

Neutral Citation Number:[2024] EWHC 1766 (Ch)

**IN THE HIGH COURT OF JUSTICE**

Nos. BR-2023-000991 and 000992

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**INSOLVENCY AND COMPANIES LIST (Ch D)**

Deputy Insolvency and Companies Court Judge Shekerdemian K.C.

8 July 2024

**IN THE MATTERS OF CIARAN CHARLES LITTLE AND JAMES PATRICK O'SHEA**

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN:**

**(1) CIARAN CHARLES LITTLE**

**(2) JAMES PATRICK O'SHEA**

**Applicants**

**-and-**

**OLYMPIAN HOMES LIMITED**

**Respondent**

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**Approved Judgment**

**(hearing date: 10 June 2024)**

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Ms Kendya Goodman (instructed by Womble Bond Dickinson LLP) for the Applicants

Ms. Katie Longstaff (instructed by Freeths LLP) for the Respondent.

## **The Applications before the Court**

1. The Applications before the Court are dated 29 November 2023 but were filed on 1 December 2023 and are in identical terms. The Applicants, Mr Ciaran Little (“**CL**”) and Mr James O’Shea (“**JOS**”) (together “**the Applicants**”) have each applied pursuant to Rule 10.4 of the Insolvency (England and Wales) Rules 2016 (“**IR**”) for orders setting aside the statutory demands served upon each of them by the Respondent (“**OHL**”) on 6 November 2023 (“**the Statutory Demands**”) and for a short extension of time for that purpose (“**the Applications**”).
2. The Statutory Demands are in substantially identical terms and are based on an alleged debt of £102,165.81 (“**the Debt**”) which arises under personal guarantees given by each of the Applicants separately (but in identical terms) and dated 27 January 2022 (“**the PGs**”). The principal debtor is CL’s company Tribeca Property Ltd (“**TPL**”) (now in liquidation). The principal debt (the subject of the PGs) arose pursuant to a facility agreement between OHL and TPL dated 27 January 2022 (“**the Facility Agreement**”).
3. For the avoidance of doubt, the amount said to be owing under the PGs is a single sum of £102,165.81 (in essence, the PGs give rise to joint and several liability). The Applicants (on identical grounds) claim:
  - (1) That the Debt is disputed on substantial grounds (IR 10.5(5)(b)); and
  - (2) That the Statutory Demands should be set aside on “*other grounds*” (IR 10.5(5)(d)), that is to say as an abuse of process (it being said that the Debt was, to OHL’s knowledge, the subject of an established dispute).

## **Timing and formalities**

4. By IR 10.4(1)-(2) an application to set aside a statutory demand must be made within 18 days from the date of the service of the statutory demand. The Statutory Demands were served on the Applicants on 6 November 2023. The Applicants should therefore

have filed their applications by 24 November 2023. They did not do so until 1 December 2023; hence they were 6 days late.

5. There is a dispute between the parties as to the reasons for this delay. The Applicants say that OHL (by its solicitors, Freeths LLP) had given an undertaking not to present a petition without first giving five working days' notice and that such notice was only given on 23 November 2023, with the consequence that (at worst), the applications were only one day late. OHL, however, says that this of itself "*provides no justification for why the deadline was not met*"<sup>1</sup>.
6. Ms Goodman's skeleton argument (and her clients' witness statements) set out the background to the question of timing and the post-service "back and forth" between the parties in some detail. Initially, I was of the view that I should deal with the extension application as a preliminary matter, without looking at the merits of the substantive application. As a matter of first impression, this seemed to me to be an obvious case for an extension: the delay was minimal, the reasons for it were acceptable and credible and the prejudice to OHL so far as I could tell (without hearing submissions), absolutely non-existent.
7. However, I was also taken by Counsel to the judgment of Deputy ICCJ Kyriakides in *Allen Rankin v Dissington Lending Company Ltd* [2021] EWHC 172 (Ch) in which the approach to extension applications was considered. In that case (at [16]), the Deputy ICC Judge considered that the merits of the substantive application were a factor to be taken into account when considering whether time should be extended. That being so, I decided (and I understood both counsel to agree) that the extension application could only really be considered at the end of the hearing, once the merits of the substantive application had been properly addressed.
8. Hence, Ms Goodman made her submissions on the extension after her submissions on the substantive application.
9. OHL initially opposed the application for an extension. However, when Ms Longstaff opened her submissions after the short adjournment, she stated that OHL would take a neutral stance. She also posited (echoing an observation that I had made in the morning

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<sup>1</sup> OHL'S skeleton at [49].

when considering the *Allen Rankin* case) that it was possible that when considering an extension of time application, the court was only required to consider whether the substantive application would pass the “paper sift” stage (the triage that set-aside applications go through before, if they meet threshold, they are listed for hearing). I am inclined to agree, although this is not something that Deputy ICCJ Kyriakides addressed. Whatever the correct position may be, I have left the question of extension to the end of this judgment.

### **Summary: the Dispute and my Conclusions**

10. The bulk of the Debt comprises contractual interest accrued on the principal debt pursuant to the terms of the Facility Agreement, as guaranteed by the PGs. The precise breakdown is as follows:
  - £100,251.81 in interest (which has been computed at the rate of 2% per month between 27 January 2021 and 27 January 2022 and from 28 January 2022 to the date of the Statutory Demands at the rate of 3% per month);
  - £1,200 (inclusive of VAT) being the legal costs incurred in connection with enforcement; and
  - £714 being the legal costs incurred in respect to the preparation and service with the Statutory Demands.
11. Interest continues to accrue at 3%.
12. The Applicants dispute the Debt. In Ms Goodman’s skeleton argument, the grounds underpinning the dispute were put in a number of different ways, some of which were not pursued.
13. As the hearing progressed, it was clear that there were, in substance, two challenges. In short, the Applicants assert:
  - (1) That the interest was waived by way of an agreed waiver (“**Waiver by Contract**”).
  - (2) Further or alternatively, OHL is estopped from seeking to recover the interest (“**Waiver by Estoppel**”).

14. Hence, the Applicants argue that the Debt is not owing and is at any rate the subject of a dispute on substantial grounds. Therefore, if OHL nonetheless wishes to pursue it, it should issue Part 7 proceedings and take the claim to trial where the issues can be tried in the usual way, with the usual trial tools.
15. In my judgment, the Waiver by Contract argument fails. The Waiver by Estoppel argument meets the well-known test for the purposes of IR 10.5(5)(b). There is in this respect a genuine triable issue.

