



Neutral Citation Number: [2019] EWHC 750 (Comm)

Case No: CL-2017-000770

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 27/03/2019

Before :

ANDREW BURROWS QC
(SITTING AS A JUDGE OF THE HIGH COURT)

Between :

ICICI Bank UK Plc

Claimant

- and -

(1) Assam Oil Co Ltd
(2) AIL Holdings Ltd
(3) Cromwell Securities Ltd

Defendants

Ms Laura John and Mr Max Evans (instructed by **Stephenson Harwood LLP**) for the
Claimant
Mr David Joseph QC and Ms Claudia Renton (instructed by **Penningtons Manches LLP**)
for the **Defendants**

Hearing dates: 5-6 March 2019

Approved Judgment

Andrew Burrows QC:

1. Introduction

1. This is an application by the claimant for summary judgment under CPR 24.2 on the basis that the defendants have no real prospect of successfully defending the claim. The claim is brought under an Amended Facility Agreement ('AFA') dated 15 April 2011. This followed an Original Facility Agreement ('OFA') dated 21 December 2007. The claim is a debt claim whereby the claimant bank, ICICI Bank UK plc ('ICICI Bank UK'), as lender, alleges that the first defendant, Assam Oil Co Ltd ('Assam Oil'), as borrower, and the second and third defendants, AIL Holdings Ltd and Cromwell Securities Ltd, as guarantors, have failed to pay sums owing under the AFA. The sums allegedly owed are, under the primary claim, which is measured in US dollars, US\$41,623,254.87 as principal plus, as at 27 December 2017, \$22,025,490.97 as interest (accruing at the contractual rate). There is an alternative claim for payment measured in sterling. On that alternative claim the principal claimed is £25,526,000.30 plus, as at 27 December 2017, £13,127,867.91 as interest (accruing at the contractual rate).
2. ICICI Bank UK's claim was issued on 18 December 2017 (although the sums claimed were amended shortly afterwards with interest updated to 27 December 2017) and the Particulars of Claim were served on 13 April 2018. The defendants served a Defence and Counterclaim on 21 June 2018. That included alleged defences of economic duress, non-disclosure, misrepresentation as to fees, and conspiracy to injure. The claimant served a Reply to Defence and Counterclaim on 9 August 2018. The claimant issued this application for summary judgment on 6 September 2018.
3. The defendants have applied for permission to serve a very different Amended Defence and Counterclaim (sent to the claimant on 28 February 2019). All the previously alleged defences and counterclaim have been abandoned. Instead, in essence, the defendants seek rescission for a misrepresentation (inducing the defendants to enter into the AFA) as to the sum of unpaid principal owing under the OFA; and restitution of sums mistakenly paid by Assam Oil. Laura John, counsel for the claimant, clarified that she would not resist that application for permission to amend (subject to costs) if the claimant's summary judgment application were to fail. It follows, and is not in dispute between the parties, that I must decide this summary judgment application on the basis of that Amended Defence and Counterclaim (subject to one point concerning an alleged admission in the original Defence that is dealt with in paragraph 49 below).
4. The second defendant, a company incorporated in Guernsey, has been struck off the register of Guernsey companies and has therefore played no part in these proceedings. David Joseph QC, for the defendants, made clear that he had no instructions from the second defendant and was therefore representing the first and third defendant only. I can therefore largely ignore the second defendant for the purposes of this judgment.
5. The correct approach for a court to take on an application for summary judgment under CPR 24.2 was not in dispute between the parties and has been clarified in several cases. These include *Swain v Hillman* [2001] 1 All ER 91, *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, at [10], and *Easyair Ltd v Opal Telecom Ltd* [2009]

EWHC 339 (Ch) at [15]. As regards applications by claimants for summary judgment, the central points to be derived from those cases are as follows:

(i) The burden of proof is on the claimant.

(ii) The court must consider whether the defendant has a ‘realistic’, as opposed to a ‘fanciful’, prospect of successfully defending the claim.

(iii) The court should not conduct a mini-trial. Where there is a dispute on the facts, the court should assume that the defendant will be able to prove the facts it is alleging unless it is clear that there is no real substance to those allegations, as where they are contradicted by the documentary evidence.

(iv) If there is a short point of law, or construction, and 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, the court should grasp the nettle and decide it.

6. What defences are the defendants here relying on? There were times during the hearing, and this is reflected in the Amended Defence and Counterclaim and in parts of the defendants’ skeleton argument, where Mr Joseph tended to suggest that payments had been made by Assam Oil to ICICI Bank UK that ICICI Bank UK could not properly account for (ie it was unclear where those payments had gone). But it became clear that the essential thrust of the defences, as ultimately put forward, was that, although paid *and accounted for*, ICICI Bank UK had been charging Assam Oil for payments that were not contractually due and had therefore been mistakenly paid by Assam Oil; and this then tied in with the submission that, in entering into the AFA, there was a misrepresentation as to the principal sum owed that entitled Assam Oil to rescind the AFA. This clarification may have followed from the realisation that, although involving some complexity and a headache-inducing paper-chase, the claimant was able to show where the payments had gone by reference to contemporaneous documents. I will need to set this out in some detail below. But, in so far as Mr Joseph was meaning to leave in play that some of the money paid could not be accounted for by ICICI Bank UK (ie that the bank could not say what had happened to it), I should make clear now that I am satisfied that there is no realistic prospect of the defendants successfully establishing at a trial that payments made by Assam Oil cannot be accounted for by ICICI Bank UK.
7. It follows that the thrust of the defences, that I am from here on concerned with, is expressed not by saying ‘we do not know where our payments have gone and the bank is unable to account for them’ but rather by saying ‘some of those significant payments we made were not contractually due’. And if they were not contractually due, Mr Joseph’s submission is that not only can there be restitution for mistake (so that the sum claimed in debt under the AFA is not owing because it ignores the deduction required for restitution of the mistaken payments) but also, and principally, there can be rescission for a misrepresentation as to the sum of principal still owing under the OFA at the time the AFA was entered into.
8. Finally, by way of introduction, it is convenient to explain that, as regards sums which both ICICI Bank UK and Assam Oil classified as repayments of principal - of course Assam Oil is alleging that there were many more payments that should have been treated by ICICI Bank UK as paying off principal but were not - there appears to be no

real dispute that, at the end of the OFA, \$10m of the principal sum loaned of \$63m had been paid off. In the AFA, it was stated in the Recital at (B) (4/14/862), clause 6 (4/14/865), and Schedule 3 clause 5.1 (4/14/900) (and note that, from here on, my references to clauses of the AFA will omit the reference to Schedule 3) that the principal sum still owing on the OFA was \$53m so that \$10m of the original principal sum loaned of \$63m had been paid off. That correlates to Table 1 in Appendix A in the defendants' own pleadings (ie its Amended Defence and Counterclaim). That table shows two payments on 21 January and 26 January 2011 amounting to \$10m. At one point, Mr Joseph appeared to cast some doubt on this by pointing to the '704' bank account of Assam Oil at ICICI Bank UK (4/13/856). That showed that ICICI Bank UK had debited, as paying off principal, two sums of \$6,844,347.02 and \$5,024,421.09 (totalling \$11,868,768.11 not \$10m). But it is clear from Table 1 in Appendix A of the defendants' own pleadings that the first of those payments was regarded as including interest of \$1,868,768.11 (and, under clause 31.5(a) of the OFA, money paid was to be applied to pay off outstanding interest before principal). That left \$10m for the payment of principal.

