLA by the “Repayment Date” of 21 April 2018; (b) on 23 April 2018 the Claimant served on the Defendant a written notice of demand for repayment of the sums due under the SLA; (c) on 19 June 2018 the Defendant requested an extension of the repayment period under the SLA to 31 July 2018; (d) on 30 August 2018 the Claimant refused that request; (e) there have been no payments of principal or interest under the SLA since then.
32. The Claimant contends that these facts give rise to what it describes as a straightforward claim, (a) for a declaration that the Defendant’s failures to repay the principal and to pay interest due under the SLA constitute “Events of Default”, and (b) for an order that the Defendant repay the principal of €4 million, together with interest calculated at the rate of 6% prior to the Repayment Date and at 8% after the Repayment Date.
33. The Defendant resists this claim, and contends that summary judgment should not be entered in respect of either aspect. It raises essentially three points by way of defence to both aspects:
- (1) That the SLA was subordinated and postponed to the MFA. It was intended to be an “equity contribution”, subordinated to the MFA in the same way as the Original Shareholder Loans were;
- (2) That the Claimant has prevented the proposed refinancing intended by the Defendant and accordingly could not complain that there had not been a repayment under the SLA or payment of interest thereunder;
- (3) That the Defendant can set off claims against the Lender for the various matters alleged in Section D of the draft Defence, to which I have already referred in the context of the MFA.
34. In support of the first of these points, Mr Barden, in helpful and attractive submissions, relied on the background to the conclusion of the SLA, to which I have referred. He relied in particular on the following matters:
- (1) That the SLA was intended to provide finance in a context in which it was the AMC Group’s own view, as expressed by Mr Buckle at the January 2015 Vienna meeting, that the Defendant was “overleveraged”.
- (2) That in an email sent to individuals who were, amongst other things, representatives of the Defendant, following the Vienna meeting, Mr Buckle stated: “As discussed, I have summarised below the key terms that we shook hands on. I trust this reflects our discussions.
1. AMC III will invest via its subsidiaries EUR 4 million in a mixture of new ordinary shares and shareholder loans, pro-rata existing shareholders, for a shareholding of 15% and 15% of shareholder loans.”

Though the Claimant had contended that this email was inadmissible, as being part of the negotiations, this was incorrect as it indicated the commercial purpose of the contract.

(3) That the core terms of the SLA matched those of the Original Shareholder Loans.

(4) That the First Addendum to the MFA, executed on the same date as the SLA, provided for the SLA to be “included in the definition of Equity Contribution for the purpose of the Equity Contribution Percentage”, and defined the SLA as the “Subordinated Lender Loan”.

35. Mr Barden contended that the subordinated and postponed nature of the SLA was borne out by the terms of clause 7.3. That, he contended, provided that the SLA was only repayable when the MFA had been repaid in full. He submitted that it was significant that clause 7.3 was stipulated to be applicable “Notwithstanding the occurrence of an Event of Default”. Further that it was explicable that it was “without prejudice to the rights of the [Claimant] under clause 7.2”, because that allowed the Claimant to trigger clause 6.4 and an increase of the interest rate on unpaid sums from 6% to 8%.

36. For the Claimant, Ms Brown QC submitted that the words of the SLA were clear. Clause 4 provides that the loan is to be repaid in full on the Repayment Date. Clause 7.3 does not have, and cannot be read as having, the effect for which the Defendant contends. It is expressly stated that it is “without prejudice [to] the rights of the [Claimant] under clause 7.2”, and those rights include the right, upon an Event of Default, to “demand repayment of all or any part of the Loan and payment of any other amounts accrued under this Agreement”. Furthermore, clause 7.3 is expressly predicated on the Claimant being able to recover sums which are due: its wording is that the Claimant agrees only to “apply proceeds recovered from the [Defendant] in repayment of the Loan” after the MFA has been repaid. That indicates that the Claimant can make the recovery, but agrees not to apply the proceeds against the SLA until the MFA had been repaid. At the hearing she suggested that that might work by sums recovered under the SLA, before the MFA has been repaid, being held in a suspense account, and that that would have the advantage of protecting the Claimant in respect of the Defendant’s insolvency.

37. Ms Brown QC also submitted that the points relied upon by the Defendant in relation to the background to the SLA do not permit or compel a different reading of the terms of the SLA from that which she advocated. Specifically, while objecting to the admissibility of Mr Buckle’s email of 30 January 2015, she also submitted that it did not actually support the construction of the SLA advanced by the Defendant, in that it did not say that the new loan would not be repayable until the MFA was repaid, and in any event it specifically envisaged a process of documentation of the agreement; that there had been such a process, involving lawyers, which had lasted nearly three months; and that the result was the SLA as executed. What had been said prior to that process of drafting and documentation was of little assistance in construing the terms actually used. Further, as to the Addendum to the MFA, it was significant that the amendment which it made to clause 21.30 of the MFA did not refer to the SLA, which could not qualify as a “shareholder loan” as the phrase was there used, as indeed is

apparent from the fact that it was treated as separate from the “shareholder loans” in Clause 20.1 of the MFA (as amended by clause 2.3.1 of the Addendum).