**IR 10.5(5)(b): the Test**

16. Substantial grounds need to be established to demonstrate that a debt is disputed: *Feldman v Nissim* [2010] EWHC 1353 (Ch).
17. It is the Applicants' burden to satisfy the Court that there is "*a genuine triable issue*", there being no material difference between such test and "*a real prospect of success*": *Collier v P & M J Wright Ltd* [2008] 1 WLR 643 at [21] per Arden LJ:

"Mr Roger Kaye QC does not explain in what way the test of real prospect of success would here differ from that of genuine triable issue. I note that in the recent case of *Ashworth v Newnote Ltd* [2007] BPIR 1012 , para 33 Lawrence Collins LJ, with whom Buxton LJ agreed, regarded the debate as to a difference between "genuine triable issue" and "real prospect of success" as involving "a sterile and largely verbal question", and that there is no practical difference between the two. I do not consider that the passage that I have cited above from the judgment of Mr Roger Kaye QC should be followed. I accept that the refusal to set aside a statutory demand is a serious step, but so is the grant of summary judgment. The court cannot grant summary judgment under CPR r 24(2) unless it is satisfied that the party against whom the order is to be made has no real prospect of success. To have a real prospect of success a party must have a case which is more than merely arguable: see *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 . If the test in the *Kellar case* [2002] BPIR 544 were applicable, the court would have to apply a lower threshold than real prospect of success, and that would mean that it would be enough on an application to set aside a statutory demand if the dispute were merely arguable. However, that approach would give no real weight to the word "substantial" in the rule 6.5(4) ; nor would it give any meaning to the word "genuine" in para 12.4 of the practice direction. In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were

not supported, by contemporaneous documentation: see also per Lawrence Collins LJ in the Ashworth case, para 34. But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material difference on disputed factual issues between real prospect of success and genuine triable issue.”<sup>2</sup>

18. Ms Goodman submitted to me that the triable issue threshold is a “low” one, citing *Black v Sale Service and Maintenance Ltd* [2018] EWHC 1344 (Ch) at paragraph 9 in support of that submission. I reject that submission, which is at odds with *Collier* (which is of course binding upon me). The well-established threshold is certainly not “low”. In any event, as I pointed out to Ms Goodman and as correctly submitted by Ms Longstaff, paragraph 9 of the judgment contains a summary of the submissions made to HHJ Jarman QC by counsel for the debtor and is not in any sense even an obiter observation, let alone a finding.
19. I should add that it is of course not every dispute of fact that will qualify for the purposes of IR 10.5(5)(b), however substantial the competing evidence. The dispute must be relevant, in the sense of underpinning a legally coherent and legally recognisable defence to the debt in question. If a dispute of fact does not give rise to an available arguable defence, then whilst that dispute might provide context and narrative, it will be irrelevant as a matter of substance.

### **The Parties, their relationship and the witness statements**

20. CL was the sole director of and a shareholder in TPL which was wound up by the Court on 10 May 2023. He worked as a consultant for OHL through TPL from around late 2020 to September 2022.
21. JOS is a solicitor of 20 years’ experience and is the founding partner of Jury O’Shea Solicitors. JOS is a business solicitor, specialising in real estate. He drafted the Facility Agreement and the PGs. He acted as OHL’s lawyer throughout 2021 and 2022 in relation to commercial property transactions. He has a long-standing relationship with CL.
22. OHL is a property development company, specialising in sourcing and developing large scale purpose-built student accommodation, build to rent, hotels, co-living and

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<sup>2</sup> Followed by Roth J in *Crossley-Cooke v Europanel (UK) Ltd* [2010] EWHC 124 (Ch) at [16], a case cited by the Applicants’ counsel.

affordable housing sites for institutional clients. Mark Slatter (“MS”) is OHL’s sole director and chairman. He is also the sole director of Balia Limited, a company which features heavily in evidence (as it did in submissions). Tom Piper is Head of Legal at OHL. As of 10 October 2022 (a key date, as explained below), he had been in that role for around two weeks.

23. It is said on behalf of the Applicants that the parties dealt with each other with a high degree of informality. I express no view on this.
24. The Applicants have between them made six witness statements (largely adopting each other’s). On the OHL’s side, there are two witness statements: one from of MS and one from OHL’s in-house solicitor, Tom Piper.

### **The Facility Agreement, the PGs and Repayment of the Loan**

25. The following facts are (save where obvious from the context) undisputed.
26. In or around December 2020 CL approached MS for a loan of around £210,000, in order to refinance a loan that a business called Angular Capital had made to TPL. The Applicants were both liable for the Angular Capital debt. On behalf of OHL, MS agreed to provide some refinancing but on the basis the Applicants contributed £20,000 each. Thus, the principal amount of the loan was agreed at £170,000 (“**the Loan**”).
27. JOS prepared all the contractual documents and confirmed by email on 21 January 2021 that the Loan would be subject to interest at a rate of 2% per month.
28. OHL advanced the Loan pursuant to the Facility Agreement. By the express terms of the Facility Agreement, the Loan was to be repaid in full on 27 January 2022 (**‘Repayment Date’**). The Loan was secured by equitable charges over two properties in Bristol owned by JOS. The charges are not in evidence but, in answer to a query from me, Ms Longstaff took instructions and told me, on instructions, that the charges were “all monies” charges.
29. By clauses 6.1 and 6.2 of the Facility Agreement, TPL agreed to pay interest on the Loan at a rate of 2% per month, such interest accruing daily (from the date of the advance) and payable on the Repayment Date. By clause 6.3, if TPL failed to make any payment under the Facility Agreement on the due date for payment, interest would

accrue daily at 1% above the rate specified in clause 6.1 (i.e. at an increased total rate of 3% per month from the Repayment Date).

30. The Applicants gave the PGs to OHL on 27 January 2021, guaranteeing TPL's liabilities under the Facility Agreement. By clause 2.2 of the PGs, the Applicants agreed to indemnify OHL in full for any failure of TPL to discharge its obligations under the Facility Agreement. By clause 5.1.4, the Applicants also agreed to pay OHL all costs of enforcement.
31. JOS drafted the Facility Agreement, using (according to his witness statement) "*standard pro forma documents available on PLC or Lexis Nexis*". The Facility Agreement included what have accurately been described by both sides as "boilerplate" provisions. These include:
- Clause 15.1 ("**the Amendment Clause**"), which provided that:

*"no amendment of this agreement or any Finance Document shall be effective unless it is in writing and signed by or on behalf of each party to it (or its authorised representative)"*
  - Clause 15.2 ("**the Waiver Clause**") which imposed an "in writing" requirement on a purported waiver in the following terms:

*"A waiver of any right or remedy under this agreement or any Finance Document or by law or any consent given under this agreement or any Finance Document, is only effective if given in writing by the waiving or consenting party and shall not be deemed a waiver of any other breach or default. It only applies in the circumstances for which it is given and shall not prevent the party giving it from subsequently relying on the relevant provision"*.
32. It was at first suggested by Ms Goodman in the course of her submissions, albeit with no particular enthusiasm, that this provision should somehow be ignored or treated as invalid, because the parties did not give any thought to it, that had the parties addressed their minds to it they would not have wished to be bound by "*such a formalistic process*" "*that was not how they conducted their business. It was in essence an oversight*<sup>3</sup>".

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<sup>3</sup> "*The Waiver Clause was included in the Facility Agreement in error, and the parties would not have included it in the Facility Agreement had they casted their minds to it*" (Applicants' skeleton).

