



Neutral Citation Number: [2020] EWHC 1249 (Comm)

Case No: CL-2010-000804

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

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

Date: 22/05/2020

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

MICHAEL WILSON & PARTNERS LIMITED

Appellant

- and -

(1) THOMAS IAN SINCLAIR

(2) SOKOL HOLDINGS INC.

(3) EAGLE POINT INVESTMENTS LIMITED

**(4) THE BUTTERFIELD BANK (BAHAMAS)
LIMITED**

(5) JOHN FORSTER EMMOTT

Respondents

Mr David Holland QC (instructed under the Public Access Scheme) for the **Appellant**
Mr Philip Shepherd QC (instructed by **Kerman & Co, Solicitors**) for the **Fifth Respondent**
The first to Fourth Respondents did not appear and were not represented.

Hearing dates: 12 May 2020

Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 9:45am on Friday 22nd May 2020.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of an appeal by the Appellant (“MWP”) from an Order of Mr Registrar Kay QC made as long ago as the 14 June 2018 by which he refused an application by the claimant to make final an Interim Third Party Debt Order.
2. Permission to appeal was granted by Males J by an order made on 23 August 2018. It is worth noting that a large number of different grounds were relied on in the Grounds and the supporting skeleton argument, most of which were no longer relevant and not relied on at the hearing before me. Many of the Grounds relied on concerned apparent contradictions between what Mr Registrar Kay had decided in his judgment leading to the Order under appeal and what had been considered and decided in a judgment under appeal to the Court of Appeal to which I refer in more detail below. This point was summarised in the skeleton submitted with the application for permission in these terms:

“8. At the instance of TP (the forth respondent to this appeal), the Court was persuaded and did find that C’s expenditure on legal fees fell under a paragraph of the said freezing order, but that it had breached the freezing order by failing to notify TP of the origin of funds expended. This finding is directly contrary to the express terms of the order of another (higher) court in a case between the same parties which was not shown to the court. The order of that other court (Sir Jeremy Cooke, sitting as a Deputy in the Commercial Court) constituted binding authority on the Master, and his decision to the contrary, with or without the authority, is erroneous.

9. The result of this clash is that C is now faced with two completely contradictory rulings on the meaning of the freezing order applying to it, and, in TP’s supplementary skeleton argument placed before the Master at the adjourned hearing on the issue of costs and permission to appeal, TP has given notice that it intends to take advantage of the inconsistency.

10. In and of itself such a finding would necessitate an appeal to resolve the discrepancy, but where, as here, the error has arisen in circumstances where TP’s counsel raised the point on the second day of the hearing without notice, and failed to provide the court with all relevant material, that constitutes an additional reason to grant permission to appeal, and the order obtained in such circumstances should be suspended pending that appeal, and TP should be deprived of its costs.

...

18. The bizarre situation has now been reached where TP persuaded Sir Jeremy Cooke to hold (and record) that paragraph

13(1) only applies to legal costs in TP's own claim to enforce his Award, and paragraph 13(2) entitles C to fund all *other* proceedings under the "*ordinary course of business*" exception, but he has now, without drawing to the Master's attention the terms of the Cooke Order, the Cooke Ruling and TP's own letter to the Master of 15th July 2017, persuaded the Master to hold the exact opposite of both propositions. Even more extraordinary is this: he has led the Master into finding that paragraph 13(2) of the freezing order cannot cover spending funds on legal costs in the ordinary course of business, and to do so would breach the freezing order, even though TP's counsel earlier in the hearing before the Master expressly disavowed that he was arguing that C was in breach of paragraph 13(2), and conceded the exact opposite, namely that "*the ordinary course of business*" exception (13(2)) *did* include legal expenses".

In fact however, there were two bases on which Mr Registrar Kay had proceeded. First he had concluded that, as a matter of law, in the circumstances, a Third Party Debt Order could not be granted. Secondly he held that if he was wrong about that, he would have refused to make the Interim Third Party Debt Order ("ITPDO") final in the exercise of his discretion. The points I have referred to were relevant only to the exercise of discretion but have no impact on the merits or otherwise of the appeal against the decision of the Registrar on the threshold point.

3. Males J directed that:

"1) Permission to appeal from all of the Judgment and Order of Master Kay QC of 14 June, and also his further Order of 20 July 2018, is hereby granted to MWP, and all such Judgment and Orders shall be stayed pending the final outcome of the Appellant's appeal, with the effect that the Third Party Debt Order of 23 May 2017 shall remain in place, and in full force and effect.

2) The appeal shall be listed to be heard in this Court, time estimate one day, after the handing down of judgment in appeal No.A3/2017/1964 (currently listed to be heard on 24 and 25 October 2018).

