Neutral Citation Number: [2024] EWHC 2663 (Ch)

Case No: CR-2023-004458

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

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

Date: 25 October 2024

Before :

DEPUTY ICC JUDGE CURL KC

- -

Between :

I P S LAW LLP

Applicant

- and -

SAFE HARBOUR EQUITY DISTRESSED DEBT FUND 3 L.P.

Respondent

Martin Budworth and **Rabin Kok** (instructed by **I P S Law LLP** for the **Applicant**)
David Chivers KC and **Matthew Abraham** (instructed by **Squire Patton Boggs (UK) LLP**) for the **Respondent**)

Hearing dates: 29 February 2024 and 21 June 2024
Draft judgment circulated: 21 October 2024

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Remote hand-down: This judgment was handed down remotely at 10.30am on 25 October 2024 by circulation to the parties or their representatives by email and by release to The National Archive.

Deputy ICC Judge Curl KC:

1. I P S Law LLP (**"IPS"**) applied on 18 August 2023 to restrain Safe Habor Equity Distressed Debt Fund 3 LP (**"Respondent"**) from advertising a winding up petition presented on 14 August 2023. The principal petition debt is £500,000, which is said to arise from a loan made by the Respondent to IPS under a loan facility agreement entered into on 19 July 2023 (**"Facility Agreement"**). IPS is in practice as a firm of solicitors and its principal is Mr Christopher Farnell. The Respondent is a wholly owned subsidiary of Safe Harbor Equity LLC (**"SHEL"**); both the Respondent and SHEL are members of the Safe Harbor group of companies (**"Safe Harbor Group"**). Mr Rafael Serrano is the co-founder and managing director of SHEL.

2. These proceedings arise from the parties' dealings in connection with proposed legal claims based on the alleged misuse of personal data belonging to professional athletes (**"Personal Data Claims"**). Global Sports Data and Technology Ltd (**"GSDT"**) was incorporated in 2019 with a view to promoting a project to enable the pursuit of the Personal Data Claims, known by all parties as **"Project Red Card"**. The directors of GSDT are Jason Dunlop (a specialist in data technology) and Russell Slade (whose background is in football management). No one suggested in any of the evidence or argument before me that any Personal Data Claims have, so far, been issued.

3. Mr Farnell's evidence is that IPS was engaged to act as GSDT's solicitor and, in the course of that engagement, was asked by GSDT to search for litigation funding for Project Red Card. According to Mr Farnell, IPS was given authority by GSDT to negotiate with funders on GSDT's behalf. Mr Farnell's evidence about these negotiations is not entirely consistent: he says twice in his first statement (at paragraphs 29 and 38) that the negotiations with the Safe Harbor Group related to the provision of funding *"to GSDT"* but also says (at paragraph 39) that the negotiations were conducted from the outset on the basis that IPS, not GSDT, would be the principal borrower under any funding arrangement. It is clear enough, however, that IPS's case as explained in Mr Farnell's evidence and counsel's submissions is that (a) IPS acted as GSDT's solicitor in these negotiations; and (b) IPS was intended to be the borrower if Safe Harbor Group provided any funding for Project Red Card.

4. IPS contests the Respondent's right to seek a winding up order on a number of grounds. These can be divided into two groups.

5. First, there are arguments based on IPS's contention that it was assured both orally and in emails that the Facility Agreement would never be enforced. These assurances are said to give rise to a promissory estoppel, estoppel by convention or a collateral contract such that there is a triable issue over the Respondent's right to present a petition based on the Facility Agreement.

6. Second, IPS says it has crossclaims arising from its contention that it has a contractual entitlement to a 10% (or some other *"substantial"*) share of the damages from the Personal Data Claims. That alleged entitlement is said to give rise to crossclaims against the Respondent far exceeding the level of the petition debt on the alleged bases that the Respondent (a) induced GSDT to

breach its contract with IPS; (b) interfered with IPS's solicitors' lien; (c) breached a contractual duty of confidence to IPS in disclosing confidential information to GSDT; (d) breached an equitable duty of confidence on a similar basis to (c); or (e) misused confidential information. In each case, it is said that the Respondent's actions resulted in IPS being *"cut out"* from Project Red Card. IPS is said to have suffered damage from having been denied its entitlement under contract to receive its share of the damages from the Personal Data Claims. Despite the lapse of time between the presentation of the petition on 14 August 2023 and the first hearing of this application on 29 February 2024, draft pleadings particularising these alleged crossclaims are not available.

When the court will restrain advertisement

7. There was no dispute between the parties over the applicable legal principles. It is well-settled that the court will restrain a petitioner from presenting or advertising a petition where the debt on which the petition is based is disputed on genuine and substantial grounds. I direct myself according to the well-known summary provided by Norris J in *Angel Group Ltd v British Gas Trading Ltd* [2012] EWHC 2702 (Ch) at [22]:

> *"The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:-*
>
> *a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: Mann v Goldstein [1968] 1WLR 1091.*
>
> *b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).*
>
> *c) A dispute will not be "substantial" if it has really no rational prospect of success: in Re A Company No.0012209 [1992] 1WLR 351 at 354B.*
>
> *d) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: ibid. at 354F.*
>
> *e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in Re A Company No.006685 [1997] BCC 830 at 832F.*

> *f) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination (ibid. at 841C).*
>
> *g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid at 837B)."*

8. I also have regard to *Portsmouth v Alldays Franchising Ltd* [2005] EWHC 1006 (Ch), [2005] BPIR 1394. That case concerned the different context of an application to set aside statutory demands served on an individual debtor, although the guidance provided by Patten J (as he then was) at [12] is apt to cover any hearing where the court must decide whether there is a triable issue without hearing live evidence:

> *"So far as the evidence is concerned, the mere fact that a party in proceedings not involving oral evidence or cross-examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance. Once the court considers that the evidence is reliable in that sense, and not some attempt to obfuscate the real issues by raising a series of hopeless allegations, then it does, of course, become necessary to consider what the legal consequences of it are."*

9. Mr Chivers KC drew my attention to passages from two further cases that are particularly relevant to the present case. First, in *Re Richbell Strategic Holdings Ltd* [1997] 2 BCLC 429, Neuberger J (as he then was) said:

> *"...a judge, whether sitting in the Companies Court or elsewhere, should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity is not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law."*

10. Second, in the Scottish case *MacPlant Services Ltd v Contract Lifting Services (Scotland) Ltd* [2007] CSOH 158, [2009] SC 125, Lord Hodge decided to make a winding up order, having had regard at [57]-[59] to the commercial improbability of the applicant's case and the inherent unlikelihood that the respondent would have entered into the agreement alleged.

11. Having heard two days of argument on this application and considered a number of dense witness statements and the many authorities cited, I have no doubt that the grounds of opposition to the debt raised by IPS are not substantial and have no rational prospect of success. It is an example of a case where a *"cloud of objections"* has been raised to *"obfuscate the real issues"* and, despite *"extensiveness and complexity"* in the evidence, IPS has no

arguable defence to the Respondent's claim. I set out in this judgment my reasons for that conclusion.

The first group of arguments

12. As noted above, it is submitted by IPS that it was assured both orally and in emails that the Facility Agreement would never be enforced, such that there is a triable issue over whether a promissory estoppel, estoppel by convention or a collateral contract preclude the Respondent from proceeding on the Petition. I summarise first the principles for each of these doctrines, before turning to the alleged facts relied upon by IPS.

13. The requirements for promissory estoppel are well-established. This general formulation of the doctrine appears in *Snell's Equity, 34th edition* at §12-018:

> *"A general, judicially approved, formulation of the requirements of promissory estoppel is as follows. Where, by his words or conduct one party to a transaction, (A) freely makes to the other (B) a clear and unequivocal promise or assurance that he or she will not enforce his or her strict legal rights, and that promise or assurance is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by B to have that effect, and, before it is withdrawn, B acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it. B must also show that the promise was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and A either knew or could have reasonably foreseen that B would act on it. Yet B's conduct need not derive its origin solely from A's encouragement or representation. The principal issue is whether A's representation had a sufficiently material influence on B's conduct to make it inequitable for A to depart from it."*

14. That formulation from *Snell* has been cited with approval by the courts a number of times, including (in the identical form in which it appeared in the 33rd edition) in *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60, [2017] Bus LR 784 at [60], per Henderson LJ, a case on which Mr Chivers KC placed some emphasis and to which I shall return.

15. Turning to estoppel by convention, this doctrine was authoritatively summarised by Lord Steyn in *Republic of India v India Steamship Co Ltd* [1998] AC 878 at 913-914:

> *"...estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption...It is not enough that each of the two parties acts on an assumption not communicated to the other."*

16. As with the promise or assurance required to establish promissory estoppel, the common assumption for the purposes of estoppel by convention must be unambiguous and unequivocal: *Smithkline Beecham Plc v Apotex Europe Ltd* [2006] EWCA Civ 658, [2007] Ch 71. Jacob LJ observed at [102] in that case that the need for the representation or common assumption to be unambiguous and unequivocal *"is inherent in the very nature of an estoppel."*

17. Turning to collateral contract, IPS relied on the following formulation in *Hughes v Pendragon Sabre Ltd* [2016] EWCA Civ 18, [2017] 1 All ER (Comm) 173:

> *"...the courts may treat a statement intended to have contractual effect as a contract collateral to the main transaction, in particular where one party enters the main contract because the statement is an assurance on a certain point."*

18. Mr Chivers KC for the Respondent emphasised the need for the statement required to establish a collateral contract to have been intended to have legal effect.