33. This submission went further than her own clients' evidence. JOS (the draftsman) in particular does not make this claim, and certainly not in the terms advanced by Ms Goodman orally. In the event, Ms Goodman did not persist with that submission. As explained below, her arguments proceeded on the footing that the "in writing" requirement in the Waiver Clause was indeed binding upon the parties but that had been satisfied.
34. For the avoidance of doubt (and for completeness), I reject the submission that I can or should somehow ignore the "in writing" requirements of the Waiver Clause on these grounds. This is, as characterised by the Applicants themselves, a "boilerplate" provision. This being so, JOS would or should no doubt have anticipated its presence (indeed this much is clear from his own second witness statement at [4]) and would have sought to have it excluded if he was not agreeable to it. But in any event, that is beside the point. The Facility Agreement and PGs were signed by the relevant parties, who are therefore bound by its (wholly unremarkable) terms.
35. The Loan was not repaid in full on the Repayment Date. There is a dispute about the reasons for this, but in my judgment nothing turns on that. By agreement and following some negotiation (which started at £100,000 on OHL's side) payment in two tranches was agreed. TPL repaid OHL a first tranche of £85,000 on 26 January 2022. Interest was not discussed at this stage. This left £85,000 of the principal due and owing, plus interest.
36. MS texted CL on 29 September 2022 about the second tranche of the Loan: "*didn't realise the £85k from the original loan to you and James was still outstanding [...] so need that back too please*". Over the following days, the parties agreed and arranged for the remaining £85,000 of the Loan to be repaid. The £85,000 balance of the principal was repaid to OHL on 4 October 2022, without interest.
37. In November 2022, the Balia Loan was put in place (see below). CL says that he continued to work for OHL during November 2022 but did not charge for his services over that period (I do not understand the fact that CL did not charge to be in dispute, albeit that the reasons may be). He last communicated with MS by text message on 4 November 2022 and stopped working for OHL in December 2022.

38. No interest was ever paid on the Loan. TPL went into compulsory liquidation on 10 May 2023. Mr Piper has stated that he wrote to the Official Receiver on 25 May 2023 stating that OHL was owed around £105,000, in interest due on the Facility Agreement. He also states that OHL submitted a proof of debt in TPL’s liquidation.
39. It was not until 20 September 2023 (almost a year after the second tranche had been paid) that Mr Piper on behalf of OHL emailed the Applicants (or more accurately he emailed JOS) referencing any unpaid interest and requiring it to be settled. There then followed two brief exchanges between JOS and Mr Piper. In essence, JOS asserted that “*given the various discussions that had taken place between Ciaran and Mark in October 2022*”<sup>4</sup> it had been agreed that the Loan including interest had been discharged.
40. Freeths LLP were then instructed by OHL to seek recovery of the debt. Pre-action protocol letters were sent to CL and JOS on 11 October 2023. The Statutory Demands were served on 6 November 2023

#### **The Balia Loan and the Verina Loan**

41. According to CL’s witness statement, “*arising out of the conclusion of the Manchester deal*” (which I take to be in or around August 2022) CL agreed to lend MS £300,000 via Balia Ltd, an SPV created by MS (the “**Balia Loan**”). The lender of the Balia Loan was a company called Jegan Property Limited (“**Jegan**”), of which CL is the sole director, and Balia. OHL guaranteed the loan.
42. The Balia Loan is contained in a loan agreement dated 1 November 2022; it expressly provides at clause 5.1 and 5.2 that the loan will bear no interest over a 12-month period. There is a dispute between the parties as to why the Balia Loan was needed and as to the reasons for the non-charging of interest.
43. The Balia Loan was due for repayment on 1 November 2023 but no payment was then made. CL served both OHL and Balia with statutory demands on 3 November 2023. These were later withdrawn (because they were defective) and were then re-served on 24 November 2023. In the event, the Balia Loan was repaid in December 2023.

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<sup>4</sup>JOS’ email 27 September 2023

44. For present purposes, the Balia Loan retains its relevance for two reasons, both arising out of the zero interest provisions. First it is said that this was the alleged consideration (or part of the alleged consideration) for the contractual waiver of the interest payable under the terms of the Facility Agreement. Second, it is said to be a feature of the reliance in the estoppel argument.
45. Separately, on 27 October 2023 (by which time the parties were in full-blown dispute over the Loan and only a few days before the Balia Loan was due to be repaid), Verina Limited (a company set up by MS) wrote to Jegan about an alleged debt of £300,000. This was said to have arisen out of consultancy services provided by Verina to Jegan to the tune of £1.887 million, of which only £1.587 million had been paid. Verina Limited assigned that alleged debt to OHL, who then wrote to Jegan, demanding payment of the £300,000.
46. According to CL, no services were provided by Verina and that this was an artificial construct whereby MS could deal with the proceeds of the Manchester deal. According to OHL, the debt was a real debt but a commercial decision was made not to pursue it.
47. The Verina loan is addressed only in CL's second statement and therefore has not been addressed by MS in his evidence. However, I agree with Ms Longstaff. The Verina loan is irrelevant to the issues that I have to decide. Accordingly, I mention it for completeness only.
48. Likewise, and for completeness, I mention the debt said to have been owed to JOS' firm, Jury O'Shea. As at the date on which the Applications were filed, JOS claimed that OHL owed fees for services provided in respect of a commercial property matter. OHL, having been pursued for these fees, applied in December 2022 by claim form for those fees to be assessed. This particular dispute has since settled.

### **The Alleged Interest Discussion**

49. According to the Applicants, notwithstanding the terms of the Facility Agreement, it was later agreed that the Loan would be repaid in two tranches, a first tranche in January 2022 and the second tranche out of the proceeds of a deal in Manchester, that both CL and MS were working on. I did not understand this to be in dispute.

50. I did not understand there to be any dispute between the parties that the Manchester deal completed in August 2022. As I have stated, the second tranche of the principal was paid on 4 October 2022.

51. In paragraph 19 of his first witness statement (an important paragraph), CL says this:

*“I recall that prior to paying the £85,000<sup>5</sup> back, Mark and I discussed the issue of interest on the loan. Although I cannot recall precisely what was said owing to the passage of time, I recall that [MS] indicated that he would normally charge significant interest on lending money to friends but he was not charging me any interest. It was therefore understood between [MS] and I that would pay back £85,000 to redeem the loan and no interest would be payable.”*

52. No further details are provided in CL’s first statement about what was, on any view, a very important conversation, assuming it took place. During the course of the hearing, I tended to refer to this discussion as “the August 2022” discussion/conversation (on the basis that the Manchester deal completed in August 2022). On reflection, however, if the conversation did take place, it could equally have taken place in September, or in the first five days of October 2022.

53. JOS does not address CL’s evidence about this conversation, other than by referencing it in the pre-action correspondence between the parties in September 2023. There are no contemporaneous documents referencing it.

54. In answer to this paragraph, MS denies that any such discussion took place, stating at paragraph 17 that CL’s assertion is “*simply false*”. At paragraph 18 of his witness statement, MS says:

*“Quite aside from the fact that I can categorically state that no such discussion around waiving interest took place, it clearly makes no commercial sense for me to waive interest on a loan that was already late being redeemed and to receive nothing in return”.*

55. By the time CL made his second witness statement (on 12 April 2024), in answer to MS’ statement, the understanding to which CL referred in paragraph 19 of his first statement was somehow, without development or explanation, elevated into something that had been “*expressly agreed*”. I can see no evidence to support the assertion that, at

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<sup>5</sup> The second tranche.

the time the alleged discussion took place, there was an express agreement articulated by MS.