3) The Appellant shall provide security for the costs in the appeal in the amount of £75,000, within twenty-eight (28) days of the Appellant's receipt of the sealed Order, failing which the Respondents shall be entitled to apply for the appeal to be struck-out."

The Court of Appeal case to which Males J referred was the appeal by MWP from the decision of Sir Jeremy Cooke I refer to below. It is a startling feature of this case that notwithstanding that the Court of Appeal handed down its judgment (dismissing MWP's appeal) on 26 February 2019, no attempt has been made by MWP to arrange for the listing of this appeal, which was only listed in the end at my insistence so that it

could be determined one way or another. I explain the context of my involvement further below.

4. It is necessary that I now set this appeal in its wider context. This is one of a number of cases pending in the Commercial Court, many of which have been issued by the Appellant. The conduct of the parties and in particular that of MWP has been the subject of criticism by judges both here and in various overseas jurisdictions in recent years. It is necessary to draw attention only to two statements from the Court of Appeal in England that illustrate the nature of the problem. Both were made when the Court of Appeal dismissed MWP's appeal from the order of Sir Jeremy Cooke removing an "*Angel Bell*" exception from a post judgment freezing order - see Michael Wilson & Partners Limited v. Emmott [2019] EWCA Civ 219. The lead judgment was given by Gross LJ. At Para. 2 of his judgment, he described these proceedings as a " ... *seemingly interminable, unhappy, ... saga*". Having described the background in terms that I intend to adopt for the purposes of this judgment and which I set out below, Gross LJ concluded that section of his judgment at para. 25 by saying of the findings of the first instance judge, that they were "*...coruscating factual conclusions; they comprise a devastating indictment of the conduct of MWP and Mr Wilson.*". In a concurring judgment, Jackson LJ said:

"Having listened to the history of the litigation between these two solicitors, I protest at the shameful waste of time and money caused by their private dispute, which has now continued for 13 years and left their reputations in tatters. We were told that Mr Emmott's global costs amount to £2.5 million, and Mr Wilson's several times that. Courts in four countries have been (and in at least two cases are being, with no end in sight) plagued with their proceedings and counter-proceedings. It appears that Mr Wilson will stop at nothing to prevent Mr Emmott from receiving the award to which, for all his deceit, he is entitled. Against that background, the robust and principled approach taken by Sir Jeremy Cooke was entirely appropriate. Any court in this jurisdiction that has to consider this dispute in future would do well to remember that the overriding objective in civil proceedings includes a duty on the court to save expense, deal with the case expeditiously and fairly, and allot to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; further, that the parties have a duty to help the court to achieve this. This pathological litigation has already consumed far too great a share of the court's resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time."

5. This criticism has focussed on the disproportionality that has been displayed in the number of claims and applications issued, the invariably prolix manner in which Mr Wilson of MWP chooses to present each application, the vast numbers of documents that he insists be included within each bundle, the vast majority of which are never referred to but which add greatly to the time taken and cost incurred at each hearing, and the lack of merit both factual and legal of many of the applications that have been

issued over the years. To that might be added the volume and length of correspondence addressed to the Court whenever a simple enquiry is made of MWP and the terms in which at least some is expressed. This caused the Judge in Charge of the Commercial Court, Teare J, to direct that all further applications concerning these parties should be assigned to, case managed and determined by me and the Judge in Charge of the QBD Lists, Stewart J, to release this appeal for hearing by me.

6. I would normally have delivered an *ex tempore* judgment disposing of this appeal at the end of the hearing but the appeal had been listed at the same time as all the other outstanding applications pending in this court for the purpose of enabling directions to be given for their disposal. The hearing of this appeal finished at about 14.45. The rest of the day was taken up with directions. It is entirely typical of the way in which this litigation is approached that rather than submitting an Order for approval that faithfully carried into effect the directions I had given, a draft was submitted together with a schedule of argument and counter argument as to the terms of the Order that will itself take some time to work through. As things are, I have directed a series of hearings, which will hopefully dispose of the outstanding issues of substance by the end of this year.

Background Facts

7. As I have indicated already, I intend to adopt the summary of the background facts as set out by Gross LJ referred to above as one of the means by which some proportionality can be injected into this litigation. Gross LJ's summary was in these terms:

“6. MWP is an entity incorporated in the British Virgin Islands (“the BVI”). At all material times it has practised as a law firm and business consultancy with its headquarters in Kazakhstan. The ultimate beneficial owner and controller of MWP is Mr Wilson who is, or was, an English solicitor.

7. Mr Emmott, whether or not he still practises as such (it matters not), is an Australian and English qualified solicitor.