19. I now turn to the evidence of the alleged facts that are said to give rise to an estoppel or collateral contract.

20. Mr Farnell's evidence is that he was introduced to Memphis Holland of an investment firm called Hanowa Capital by Ron Higgins and Adrian Nash of Unique Financial Holdings (**"Unique"**). Unique was another funder, other than Safe Harbor Group, with which Mr Farnell had discussions over Project Red Card. Mr Farnell says that Ms Holland introduced herself to him as *"a representative and arranger for the Safe Harbor Group."* This appears to be said to have happened in or around November 2022. The evidence is currently insufficient, in my judgment, to be able to be clear about Ms Holland's precise role, in particular about whether she was a broker or an agent and, if an agent, whose agent she was. Had it been sufficient for IPS to show a triable issue over whether or not Ms Holland was an agent for the Safe Harbor Group, then I would have allowed the application. For reasons set out below, this is not sufficient.

21. Negotiations ensued between IPS and Safe Harbor Group over the provision of what Mr Farnell describes as *"a full-fledged litigation funding agreement"* and which was generally referred to in the contemporaneous correspondence as a *"longform funding agreement"* (**"Full Funding"**). Mr Farnell's evidence is that, by the end of February 2023, bridging finance was required to enable GSDT and IPS to progress the litigation of the Personal Data Claims during the period that the Safe Harbor Group was completing its due diligence in relation to Full Funding. According to Mr Farnell, by that time *"1800 players on whose behalf GSDT was bringing Personal Data Claims were anxious to see"* those claims progressed and there was *"some pressure on both GSDT and IPS to issue claims quickly"*. The £500,000 advanced under the Facility Agreement is said to be this bridging finance, which Mr Farnell says was urgently required for that purpose. Clause 3 of the Facility Agreement provided that IPS was to *"use all monies borrowed by it under this Agreement*

to fund costs incurred in litigating the Global Sports UK Litigation...", which was a reference to the Personal Data Claims.

22. Before going further, I should identify a significant silence in the evidence of IPS, which was highlighted a number of times by Mr Chivers KC. As I mentioned earlier, there was no suggestion before me that any Personal Data Claims have yet been issued. Whether or not IPS has spent the £500,000 and, if so, how it has spent it, is unclear. Instead, in Mr Farnell's first statement, having referred to the restriction on the use of funds imposed by clause 3 of the Facility Agreement, Mr Farnell said only *"It has never been suggested that IPS used funds lent under the Facility Agreement for any other purpose."* This was an odd way of putting it: had the money been spent on progressing the Personal Data Claims, one would have expected Mr Farnell simply to say so, rather than frame it in this passive and negative language.

23. Mr Farnell's position was subsequently contradicted by the Respondent's evidence in answer: Mr Serrano stated in his witness statement that the Respondent had asked for details of the status of the funds advanced under the Facility Agreement and that this had not be provided, adding that *"To the extent that funds have been used at all, and no longer sit in the Applicant's bank account, they have not been used for the purpose required by the Facility Agreement."* Having been challenged in this way, Mr Farnell did not take the opportunity in his evidence in reply to explain what had happened to the money. IPS remained silent on the point. No explanation was offered by IPS for this silence and, despite the emphasis placed on it by Mr Chivers KC in his oral submissions, IPS did not attempt to shed any light on the position in its own oral submissions.

24. Returning to the alleged facts relied on by IPS, Mr Farnell's evidence is that IPS and the Respondent began to explore the provision of bridging finance on or around 27 February 2023. By an email of 28 February 2023, Ms Holland emailed Helena Clarke of the Respondent's solicitors to convey an apparent concern raised by Mr Farnell in a discussion with Mr Serrano:

> *"I just talked to Rafael* [Serrano] *who asked me to send this question to you: Chris* [Farnell] *asked the question: what are the terms of recourse? If it's on demand but funds have been deployed for project, the funds will not be available for repayment."*

25. Ms Clarke responded on the same day as follows:

> *"Yes – the loan would be an on demand facility and the personal guarantee would provide recourse to Chris personally, should IPS be unable to repay the monies when due. As Chris says, this leaves him/IPS exposed to the risk that the loan is recalled once funds have been deployed. This is only being considered as a temporary measure because funding is required in very short order and it is not possible to draft a long-form loan document that would allocate risk properly between the parties.*

> *From Safe Harbour's point of view, recalling the loan is unlikely to be an attractive course of action, as it is unlikely that their full outlay would be recovered and therefore, we would hope that Chris could get comfortable with this solution as it puts both parties in a situation where their best outcome is likely to be to work together in good faith to agree full loan terms as quickly as possible to put the bridging loan on a permanent footing, following which the personal guarantee can be released."*

26. There was no ambiguity in Ms Clarke's email on two points: first, the proposed loan would expose Mr Farnell to personal risk; second, Safe Harbor Group hoped that Mr Farnell would become comfortable with that risk given the wider commercial context.

27. By 1 March 2023, Ms Holland was able to report to Mr Farnell (copied to Mr Serrano) that the proposed terms would include a provision that the loan would be £500,000 and would be *"a convertible facility as part of the funding upon long form completion"* or repayable in six months *"if the long-form is not agreed to"*. The correspondence shows that Mr Farnell agreed to those terms in principle.

28. Things changed, however, on 3 March 2023. On that day, Ms Clarke sent to Mr Farnell draft documentation providing for the loan to be repayable on demand rather than after six months. Ms Clarke explained why this change had been made in an email to, among others, Ms Holland, which Ms Holland subsequently forwarded to Mr Farnell:

> *"The loan circulated reflects the emails you are referring by to* [sic]. *As this is being out* [sic] *in place in short order and without proper oversight of the circumstances around the litigation, we cannot build in appropriate oversights and events of default and as such the loan needs to be on demand, as explained in my email below. As Rafael references, the loan will convert such that it becomes part of the main loan when the long-form funding agreement is agreed. There is a long-stop date of 6 months, after which if a long-form agreement is not signed then bridge loan will become automatically payable."*

29. Shortly afterwards, in an email to Mr Serrano copied to various others including Mr Farnell, Ms Holland asked *"What changed?"*

30. At 9.16pm on the same day, Mr Serrano explained to Mr Farnell and Ms Holland that:

> *"...This was a point that we have been going back and forth w internally. My intention was to have it be six months. However, it's raising some concerns internally and will not work. If the law allows for it we can do it on demand w 60 day notice.*
>
> *Again, this is all likely for not as we have every intention of moving forward w the long form agreement. We would not have done all this otherwise."*

31. Mr Farnell defines that email in his first statement as *"Serrano's First Assurance"*, although he simultaneously concedes that it was not unequivocal. As both parties adopted similar language to describe it in their written and oral submissions, and for the sake of convenience, I will do the same (**"First Assurance"**). My use of the word *"assurance"* in defining this and subsequent statements by Mr Serrano should not be taken to imply that that is what they were in any legally significant sense.

32. Mr Farnell emailed Mr Serrano almost at once (at 9.20pm on 3 March 2023) to ask *"...what the issue is?"* and subsequently arranged a call with Ms Holland.

33. Mr Serrano replied at 10pm and said:

> *"As I said, we have never done alone* [sic] *of this nature before. This is not what we do typically. I made a very unique exception. And it's causing concerns internally that I have to address. Which I believe I can but only if we implement something of the sort.*
>
> *Again, I believe this is off or not* [sic]. *As of the end of the day we are fully intended to move forward. And once we have completed and finalized agreed-upon longform, all of this becomes moot."* (**"Second Assurance"**)

34. Both parties accepted that the words *"off or not"* in the Second Assurance involved a typographical error, perhaps caused by autocorrect or automated audio dictation. Mr Farnell suggested in his evidence that it should say *"all for not"*, which expression had appeared in a slightly different form (*"...all likely for not..."*) in the First Assurance. I suspect it is more likely that Mr Serrano meant to say *"all for naught"*, although it amounts to the same thing whatever precise form of words was intended. In my judgment, it is clear that by the Second Assurance Mr Serrano meant to convey his expectation that, whether the terms provided for repayment of the bridging finance in six months or on demand with sixty days' notice, as both parties expected Full Funding to be entered into in the near future, those repayment terms would not ultimately engage (i.e. *"...all of this becomes moot"*) because the bridging finance would roll over into the Full Funding. This is particularly so when the Second Assurance is read in the context of Ms Clarke's email referred to at §25 above and the First Assurance.