56. Initially, from her skeleton argument, I had understood that Ms Goodman would be contending in support of the waiver by contract argument:

(1) that the discussion referenced by CL of itself created an agreed waiver of interest, and was therefore a freestanding substantive and recognisable defence as a matter of law; and/or

(2) that the discussion referenced by CL was a component (or the initial component) of the waiver request/waiver acceptance process which culminated in an agreed waiver on or around 10 October 2022 (see paragraph 66 below).

57. If Ms Goodman had persisted with those submissions, I would have had to decide whether there was a dispute on substantial grounds as to fact of this discussion ever having taken place (and when and what was said and by whom). In other words, did the evidence disclose a triable issue with a real prospect of success for the Applicants?

58. However, Ms Goodman conceded that she could not advance any argument as per sub-para (1) above, given the requirement for writing in the Waiver Clause. This concession was in my judgment rightly made. There is no reason why the “in writing” requirement should not be upheld (*Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, per Lord Sumption JSC at [16]).

59. As for sub-para (2), she made it clear (again correctly in my judgment) that she would not be relying on that discussion and would be confining her clients’ case on waiver to “waiver by contract” by reference only to the October 2022 email exchanges which I address below.

60. Given the concessions rightly made by Ms Goodman, I do not have to decide whether, for the purposes of the waiver by contract argument, there is a dispute on substantial grounds for the purposes of IR 10.5(5)(b) arising out of the competing evidence as to the alleged discussion. This is not material.

61. I should stress that I cannot and do not reject CL’s paragraph 19 account out of hand, notwithstanding the deficiency in the detail of his evidence about what would on any

view have been an important conversation. Equally, I cannot fairly or properly find that his version of events is incredible, despite Ms Longstaff's overarching submission that the Applicants' case is inherently implausible. Therefore, as part of the narrative I leave open the possibilities both that this discussion may have taken place and that its gist was as stated by CL in paragraph 19 of his first statement.

### **Waiver: the Law**

62. *“Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor” (Chitty on Contracts, (35<sup>th</sup> edn., Sweet & Maxwell, London 2023), §26-043).*
63. That waiver can be oral, written, or inferred from conduct (*Chitty*, §26-044). *“An oral forbearance or concession made by one party to the other does not require to be so evidenced [in writing], even if made at the latter's request” (Chitty, §26-044).*
64. The above principles are uncontroversial and were not in dispute.
65. In addition, it was seemingly common ground between the parties that a contractual waiver should be supported by consideration<sup>6</sup>. I test this proposition below.

### **The Applicants' Arguments on waiver**

66. In her skeleton argument, Ms Goodman made a number of submissions in the alternative, the premise of her case being that there had been a “waiver by contract”:
  - (1) It was submitted that OHL agreed to waive the payment of interest pursuant to the Facility Agreement orally (in the discussion referred to above).
  - (2) It was submitted that OHL had waived its right to interest by its conduct<sup>7</sup>.

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<sup>6</sup> But see *Chitty* at §26-047, discussed below.

<sup>7</sup> See Applicants' skeleton at [89]: sending over the Draft Deed of Release (qv.), not pursuing interest for a year, using CL's services without payment and without communicating that interest continued to accrue.

- (3) It was submitted that there had been an effective written contractual waiver, through different combinations of the communications exchanged between 4 October 2022 and 10 October 2022 (“**the October 2022 Emails**”).
67. As to (1), as I have stated, Ms Goodman withdrew the argument based on alleged oral waiver.
68. As to (2), again, this line of defence was not pursued (and would in any event have failed given the “in writing” requirement in the Waiver Clause). That said, Ms Goodman did submit (and I accept) that even though there could be no waiver by conduct, the parties’ conduct did retain some relevance, if and to the extent that it was consistent with either or both parties’ understanding that some kind of forbearance was in place.
69. In the event, (3) was the only focus of Ms Goodman’s submissions on contractual waiver. The following communications were relied upon.
70. On 30 September 2022, just before payment of the second tranche, MS texted CL: “*can you send the £85k today ?*”, to which CL responded, “*Yes will send over – if it needs to be chaps over the limit then yes or else chaps form [sic] Monday*”. CL then asked for bank account details and was told by MS to check with Rowan McClean (OHL’s finance director). Later that day, Rowan McClean gave CL’s bank details, stating “*Mark mentioned that you wanted to know which account to send £85k loan to*”.
71. There was no mention of interest in those exchanges. Indeed, in his witness statement CL says that MS did not raise the matter of interest when demanding repayment of the second tranche of the Loan. I did not understand this to be disputed.
72. On the morning of 4 October 2022 (before the second tranche of £85,000 was paid) CL and MS messaged by text as follows:
- (1) At 8:29 am, CL to MS “*85k will be with you this morning and getting the doc in a simple form*<sup>8</sup>”
- (2) At 9:39 am, MS to CL “*thanks for the £85k... will wait out on the doc*”

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<sup>8</sup> The document referenced here was in respect of the Balia Loan.

73. Again, there was no mention of interest.
74. The following emails were exchanged on 4 October 2022:
- (1) At 09:55am, Rowan McClean confirmed by email that OHL had safely received the balance of the Loan.
  - (2) At 10.06am, CL responded, cc'd to MS, "*can you confirm that all the security on the loan has now been released?*".
  - (3) MS emailed at 12.39pm on 4 October 2022 "*can you email a copy of the loan document if you have it hand so we can sort all that out via Tom Piper*". This email has MS' automatic e-signature applied to it. The email does suggest that there are any outstanding sums due to OHL.

(Together, "**the 4 October Emails**")

75. CL then emailed Mr Piper on 5 October 2022 at 09:59 attaching a copy of the draft unsigned Facility Agreement, stating "*please see enclosed documents related to this loan which has now been redeemed*" ("**the 5 October Email**"). MS was copied with this email but did not respond to it (or rather there is no evidence that he did).
76. Five days later, on 10 October 2022, Mr Piper responded stating:

*"I've drafted a short release acknowledging that [TPL], yourself and James are released from the terms of the facility and the two properties in Bristol are also released. This is attached. The documents you sent through looked like drafts. Do you have signed copies so I can refer to the date of the facility in the release"*

(**"the 10 October Email"**).

77. Mr Piper attached to 10 October Email a draft deed of release ("**the Draft Deed of Release**") the terms of which provided that JOS, CL and TPL were released from the PGs and the Facility Agreement and that the Bristol properties were likewise released from the charges securing them. The Draft Deed of Release is unsigned and is exhibited to CL's statement. It is complete save in one respect in that the date of the Facility Agreement is left blank.

78. Mr Piper has made a witness statement in support of OHL. He says that as of 4 October 2022, he had only been in the job for a couple of weeks. He took the 5 October Email “*at face value*” and provided the “*incomplete draft deed of release*” on 10 October 2022 on that basis (paragraphs 8 and 9). In other words, it is implicit from his evidence that he says that he was, at that time, mistaken.
79. When he did find a signed copy of the Facility Agreement, Mr Piper says at paragraph 11 of his statement that he realised “*at this point*”<sup>9</sup> that the lending had not been fully redeemed as the interest had not been repaid. MS then apparently said something along the lines of “*okay, we need to get that back then*”. However, Mr Piper did not action this or correct the position with the Applicants. As stated above, it was not until almost a year later, on 20 September 2023, that Mr Piper raised the matter of unpaid interest with JOS.
80. The Applicants did not send a signed copy of the Facility Agreement in response to Mr Piper’s request. Nor did they chase for a signed version of the Deed of Release, or indeed provide executed counterparts. Nonetheless, they rely on the 10 October Email and/or the 4 and 5 October Emails as comprising the waiver. Hence, they say that they understood, at that point, that the Loan had been discharged and that any right to interest had been waived by MS and/or Mr Piper on OHL’s behalf. On this basis also, they say that they were released from the PGs and that the Bristol properties were released from the charges securing them<sup>10</sup>.
81. Ms Goodman therefore argued that the contractual waiver was made in writing in the form of:
- (1) in the 4 October Emails; further or alternatively
  - (2) in the 5 October Email and the 10 October Email.