2. The disputed four categories of payment

9. Having cleared the ground, it follows that what I need to focus on in this judgment are the payments that the defendants allege were not contractually due but were paid to ICICI Bank UK (or ICICI Bank Ltd Offshore Banking Unit). In line with the parties' skeleton arguments, those payments may be said to fall into four categories:

(i) Payments of default interest (especially prior to the AFA) which were labelled as being for the non-creation of security.

(ii) Payments of fees (between December 2007 and June 2011) for 'structuring' services.

(iii) Payments of default interest (under clause 8.3(a) of the OFA and 8.3(b) of the AFA).

(iv) Payments of legal fees (under clause 16.1 of the OFA and the AFA).

It is in relation to those four categories of payment (I shall refer to them as the 'disputed four categories of payment') that Assam Oil alleges not only that it is entitled to restitution, and hence to a deduction from the sum claimed by ICICI Bank UK under the AFA, but also that, in so far as the payments were made prior to 15 April 2011, they tie up with there being a misrepresentation inducing the defendants to enter into the AFA on 15 April 2011 so that Assam Oil is entitled to rescind the AFA.

10. The central question I need to answer is as follows. Were the disputed four categories of payment contractually owed ie were they valid contractual payments? If they were valid contractual payments, it follows (as a matter of law, as I shall explain) that there is no entitlement to restitution for mistake (and hence no deduction from the debt claimed is required). There would also be no factual basis for alleging a misrepresentation inducing the defendants to enter into the AFA (and hence there can be no rescission of the AFA). Depending on my answer to that central question, I may need to answer a subsidiary question as to the currency of the debt owed.

3. The central question: were the disputed four categories of payment contractually owed?

(1) Payments of default interest (especially prior to the AFA) that were labelled as being for the non-creation of security

11. The claimant's case is that the contemporaneous documents show the contractual basis for the default interest labelled as non-creation of security. In an email dated 4 September 2009 to Monwara Dewan for Assam Oil (5/25/1647), a letter was attached (5/25/1648). The letter, dated 4 September 2009, was from ICICI Bank UK to Assam Oil and was headed:

'Failure to maintain Default Value Amount and Event of Default under the USD 63.0 million term loan facility ... availed by Assam Oil Company Ltd'

After referring to the OFA of 21 December 2007, the letter went on:

'In respect of the Facility granted to the borrower/AOCL, there has been various correspondence/letters exchanged between the lender and AOCL, resting with the Letter dated April 27, 2009 from the Lender to AOCL, wherein we have repeatedly requested you to take steps to cure the various defaults committed by you under the Facility Agreement.

We would once again like to bring to your notice that your failure to submit the Development Plan to the DGH [directorate of General Hydrocarbons] before May 31, 2008 and approval not being accorded to the Development Plan by the DGH prior to November 30, 2008 amounts to Events of Default under clause 25.15 (Failure to submit Development Plan) and clause 25.16 (Non-approval of the Development Plan) of the Facility Agreement respectively.

Also please note that the Borrower has not submitted the financial statements for the financial year ending September 30, 2008 within the period stipulated in clause 19.1 (Financial statements) of the Facility Agreement. Non-submission of the financial statements within the stipulated time period amounts to an Event of default under sub clause (a) of clause 25.4 (Other obligations).

Please also refer to our letter dated November 3, 2008 wherein we had brought to your notice that as per Section 25.23 of the Facility Agreement, the Default Value Amount is required to be maintained by you at a level which is above 125% of the aggregate outstanding principal amount under the Facility at all times to avoid the occurrence of an Event of Default.

In spite of several correspondences from our side, no steps have been taken from your side for curing the above-mentioned Event of Defaults. In light of the aforesaid, please note that the Lender will be forced to charge an additional interest of 2% per annum as default interest in light of the Company's continuing Defaults and the same will be applicable for the interest payment falling due in December 2009. However, please note that this would be without prejudice to the company's obligation to cure the various defaults immediately while also keeping our rights to take action against the company under the Transaction Documents.'

The letter was signed for ICICI Bank UK and at the bottom was written ‘Copy to: The Guarantor’ plus two other parties.

12. Over three months later, on 17 December 2009, ICICI Bank UK again emailed Monwara Dewan (and Sanjay Guha) (5/25/1651) saying:

‘As per our letter dated September 4, 2009 a default interest of 2% is also applicable for the current interest period on the USD 63.0 million facility which is payable in December 2009.

Accordingly please find attached the revised interest advise (sic) for Assam Oil.’

Attached to that email was a one-page document (5/15/1652) to Assam Oil from ICICI Bank UK headed ‘interest due reminder’ and dated 17 December 2009 which showed all the interest payable. This included as a separate entry 2% ‘default interest’ amounting to USD 640,500. Although we do not have any covering emails, there are then two further one-page documents in the same format (5/15/1509 and 5/15/1510) to Assam Oil from ICICI Bank UK each headed ‘interest due reminder’. The first was dated 16 June 2010 and included as a separate entry 2% ‘default interest’ amounting to USD 637,000; and the second was dated 15 December 2010 and included as a separate entry 2% ‘default interest’ amounting to USD 640,500. The total of the three sums of 2% default interest being charged was therefore \$1,918,000.