35. Mr Farnell suggests in his evidence that the Second Assurance unequivocally meant something much more far-reaching. He focuses on the omission from the Second Assurance of the word *"likely"* (which had appeared in the First Assurance as a qualification to the words *"for not"*) and the inclusion of the word *"fully"* before the words *"intended to move forward"*. Mr Farnell says in his first statement that, as a consequence of these differences, he regarded the Second Assurance as an unequivocal assurance that the proposed bridging loan *"would not be recalled on demand once IPS had used the bridging finance to fund litigation."* In my judgment, no reasonable person (and certainly no solicitor) could have understood the Second Assurance in the way Mr Farnell says he did: the interpretation Mr Farnell says he gave to the words is not a reasonably available construction, particularly when read in the

context of the email chain as a whole. If I am wrong about that, then the Second Assurance was not unequivocal (as Mr Farnell's interpretation was not the only available one) and no reasonable person would have relied on their having understood it in that way without first double-checking with Mr Serrano that this is indeed what was meant, given the stark inconsistency between such an interpretation and the unambiguous position adopted in the earlier emails.

36. A telephone call subsequently took place at around 3pm on 4 March 2023 between Mr Farnell, Ms Holland and Mr Serrano. That call is said to have concerned further discussion of the repayment terms, further underlining that Mr Farnell could not possibly have understood the Second Assurance to have put the matter to rest in unequivocal terms: had Mr Farnell thought that, then there would have been no need to have any further discussion about it.

37. Mr Farnell's evidence is that during the call on 4 March 2023, Mr Serrano:

> *"69.1 Apologised for the delay in providing bridge funding;*
>
> *69.2 Was emphatic that the Safe Harbor Group was fully committed to a long-term funding agreement;*
>
> *69.3 Again assured me that any on-demand loan would not be enforced and would be a mere formality..."*

38. That series of linked statements allegedly made by Mr Serrano (**"Third Assurance"**) was not recorded by Mr Farnell in any attendance note or otherwise. A kind of written record exists, however, in the form of an email from Ms Holland sent shortly after the call had taken place, copied both to Mr Farnell and Mr Serrano. Ms Holland's email does not mention any suggestion by Mr Serrano to the effect that the proposed bridging loan would not be enforced and was instead a mere formality. There is no evidence that Mr Farnell responded to this email, copied to Mr Serrano, to say something like, *"Hold on, I think we should also record that Rafael said that the repayment terms would not be enforced at all..."*

39. A further piece of evidence that I should address at this point in the chronology is a handwritten note made by Mr Higgins of Unique about what Mr Farnell said to him in a call between the two of them later on 4 March 2023. This note is exhibited to the second witness statement of Mr Higgins dated 18 June 2024, which I allowed into evidence on the afternoon of the second day of the hearing for reasons given in an *ex tempore* judgment given at that time. The note reads:

> *"4/3/23 Saturday morning*
>
> *Incoming call from Chris.*
>
> *Chris said he had just received a phone call from Memphis and Rafael. The call was set up by Memphis directly as they did not want to have their lawyers on the call due to the fact that Rafael did not want them to know*

> *that he was informing Chris that he would never take action to enforce the agreement he had with Chris, but the documents needed to be structured in that way due to the advice Rafael had from his lawyers.*
>
> *You* [sic] *mentioned that Rafael had given Chris his personal assurance that IPS law would not be held responsible for these sums."*

40. For the purposes of this application, the Respondent does not challenge the contemporaneity of the note, but Mr Chivers KC made clear that it may wish to do so (particularly drawing attention to the anachronistic use of the word *"You"* in the final paragraph) in any subsequent proceedings.

41. In my judgment, the note taken by Mr Higgins provides, at most, evidence that (a) a telephone call between Mr Farnell, Ms Holland and Mr Serrano took place on 4 March 2023; (b) a further telephone call between Mr Farnell and Mr Higgins took place later on the same day; and (c) Mr Farnell summarised to Mr Higgins on call (b) Mr Farnell's interpretation of things said by Mr Serrano on call (a). In my judgment, this takes matters no further than Mr Farnell's own witness evidence of what was said on call (a). This is because it is clear from the evidence that Mr Farnell is inclined to attach a meaning to the statements of Mr Serrano (whether through genuine misapprehension, wishful thinking, or some other reason) that is other than their most natural meaning. There is no doubt about this, because it is possible to compare Mr Farnell's summary of the Second Assurance with what Mr Serrano actually wrote. As I have said, I do not consider Mr Farnell's suggestion that the Second Assurance was unequivocally to the effect that the repayment terms of the Facility Agreement would not be enforced to be a reasonable interpretation of it. Accordingly, evidence of the way that Mr Farnell summarised the oral statements constituting the Third Assurance to Mr Higgins is not, without further support, evidence of what Mr Serrano actually said or what meaning could reasonably be attached to the words actually spoken. It is evidence only that Mr Farnell told a third party his own version of what had been said by Mr Serrano.

42. Further, and in any event, the interpretation Mr Farnell says he gave to Mr Serrano's various statements is, in my judgment, commercially absurd. Mr Farnell's evidence (supported by the contemporaneous documents) is that he had been content to agree repayment within six months and had expressed disquiet only with the revised proposal that the loan should be repayable on demand. Yet IPS's case is that, when the point was raised by Mr Farnell with Mr Serrano, the latter did not merely concede the ground over which an objection had been raised, but went far further than even Mr Farnell had proposed and spontaneously agreed that the repayment of the loan would not be enforced at all. This is so inconsistent with the way that any commercial lender could be expected to behave that the suggestion can, in my judgment, fairly be regarded as commercially absurd. Any reasonable commercial person (and certainly any solicitor) would have double-checked the position had they genuinely perceived such a volte-face. It is also inconsistent, to the point of implausibility, with the care that Safe Harbor Group and its solicitor took to negotiate the repayment provisions of the Facility Agreement, which were plainly and obviously directed at protecting the Respondent's position.

43. Another critical aspect of the contemporaneous evidence is the Respondent's requirement that Mr Farnell should receive independent legal advice (**"ILA"**) on the personal guarantee he executed in support of the Facility Agreement. This requirement appears first to have been raised by Michael Roca, the Safe Harbor Group's director of Risk and Underwriting, by an email on 3 March 2023. Mr Farnell does not mention the ILA in his evidence and the skeleton argument filed on behalf of IPS sought to rely on the lack of any evidence of ILA actually having been taken as a point in favour of the application. In response to this, Ms Clarke of the Respondent's solicitor filed a witness statement dated 27 February 2024 to point out that ILA had in fact been taken by Mr Farnell as a condition precedent to the Respondent entering into the Facility Agreement with IPS. This took the form of a letter from ET Law Limited that appears to have been emailed to Safe Harbor Group on 7 March 2023, which contained the following:

> *"3. We have explained to Our Client* [Mr Farnell] *that the Lender* [the Respondent] *is unwilling to make available the loan facility provided for under the proposed Facility Agreement unless Our Client signs the Security Document* [a personal guarantee] *and thereby agrees to its terms.*
>
> *4. We confirm that we met Our Client in person and alone. We explained to Our Client the legal nature, conditions and practical implications of the Security Document, including the responsibilities, obligations and liabilities that Our Client assumes under it. We also explained that the Property is at risk if the Borrower does not keep to the terms of the Facility Agreement.*
>
> *5. When giving the explanation described in paragraph 4 above, we took fully into account the information which has been provided to us in connection with the Facility Agreement and our explanation was consistent with that information.*
>
> ...
>
> *8. We note that the Lender is unwilling to make a loan to the Borrower unless this letter of confirmation is given. The Lender's Solicitor, the Lender and the Lender's successors in title may rely on this letter as a solicitors' letter of confirmation."*

44. The ILA, which post-dated the Third Assurance, is self-evidently inconsistent with any suggestion that Mr Farnell believed that the repayment terms of the Facility Agreement would not be enforceable, whether on the basis of Mr Serrano's assurances or for any other reason, or that the parties were conducting themselves on the basis of a shared convention to that effect.

45. A further striking feature of this case is the very late stage at which IPS raised the first group of arguments. Mr Farnell did not mention the assurances he said he had received when the Respondent first began to raise the point that the loan would soon become repayable. By an email dated 12 April 2023, Ms Clarke reminded Mr Farnell that:

> *"...the bridge loan terminates on 24 April* [i.e. after 60 days], *and the time is tight to have the litigation funding agreement in place by then, so would appreciate your responses on the requested items as soon as possible. As you know, the intention is that the bridge loan will form part of the long-form litigation funding agreement following its maturity date, but we need to be in a position to have the litigation funding agreement ready by the time the bridge loan terminates. There will be no extensions to the termination date of the bridge loan."*

46. Ms Clarke's email then raised a series of queries, to which Mr Farnell responded later that evening. I return to that email later in this judgment, as it is relevant to the issues raised in the second group of arguments. For present purposes, it is relevant to note that Mr Farnell did not suggest at this time that repayment of the loan was not enforceable in the event that Full Funding did not complete.

47. Following service on it by the Respondent of a statutory demand dated 26 May 2023 based on the Facility Agreement, IPS sent a four page letter dated 12 June 2023 to the Respondent indicating that the debt was disputed. Not only was no argument raised referring to the alleged assurances and their purported legal effect, the letter in fact appeared to concede that the Facility Agreement was enforceable. After setting out a closely-reasoned argument based on the relevant clauses of the Facility Agreement, the letter took issue only with the timing of repayment becoming due and reserved the right to challenge quantification of the debt. The letter then went on to raise allegations around the disclosure of confidential information, i.e. matters giving rise to the second group of arguments. In a subsequent letter to the Respondent's solicitors dated 7 July 2023, Mr Farnell discussed the breach of confidence allegations in some detail and did not mention any alleged assurance. A further six page letter dated 27 July 2023 followed, which raised various arguments, none of which related to any assurance or any of the matters raised in the first group of arguments.