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<sup>9</sup> He does not provide a date but piecing together other parts of his statement and other uncontroversial aspects of the chronology, I take this to be at some point not long after 10 October 2022.

<sup>10</sup> “*Simply put: to their minds, the matter was concluded by the parties’ communications, and their conduct*” (Applicants’ skeleton at [90]).

82. In both cases, the consideration was said to be either the agreement (presumably by Jegan) not to charge interest on the Balia Loan<sup>11</sup> and/or CL in providing services to OHL free of charge, or a combination of both.

83. The Applicants also rely on a series of texts exchanged between CL and MS as conduct consistent with the existence of an operative contractual waiver being in place, to the knowledge of the parties. I quote below from Ms Goodman’s skeleton argument:

“79. On 17 October 2022, Mr Slatter texted Mr Little, chasing the Balia Loan documents. In a first text message sent to Mr Little at 04:15, he stated “[Mr O’Shea] ignoring us Friday and yesterday ... i think we need a face to face today ... shall I come round to yours? ?”.

80. Then, at 04:20, he texted Mr Little chasing the Balia Loan documents. He stated:

*“I can’t believe you came begging for a job, got yourself in such a hole that you needed that £170k immediately, no fucking thank you, no interest, you pull this stunt on [Jegan] and now you and that twat James Oshea string this out forever ... if that money is not in by today we are back to square one.”*

81. Mr Slatter has commented on this text message that it demonstrates “*that I was angry that no interest had been paid on the loan [...] an expression of my extreme frustration that no interest had been paid despite the terms that [Mr Little] himself suggested*” (Slatter 1, para 24). The Applicants submit that, if the text message is read naturally and objectively, it demonstrates Mr Slatter’s impatience at the Balia Loan documents being delayed. The reference to “*no interest*” is an acknowledgement that Mr Slatter had waived interest on the Facility Agreement, and that Mr Slatter considered that Mr Little was, through his inaction with respect to the Balia Loan, being ungrateful to Mr Slatter for having caused the Respondent to waive its rights to interest.

82. Mr Little’s response was “[Mr O’Shea] *went back yesterday- all is fine and will be done Today*”. This text references amendments Mr O’Shea had made to the Balia Loan documents.

83. Mr Slatter’s response at 12:18 was as follows:

*“Just seen his proposed changes, no it remains 12 months and zero interest ... if this does not get done as agreed I am blowing this whole thing open ... stop fucking me around*

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<sup>11</sup> Ms Goodman submitted in her skeleton argument: “*It is submitted that the Balia Loan was offered at zero-interest to reflect the waiver of interest on the Facility Agreement*”.

*I let you repay that loan god knows how many months after it supposed to be and you didn't offer me a penny in interest [...]"*

84. Mr Little considered that Mr Slatter was leveraging the fact he had caused the Respondent to waive its right to interest on the Facility Agreement, in order to demand that no interest be applied to the Balia Loan. These texts exemplify the informal format and *quid pro quo* nature of interest negotiations between Mr Slatter, Mr Little, and their respective corporate vehicles.

85. Mr Slatter refers to this text message as demonstrating his “*frustration at the lack of interest being paid in breach of the relevant loan documents, as opposed to an acknowledgment of a waiver of interest*” (Slatter 1, para 25). This does not cohere with his reference to Mr Little having failed to “*offer*” interest, rather than Mr Little “*owing*” interest (as one might expect from a party seeking to assert a breach).”

84. At this point, I should also address Ms Goodman’s arguments on what constitutes a signature, relying upon the judgment of HHJ Pearce in *Neocleous v Rees* [2019] EWHC 2462 (Ch). She submitted both orally and in writing that the email footers and sign-offs in the October 2022 Emails qualify as “*electronic signatures*” and a sufficient act of signing, or “[*indicate*] a clear intention to associate oneself with the email – to authenticate it or to sign it” (*Neocleous* at [55] and [57]).

85. The relevance of these arguments was not obvious to me, given that the Waiver Clause only requires “*writing*” (and not also signatures, unlike the Amendment Clause which I consider further below). That said, should it matter, I do find (applying *Neocleous*) that the emails were on both sides were validly signed electronically, in that:

- individuals’ names were added or formed part of the footers on both sides;
- the insertion of “*Kind regards*”, “*Thanks*”, “*Many thanks*” and “*BR*” shows an intention to connect the name with the contents of the emails; and
- on the OHL side at least, the footers (at the end of each document) contained names and contact details in the conventional style of a signature.

### **OHL’s arguments on Contractual Waiver**

86. In response, Ms Longstaff argued that:

- (1) The October Emails (in any of the combinations I have referred to) did not contain a request, or clear request for interest to be waived (this being an

essential component, see *Chitty*, opp.cit). There was no request. There was simply (as stated in paragraph 22 of MS' statement) an incorrect assertion that the Loan had been redeemed. The October Emails simply contain a series of assertions.

- (2) Not only was there no clear request, but also, there was no clear acceptance.
- (3) There was no consideration and/or no identified consideration passing from the Applicants to OHL (or indeed from TPL to OHL). The Loan and the Balia Loan are entirely different transactions; there is no link. All that there is a series of unsupported bare assertions to suggest that there was quid pro quo for the waiver. In any event, whatever the quid pro quo (or proposed quid pro quo) moving from the Applicants/TPL was or may have been, it was not communicated to OHL.
- (4) The text messages of 17 October 2022 do not evidence any agreed waiver or the existence of consideration for that waiver. To the contrary, they are consistent with OHL's case that interest is due, is payable but has not been paid. In my judgment, in context, it is more likely that "*no interest*" means "*you haven't paid interest*", which is what MS himself has stated in his witness statement.
- (5) Likewise, the fact (if it is a fact) that CL did not charge for his services. If this was part of the quid pro quo, then this was only in CL's mind. It was not communicated to OHL.
- (6) The interpretation provisions in clause 1.2.9 of the Facility Agreement state that "a reference to writing or written includes fax" should be construed as excluding emails.

87. As I have stated, there is a dispute between the parties as to the reasons for the Balia Loan being interest free. MS has said: "*this was for CL's own tax reasons, rather than there being any link with the TPL loan*". However, putting that dispute to one side, there is no evidence whatsoever contemporaneously linking the alleged waiver of interest on the Loan with the absence of interest on the Balia Loan (or indeed CL providing his services for free). Even if, in CL's head, this was the quid pro quo, it was not communicated to OHL, let alone agreed to by OHL. This seems to me to be a glaring hole in the Applicants' case.