13. It is common ground between the parties that those sums were paid by Assam Oil. Some of the payments were paid from Assam Oil’s designated account with ICICI Bank UK (this was account number 75822704 which was referred to as the ‘704 account’) and others were paid directly to ICICI Bank UK by Duncan Macneill & Co on behalf of Assam Oil. The payments tended to be referred to as penalties for ‘non-security creation’ (see, eg, the 704 account ‘transaction inquiry’ document at 4/13/834). The payments (with the exception of a \$50,000 payment) are set out in Table 5 of Appendix A (1/5B/151.75) to the Amended Defence and Counterclaim (which is referred to in paragraph 24.3 of that Amended Defence and Counterclaim). That Table – which I should emphasise was drawn up by the defendants - shows that the payments made were as follows: \$298,000.71 on 22 December 2009; \$50,000 on 8 January 2010; \$106,500 on 19 January 2010; \$175,000 on 25 January 2010; and \$640,500 on 16 February 2011. A further \$50,000 does not appear in that Table but was paid by Duncan Macneill & Co on behalf of Assam Oil on 12 January 2010 (see the bank statement at 5/16/1468). The Table also shows that a payment of \$637,000 was paid from account number 75822705 on 8 September 2010. The total of the payments made was therefore \$1,957,000.71. That those payments (except the \$50,000 on 12 January 2010) were made is supported by the First Witness Statement of Susan Millar for the Claimant at paragraph 31.2 (1/7/161). The difference between the \$1,957,000.71 paid, and the \$1,918,000 owed, is explained by \$25,000 being deducted to pay agency fees, a \$25 bank charge, and \$13,975.71 being returned by the bank on 8 September 2010 to the 704 account, as having been an overcharge: see the reminder notice (4/13/848, 10 lines from the top), the email chains (5/25/1653-1658) and the bank account 704 statement (‘refund of excess’ entry dated 8 September 2010) (4/13/856).
14. The essential issue, therefore, is not whether Assam Oil made those payments of \$1,918,000 to ICICI Bank UK but whether they were payments that were contractually

owed by Assam Oil to ICICI Bank UK. I have set out in paragraph 11 above the basis for the payments that the bank was putting forward in the contemporaneous documents. The bank was saying in its letter of 4 September 2009 that, in the light of Assam Oil's continuing breach of the facility agreement, the bank would be charging an extra 2% interest. The defaults specified in that letter were Assam Oil's failure to maintain the default value amount (contrary to clause 25.23 of the OFA), its failure to submit financial statements within the stipulated time period (contrary to clause 25.4(a)), and its failure to submit, or have approval for, the development plan (contrary to clauses 25.15 and 25.16). It was recognised by Ms John that there was no express clause in the OFA permitting the bank to impose that charge (contrast the power to charge extra interest for non-payment in clause 8.3). Rather her submission was that that charge was being put forward in consideration of the bank not exercising its right to terminate the OFA for breach of those various clauses. In other words, ICICI Bank UK was implicitly saying to Assam Oil that, in return for the bank not exercising its right to terminate the OFA, it would be charging Assam Oil an extra 2% interest and that that extra interest would be payable for the immediate period (ie payable on 24 December 2009) and thereafter. The fact that Assam Oil continued with the OFA, and paid the sums due under it - including the payment of the extra 2% interest - showed, according to Ms John, that Assam Oil had consented to that extra payment. It was, she submitted, a contractual agreement constituted partly in writing (by the 4 September 2009 letter) and partly by the conduct of the parties. In particular, one could regard the letter of 4 September as constituting an offer by the bank which was accepted by the conduct of Assam Oil in making the payments. Mr Joseph submitted that there was no consideration for the extra payment – it was simply imposed on Assam Oil – and that Assam Oil had not agreed to it.

15. I agree with Ms John's submissions. In the 4 September 2009 letter, the bank made clear that there were various defaults by Assam Oil and that, because of those defaults, extra interest of 2% would be charged. The bank was implicitly indicating that the OFA would only be continued, rather than terminated immediately as the bank had the right to do, if Assam Oil paid the extra 2%. Cast in legal terms, the consideration for the extra 2% interest payment by Assam Oil was the ICICI Bank UK's continuation, instead of termination, of the agreement. Assam Oil agreed to that as shown by its continuation of payments under the OFA and, in particular, its payment of the extra 2% interest starting with payments made on its behalf by Duncan Macneill & Co on 22 December 2009 and continuing with the subsequent payments of the extra 2% interest (referred to in paragraph 13 above). We have seen (in paragraph 12 above) that the bank sent to Assam Oil the demands for payment, with the 2% default interest separately specified, in the 'interest due reminder' documents dated 17 December 2009, 16 June 2010, and 15 December 2010. The notes to the financial statements for Assam Oil for the year ended 31 December 2009 also made clear that 'substantially higher interest' was being paid than originally forecast because the company 'has been in breach of its loan covenants' (5/25/1667).
16. Assam Oil has not pointed to any document, or any other evidence, suggesting that it did not agree or consent to that extra payment of 2% interest. In Monwara Dewan's witness statement dated 19 December 2018 (1/8/169), at paragraph 39, she simply pointed to there being no provision of the OFA allowing the charging of that interest (that is of course accurate but, as made clear, at paragraph 14 above, Ms John was not suggesting that there was a provision in the OFA expressly allowing this) and that Ms

Millar, for the bank, had provided no reference to a contractual basis for such a payment. But the bank is able to point to the contractual basis of the payment – the letter of 4 September 2009 – attached in the email to Monwara Dewan of that date. It may not be surprising that, almost a decade later, Monwara Dewan could not remember that email and attachment. But the fact remains that nothing has been put forward by Assam Oil that contradicts the clear contemporaneous evidence comprising that email and letter.

17. When the AFA was entered into, on 15 April 2011, a new default interest clause was inserted, as clause 8.3(a), which swept up the extra 2% interest. This reads as follows (4/14/907):

Default interest

(a) If an Event of Default other than any Event of Default under Clause 25.1 (Non-payment)...is continuing, the Margin shall be increased by 2 per cent with effect from the date on which the Event of Default occurs.'

The default events in the AFA continued to include those referred to in the 4 September 2009 letter, namely clauses 25.4 (other obligations), 25.15 and 25.16 (submission, and approval, of development plan) and 25.23 (maintaining the default value amount). Plainly Assam Oil was accepting that extra 2% interest when entering into the AFA. This tends to offer support for the view that Assam Oil was equally willing to accept the increase in interest in the later period of the OFA.

18. Mr Joseph had one further submission on these payments of default interest. He pointed to clause 37.1(a) of the OFA (4/14/1100). This reads as follows:

Required consents

...any term of the Finance Documents...may be amended or waived only with the consent of the Majority Lenders and the Obligors and any such amendment or waiver will be binding on all Parties.'

As made clear in the 'Definitions' clause 1.1, the 'majority lenders' are ICICI Bank UK; and the 'obligors' are the borrower, Assam Oil, and the guarantor, AIL Holdings Ltd. I have made plain, in paragraph 15 above, that ICICI Bank UK and Assam Oil agreed to the 'amendment' whereby the extra 2% interest would be payable. As to whether the guarantor, AIL Holdings Ltd, ('AIL') consented, the following points are important:

(i) At the bottom of the letter of 4 September 2009, it is indicated that a copy of the letter was sent to the guarantor.