48. The explanation given by Mr Farnell in his second statement for not raising the first group of arguments any earlier is that *"...I could not assert that there was a genuine dispute over the debt without going through the flurry of emails relating to the negotiations one by one to pinpoint the precise representations that were made. It took time to do this – time that IPS did not have as it is a small firm, comprising less than six individuals at present."* In my judgment, this explanation is inadequate to explain the late emergence of the first group of arguments. It overlooks the fact that the Third Assurance was entirely oral and was not documented by Mr Farnell in any way at that time and, accordingly, cannot have required a review of emails in order to be identified. Given that the Third Assurance is alleged to have been in strikingly stronger terms than its predecessors, it is the high-point of IPS's current case, and was either within Mr Farnell's recollection (and accordingly available to be deployed by him if he thought it had any legal relevance) at all material times, or he had forgotten about it (and necessarily also forgotten any legal significance it may have) until it came back to him some later when his first witness statement was prepared. Either explanation is inconsistent with the

proposition that Mr Farnell would not have caused IPS to enter into the Facility Agreement without the Third Assurance. I record here for completeness and for the avoidance of doubt that the late-admitted evidence of Mr Higgins' notebook discussed at §39 above is said by Mr Higgins to have been discovered by him on 17 June 2024, so this cannot have been the thing that jogged Mr Farnell's memory at the time he made his first statement on 20 August 2023.

49. It is relevant to note that the application notice dated 18 August 2024 also referred only to matters giving rise to the second group of arguments. The alleged assurances giving rise to the first group of arguments appear to have been raised for the very first time in Mr Farnell's first witness statement dated 20 August 2024. While the Respondent took no technical issue with this omission, Mr Farnell's failure to mention any allegation that an assurance was made to him by Mr Serrano until his first statement was prepared, long after IPS had raised detailed grounds of opposition to the Respondent's claim, demonstrates that IPS has no rational prospect of succeeding at trial in showing that Mr Farnell reasonably understood anything said by Mr Serrano as having been intended to have the legal effect for which it contends on this application.

50. The Respondent placed particular emphasis on *Harvey v Dunbar Assets plc* [2017] EWCA Civ 60, [2017] Bus LR 784. In that case, Mr Harvey, who had signed a personal guarantee, attempted to set aside a statutory demand served on him based on the guarantee debt on the ground of promissory estoppel. Mr Harvey's evidence was that his main contact at the lender had assured him that the lender had never enforced a personal guarantee in the past and would never do so in the future. In dismissing Mr Harvey's appeal, Henderson LJ (with whom Gross LJ and Sir Stephen Tomlinson agreed) remarked at [65] as follows:

> *"The basic problem which confronts Mr Harvey is the inherent implausibility of his case. As an experienced and hard headed man of business, how could he possibly have supposed that the Bank was inviting him to execute a guarantee which would never be enforced against him? And even if Mr Cullen used language which, taken literally, might have conveyed such a suggestion, how could Mr Harvey possibly have taken it seriously? He knew that the Bank was not prepared to lend to Vision without a guarantee, and he knew that his participation was required precisely because he was a man of substance. The terms of the Guarantee were of a standard nature, and Mr Harvey nowhere suggests that he was unable to understand them. It is simply not credible that he proceeded to execute the Guarantee on the footing that he was engaging in a solemn farce, and that it would never in any circumstances be enforced against him."*

51. In my judgment, the Respondent's position on this part of the case is even stronger than it was for the lender in *Harvey v Dunbar*, because of the key feature that the Respondent required Mr Farnell (an experienced solicitor) to take ILA after the Third Assurance was allegedly given. By contrast, Mr

Harvey was not legally qualified and was not required to take any advice bringing home to him the implications of providing a personal guarantee.

52. I summarise now my conclusions on the first group of arguments. In my judgment, the First Assurance and the Second Assurance were not unequivocal. Mr Farnell's alleged interpretation is either not an available one or is, at the very least, not the most likely interpretation; it is certainly not the only one available. The final paragraph of the Third Assurance might be said to appear unequivocal in the summary form asserted by Mr Farnell in his witness statement, but I do not consider that IPS has any rational prospect of succeeding at trial in proving that Mr Serrano spoke in those terms given the matters I have set out at §38 to §49 above. In any event, and even if I am wrong about that, there is in my judgment no rational prospect that IPS will be able to establish any intention to affect legal relations between IPS and the Respondent or any shared convention on which IPS and the Respondent conducted their dealings by reference to the alleged assurances. So much is clear from the unchallenged correspondence post-dating the Third Assurance and the existence and content of the ILA, both of which are wholly inconsistent with Mr Farnell or IPS having had any belief that the repayment terms of the Facility Agreement would not be enforced. These features mean that there is no substantially triable issue arising from any of the grounds raised in the first group of arguments.

53. For completeness, I also mention a further point raised by Mr Chivers KC, which is that there is no room for equity to come to the assistance of IPS in this case. Mr Chivers submitted that IPS has had £500,000 of the Respondent's money on the basis that it was urgently required in order to progress litigation, and the Facility Agreement expressly provided for it to be spent on such litigation and nothing else, yet no litigation has been brought. Despite that context, IPS has declined to say what it has done with the money and has instead given the cagey and unenlightening response summarised at §22 above. The Respondent explicitly challenged that by its evidence in answer and IPS has not addressed that challenge in its evidence in reply. Given the lack of live evidence, I would not have dismissed IPS's application solely on this ground had the application otherwise succeeded, but I nonetheless record that I consider this further point to have considerable force and that IPS's failure to address what it has done with the money is troubling.

The second group of arguments

54. Each of the ways that IPS puts its case under the second group of arguments is based on the proposition that the Respondent disclosed confidential information to GSDT or otherwise misused such information. I now briefly summarise how this is said to have happened. On 22 November 2022, IPS and SHEL entered into a non-disclosure agreement (**"NDA"**). The NDA defined *"the Project"* as Project Red Card and, as part of that definition, specifically provided that *"the Project"* is *"...in conjunction with"* GSDT. *"Confidential information"* is defined as information *"...which concerns the business and affairs of the Project and is of a confidential nature..."* Clause 3.2 provides that such confidential information *"...shall not be used or disclosed by the*

Receiving Party except for the purposes of the Project and in accordance with the terms of this Agreement." The Respondent is not a party to the NDA.

55. IPS also seeks to rely on the confidentiality provisions of a term sheet (at page 85 of his first exhibit), which is undated (although it appears to have been emailed by Ms Holland to Mr Farnell on 11 January 2023) and unsigned (**"Term Sheet"**). Mr Farnell's treatment of the Term Sheet in his evidence is inconsistent in material ways with the substance of the document he exhibits. He says that he *"...informed GSDT of the terms of the Term Sheet before it was signed and they agreed to those terms, but GSDT was not a party to the Term Sheet."* In so far as the words *"...before it was signed..."* imply that the Term Sheet was subsequently signed, then this is not supported by the document Mr Farnell exhibits, which is unsigned. Further, the (unexecuted) execution block in the document has three parties: SHEL, IPS and GSDT. Accordingly, the draftsperson envisaged that GSDT *would* be a party to the Term Sheet.

56. It appears that the significance of the Term Sheet is said to be that if it had come into effect then it would arguably have bound the Respondent to the non-disclosure provisions of the NDA. This is because, by the Term Sheet, *"the Funder"* acknowledged the NDA and incorporated it into the Term Sheet. The defined term *"the Funder"* could arguably have caught the Respondent, and thereby bound it to the NDA, as *"the Funder"* is defined as being SHEL *"(or a related entity)"*, which could have extended to the Respondent as such *"a related entity"*. Curiously, several paragraphs after discussing the Term Sheet as if it is a binding document (he describes the version exhibited at page 85 of his first exhibit at paragraph 42 of his first statement as having been *"entered into"* on or around 11 January 2023, which is the date it was emailed to Mr Farnell), Mr Farnell adds as an apparent afterthought that it *"was never formally signed"* (which in context appears to mean that it was never signed at all) and went through several redrafts between January and March 2023. A subsequent heavily amended redline redraft of the Term Sheet also exhibited by Mr Farnell shows the Respondent as the sole counterparty.

57. Although Mr Farnell suggests that the Term Sheet (apparently in its 11 January 2023 iteration) became binding, he does not explain the basis for that assertion (given that it was subsequently heavily redrafted and was never in any event executed) and does not address the fact that GSDT was identified as a party to the 11 January 2023 version that he says was *"entered into"*. IPS's case is that the Respondent breached the confidentiality provisions of the Term Sheet, implying that Mr Farnell thinks those provisions were contractually binding and extended to keeping matters confidential from GSDT, but there is in my judgment no serious basis for that contention based on the documents exhibited in support of it and the incoherence of the argument advanced in reliance on them. So much is clear even without making the basic point (to which I return later in this judgment) that IPS was in any event GSDT's solicitor in the negotiations with Safe Harbor Group with all the obvious implications of that.