## **Discussion and Conclusions on Contractual Waiver**

88. I prefer Ms Longstaff's submissions and reject the submission that there is any substantial dispute as to the existence of a contractual waiver.
89. **Requesting and Acceding** Mindful of the test set out in *Chitty*, I do not find that any of the emails of 4, 5 and 10 October either separately or collectively contain any request by TPL or the Applicants that OHL should forbear to insist on the payment of interest as prescribed by the Facility Agreement.
90. Indeed, if one takes up the narrative with MS/CL's texts of 8.29am and 9.29am on 4 October, it is far more obvious that the subsequent emails of 4 October and 5 October were concerned with the principal, rather than the payment of interest and not interest, which is OHL's case. This analysis is fortified by the fact that even on the Applicants' case, interest was not mentioned in these emails or, perhaps more pertinently, in the immediately preceding September exchanges with Rowan McClean. It seems to me that, putting matters at their highest, the more appropriate characterisation of the 4 October 2022 email from CL is as his request for confirmation of a state of affairs which, on his own case, was already in place as a consequence of the alleged discussions over interest.
91. **Consideration** On the question of consideration, if consideration is an essential component of a waiver (as opposed to a variation) then I agree with Ms Longstaff. There is simply no nexus between the facts alleged to provide such consideration and the waiver itself. Certainly, there is no evidence whatsoever that the quid pro quo was even impliedly communicated to OHL. The high watermark of CL's evidence on this is in paragraph 32 of his first statement:

*"I replied to Mark's text messages the following [sic]*

*'He went back yesterday (referring to the changes James had made on the loan agreement) and said 'all is fine and will be done Today.*

*Mark responded:*

*'Just seen his proposed changes, no it remains 12 months and zero interest'.*

*This was reference to the fact that under the loan facility agreement for £300k from JPL to Balia, I had agreed not to charge any interest on this sum for the first*

*12 months. This was in recognition of the fact that Mark had waived his right to interest on the original loan of £170k to TPL”*

92. This may have been how CL construed the conversation but he does not suggest that his understanding was communicated, let alone agreed to (as some sort of quid of quo) by MS.
93. Despite the apparent common ground between counsel as to the need for consideration to support a so-called “contractual waiver”, in my judgment this is not inevitably the case unless a so-called “contractual” waiver is more appropriately to be characterised as a variation; in such a case, then consideration will be essential:
- “A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given.” (*Chitty*, at §26-047 citing *W.J. Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189, 193).
94. If, on the present facts, the waiver relied upon did not require to be supported by consideration, then the Applicants’ case on so-called contractual waiver in any event fails, given the absence of writing containing a clear request and a clear acceptance and compliance with the Waiver Clause.
95. Further or alternatively, if on the other hand, the waiver relied upon is more appropriately to be characterised as a variation or amendment, then it would require consideration and would also have to comply with the requirements of the Amendment Clause (writing and signing). In this eventuality, even though the October Emails relied upon were, as I have found, “*signed by, or on behalf of each party*” in the *Neocleous* sense, the Applicants’ case would nonetheless still fail given my findings on the absence of writing, clear request, clear acceptance and additionally, the absence of consideration.
96. For completeness, I reject Ms Longstaff’s submission on the meaning of “written” or “writing”. As a matter of construction and giving clause 1.2.9 its ordinary and natural meaning, emails plainly qualify as “writing”. There is no rational or commercial basis to treat emails any differently from faxes.

### **Waiver by Estoppel: the Law**

97. The parties agree that waiver by estoppel is a species of promissory estoppel.

“For promissory estoppel to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not “inequitable” for the first party to go back on their promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships.” Chitty, §7-031

98. For a promissory estoppel to be effective, there must first be a clear on unequivocal statement, or alternatively clear conduct which objectively assessed indicates an intention or promise to give up, or not to enforce a right (see *Chitty* at §26-047). The promise can be implied, it does not need to be express provided that it is “*unambiguous*” and one “*which is intended to affect the legal relations between the parties*” (*Spence v Shell* (1980) 256 E.G. 55, per Oliver LJ at 63).
99. Consideration is not required<sup>12</sup>. Moreover, the operation of estoppel is not excluded by a no oral-variation clause, see *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* *ibid*, per Lord Sumption JSC at [16]<sup>13</sup>:

“The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by *Rock Advertising* were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At

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<sup>12</sup> See *Chitty* at §7-032 “This equitable doctrine can now be applied to arrangements which might have been regarded as ineffective at common law for want of consideration”.

<sup>13</sup> See also *MSAS Global Logistics v Power Packaging Limited* [2003] EWHC 1393 (Ch) at [51] per Davis J.

the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe.”

100. The tests, including as to intention, are objective:

“it is enough if the promise induces the promisee reasonably to believe that the other party will not insist on their strict legal rights” (*Chitty* at §7-039).

101. Thereafter, the representee must have acted in reliance upon the representation made. But even if all these criteria are met, there is an addition factor.

*“Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not “inequitable” for the first party to go back on their promise”* (see *Chitty*, opp.cit and *Hughes v Metropolitan Railway Co* [1877] 2App Cas 439).

### **The Applicants’ Arguments on Estoppel**

102. In paragraph 41 of his first statement, CL said this:

*“I relied upon the statements by Mark that the loan had been redeemed and the assurance given by Tom Piper in his email dated 10 October 2022 ...that TPL, James and I were released from the terms of the loan agreement and guarantees to my detriment. Had it been my understanding that interest had been payable on the original loan, I would have taken steps to pay the interest when the second tranche of 85K was paid back to OHL, as I had funds at this time arising out of the conclusion of the Manchester deal to enable me to do so. Further I would not have agreed to a provision in the [Balía Loan] of £300k to Mark...allowing for no interest being payable in the first year. I expressly agreed this provision in recognition of the fact that Mark had agreed for no interest to be payable on TPL’s original loan of £170,000. Alternatively, the amount loaned to Mark would have been reduced to take account of the interest payable”.*

103. Quoting from Ms Goodman’s skeleton at paragraph 103 it is said that:

*“OHL made unequivocal statements and representations, both express and implied, as set out in paragraphs 75,80 and 83, above(the “**Representations**”). The Representations, objectively construed, communicated clearly and unequivocally to the Applicants that they were released from their obligations under the PGs and/or that the OHL was not going to enforce its rights under the PGs, in respect of any interest which might have accrued.”*

104. Paragraphs 75, 80 and 83 of her skeleton cross-reference the 10 October Email and MS’ texts of 04.20 and 12.18 on 17 October 2022.

105. Moreover, it is said that OHL's actual mental state (or perhaps more accurately, Mr Piper's) is not relevant, given the objective assessment of the presence or absence of intention. Hence, it is irrelevant that Mr Piper says that he was mistaken, or indeed if he was in fact mistaken. Equally it is not relevant that both MS and Mr Piper say that they did not intend the Applicants to rely on the Representations.
- (1) As to reliance, the Applicants argue that they both relied on the Representations to their detriment. Had they had reason to know that interest was continuing to accrue on Loan, steps would have been taken to pay the interest when the second tranche was paid.
  - (2) By way of further reliance, CL says that he agreed to zero-interest on the Balia Loan and continued to provide his services free of charge after repayment of the (principal) Loan and JOS says that he would have approached the negotiations over his firm's fees differently.
106. Hence, Ms Goodman's skeleton concludes at [108]: "*It is thus now inequitable for the OHL to resile from its promise*".