(ii) Similarly to what I have said in paragraph 17 above, AIL remained a guarantor under the AFA and this tends to offer support for the view that, on the assumption that AIL knew of it, AIL consented to the increase in interest in the later period of the OFA.

(iii) Not a shred of evidence has been put forward by Assam Oil to suggest that AIL did not consent to that extra interest being required.

(iv) Assam Oil in any event faces a difficulty in that, as I have made clear at paragraph 4 above, AIL, the second defendant, has been struck off the register of companies. Mr Joseph has no instructions from the second defendant. It seems unlikely therefore that, at any trial, there would be any relevant evidence from AIL.

(v) Even if there were evidence that AIL did not consent, there is a powerful legal argument that, because ICICI Bank UK and Assam Oil had made an agreement as to the extra 2% interest, they would be bound as between themselves even though AIL would not be bound to guarantee the extra 2% payment. That is, that on the correct interpretation of clause 37.1(a) one required the consent of AIL only to the extent that the guarantor would be bound. This may be at the core of what Ms John had in mind when she submitted that the agreement between ICICI Bank UK and Assam Oil can be seen as a side agreement (or, one might say, a collateral agreement) rather than as an amendment falling within clause 37.1(a).

19. In conclusion, for the reasons which I have set out, it is my view that Assam Oil has no realistic prospect of successfully denying at a trial that the payments of an extra 2% default interest (prior to the AFA) were contractually owed.
20. For completeness I should add that the defendants also appeared to submit (see their skeleton at paragraph 65.1) that extra 2% interest payments for non-creation of security paid *after* the making of the AFA were not contractually owed. They point, for example, to a payment of \$179,611. But I am satisfied that that sum (and others like it) were contractually owed under the new clause 8.3(a) of the AFA for continuing defaults (other than the non-payment of money). So, for example, the charge of \$179,611 is set out, with a separate entry referring to non-creation of security, in the interest due reminder sent to Assam Oil by ICICI Bank UK dated 21 June 2011 (**4/13/835**); and authorisation for ICICI Bank UK to debit the payment from Assam Oil's account was given by Sanjay Guha and Monwara Dewan on 12 July 2011 (**4/13/837**). Given clause 8.3(a) of the AFA, there is no realistic prospect of the defendants establishing at a trial that those payments of interest were not contractually owing.

(2) Payments of fees (between December 2007 and June 2011) for 'structuring' services

21. As I understand it, Assam Oil does not now dispute that four lots of fees, for purported services rendered to Assam Oil or to other parties, were paid by Assam Oil to ICICI Bank UK or to its parent company, ICICI Bank Ltd Offshore Banking Unit ('ICICI Bank OBU'). I deal with those payments of those four lots of fees in the next four paragraphs. The essential submission of Mr Joseph was that, accepting that those payments of fees were made by Assam Oil, with one exception (the 'arrangement fee') they had no valid contractual basis.
22. As regards what was treated as 'Fee 1', albeit that there were actually two separate fees paid, this comprised total fee payments of \$4.55m (broken down into one fee payment of \$1.89m and another fee payment of \$2.66m) authorised by Assam Oil on 24 December 2007. As regards the first fee, by a 'fee letter' dated 21 December 2007 to Assam Oil from ICICI Bank UK, the bank informed Assam Oil that the 'arrangement fee' for the OFA amounted to \$1.89m (**4/14/1192**). As regards the second fee, an 8-page document, dated 15 October 2007 (and signed for Assam Oil on 31 December

- 2007) set out the services - and the fee of \$2.66m and other terms - that ICICI Bank OBU would perform for Assam Oil (**5/16/1491.7**). The services were described, under a heading 'Negotiations and Structuring of the Transaction', as assisting Assam Oil 'to design and implement a suitable investment strategy'. By a letter of 20 December 2007 to Assam Oil (and confirmed by signature on behalf of Assam Oil), ICICI Bank OBU confirmed that, further to the mandate of 15 October 2007, the 'structuring assignment' had been completed (**5/16/1491.15**). On 24 December 2007, Monwara Dewan, on behalf of Assam Oil, wrote to ICICI Bank UK to the effect that, from the loan facility of \$63m, \$4.55m should be deducted. Out of that, \$1.89m should be kept by ICICI Bank UK while \$2.66m should be paid to ICICI Bank OBU (referred to also as ICICI OBU-Seepz) (**4/14/1194**).
23. Turning to 'Fee 2', this comprised a fee of \$4.9m, paid by Assam Oil, for a 'structuring assignment' for Assam Co Ltd (note not Assam Oil). An 8-page document, dated 15 October 2007 (and signed for Assam Co Ltd on 15 October 2007) set out the services - and the fee of \$4.9m and other terms - that ICICI Bank OBU would perform for Assam Co Ltd (**5/16/1491.16**). The services were described, under a heading 'Negotiations and Structuring of the Transaction', as assisting Assam Co Ltd 'to design and implement a suitable investment strategy'. By a letter of 20 December 2007 to Assam Co Ltd (and confirmed by signature on behalf of Assam Co Ltd), ICICI Bank OBU confirmed that, further to the mandate of 15 October 2007, the 'structuring assignment' had been completed (**5/16/1491.24**). Although, over ten years on, the document by which Assam Oil authorised that payment has not been traced (see the second witness statement of Susan Millar dated 6 February 2019 at paragraph 90.2)(**1/9/211**), the 704 bank account statement/account ledger report shows that a payment by Assam Oil of \$4.9m, out of account 704, was made on 28 March 2008 (**4/13/855**) following a payment of \$5m into the account on the same date by Duncan Macneill & Co.
24. As regards 'Fee 3', this comprised a fee of \$2.2m paid by Assam Oil for a 'structuring assignment'. A 17-page document, dated 27 November 2010 (and signed for Assam Oil by Monwara Dewan) set out the services - and the fee of \$2.2m and other terms - that ICICI Bank UK would perform for Assam Oil (**4/14/1195**). The services were described, under a heading 'Scope of Services', as assisting Assam Oil 'in identifying suitable structures for raising structured loan facilities'. By a letter of 24 December 2010 to Assam Oil (and confirmed by the signature of Monwara Dewan on behalf of Assam Oil), ICICI Bank UK confirmed that, further to the mandate of 27 November 2010, the 'structuring assignment' had been completed (**4/14/1212**). On 11 January 2011, there was a remittance instruction from Assam Oil, signed by Sanjay Guha, authorising transfer of \$2.2m from account 704 (**5/25/1584**) (although it should be noted that that instruction did go on to say 'please utilise this funds (sic) as a part payment of the USD 63m loan'); and the 704 bank account statement/account ledger report shows that a payment by Assam Oil of \$2.2m out of account 704 (with the reference 'Cops Struc') was made on 3 February 2011 (**4/13/856**). It is worth adding that, prior to the confirmation on 24 December 2010 by Assam Oil that the services had been completed, emails show that Assam Oil took legal advice from their lawyers, Khaitan & Co, as to whether the confirmation letter should be signed (**5/25/1560-1561**).
25. Turning finally to 'Fee 4', this comprised a fee of \$2.8m, \$1.2m of which was paid by Cromwell Securities Ltd ('Cromwell') and \$1.6m of which was paid by Assam Oil, for a 'structuring assignment' for Cromwell. A 17-page document, dated 7 February 2011