58. The alleged disclosure of confidential information in question is said to have taken place following contact having been made by Ms Holland (who Mr Farnell contends was an intermediary, agent or representative of the Safe Harbor Group) with a contractor working for GSDT. Mr Farnell alleges that at some point after 12 April 2023 (when Mr Farnell had the exchange with Ms Clarke summarised at §44 above), Ms Holland directly contacted Matthew Bibby, who was a software developer engaged by GSDT. In a LinkedIn message to Mr Bibby (the date of which is not in evidence), Ms Holland wrote *"…We've been ready to fully fund since early March but need to complete the diligence process. Would you please connect me with* [GSDT/Mr Dunlop] *to determine if they are interested in moving forward with us?"* As noted earlier in this judgment, it is not possible to be confident about Ms Holland's precise role from the evidence presently available but this makes no difference to the outcome: for the purposes of the second group of arguments I assume in IPS's favour that IPS would succeed at trial in showing that Ms Holland was an agent for the Safe Harbor Group, including the Respondent. It appears that Mr Serrano, Mr Dunlop and Mr Slade subsequently met on a number of occasions, supported in particular by the evidence of Mr Higgins of Unique, who was present at these meetings. Mr Farnell contends that the Respondent induced GSDT to breach its contract with IPS and/or disclosed confidential information to GSDT causing it loss.

59. It is clear that each of the ways that IPS puts its case under the second group of arguments depends upon IPS having had an enforceable right to share in the proceeds of the Personal Data Claims. Without such a right, there can be (a) no relevant breach of contract by GSDT for which the Respondent can arguably have any liability; and (b) no loss occasioned either by breach of contract or disclosure of information.

60. Unsurprisingly, much of the argument at the hearing centred on the nature of the relationship between IPS and GSDT but it is important to be clear about what is really in issue here. IPS's evidence and submissions largely focused on its contention that IPS was GSDT's solicitor. In my judgment, the relevant question for the purposes of the instant application is the different question of whether or not there is a substantially triable issue that IPS has a binding contractual entitlement to share in the net damages recovered under Project Red Card. IPS's submissions tended to elide these two questions: it seemed to be assumed by IPS that as long as it could show a triable issue over the question of whether or not it was GSDT's solicitor then it must follow that all aspects of that relationship, including its contention that IPS had an enforceable contractual right to share in the proceeds of Project Red Card, must also be triable. In my judgment, that assumption does not follow.

61. It does not follow because, as Mr Chivers KC pointed out, the fact that IPS may have been GSDT's solicitor does not answer the Respondent's right to present a petition, whatever doubt there may be about the precise terms or scope of the retainer: a falling out between a solicitor and their client does not generally lead to a cross-claim valued at £60 million on the part of the solicitor against the client. To establish such a triable cross-claim, IPS must go way beyond showing uncertainty over the content of the retainer and must instead

show a substantially triable issue in relation to a share of the spoils of as-yet unlitigated claims.

62. Mr Budworth for IPS emphasised that Mr Dunlop of GSDT asserts in his witness statement that GSDT had not engaged IPS to provide legal services at all. But Mr Chivers KC made clear that, for the purposes of this hearing, the Respondent is content not to dispute IPS's position that it acted as GSDT's solicitor. In other words, IPS does not adopt GSDT's flat denial of a solicitor-client relationship. Instead, Mr Serrano's evidence for the Respondent is more nuanced. While Mr Serrano disputes that IPS was instructed specifically to litigate the Personal Data Claims, he simultaneously accepts that he believed during the litigation funding negotiations that IPS was engaged by GSDT and accepts that IPS believed it had been so engaged. It is unsurprising that the Respondent took this approach, as the documentary evidence provides a good degree of support for IPS's contention that it had been GSDT's solicitor from, at the latest, about mid-2021 (when IPS's previous solicitors appear to have been disinstructed) until the relationship broke down in around May 2023. Had it been sufficient for IPS to show a triable issue over whether or not it was GSDT's solicitor during (at least) this period, then it would have succeeded. In focusing so keenly on the question of whether or not IPS was GSDT's solicitor, rather than the question of whether or not IPS had an enforceable and irrevocable right to litigate and share in the proceeds of Project Red Card, IPS was for much of the time boxing at shadows.

63. In my view, it is clear (such that there is no rational prospect of showing the contrary at trial) that IPS had no enforceable right to share in the proceeds of Project Red Card and, accordingly, it suffered no damage capable of being set off against the petition debt. I set out my reasons for that view in the following paragraphs.

64. There is disagreement between the parties about how the Personal Data Claims were to be pursued. Mr Farnell's evidence is that those claims were *"meant to be assigned"* by the various sportspeople to GSDT, although he remains unsure whether any assignments were *"properly effected"*. In sharp contrast, Mr Dunlop's evidence is that GSDT would provide the individual claimants with details of a law firm, which would then enter into either a damages based agreement (**"DBA"**) or conditional fee agreement (**"CFA"**) directly with the individual, with each of GSDT, the law firm, any funder and any agent entitled to a payment from the damages received by the individual claimant. As late as 20 April 2023, Safe Harbor Group's solicitor, Ms Clarke, remained (understandably) uncertain about what was proposed, remarking *"currently there is some confusion throughout the document as to whether this is an agreement with Global, encompassing all claimants (which these definitions/clauses suggest), or an agreement to be entered into with each individual claimant. Please confirm which is intended."* No light is shed on matters by the documents relied on by IPS, which are in a primitive and inconsistent state, as I shall come on to in more detail in a moment.

65. While the uncertainty over the mechanical structure of Project Red Card and the means of remunerating those involved plainly cannot (and does not need to) be resolved on this application, I disagree with Mr Farnell's dismissive

assertion that *"the precise legal relationship between GSDT and the players is not relevant to this Application."* Given that, on this part of its application, IPS needs to show that there is a triable issue arising from its contention that it had a crystallised and irrevocable contractual entitlement to share in the damages recovered under Project Red Card, in my judgment the significant lack of clarity over how the Personal Data Claims were to be litigated and how Project Red Card more generally was to work is highly relevant in determining whether there can be such a triable issue.

66. IPS's case, as introduced at paragraph 22 of Mr Farnell's first statement, was that *"In September 2020, GSDT formally instructed IPS to advise on Project Red Card generally and to litigate the Personal Data Claims."* In that first statement, Mr Farnell relied on two documents as *"primarily"* containing the terms on which IPS would act: first, an agreement between GSDT and IPS dated 1 September 2020, which was described by him as the **"Global Agreement"**; and, second, IPS's standard letter of engagement dated 1 December 2022 and accompanying standard terms of retainer (**"December 2022 Engagement Letter"**). The December 2022 Engagement Letter was referred to by IPS during the hearing as *"the CFA"*, although even if its terms had become binding in their entirety the document itself cannot conceivably have given rise to a CFA arrangement. No competent solicitor could reasonably have thought that it did: it is at most an engagement letter that contemplates that a CFA might, separately, be entered into. In Mr Farnell's second statement, he made reference to (and exhibited) a further engagement letter dated 22 August 2022 (**"August 2022 Engagement Letter"**).

67. None of the Global Agreement, December 2022 Engagement Letter or the August 2022 Engagement Letter is signed by GSDT. Only the August 2022 Engagement Letter is signed by IPS.

68. IPS's case (set out in Mr Farnell's first statement) is that it was appointed on an exclusive basis by GSDT, which GSDT had no contractual right to terminate, to represent *"the GSDT Clients"* (i.e. professional sportspeople) in *"the claims underpinning Project Red Card"*. Mr Farnell explains that IPS:

> *"...would be paid 10% of any award of damages or any settlement of each of the claims underpinning Project Red Card. IPS would invoice the underlying athlete (the GSDT Client) for the 10%."*

69. Although it is unsigned, Mr Farnell nonetheless suggests that the Global Agreement was accepted by conduct or that *"GSDT and IPS had an oral agreement to pay GSDT 10% of all damages received."* This point is developed in IPS's skeleton argument, where it is submitted that external and internal communications *"state that IPS was to be awarded 10% of damages recovered by the Players"* and suggests that the figure of 10% *"appears consistently in documents dating from 2021 to 2023."*

70. At the centre of things, then, is the Global Agreement. In my judgment, it is sufficiently clear from the face of this document (such that any argument to the contrary has no rational prospect of success) that it was, as most, an early draft for discussion or negotiation. I take this view because it is not a

document that any solicitor, let alone one of Mr Farnell's seniority, could have regarded as fit for execution. It is also inconsistent with Mr Farnell's evidence of how Project Red Card would work.