### **OHL's arguments on Estoppel**

107. OHL contends that:
- (1) That there was no clear and unequivocal representation that the Applicants were released.
  - (2) There was no separate representation to JOS (and therefore he could not have relied upon it).
  - (3) It cannot be inferred that there was any intention to induce the Applicants to believe given that all Mr Piper did in his 10 October 2022 Email was send a draft deed of release with signature blocks and simultaneously ask for a copy of the signed Facility Agreement.
  - (4) There was no reliance but at any rate, if there was reliance, it was not reasonable for several reasons: Mr Piper had only been in the job a couple of weeks, that CL was fully aware that Mr Piper was new and that he didn't know the details or lacked knowledge. The release was not reduced to writing. It was not

reasonable for a sophisticated businessman not to take advice and not insist on writing.

- (5) There is no evidence that the Applicants had the means to pay the interest.
- (6) The Applicants' evidence comprises a series of assertions, but based on *Collier*, assertions without more are not enough.

### **Discussion and Conclusions on Estoppel**

- 108. There is a disconnect between paragraph 41 of CL's statement on the one hand, in which he refers to "*statements by Mark that the loan had been redeemed*" and the 10 October Email as creating the estoppel and Ms Goodman's skeleton argument on the other.
- 109. In paragraph 103 of her skeleton, Ms Goodman identifies the 10 October Email and the subsequent texts as being the material representations. Obviously, CL's witness statement evidence must take precedence as admissible evidence of fact. Whilst there is an element of ambiguity in his reference to "*Mark's statements*", it is far from obvious that he was referring to "Mark's" texts as opposed (possibly) the statements made in prior email exchanges, or in the course of the Alleged Interest Discussion.
- 110. In any event, I disagree that the texts of 17 October also amounted to "*unequivocal statements and representations*" (and that is not how I read paragraph 41 of CL's statement, although I accept that there is some ambiguity in his references there to "Mark's statements"). I do not consider that those texts contain any clear and unequivocal representation, let alone ones which were intended to be relied upon. My conclusions on those texts are set out in paragraph 87, above.
- 111. In my judgment, putting to one side what preceded and post-dated it, the 10 October Email did make a clear and unequivocal statement, both that TPL was released from the Facility Agreement and that the Applicants were released from their PGs and that additionally, the Bristol properties were released from the equitable charges. I do not consider that the words "*I've drafted a short release acknowledging that [TPL], yourself and James are released from the terms of the facility and the two properties in Bristol are also released. This is attached*" can realistically be construed or understood (on an objective assessment) any other way.

112. As for the attached draft deed, I do not consider that the fact it was an incomplete draft changes this analysis. The only thing that was missing was the date of the Facility Agreement. In every material respect it was complete, in that it unequivocally referenced the release in terms that were entirely consistent with the substantive part of the covering email. In my judgment, the draft deed can be characterised in two ways. It either formed part of the representation contained in the body of the covering email or it is a piece of evidence supporting that representation.
113. Likewise, I do not consider that the final sentence of the email (“*The documents you sent through looked like drafts. Do you have signed copies so I can refer to the date of the facility in the release*”) alter that analysis in any way. Objectively viewed, there was only one thing that Mr Piper was seeking to do, namely to insert a date in a document that was complete in every material respect. In my judgment this was in context an administrative act and not a substantive one. It is not suggested that the draft facility agreement referenced was incomplete in any other way or that Mr Piper’s acknowledgment of the release was caveated or in was in anyway conditional.
114. I also consider that applying an objective test, the representation contained in the 10 October 2022 Email was intended to be relied upon. This is evident not only from the unequivocal language of the first sentence, but also, importantly, the attachment of the draft deed and the request for the signed Facility Agreement (the only outstanding matter being, as I have said the insertion of the date).
115. I do not consider the fact that the deed of release was not executed has any bearing on the analysis. The point here is that on OHL’s evidence, the understanding was “clear”, namely that TPL, JOS and CL had been released “*and no further formalities were required*” (CL 1<sup>st</sup> at [28]).
116. Moreover, however mistaken Mr Piper was or may have been as to the status of the Loan at that precise moment in time, it cannot be said that Mr Piper (OHL’s Head of Legal and duly authorised agent) did not intend his email to be acted upon.
117. In answer to Ms Longstaff’s oral submission, that Mr Piper was new to the job and lacked the relevant knowledge and detail, in my judgment that point goes nowhere, unless (possibly) it could be said (with evidence) that the Applicants knew that he was mistaken and that there was no actual intention to alter the legal relationship. There is

no such evidence. It seems to me that if there is an issue about what the Applicants knew Mr Piper did or did not know, or if (as Mr Piper suggests obliquely at paragraph 8 of his statement<sup>14</sup>) he was misled by CL, then these are issues for trial.

118. As Ms Goodman submitted in reply: how could CL have known that Mr Piper did not know the circumstances? The submission is fortified by the fact that it was MS who directed the Applicants to Mr Piper in the first place “*to sort all that out*” (his email of 12.39pm on 4 October 2022). Again, if there is an issue about what the Applicants knew, that is a matter for trial.
119. If the events that preceded and post-dated the 10 October Email are brought into play (whether or not they have to be), they tend to support the Applicants’ case.
120. I consider that the email exchanges of 4 October 2022 and 5 October 2022 both support the Applicants’ case on estoppel by providing important context for the 10 October 2022 email:
- (1) Rowan McClean was asked by email, ccd to MS to “*confirm that all the security on the loan has now been released?*”
  - (2) It was MS (not Rowan McClean) who responded to this email “*Can you email a copy of the loan document if you have it to hand so we can sort all that out via Tom Piper*”.
  - (3) CL sent the (draft) Facility Agreement to Mr Piper on 5 October, stating “*...this loan which has now been redeemed*”. Again, this email was ccd to MS.
  - (4) There was no suggestion that the loan had not been redeemed or that “*all the security*” had not been released.
121. In my judgment, it is eminently arguable that the October Emails when read together, or the 10 October Email when read alone comprise “*an unequivocal statement which objectively assessed indicates an intention or promise to give up, or not to enforce a right*”.

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<sup>14</sup> “*I initially took CL’s email at face value. As these proceedings demonstrate, I now realise that was perhaps naïve of me*”.