(and signed for Cromwell) set out the services - and the fee of \$2.8m and other terms - that ICICI Bank UK would perform for Cromwell (4/14/1213). The services were described, under a heading 'Scope of Services', as assisting Cromwell 'in identifying suitable structures for raising term loan facilities'. By a letter of 28 February 2011 to Cromwell (and confirmed by the signature of Dev Joory on behalf of Cromwell), ICICI Bank UK confirmed that, further to the mandate of 7 February 2011, the 'structuring assignment' had been completed (4/14/1242.1). The bank account statement for Cromwell shows that, on 14 April 2011, a payment of \$1.2m (plus \$125) was made by Cromwell to ICICI Bank UK for 'payment of structuring advisory fee' (5/16/1469). On 20 June 2011, there was a remittance instruction to ICICI Bank UK from Assam Oil, signed by Sanjay Guha and Monwara Dewan, authorising payment from Assam Oil's account of \$1.6m for the 'fees due from Cromwell' (4/14/1230); and the 704 bank account statement/account ledger report shows that a payment by Assam Oil of \$1.6m out of account 704 (with the reference 'Cops Struc') was made on 20 June 2011 (4/13/856).

26. It is therefore clear that, in the light of the contemporaneous documents, the four sets of fees were paid by Assam Oil (and there is no suggestion that, as regards Fees 1 and 2, ICICI Bank UK did not pay across to ICICI Bank OBU any fees received on the latter's behalf). In so far as relevant, there is also documentation (with the one exception explained at paragraph 23), showing the authorisation of those payments. Mr Joseph was not seeking to dispute that those payments were made and certainly he would not, in my view, have any realistic prospect at a trial of successfully establishing that the payments were not made (or indeed that the payments were not authorised). Rather his essential submission was that, with the exception of the arrangement fee that was part of Fee 1, those payments were not contractually owed. In other words, his essential submission was that the fees paid for the four 'structuring assignments' were not contractually owed.
27. On the face of it, the documents show that four contracts for services – described, for example, as 'identifying suitable structures for raising structured loan facilities' or 'in identifying suitable structures for raising term loan facilities' or 'to design and implement a suitable investment strategy' – were entered into by ICICI Bank UK or ICICI Bank OBU with Assam Oil or with Assam Co Ltd or with Cromwell. On the face of it, the 8 or 17 page documents contain the detailed contractual terms.
28. Mr Joseph, especially at paragraphs 34-37 of the defendants' skeleton argument, submitted that the four fee payments were, in reality, extra fees for providing the loan facilities. No services were actually being provided. The structuring agreements were sham agreements and/or were not supported by consideration because nothing of value was being provided in return for the fees. He pointed, for example, to the timing of the structuring agreements with the first two of them being close in time to the making of the OFA (ie late December 2007) and the latter two being close in time to the making of the AFA (ie late 2010 - April 2011). At paragraph 36 of the defendants' skeleton argument, certain contemporaneous documents were pointed to which it was submitted 'openly expressed that these agreements' purpose was to provide by another avenue for the payment of fees in relation to the Facility Agreements'.
29. I do not accept this submission for the following reasons:

(i) Given that, on the face of it, one of the purposes included advice on possible facility agreements, it is not surprising that the relevant advisory services were provided at times close to when the OFA and AFA were entered into.

(ii) The contemporaneous documents referred to in the defendants' skeleton argument at paragraph 36 are consistent with fees being paid for advice as to obtaining loans (including the AFA) rather than fees for providing the facility agreements. In my view, they do not 'openly express' that the purpose of these agreements was to provide another avenue for the payment of fees for providing the facility agreements. On the contrary, Mr Joseph has not provided any evidence at all that the parties' intentions were to disguise extra fees to ICICI Bank UK (or to ICICI Bank OBU) for the provision of the facility agreements.

(iii) The contemporaneous documents show that there can be no dispute that the parties entered into the agreements to pay the four sets of fees which were expressed to be for the services provided. Mr Joseph put forward no suggested explanation as to why the parties would do that if, in reality, these were fees payable under the facility agreements (and clause 11 of the facility agreements dealt with fees).

(iv) Closely connected to the last point is that the invocation by the defendants of the law on sham agreements seems misplaced. The law on sham agreements is concerned with where the courts go behind the form of a particular arrangement to its substance because different consequential rules may flow from classifying the contract in one way rather than another. For example, in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270 the question was whether an agreement was a contract for the sale of goods (by Parrot to Exfinco) or a contract of loan (by Exfinco to Parrot) secured by a charge (in favour of Exfinco over Parrot's goods). The practical importance of that classification was that, if the latter, the charge was likely to be void for non-registration. The Court of Appeal decided that the agreement was a contract for the sale of goods. Staughton LJ famously said, at 300, that, in deciding this type of question, the courts have used a variety of terms to stress that they are concerned with substance not form. In his words: 'substance, truth, reality, genuine are good words; disguise, cloak, mask, colourable device, label, form, artificial, sham, stratagem and pretence are "bad names"' (citing, for the last phrase, Dixon J in *Palette Shoes Proprietary Ltd v Krohn* (1937) 58 CLR 1 at 28). Another example, in a different context, is whether a person is an employee/worker, so as to have the benefit of employment protection legislation, or is, in contrast, an independent contractor. In the leading case of *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745, the Supreme Court decided that car valet cleaners were employees or workers and not independent contractors even though the contract stated expressly that the valeters were independent contractors and not employees. What mattered was the substance - the parties' true common intentions - and not the form of the transaction; and one could treat a transaction as a sham even if there was no intention to deceive. But in this case, it is hard to see why the parties would be motivated to 'pretend' that services were being provided for a fee, if in reality the fee could simply have been charged under the facility agreement. Put another way, no suggestion has been made that there would be advantageous legal (or, indeed, factual) consequences by adopting one form of agreement rather than the other.

30. For the reasons which I have set out, Assam Oil has no realistic prospect of successfully denying at a trial that the payments of the four sets of fees were contractually owed.