71. First, the Global Agreement is expressed to be between IPS and GSDT. Yet the recitals contemplate that the litigation will be brought not by GSDT but by *"a number of professional athletes"* who are defined as the *"GSDT Clients"*. Clause 2 provides that the Global Agreement *"contains the terms and conditions upon which* [IPS] *agrees to act for the GSDT Clients."* Clause 2.1 provides that IPS shall be entitled to 10% of the GSDT Clients' damages, for which clause 2.3 entitles IPS to invoice the GSDT Clients directly. So far, the Global Agreement does not provide, on any view, for IPS to represent GSDT in any litigation. Rather, it is a contract to represent the GSDT Clients. In my judgment, no effective or enforceable contract in these terms could come into existence without the GSDT Clients being parties and there is no evidence that there was any prospect of this happening: in his first statement dated 31 October 2023, IPS's witness Mr Higgins expressed his belief that GSDT had no authority from the sports people to manage their claims or progress litigation on their behalf.

72. Later, however, the Global Agreement switches from the language of a bilateral agreement to that of a solicitor's engagement letter. Clause 4.1 starts with *"We must:"* and then addresses itself to *"you"*, speaking of the need to *"act in* your *best interests"*, give *"best advice about whether to accept any offer of settlement"*, and *"keep you informed about the progress of your case"*. Despite the laborious definitions in clause 1 (which go as far as defining what the words *"includes"* and *"writing"* mean), there is no guidance anywhere about who is *"we"* and who is *"you"*. Although one can infer that *"we"* means IPS (i.e. the solicitor) and *"you"* means GSDT (as the only other party), to read it like that would produce a contract that no solicitor could enter: how could IPS act in GSDT's best interests in the litigation if IPS's clients in that litigation are the GSDT Clients? Or give its *"best advice"* to GSDT about whether to settle when that would be a decision for the litigant (i.e. the relevant GSDT Client) in whose interests IPS would be required to act with single-minded loyalty? Matters become stranger still with clause 5.2, which introduces the undefined concept of *"the Supplier"* and *"the Services"*. Who or what these are is not explained.

73. Beyond these fundamental defects, the greater part of the Global Agreement (clauses 10 to 38) is in boilerplate format and contains drafting errors on a significant scale. Without going through them all, there are three different entire agreement clauses (clauses 10, 13 and 23.1), the same number of different severance clauses (clauses 11, 17 and 30), two different notice clauses (clauses 12 and 24), and the same number of different variation clauses (clauses 14 and 27), assignment clauses (clauses 18 and 28.1), waiver clauses (clauses 15 and 31.3), jurisdiction clauses (clauses 21 and 37.1) and exclusion of third party rights clauses (clauses 19 and 35.1). No reasonable solicitor would think this a document ready for execution.

74. As mentioned, the Global Agreement is dated on its face 1 September 2020 and was never executed. In his first statement, Mr Farnell's evidence was that

GSDT *"formally instructed"* IPS in September 2020. In the Respondent's evidence in answer, however, Mr Dunlop of GSDT said that GSDT began discussions with IPS in relation to Project Red Card *"in or around March 2021."* Mr Farnell concedes this considerably later date for IPS and GSDT having *"first made contact"* in paragraphs 24 and 31 of his second statement. This revised evidence was consistent with IPS's skeleton argument, which described IPS as having *"been GSDT's solicitor since 2021"*. The acceptance by IPS that its first contact with GSDT had taken place in March 2021 is obviously inconsistent with the Global Agreement having been entered into in September 2020. There was no attempt by IPS either in evidence or submissions to address this significant inconsistency in its position.

75. Further, as Mr Chivers KC pointed out, the August 2022 Engagement Letter is in any event inconsistent with the Global Agreement: it covers the same matter (defined as *"Professional Footballers' data misuse claim"*) as the Global Agreement, but with IPS to be remunerated on a paid-per-hour basis rather than on a share of damages basis. As is the case with the Global Agreement, the August 2022 Engagement Letter is plainly and obviously a draft: under the sub-heading *"Services"* appears (highlighted in yellow) the words *"[Chris, do you want to include a detailed narrative here?]"* and the hourly rate (also highlighted in yellow) is *"£[xxx] plus VAT"*. As previously mentioned, it is unsigned by GSDT.

76. Moreover, the December 2022 Engagement Letter is also inconsistent with the Global Agreement in fundamental respects. Although it is plainly not itself a CFA (as it was inaptly described by IPS in submissions) it nonetheless refers to IPS having *"...agreed to act under a Conditional Fee Agreement the terms of which are incorporated in the Conditional Fee Agreement which will also be explained to you personally."* A CFA could not, of course, provide for IPS to receive 10% (or any share) of the damages from Project Red Card: such an arrangement would be a DBA, not a CFA. To the extent that a CFA was being contemplated by December 2022, this would clearly contradict any suggestion that a binding DBA was in place.

77. Another fundamental inconsistency between it and the Global Agreement is that the December 2022 Engagement Letter envisages that IPS will act on behalf of GSDT (not the GSDT Clients) in the Project Red Card litigation. At paragraph 1, *"Services"* is defined as *"Advice on the misuse of professional athletes data to include all conduct of any litigation"*. The next subheading provides for *"Excluded matters"* and the only matters so excluded are to do with tax. At paragraph 7, it provides that *"Any advice and/or services provided by* [IPS] *is for your benefit only and may not be used or relied upon by anyone else."* Assuming in favour of IPS for present purposes that an engagement in these terms came into effect, the December 2022 Engagement Letter heavily contradicts in the most fundamental terms the premise of the Global Agreement, which is that IPS was to act for the GSDT Clients in the Project Red Card litigation in return for a share of the GSDT Clients' damages. Both the claimant in the litigation and the means by which the solicitor will be remunerated are different. As Mr Chivers KC pointed out in submissions, IPS does not address these inconsistencies.

78. Accordingly, I accept Mr Chivers KC's submission that neither the August 2022 Engagement Letter nor the December 2022 Engagement Letter assists IPS in showing that the Global Agreement, or any concluded agreement providing for IPS to receive 10% of damages from the Personal Data Claims, was in place between IPS and GSDT. If anything, IPS's evidential case on the December 2022 Engagement Letter (at least) points strongly away from such a state of affairs. As mentioned earlier, Mr Farnell positively relied in his first statement on the December 2022 Engagement Letter as one of the two documents (the other being the Global Agreement) that *"primarily contained"* the terms on which IPS was instructed to advise on and litigate the Project Red Card claims. In my judgment, however, the submission that the December 2022 Engagement Letter was binding as to its terms cannot stand with any suggestion that the much earlier Global Agreement remained (and remains) binding after the date of the December 2022 Engagement Letter. This is because the standard terms of retainer that are appended to and (on IPS's case) form part of the December 2022 Engagement Letter exclude any prior agreement between IPS and GSDT from the engagement recorded in that document. Clause 27 of those terms provides as follows:

> *"**27. ENTIRE AGREEMENT***
>
> *27.1 These Terms and the Letter represent the entire agreement and understanding between you and* [IPS] *relating to the performance of the Services by* [IPS] *and supersede all prior agreements, arrangements and understandings between us relating thereto.*
>
> *27.2 You acknowledge and agree that in entering into the agreement with* [IPS] *for* [IPS] *to perform the Services that you have not relied upon any oral or written representation, statement, warranty or understanding (whether negligently or innocently made) by* [IPS] *or any employee, partner or members of* [IPS] *other than as expressly set out in these Terms and the Letter."*

79. I turn now to the four pieces of evidence that are relied on in particular by Mr Farnell in his evidence to support IPS's case that the Global Agreement was accepted by conduct and/or that IPS and GSDT had an oral agreement to pay IPS 10% of all damages received.

80. First, there is an email dated 20 September 2021 from Mr Dunlop of GSDT to a potential investor in which Mr Dunlop wrote:

> *"We are targeting a return to player of 75%. With 10% to GSDT 10% to the legal team and Funders 5% to agents."*

81. In my judgment, this does not support IPS's case. The word *"targeting"* is inconsistent with there being any concluded agreement. As drafted, the email suggests that at least the player's proposed share was subject to a degree of movement, which means that at least one of the other interests (GSDT, legal team and funders, and agents) must also have been subject to movement as a consequence. If there was a concluded deal in place, then *"targeting"* would have been a particularly inapt word to use.

82. Further, this email discloses another issue with which IPS has never engaged. This is the question over the level of any funder's share and where that share was to come from. Taken at its very highest and ignoring the reference to *"targeting"*, the email does not provide for IPS to receive 10% of damages; it provides for IPS and *"funders"* both to be rewarded from that share in some undefined way.

83. The second document relied on by IPS is an email dated 11 October 2021 to the same potential investor as the 20 September 2021 email referred to at §80 above, which attached an Excel spreadsheet. On the right hand side appears the following summary:

"Project red card	*20%*
Agents	*5%*
Players	*75%"*

84. Mr Farnell's evidence is that *"Project red card 20%"* in that summary is a reference to the combined share for GSDT and IPS of the total settlement figure and he goes into no further detail than that. But beneath the summary just mentioned there is a further working that shows how the *"Project red card 20%"* combined share is to be broken down. This shows IPS getting a 20% share of the *"Project red card 20%"*. Although it is not spelt out on the document, 20% of 20% equates to 4% of the whole. On the worked example shown on the document, the notional settlement (after deduction of funding costs) is £72,590,000 and of this IPS gets £2,903,600, which is exactly 4%. Further fees are then deducted from the £2,903,600, leaving IPS with £2,513,600. This document plainly does not anticipate IPS getting 10% of the damages recovered under Project Red Card. It is a working showing a quite different distribution scheme.