38. In my judgment, the arguments of the Claimant on this point are to be preferred. The terms of the SLA provide for the principal amount to be repayable at the end of 36 months. Under clause 7.2(b), if there is no payment when due, the Claimant has the right to demand payment. That right is specifically stated to be preserved, and not interfered with, by clause 7.3. Furthermore, clause 7.3 cannot, in my judgment, be read, even when considered against the background to which the Defendant has drawn attention, as preventing the Claimant from recovering sums due under the SLA until after the MFA has been repaid. It refers to a postponement of the application of proceeds recovered, not to a postponement of the right to recover. While the precise intention behind clause 7.3 is perhaps debatable, I do not consider that it can be read as preventing recovery under the SLA until the MFA has been repaid.
39. The second defence raised by the Defendant to the claim under the SLA is that the Claimant has prevented the refinancing, and as a result cannot complain about the failure to pay under the SLA. This argument fails for the same reasons as the similar argument in relation to the MFA fails. It is not an express, nor can it be regarded as an implied term of the SLA that the Claimant as Lender should cooperate to facilitate refinancing, or that in the absence of such cooperation the Lender should not be entitled to claim on the loan agreement.
40. The third defence is the contention that the Defendant is entitled to set off cross-claims which it has against the Claimant against sums due under the SLA. Once again, I consider that this argument fails for essentially the same reason as the analogous argument in relation to the MFA fails. The SLA contains its own non-set-off clause. It is not in exactly the same terms as that in the MFA, but it provides that there shall not be “any set-off or deduction”. Similar wording was considered in Caterpillar v John Holt, where Longmore LJ said (at [36]) “‘Any’ must mean what it says.” I consider that the effect of the clause used is to prevent an equitable as well as a legal set-off.
41. In those circumstances I consider that the Claimant is entitled to summary judgment both in respect of its claim for a declaration that the non-payment of the principal and interest under the SLA constituted an Event of Default within the meaning of clause 7.1 thereof and in respect of its money claim for principal and interest due under the SLA.

Cross-application: Case Management Stay

42. The Defendant applies, by its cross-application, for a stay of the proceedings pending the determination of the ICC arbitration which has been recently commenced. This has been described, by way of shorthand, as a “case management stay”.

43. There is no dispute that the court has the power to grant such a stay, pursuant to CPR r. 3.1(2)(f) and s. 49(3) Senior Courts Act 1981, even when the parties to the other proceedings are different.
44. In Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 it was said that such a stay would only be granted in “rare and compelling circumstances” (per Lord Bingham of Cornhill CJ at 186C).
45. I do not consider that the present can be said to be a case in which such a stay is appropriate, at least insofar as it is sought to stay the proceedings at the present juncture and thus to prevent the Claimant obtaining summary judgment on the parts of the claim in relation to which it has sought it. The following are relevant considerations in reaching this conclusion.

(1) The Claimant is not a party to the arbitration, and the arbitration cannot, without further agreement between the parties as to the jurisdiction of the arbitrators, determine the Claimant’s claims under the MFA and the SLA.

(2) Both the MFA and the SLA contain exclusive jurisdiction clauses in favour of the courts of England, which are agreed to be “the most appropriate and convenient courts to settle Disputes”. This is a matter of considerable significance, as was the presence of English jurisdiction clauses in Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2016] 1 CLC 750, and Classic Maritime Inc v Lion Diversified Holdings Berhad [2010] 1 Lloyd’s Rep 59. To grant a case management stay would effectively deprive the Claimant of the benefit of these provisions, including the English court’s process of summary judgment, which the Defendant agreed to.

(3) The fact that the Claimant is, in my judgment, entitled to summary judgment, is itself a reason for a refusal of a case management stay: Classic Maritime Inc. v Lion Diversified at [25].

(4) The arbitration has only just been commenced. This is not a case in which there are alternative proceedings which have been significantly progressed.

(5) Insofar as the stay is sought on the basis that the result of the arbitration may be that the Claimant’s claims under the MFA and SLA will “fall away”, this appears to be premised on the assumption that an award may be made in the arbitration which will in effect require the Claimant not to continue with the claims it has made in this action, and that the party bound by the award would be able to prevent the pursuit of such claims. That assumption is questionable, however, not least because the shareholder of the Claimant is at liberty to sell its shareholding, and because the MFA expressly permits the assignment of the loans made thereunder.

46. I do not rule out that it might be appropriate, once this application for summary judgment is disposed of, for some or all of the remaining aspects of this litigation to be stayed in favour of the arbitration. That possibility is not however a matter on

which I have heard any submissions, and I do not need to express any view about it at this juncture.

Cross-application: Stay of Enforcement

47. The Defendant further seeks, if the court is minded to grant summary judgment in favour of the Claimant, an order staying enforcement of that judgment pending the outcome of the arbitration, on essentially similar grounds to those on which the case management stay is sought.
48. I did not see how this application can apply to the aspect of the application for summary judgment which seeks the making of declarations.
49. As to the application that the money judgments to which, as I have found, the Claimant is entitled, should be stayed, what is sought is a stay of the type referred to in and governed by CPR r. 83.7. As indicated in CPR r. 83.7(4) this requires a showing that “there are special circumstances which render it inexpedient to enforce the judgment or order”.
50. I do not consider that there are special circumstances which render it inexpedient to enforce the order. The Claimant is entitled to summary judgment because there is no issue which requires trial. In the circumstances, the Claimant should be entitled to enforce that judgment. The existence of the ICC arbitration is not a good reason for refusing its enforcement, for essentially the same reasons as I have given in relation to the refusal of a case management stay.

Conclusion

51. The Claimant is entitled to summary judgment. I trust that the parties will be able to agree the terms of the order, including as to the amounts which are payable. Failing agreement I will determine any issues on paper.