(3) Payments of default interest (under clause 8.3(a) of the OFA and 8.3(b) of the AFA)

31. Although Mr Joseph did not pursue this with quite the same vigour, he submitted that under clause 8.3(a) of the OFA and clause 8.3(b) of the AFA – requiring the payment of default interest for non-payment – 4% interest (on top of the existing rate of interest comprising the margin and the LIBOR rate under clause 8.1) meant that the payment was a penalty. So applying the modern test laid down in the leading case of *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, [2016] AC 1172, the submission was that the required payment of interest for breach was out of all proportion to a legitimate interest of ICICI Bank UK in the performance of the contract. It was further submitted that Assam Oil was entitled to restitution, and hence a deduction from the sum claimed, of the excessive penal sums paid. The submission was made in relation to clause 8.3(a) of the OFA but, more forcibly, in relation to clause 8.3(b) of the AFA. This was because, while the margin was fixed at 5% under the OFA (see the definition of ‘margin’ at **4/14/1024**), under the AFA the margin was 5% prior to the ‘effective date’ (which was the date after 15 April 2011 when ICICI Bank UK notified other parties that all the documents were in order), 5.75% for the following 18 months, and 8% after that. Mr Joseph submitted, therefore, that after 18 months, the added 4% would mean that the rate of default interest, for non-payment, would be LIBOR plus 12%.
32. I do not accept this submission that the default interest was a penalty whether under the OFA or the AFA. As a matter of law, as confirmed by *Makdessi*, the only element that can be challenged as a penalty is the sum payable for breach. The interest fixed under the contract for the period of the loan (that is, the margin plus LIBOR) is not susceptible to challenge as a penalty: it is simply fixing the price of the loan. So under both the OFA and the AFA one is asking whether the extra 4% interest charged for default constitutes a penalty. Applying the test in *Makdessi*, that was not a sum that was out of all proportion to ICICI Bank UK’s interest in the contract being performed. The modern trend is for the courts to be reluctant, as regards commercial parties, to strike down a payment as a penalty: see Burrows, *A Restatement of the English Law of Contract* (2016) p 138: *Chitty on Contracts* (ed Beale) (33rd edn, 2018) para 26-195. Moreover, in the context of a loan, it is clear that, as recognised in *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, a borrower in default is not the same credit risk as a prospective borrower. I was referred by the claimant to *ZCCM Investments Holdings plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm) where a default rate of 10% (on top of LIBOR) was held not to be a penalty applying *Makdessi*. While I do not need to ‘grasp the nettle’ to decide this, it is clear that the defendants have no realistic prospect of establishing that, even under the AFA, the 4% rate of default interest under the AFA was a penalty.

(4) Payments of legal fees (under clause 16.1 of the OFA and the AFA)

33. By clause 16.1 of the OFA, Assam Oil was to pay to ICICI Bank UK

'the amount of all costs and expenses (including legal fees) reasonably incurred by ... them in connection with the negotiation, preparation, printing, execution and syndication of:

(a) this Agreement and any other documents referred to in this Agreement...'

It is not in dispute that Assam Oil paid to ICICI Bank UK under the OFA \$486,530.11 as legal fees; and it is also not in dispute that \$461,167.50 of those fees were paid to Linklaters (see Table 4 of the Amended Defence and Counterclaim) **(1/5B/151.74)**. Furthermore it is not in dispute that Linklaters did charge ICICI Bank UK those sums. What the defendants submit is that those fees were not 'reasonably' incurred.

34. This submission has no force at all. The OFA was a complex document, which was accompanied by other complex linked agreements referred to in the agreement including hedging swap agreements. Moreover, the facility was for a high sum (\$63m). London law firms are expensive but there is no good reason to think that ICICI Bank UK was acting unreasonably in taking the best legal advice and assistance possible and there is no good reason to go behind what Linklaters were charging and to say that that was unreasonable. As Ms John pointed out, the legal fees were significantly less than 1% of the sum loaned under the OFA.
35. For completeness, I should add that the defendants made a similar submission about the legal fees in relation to the AFA (see paragraph 65.4 of the defendants' skeleton argument). I understand that Linklaters charged, and were paid, \$245,369.52 for work on the AFA. For the same reasons as set out in paragraph 34, there is no good reason to regard those charges as unreasonable.
36. For these reasons, Assam Oil has no realistic prospect of successfully denying at a trial that the legal fees were reasonably incurred and contractually owed.

(5) Conclusion on the central question

37. My conclusion on the central question, therefore, is that the defendants have no realistic prospect of successfully denying at a trial that the disputed four categories of payment were contractually owed.

4. The consequences of my conclusion on the central question

38. In the light of my conclusion on the central question, two crucial consequences follow:
 - (i) The defendants' allegation that ICICI Bank UK made a misrepresentation as to the principal sum owed, which induced Assam Oil to enter into the AFA, falls away. The basis of there being a false representation as to the principal sum owed was that the disputed four categories of payment (paid before 15 April 2011) were not contractually owed and should therefore have gone to reduce the principal sum. But as there is no

realistic prospect of the defendants successfully denying that the disputed four categories of payment were contractually owed, there is also no realistic prospect of their establishing that there was a false representation made by ICICI Bank UK, prior to the making of the AFA, as to the principal sum owed. Put another way, the principal sum owed was represented by ICICI Bank UK to be \$53m because \$10m of the original loan of \$63m had been paid off: that was a true statement and contained no inaccuracy or half-truth. The defendants have no realistic prospect of establishing at a trial that the representation was false and hence have no realistic prospect of establishing that Assam Oil is, or was, entitled to rescind the AFA for misrepresentation. (It is not clear from the Amended Defence and Counterclaim whether the defendants are counterclaiming damages for tortious misrepresentation but, in so far as they do, it is a fortiori that that counterclaim also has no realistic prospect of success).

(ii) In respect of the disputed four categories of payment, the defendants have no realistic prospect of establishing that Assam Oil is entitled to restitution for money paid by mistake (and hence no deduction from the debt claimed under the AFA is required). The mistake alleged is that Assam Oil thought that the disputed four categories of payment were contractually owed when they were not. But my above conclusion as to the payments being contractually owed undermines that allegation as to mistake. The defendants have no realistic prospect of establishing that Assam Oil was mistaken in making the disputed four categories of payment believing that they were contractually owed when they were not. Even if a different mistake, which caused the payments, could be made out by the defendants, there would still be no realistic prospect of Assam Oil being entitled to restitution. This is because the payments were contractually owed to ICICI Bank UK (or, as regards Fees 1 and 2, ICICI Bank OBU) either by Assam Oil or, in respect of Fee 2, by Assam Co Ltd or, in respect of Fee 4, by Cromwell. It is a well-established proposition of law that a mistaken payer is not entitled to restitution of payments that were owed by the payer under a valid contract between the payer and the payee: *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 208 (per Millett LJ); *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 at 407-408 (per Lord Hope); *Deutsche Morgan Grenfell plc v IRC* [2006] UKHL 49, [2007] 1 AC 558 at [84]-[85] (per Lord Scott); *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 at [18] (per Lord Sumption, giving the advice of the Privy Council, although his Lordship's mode of expression - that a mistaken payment cannot be recovered 'to the extent [it] discharges a contractual debt of the payee' - must be taken to mean 'to the extent [it] discharges a contractual debt owed to the payee'). As regards Fee 2, in respect of Assam Co Ltd, and Fee 4, in respect of Cromwell, it is also the law that a mistaken payer is not entitled to restitution 'if the money is paid to discharge, and does discharge, a debt owed to the payee ... by a third party by whom [the payer] is authorised to discharge the debt' (per Robert Goff J in *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] QB 677, 695). See also, for example, *Aiken v Short* (1856) 1 H & N 210.