85. The third document relied on by IPS is an email dated 22 February 2023, by which Mr Dunlop provided a further (different) Excel spreadsheet to Mr Farnell. In Mr Farnell's evidence, he simply points out that the column labelled *"IPS/GSDT/SH"* shows that the percentage of damages to be received by IPS, GSDT and the Respondent adds up to 30%, and goes no further. But it is plain from the spreadsheet that it goes into significantly more detail than that and on a careful reading does not support IPS's contention that there was any concluded contract entitling it to 10% of the damages. This is because the spreadsheet models for the 30% of the whole referred to by Mr Farnell to be further broken down, such that the Respondent receives 30% and IPS and GSDT receive 70% of that 30%. It then models for IPS to receive 33% and GSDT to receive 66% of that 70% of the 30% of the whole. Although the calculation for the stand-alone percentage figure for IPS is not expressly modelled, it is a matter of arithmetic (and Mr Budworth accepted this in oral submissions) that 33% of 70% of 30% is about 7% (in fact 0.0693), which is not 10% or close to it.

86. Pausing here, it is notable that IPS accepts in its skeleton argument that *"...There might not be a triable issue if this figure* [i.e. 10% of the damages]

had appeared only sporadically, but it appears consistently in documents dating from 2021 to 2023." The second and third documents, on which IPS itself places particular reliance, in fact demonstrate that the figure of 10% was only one of a number of bases for remuneration that were contemplated during the period 2021 to 2023 and was on any view not referred to consistently. Indeed, the second and third documents show that when the point was addressed in any kind of detail, the figure of 10% played no part. Moreover, the material inconsistency between the second and third documents themselves (even leaving aside any talk of 10%) further shows that the issue was at large and no agreement had been reached.

87. Finally, the fourth document relied on by IPS is an email dated 12 April 2023 from Ms Clarke of the Respondent's solicitors to Mr Farnell, to which Mr Farnell responded on the same day with comments. Ms Clarke raised a number of queries in that email about how the arrangement was going to work and Mr Farnell responded in red. It is on the first of these points that IPS relies in particular in support of its case (in the following extract the red text, i.e. Mr Farnell's response, is rendered in bold type):

> *"1. Economics – Under the Global Agreement and your engagement with the players, IPS [IPS] are expecting to receive 10% of any damages or settlements awarded to the players. The terms discussed with Safe Harbor (and reflected in the latest draft term sheet) are that Safe Harbor will receive their outlay, plus interest, plus 10% of any damages/settlements (including cost awards). It therefore looks like there is some disconnect between these two positions.*
>
> ***Please explain why you believe there is a disconnect as it is not clear from your comment why you believe there is an issue.****"*

88. I do not consider this exchange to provide any additional support for IPS's position: in the first sentence, Ms Clarke is doing no more than restating what the Global Agreement says on its face. It does not of itself do anything to advance IPS's contention that the Global Agreement (or some of its terms) took effect as a binding contract. Ms Clarke then goes on to explain why the Global Agreement does not work from the Safe Harbor Group's point of view given the need for that Safe Harbor Group also to receive some upside. By the time Ms Clarke sent her email, Mr Farnell could not have thought that GSDT considered IPS to have a crystallised entitlement to 10% of the damages. This is because Mr Dunlop had only a few weeks earlier sent Mr Farnell the spreadsheet discussed at §85 above on 22 February 2023 (a document that IPS not only admits but on which it particularly relies), which modelled for IPS to receive less than 7% of the damages.

89. Whether or not the point ought to have been obvious to Mr Farnell on 12 April 2023, the same point (among others) was picked up again in a detailed email dated 17 April 2023 from Ms Clarke to Mr Farnell, in which Ms Clarke provided a number of comments on the Global Agreement. Ms Clarke's email clearly approached these documents on the basis that they were in draft and provided Safe Harbor Group's drafting comments on them. By a further email dated 20 April 2023 in the same chain as the detailed email of 17 April 2023,

Ms Clarke set out a note of a call that apparently had taken place earlier that day with Mr Farnell to discuss the drafting comments she had raised. Again, it is plain from the note that both parties approached the documents as drafts: for instance, the email says *"...we will put a call in the diary to go through the outstanding commercial points"* and (immediately prior to a discussion of the Global Agreement) *"...the majority of the points raised were drafting points."* The following points appear in the email of 20 April 2023:

> *"Global Agreement*
>
> - *CF* [Mr Farnell] *confirmed that this has been in agreed form for some time, but that it will need to be updated, and that Global* [GSDT] *are aware of that and that he didn't foresee any issues with negotiating the requested updates.*
>
> - *HC* [Ms Clarke] *raised that SH* [Safe Harbor Group] *need to start talking to Global* [GSDT], *as they will need to be across the terms of the LFA* [litigation funding agreement] *and be a party to certain documents (for example, a waterfall/payments agreement). CF agreed that it would be useful for those lines of communication to be opened sooner rather than later and confirmed that he would try and organise that by the end of the week.*
>
> - *HC queried the financials, noting that under these documents IPS is receiving only 10% from the claimants, whereas they will need to receive more than this to make payment to SH* [the Respondent]. *CF agreed and noted that these figures were from a time before any funding was envisaged. It was agreed that the figure would need to be in excess of 20% in order to cover all of IPS's outgoings under the LFA and retain 10% for itself.*
>
> - *CF confirmed that the remaining drafting updates looked uncontroversial.*
>
> ...
>
> *Engagement Letter*
>
> - *CF confirmed that terms had been agreed , but that they had not been signed yet. This should make it easier to make the necessary updates.*
>
> ...
>
> ***Action Points***
>
> 1. *CF to open lines of communication between Global and SH by the end of this week/beginning of next week;*
>
> 2. *CF to update documents and send updated drafts by early next week;*

..."

90. Mr Farnell replied on 24 April 2023 and said *"I can confirm receipt of the contents of the notes, and I will hopefully be in a position to provide to you with* [sic] *the drafted revised documentation as soon as practically possible but, in any event, early this week."* Mr Farnell did not clarify, correct or otherwise dissent from the accuracy of Ms Clarke's note of their call on 20 April 2023, as he would reasonably be expected to have done if, having acknowledged it, he did not regard it as an accurate account of their conversation. In particular, Mr Farnell did not suggest that, contrary to the premise of the discussion recorded in Ms Clarke's note, the Global Agreement was in fact already a binding document and accordingly incapable of further negotiation of the kind anticipated by Ms Clarke, or that IPS and GSDT were somehow otherwise already subject to a binding agreement in similar terms. Nor did Mr Farnell dissent from the description of the documents as *"drafts"* in action point number 2. Further, Mr Farnell did not take issue with the second bullet point in the email, in which Mr Farnell agreed with Ms Clarke that Safe Harbor Group should be put in touch with GSDT that week in order that the latter could be *"...across the terms of the LFA..."* or action point number 1 to similar effect.

91. In my judgment, this exchange puts beyond doubt (such that any argument to the contrary has no rational prospect of success) that IPS (and Safe Habor Group) regarded the Global Agreement as a draft subject to negotiation as to its commercial terms as late as 24 April 2023. IPS's submissions suggested that all that was being discussed in these exchanges was a variation to a concluded agreement and focused in particular on Mr Farnell's attributed use of the words *"...this has been in agreed form for some time..."* in support of that suggestion. In my view, that is not an available interpretation of the email of 20 April 2023: the reference to being *"in agreed form for some time"* is much more consistent with the document being a draft and the subsequent reference to *"...the remaining drafting updates..."* (which is consistent only with the preceding matters also being drafting updates) settles the matter.

92. Overall, the inconsistency between the terms of the Global Agreement and reality, the lack of clarity over the way in which the underlying litigation would work, and the general state of the drafting, together with the Global Agreement being unsigned, all drive me to the conclusion that IPS's claim that there was a concluded contract in the form of the Global Agreement giving IPS an enforceable and irrevocable right to share in the proceeds of Project Red Card, whether by written instrument, conduct, orally or otherwise, does not give rise to a substantially triable issue. I agree with the submission of Mr Chivers KC that *"no one in their right mind"* would sign the Global Agreement, which is plainly an incomplete draft, or would think its terms capable of giving rise to a concluded agreement.

93. It seemed to be implied in IPS's oral submissions that the differences between IPS's share referred to in the various documents could be a point in its favour: shifting commercial arrangements meant uncertainty and that meant triability. In my view that is a fallacy. Far from showing a triable issue, the continuing negotiations over IPS's prospective share support the view that no deal was

concluded. When one adds to this (a) the fact the Global Agreement was unsigned (and unsignable in its current state on any serious view); (b) no one knew whether the proceedings would be brought by the original claimants or by GSDT as their assignee; and (c) there was ongoing uncertainty over the way in which any funder (whether the Respondent or someone else) would be remunerated or where any share it might have would come from, it is in my view sufficiently clear, such that there is no triable issue on the point, that IPS did not have a binding contractual right to a share of damages from the Personal Data Claims. The four pieces of evidence relied upon by IPS in support of its case are firmly to the effect (such that the contrary is not rationally arguable) that the basis on which IPS might act for GSDT in the Personal Data Claims was at large and subject to contract.