122. At this point I must revisit the Alleged Interest Discussion. As I have said, I cannot simply reject CL's evidence about this out of hand, whatever its deficiencies. I cannot find (as MS has said) that it did not happen, nor can I find that CL's account is incredible. Moreover and importantly, when one takes up the story in late September 2022, starting with the emails to Rowan McClean and thereafter the October email traffic up to and including the 10 October Email, it is all consistent with that discussion (as contended by CL) having taken place, broadly in line with the account given by CL and his understanding, namely that he "*would pay back £85,000 to redeem the loan and no interest would be payable*".
123. For the purposes of the estoppel analysis, the Alleged Interest Discussion cannot be considered in a vacuum. It needs to be put in its context and it forms an important part of the narrative, leading up to the critical subsequent events, that is to say the emails with Rowan McClean, the 4 October £85,000 payment, the 4 and 5 October Emails and the 10 October Email, and possibly also the 11 months of silence, before the demand for interest was made.
124. These subsequent events are all seriously arguably entirely consistent with the Alleged Interest Discussion having taken place, as described by CL. In my judgment there is a dispute on substantial grounds as to the fact of that discussion having taken place, and its contents. That dispute in turn is a component of the wider (or main) dispute (again on substantial grounds) namely if one takes all the components together (being the Alleged Discussion and the conduct thereafter in the form of the October Emails together, or the 10 October Email alone) it is strongly arguable that they comprise "*an unequivocal statement which objectively assessed indicates an intention or promise to give up, or not to enforce a right*". Alternatively, that has been "*clear conduct which objectively assessed indicates an intention or promise to give up, or not to enforce a right*".
125. As for reliance, I do not agree that the Applicants could not reasonably have relied on the relevant representations (whether the representation contained in the 10 October Email alone, or those taken in conjunction with the emails of 4 and 5 October), or that their reliance was not reasonable, given the circumstances that I have addressed above - starting with the exchanges with Rowan McClean on 30 September 2022 and ending with the 10 October Email, the author of which was OHL's Head of Legal to whom CL

had been directed by OHL. There is in my judgment, a serious argument to be made (on substantial grounds) that the Applicants' reliance was reasonable.

126. Turning now at the acts said to constitute reliance, but prefacing my observations by reference to *Chitty* at §7-044. Detriment is not a requirement for reliance, but change of position is.
127. No arrangements were made to pay the interest, which had been accruing at the default rate since 27 January 2022. In my judgment this lends significant support to the assertion that there was, in fact, both representation and reliance. Ms Longstaff submitted that there was no evidence that the Applicants had the money to pay the interest and no accrued interest was paid before the alleged representations were made – but CL has said in his statement that at that time he had the funds from the Manchester deal (from which he paid the second tranche). I therefore do not consider that submission to be well made.
128. As for the zero-interest on the Balia Loan, CL's evidence is that he

*“would not have agreed to a provision in the [Balia Loan] of £300k to Mark...allowing for no interest being payable in the first year. I expressly agreed this provision in recognition of the fact that Mark had agreed for no interest to be payable on TPL's original loan of £170,000”.*

129. When considering the matter of consideration for a contractual waiver, as I have stated, this quid pro quo was not communicated to OHL (and there is no suggestion that it was). However, when considering reliance for the purposes of estoppel, there is no requirement that the act constituting reliance on the part of the representee must be communicated to the representor. It is enough that there has been the act said to constitute reliance and that the promise/representation has influenced it or been a contributing factor (*Chitty* at §7-043). This is a question of fact. In this framework, I cannot reject CL's evidence. Whether or not his decision not to charge interest came as a consequence of the representation is a matter for trial, but it is plainly well arguable.
130. Ms Longstaff has submitted that JOS should be treated differently to CL, relying on the fact that the 10 October Email was not sent or forwarded to him at the time (indeed there is no evidence that it was). However, I do not think this matters, if CL had shared with JOS the fact of the release, or his understanding that a release had been given which appears to be the case as set out in JOS' evidence. JOS statement does not suggest

that he was told about the Alleged Interest Discussion but he does state (at paragraph 15) (without giving dates):

*“Following this [payment of the first tranche] I was made aware by Ciaran that the remainder of the loan (the second tranche of £85k) was paid by him to OHL on 4 October 2022. Ciaran informed me that he had been provided with a Deed of Release by Tom Piper (Head of Legal for OHL) and this confirmed that TPL, Ciaran and I were released from the terms of the Facility Agreement and that my two Bristol properties were also released. I therefore considered that this was an end to the matter”.*

131. It seems to me that in circumstances where:

- (1) There was no or no obvious commercial basis for any differentiation between CL’s treatment and that of JOS.
- (2) The 10 October Email plainly refers to JOS.
- (3) CL’s description to JOS of the contents of the Deed of Release was an accurate one.

It is eminently arguable that the representations should be treated as also having been made to JOS and that he was entitled to rely on them, just as CL was. According to JOS evidence, his reliance took the form of letting interest continue to accrue rather than arranging to pay it. As in the case of CL, I find this to be plausible. Rather less convincingly, JOS also claims vaguely that but for this assurance his approach to the settlement discussions over his firm’s unpaid fees “would have undoubtedly been different”. Given the absence of any detail, I disregard this.

132. Pulling all of the above together, in my judgment, there are genuine disputes on substantial grounds on the following issues (aka a genuine triable issue), all of which are essential components of a defence based on promissory estoppel:

- (1) Were clear and unequivocal representations or promises given by OHL to the Applicants, that it would not enforce its strict legal rights, as alleged?
- (2) Did OHL intend those representations to be relied upon by the Applicants?
- (3) Was there reliance by the Applicants and was that reliance reasonable?

133. That then leaves the question whether it would be inequitable for OHL now to renege. Neither counsel addressed me on this question. On a brief reading of *Chitty* at §7-045 (which was in the Applicants’ authorities bundle), it is tolerably clear that the law in this respect is not entirely straightforward and that the arguments are nuanced. This being so, it seems to me that in circumstances where I am not finally deciding this dispute (that being a matter for the trial judge), having found that there are genuine triable issues as set out above, it would follow that there would likewise be a genuine triable issue in this respect.
134. If I am wrong in approaching the question in this way, then based on my findings, coupled with the fact that it was not until almost a year later that OHL raised the matter of the unpaid interest, I find that there is a genuine triable issue on the question of whether it is inequitable for OHL to go back on its promise. I should add that this was in circumstances where, on Mr Piper’s evidence (at paragraphs 10 and 11) he knew at an early stage that interest was due and unpaid and was told by MS “*okay we need to get back to that then*”; but he did nothing about it until 20 September 2023. In the intervening period before then, according to JOS, nothing was heard from OHL on the matter of the Facility Agreement.
135. Accordingly and in conclusion, I find that there is a genuine triable issue on the question of the existence of an operative promissory estoppel.

### **Abuse of Process**

136. I do not think that this adds anything. It seems to me that this is a straightforward instance of the debt which is said to be (and which I have found to be) disputed on substantial grounds for the purposes of IR 10.5(5)(b). There is nothing in my judgment which renders the statutory demand inherently abusive, especially given that (as I have stated), OHL seems to have sat on its hands for the best part of a year.

### **Extension of Time**

137. As I have stated, the delay was de minimis in the context, the reasons given for it were acceptable and understandable and it was not suggested that there was any prejudice to OHL (which ultimately took a neutral stance). More importantly and having regard to my findings on the substantive merits, this is an obvious case for the grant of an extension.

**Disposition**

138. For the reasons set out above, I find that the debt which is the subject of both Statutory Demands is disputed on grounds which appear to me to be substantial.
139. Accordingly, I will:
- (1) grant the extension sought on both Applications;
  - (2) order that both demands should be set aside; and
  - (3) direct a further hearing for the purposes of addressing any further consequential relief, unless an order can be agreed in the meantime.
140. I thank both Counsel for their very considerable assistance in this matter and for efficiently addressing a significant quantity of material within the allotted time-estimate.

Marcia Shekerdemia KC

8.7.2024