39. It further follows that I do not need to address some of the additional interesting legal questions that were raised including, for example, the application of the law on 'no partial rescission', and certain aspects of the law on limitation both under the Limitation Act 1980 and in relation to the equitable doctrine of laches.
40. However, although not necessary for me to do so, I do want to say something more on clause 31.6 (the 'no set-off' clause) of the AFA in case what I have decided on restitution of payments is overturned on an appeal. Ms John submitted that, even if

Assam Oil is otherwise entitled to restitution of mistaken payments, clause 31.6 knocks out that claim. It should be noted that this submission was, correctly, directed only to restitution of payments and cannot apply to the alleged rescission for misrepresentation (because, for example, the rescission for misrepresentation is being put forward as a defence wiping away the AFA and not as a set-off or counterclaim).

41. Clause 31.6 of the AFA reads as follows:

'No set-off by obligors

All payments to be made by an Obligor under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set-off or counterclaim.'

As is well-known (and see, for a summary, my judgment in *Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm), at [11]), the modern approach in English law to contractual interpretation is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. Important cases of the House of Lords and Supreme Court recognising the modern approach include *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, HL, especially at 912-913 (*per* Lord Hoffmann giving the leading speech); *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. Given that the parties have here used the technical legal terms 'set-off or counterclaim', one can presume that, in applying the modern approach to interpretation, those terms have their normal legal meaning 'unless there is something in the context to displace that presumption': Lewison, *The Interpretation of Contracts* (6th edn, 2018) para 5.08.

42. Mr Joseph submitted that the deduction for restitution merely went to determining what sum of money was owed under the AFA when taking account of payments owed both ways. In other words, it operated as a straightforward defence and did not involve a cross-claim set-off. He relied for that distinction on what Lord Denning MR said in *Henriksens Rederi A/S v Centrala Handlu Zagranicznego (CHZ) Rolimpex, The Brede* [1974] QB 233, at 245 (with Lord Denning's emphasis):

*'In point of principle, when applying the law of limitation, a distinction must be drawn between a matter which is in the nature of a **defence** and one which is in the nature of a **cross-claim**. When a defendant is sued, he can raise any matter which is properly in the nature of a **defence**, without fear of being met by a period of limitation. No defence, properly so called, is subject to a time-bar. But the defendant cannot raise a matter which is properly the subject of a **cross-claim**, except within the period of limitation allowed for such a claim. A cross-claim may be made in a separate action, or it may be made by way of set off or counterclaim. But on principle it is always subject to a time-bar.'*

See also *Chitty on Contracts*, paras 28-123 – 28-124.

43. Say, for example, a lender lends £1,000 to a borrower repayable with 10% interest in a year's time. The borrower pays back £440 at the end of the year. If the lender brought a claim for £1,100, the borrower would have a defence as to £440 because the debt owing is only £660. That defence as to £440 would not be regarded as a 'set-off' and the borrower's assertion of it would not fall within the Limitation Act 1980. But in other situations the distinction between a defence and a set-off/counterclaim may be much more difficult to draw. As is said in *Chitty on Contracts* (33rd edn, 2018) at para 28-124:

'[I]t is a matter of considerable refinement whether a particular cross-claim is to be treated as a defence or matter of set-off.'

44. My inclination is to think that seeking restitution of payments made, mistakenly believing that they were contractually owed under the AFA (or a closely linked transaction), does generally constitute the assertion of a cross-claim set-off rather than a straightforward defence (although this may depend on the precise mistake in question). In general, therefore, restitution for mistaken payment would be knocked out by clause 31.6. That restitution for mistake is knocked out by clause 31.6 might also be said to be supported, as a matter of interpretation, by business common sense and the purpose of the clause in not complicating a debt claim by the lender. But in the light of my decision above, the complexity and wide-ranging nature of the question, and that this is a summary judgment application in which the issue has not been fully explored, I prefer to express no concluded view as to whether clause 31.6 knocks out restitution for payment by mistake.
45. I add for completeness that, after the passage cited above, Lord Denning MR in *The Brede*, went on, in obiter dicta, at 246, to suggest that, even if one had a set-off, if it was an equitable set-off, as opposed to a legal set-off, it would not be subject to the limitation periods in the Limitation Act 1980. Cairns and Roskill LJ (at 254 and 264) expressly dissociated themselves from what he had said and certainly Roskill LJ doubted whether it was correct. But in *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890, 945, Hobhouse J, after hearing argument on the point, agreed with Lord Denning's obiter dicta.

5. The subsidiary question: the currency of the debt owed

46. The bank's primary claim is for payment of the debt owed under the AFA measured in US dollars. But in clause 2.1 of the AFA, the currency of the term loan was changed from US dollars in the OFA to sterling. So that clause in the AFA reads:

'The Facility

Subject to the terms of this Agreement, the Lenders make available to the Borrower a term loan facility in sterling in an aggregate amount equal to the Total Commitments.'

Clause 2.1 of the OFA had used exactly the same words except for 'US Dollars' rather than 'sterling'.

Again, under 5.1 of the AFA, the amount of the outstanding loan as at the effective date for the operation of the AFA was expressed as being ‘the sterling equivalent of US\$53,000,000’. So that clause in the AFA reads:

‘Outstanding Loan

As at the Effective Date, the amount of the Loan outstanding is the sterling equivalent of US\$53,000,000 and the Total Commitments have been cancelled in full.’

In working out the ‘sterling equivalent’ it should be noted that, by clause 1.2(e) of the AFA (and exactly the same clause appeared in the OFA), it was set out that the rate of exchange to produce a currency equivalent was the bank’s ‘spot rate of exchange’ at 11.00 am on the particular day.