94. IPS's submission that there is a triable issue over whether there was a concluded agreement for some unspecified proportion other than 10% was only faintly put at the hearing and I reject it. If the evidence cannot give rise to a triable issue over the contention that there was a concluded contract for 10% (the figure mentioned in the Global Agreement) then it cannot disclose one in relation to a vague suggestion that there was a concluded contract for some unspecified lesser sum; the inability to specify such a fundamental commercial feature of such an alleged contract is strongly inconsistent with any contract having come into existence, on top of all the other reasons (set out above) why a contract did not come into existence for 10%.

95. Pausing here, the consequence of this conclusion is that there is no substantially triable issue on the second group of arguments because there is no rational prospect of IPS showing at trial that it had any binding contractual right to share in the proceeds of Project Red Card and, accordingly, it has no rational prospect of showing any actionable loss or damage at trial capable of being set-off against the petition debt.

96. I do not refuse the application in relation to the second group of arguments solely on that basis. Further, and in any event, I do not consider that there is any substantially triable issue over the contention that there was any wrongful disclosure or misuse of confidential information for reasons I shall now set out.

97. The premise of IPS's case on this aspect, as set out in Mr Farnell's witness evidence, is that the Safe Harbor Group and GSDT were to be put in direct contact *"eventually"* but that this was *"only meant to happen following the signing of"* Full Funding. In my judgment, this contention is totally inconsistent with the contemporaneous correspondence. It is plain from the email exchange of 20 and 24 April 2023 (summarised above) that both the Respondent's solicitor and Mr Farnell contemplated that the Safe Harbor Group would be put in touch with GSDT by IPS prior to Full Funding being agreed. Subsequent emails in that chain (which were omitted from Mr Farnell's evidence) were exhibited by Mr Serrano as part of the Respondent's evidence in answer. These put beyond doubt the clear recognition between IPS and Safe Harbor Group that the former would put the latter in touch with GSDT prior to the completion of Full Funding. The evidence shows, decisively, that Mr Farnell cannot possibly have thought that there was any

prospect of Full Funding being concluded without the Respondent first being put in touch with GSDT.

98. On 26 April 2023, Mr Farnell informed Ms Clarke that he was meeting Mr Dunlop and Mr Slade the following day *"as regards all of the points you have raised"* (which must, therefore, have included the point about opening *"lines of communication"* between and Safe Harbor and GSDT mentioned by Ms Clarke on 20 April 2023) and that he would revert *"immediately afterwards."*

99. Mr Serrano emailed Ms Clarke (copying Mr Farnell and Ms Holland, among others) on 1 May 2023 as follows:

> *"Our desire is to fund this litigation and work with you, but if unable to get comfortable we need to move on.*
>
> *The call and next steps w Global must take place with in 72 hours or we require payment in full. Let us know."*

100. Mr Farnell emailed Ms Clarke on 3 May 2023 indicating that he would be in a position to send through revised documents that day and requested that *"we look to complete all matters by the 12 May which I believe to be reasonable."* Some further drafting points were mentioned. Despite the strength of Mr Serrano's insistence that a call should take place with GSDT, Mr Farnell made no reference to Safe Harbor's desire to open lines of communication with GSDT or to Mr Farnell's agreement to do this. Ms Clarke responded within half an hour and wrote:

> *"We do need to see movement on the discussion with* [GSDT]. *This was promised at the end of last week, and then 'early this week'. Have you opened communication with* [GSDT] *about this? It feels like it should be achievable to get some time in everybody's diaries before the end of this week and the upcoming bank holiday."*

101. On 4 May 2023, Ms Clarke asked Mr Farnell by email *"...could you let us have an update on progress with putting together a call with Global. You will be aware that Safe Harbor expect that call to take place not later than tomorrow."* There is no evidence of a response to that request and Ms Clarke chased on 10 May 2023 to ask for an update on the proposed call with GSDT *"as a matter of urgency"*. The following day, Ms Clarke emailed Mr Farnell and wrote *"Safe Harbor need a call to be set up with Global no later than tomorrow. If there is no call before the end of this week we are instructed to make demand and commence enforcement proceedings under the bridge loan and personal guarantee on Monday."*

102. It is accordingly clear from these subsequent exchanges (such that IPS has no rational prospect of showing the contrary at trial) that both IPS and Safe Harbor Group anticipated and agreed that the latter would be put in touch with GSDT before Full Funding could be completed. Mr Farnell's unsupported assertion that any contact was to post-date completion of Full Funding is directly contradicted by these exchanges, to which he was a party. As with other aspects of IPS's case, the inconsistency between that case and what the

contemporaneous documents say was not really addressed by IPS at the hearing.

103. It is not, in any event, clear what confidential information is said to have been disclosed or how its disclosure is said to have caused loss to IPS. This is particularly so given that Mr Farnell's own evidence in his first statement that he *"regularly updated"* and *"continuously informed"* GSDT about the negotiations and asserts that he *"constantly updated GSDT on the progress of the negotiations and was in fact under a substantial amount of pressure from GSDT to close a long-term litigation funding agreement in IPS's name."* As noted above, Mr Farnell expressly agreed prior to Ms Holland's email to Mr Bibby that Safe Harbor Group should be in direct contact with GSDT and agreed that he would arrange for that to happen. Accordingly, exactly what it was that the Respondent disclosed that IPS believes GSDT had no right to know is entirely obscure.

104. There is a yet further fatal impediment to IPS's case on its arguments based on the disclosure of information. On IPS's case, it was GSDT's solicitor and engaged in the negotiations with Safe Harbor Group on behalf of GSDT, notwithstanding that IPS was to be the borrower under any funding agreement that was subsequently agreed. Accordingly, IPS could not, as GSDT's fiduciary, keep information about those negotiations, or in relation to Project Red Card generally, confidential as against GSDT. It is further obvious that IPS, as GSDT's solicitor in the negotiations with Safe Harbor Group, could not derive or seek to derive any profit or advantage from those negotiations at the expense of its client GSDT, such that IPS might suffer actionable loss by reason of the substance of the negotiations being disclosed to GSDT.

105. In order to try to overcome this basic difficulty, IPS attempted an alternative case on breach of confidence on the footing that IPS was not, contrary to IPS's own evidence, in a solicitor-client relationship with GSDT. Mr Budworth's skeleton submitted that *"...the breach of confidence case becomes particularly strong if, as the Petitioner says, IPS and GSDT were not in a solicitor-client relationship."* Such an argument cannot begin to get off the ground because, as noted above, the Respondent does not dispute on this application that IPS was solicitor to GSDT. In running an argument that is directly contrary to its own evidential case, and which is inconsistent with both parties' positions on this application, IPS further underlines the general lack of merit in its arguments.

106. I reiterate that I am not required to decide whether there is a triable issue on whether or not there was any retainer between IPS and GSDT or, if there was, its precise terms and scope. As noted earlier in this judgment, that was not in issue on this application. To the extent those issues are at large between IPS and GSDT, or anyone else, then they will fall to be decided in other proceedings. For the avoidance of doubt, nothing I have said in this judgment binds GSDT.

Abuse of process

107. Finally, IPS contended that the petition is an abuse of process, citing Rose J (as she then was) in Maud v Aabar Block SarL [2015] EWHC 1626 (Ch), [2015] BPIR 845 at [29]. In that case, Rose J concluded that the pursuit of insolvency proceedings in respect of a debt that is otherwise undisputed will amount to an abuse, firstly, where the petitioner does not really want to obtain the liquidation or bankruptcy of the debtor but wishes to put pressure on them to take some other action; or, secondly, where the petitioner does want to obtain that relief but is not acting in the class interest of the creditors.

108. In support of this submission, IPS relies solely on Mr Farnell's note of the alleged contents of a telephone call made by Mr Serrano to Mr Farnell on 12 June 2023. The note suggests that Mr Serrano threatened Mr Farnell before putting the phone down. Mr Serrano denies threatening Mr Farnell. That evidential dispute cannot be resolved without cross-examination but it does not need to be for the purposes of disposing of this application. Taken at its highest, the alleged contents of the call, although unpleasant and improper, do not begin to disclose a case that the Respondent does not genuinely seek a winding up order for the benefit of the creditors as a class. Animosity between creditor and debtor is far from unusual and does not, in and of itself, support an allegation that the process of the court is being abused.

109. After this judgment was circulated in draft, written submissions on consequential matters were made by the parties. The submission of IPS included the assertion that, by the immediately foregoing paragraph, the court had *"observed that...the conduct of...Mr Serrano towards the Company was unpleasant and improper"*. IPS suggested that regard should be had to this feature, among others, when determining costs. To the extent that the same is not already obvious, I emphasise that the foregoing paragraph does no more than record an *allegation* that Mr Serrano *denies*, which *cannot be resolved without cross-examination* and has for present purposes been *taken at its highest* to see whether it could disclose a case of abuse of process. Accordingly, no finding about Mr Serrano's conduct has been made.

Conclusion

110. There is in my judgment no substantial dispute over the debt identified in the petition and I propose to dismiss the application to restrain advertisement.