Again under clause 31.8(a) of the AFA, the currency of account and payment were specified to be sterling (while the same clause in the OFA had specified US dollars). This was subject to exceptions (in paragraphs (b) to (e)) so that, for example, if a sum for repayment of the loan or interest was denominated in a particular currency, it should be paid in that currency. So clause 31.8(a) reads:

‘Currency of account

(a) Subject to paragraphs (b) to (e) below, sterling is the currency of account and payment for any sum due from an Obligor under any Finance Document.’

47. Applying the terms of the AFA, therefore, the debt owed by Assam Oil to ICICI Bank UK was measured in sterling not US dollars. But Ms John for ICICI Bank UK argued that it is significant that, after the coming into effect of the AFA, the parties continued to operate in US dollars not sterling. As the contemporaneous documents show, all payments were made by Assam Oil in US dollars and all demands for payment (eg the interest due reminders) were made in US dollars. Ms John therefore submitted that the AFA has been varied so that the debt owed is measured in US dollars not sterling or that Assam Oil is estopped from denying that the debt owed is measured in US dollars not sterling.
48. I cannot accept that submission. While documentation is not essential, it is relevant that there is no document setting out such a variation or amendment. As regards promissory estoppel, this can only be used as a defence and not a cause of action (see, eg, *Combe v Combe* [1951] 2 KB 215; *Baird Textiles Holdings Ltd v Marks and Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737) and here it would appear that ICICI Bank UK would be seeking to use it as a cause of action for a higher sum of money to be paid than that set out in the AFA. In any event, there needs to be a clear and unequivocal promise or representation for promissory estoppel to apply (see, eg, *Woodhouse AC Israel Cocoa SA v Cocoa Nigerian Produce Marketing Co Ltd* [1972] AC 941) and there is no such promise or representation here. In so far as the bank seeks to rely on an estoppel by convention, one again would need clear evidence that the parties have agreed that the debt should be measured in US dollars and, in any event, that doctrine is dependent on it being unfair for one of the parties to resile from the agreement (see, eg, *Amalgamated Investment and Property Co Ltd v Texas Commerce Int Bank Ltd* [1982] QB 84; *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] AC 436) and that is pre-eminently a triable issue. Moreover, under clause 37.1 of the AFA

any 'amendment or waiver' would need to have the consent of the guarantors as well as the borrower and lender and, even if Assam Oil and ICICI Bank UK had consented to an amendment, there is nothing to indicate that Cromwell, as guarantor, consented to this (cf my consideration of AIL's consent in paragraph 18 above). An underlying point running through these objections is that just because the parties continued to operate in US dollars does not mean that they had agreed that the debt should be measured in US dollars rather than sterling. Contractual parties may operate with each other day to day using one currency, because it is convenient for them to do so, while accepting that the overall reckoning of the debt owing will be measured in the different currency laid down in the contract.

49. Ms John further submitted that Assam Oil had made an admission that, despite the terms of the AFA, the debt owed should be measured in US dollars not sterling. She pointed to paragraph 21 of the original Defence. This was pleading to paragraphs 20 and 21 of the Particulars of Claim which were under the heading 'The currency of the Amended Facility Agreement'. One aspect of paragraph 20 of the Particulars of Claim referred to interest being calculated using a LIBOR rate in US dollars rather than sterling. Paragraph 21 of the Defence read as follows:

'As to paragraphs 20 and 21, it is noted that the USD LIBOR is a higher rate than sterling LIBOR. Despite this, the Defendant agrees to proceed upon a USD basis rather than a GDP basis.'

In my view, this is insufficiently clear to amount to an admission that, despite the terms of the AFA, the debt owed is to be measured in US dollars rather than in sterling. That pleading says nothing expressly about the currency of the overall debt and, on its best interpretation, is confined to a narrower point dealing with the relevant LIBOR rate of interest. Ms John relied on the general proposition in CPR 16.5(5) that 'a defendant who fails to deal with an allegation shall be taken to admit that allegation.' But paragraph 4 of the Defence indicated that where an allegation was not admitted the Claimant must 'prove the same'. And CPR 16.5(4), as a qualification to CPR 16.5(5), reads: 'Where the claim includes a money claim, a defendant shall be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation.'

50. Even if their pleading had constituted an admission, the defendants have sought to withdraw that admission. Their Amended Defence and Counterclaim at paragraph 42 denies in detail paragraph 20 of the Particulars of Claim. By CPR 14.1(5), the defendants need the permission of the court to withdraw the admission (assuming it was an admission). In the exercise of my discretion, I grant that permission. I have considered the approach and the non-exhaustive list of factors set out in the leading case of *Sowerby v Charlton* [2005] EWCA Civ 1610, [2006] 1 WLR 568 and my two primary reasons for granting permission, in the general exercise of my discretion, are as follows:

(i) Assuming, as I am here doing (contrary to what I have decided in paragraph 49 above), that there was an admission by the defendants, that admission was certainly not a clear one. The defendants can be forgiven for believing that that admission had not been made.

(ii) To allow the withdrawal of the admission does not unduly prejudice ICICI Bank UK. ICICI Bank UK still has its alternative claim in sterling; and the overall impact of allowing the withdrawal is that it will still be open to ICICI Bank UK to seek judgment for the debt measured in US dollars at a trial. In contrast, if I were to refuse to allow withdrawal there would be serious prejudice to the defendants because, based on the admission, summary judgment would be entered against them for the debt measured in US dollars. The difference between the two measures is substantial. I understand that it is in the region of £15-20m.

51. My conclusion on the currency issue, therefore, is that the defendants do have a realistic prospect of establishing at a trial that the debt owed is to be measured in sterling not US dollars. This is because the terms of the AFA specify sterling and there is a realistic prospect of the defendants successfully denying the claimant's allegations of variation or estoppel. The defendants also have realistic prospects of successfully denying that the defendants made a relevant admission and, even if they did make such an admission, I have granted them permission to withdraw that admission.
52. It follows that, for the purposes of this summary judgment application, ICICI Bank UK must fall back to its alternative case which is that the currency of the debt owed is sterling. It is not in dispute that in so far as the measure of currency is not US dollars, it is sterling.

6. Overall conclusion

53. For the reasons given, the defendants have no realistic prospect of successfully defending the alternative sterling claim at a trial. This is because, on the central question, they have no realistic prospect of successfully denying that the disputed four categories of payment were contractually owed. There is therefore no realistic prospect of the defendants succeeding on rescission of the AFA for misrepresentation or restitution for mistake. Moreover, there is no other compelling reason for a trial. On the subsidiary currency question, I have decided that the defendants do have a realistic prospect of establishing at a trial that the debt owed is to be measured in sterling not US dollars.
54. It follows that ICICI Bank UK is entitled to summary judgment under CPR 24.2 for the sum claimed measured in sterling. This was its alternative claim. But if it wishes to maintain its primary claim for the sum measured in US dollars, it will need to proceed to trial.