8. The dispute has its origins in an agreement dated 7 December 2001 (“the Emmott agreement”), made between Mr Emmott and MWP. The Emmott agreement was intended to create a “quasi-partnership” between Mr Emmott and Mr Wilson. Mr Emmott was to receive a 33% shareholding in MWP, while Mr Wilson was to retain a 67% shareholding (via a corporate vehicle). The Emmott agreement was governed by English law and contained a London arbitration clause.

9. On 20 December 2005, Mr Emmott entered into a secret agreement with two other MWP employees, Messrs. Nicholls and Slater, providing for the establishment of a rival business (“the Temujin Partnership”). Ultimately, Mr Emmott, Mr Nicholls and Mr Slater left MWP to work at the Temujin partnership.

10. Litigation ensued in several jurisdictions, including Australia, New Zealand, the Bahamas, the BVI and this jurisdiction – and has continued to this day. We were told that, aside from the matter before us, there are some 9 sets of proceedings current in the English court and litigation is continuing in New South Wales, the BVI and New Zealand. We have little doubt that the costs by now comfortably exceed any amounts in dispute.

11. The present appeal has its origins in the London arbitration proceedings. By their Second Interim Award (“the SIA”), dated 19 February 2010, the arbitrators (Mr Berry, Lord Millett, Ms Davies) found, in summary, that Mr Emmott had satisfied the conditions for obtaining his 33% shareholding in MWP. On the other hand, he had been guilty of deliberate, serious and dishonest breaches of his fiduciary obligations to MWP. By their Third Award (Quantum) (“the TQA”), dated 5 September 2014, the arbitrators held that the quantum of the former outweighed the latter. The upshot was that MWP was ordered to pay Mr Emmott approximately £3.2 million and US\$841,000.

12. Pausing here, the flavour of the dispute and the arbitrators’ overall view of the principal protagonists appears from their trenchant observations at paras. 1 and 2 of the SIA:

“1. It has to be recorded at the outset of this Award, that we found neither Mr Wilson nor Mr Emmott to be witnesses on whom we could rely. On any showing Mr Wilson was truculent and evasive....Clearly he nurses a deep sense of grievance against Mr Emmott for the conduct of which he now complains and, no doubt, for the vast expense he has incurred in various jurisdictions, and in these proceedings, in pursuit of his case. However, it is clear to us that he is unwilling even to consider that there may have been explanations which might have allayed some of his suspicions about Mr Emmott’s conduct. He was always prepared to assume a dishonest motive in any activity undertaken by Mr Emmott or others associated with him, some of whom MWP is now suing in various proceedings elsewhere. The overstatement of his own case, to the extent that certain of his evidence was simply unbelievable, made his evidence unsatisfactory and unreliable.

2. By the same token Mr Emmott’s evidence revealed....that he is a person willing to produce false, backdated, documents, that is to say forgeries, and to mislead his family trustee/bankers. He admitted in the course of his evidence that at the very least he had been less than frank with his quasi partner Mr Wilson and that he had produced wholly bogus invoices to mislead auditors and/or tax authorities. His

conduct in relation to MWP at times can only be described as disgraceful.”

13. In the event, MWP did not honour the award and the *Mareva* was made in aid of enforcement. At the time, the TQA was still subject to challenge and, as already indicated, the *Mareva* contained the exception. Other terms of note included the following. By para. 7, MWP was restrained from: (1) removing from England and Wales any of his assets within the jurisdiction up to the value of £3,909,613 plus US\$841, 213; and (2) disposing of, dealing with or diminishing the value of any of his assets whether within or outside the jurisdiction up to the same value. By para. 9, the *Mareva* applied “in particular” to a wide range of assets - including bank accounts in London, bank accounts in the Channel Islands, accounts in New South Wales, bank accounts in Almaty (Kazakhstan), together with shares, warrants and securities in a particular company, a sum held by the Court Funds Office, various sums that might be payable to MWP by way of costs orders and fees received or due to MWP.

14. In addition to the (*Angel Bell*) exception, there were other exceptions to the *Mareva*. Para. 13(1) provided an exception for spending “a reasonable sum” on legal advice and representation, subject to a requirement that MWP tell Mr Emmott’s legal representatives where the money was to come from, before any such spending.

15. Para. 13(4) provided that the *Mareva* “will cease to have effect” if MWP provided security in the amount of the assets frozen into court or making other provision for security agreed with Mr Emmott’s representatives.

16. Subsequently, by his order dated 26 June 2015, Burton J, *inter alia*, dismissed MWP’s various challenges to and appeals against the TQA and gave leave to Mr Emmott to enforce the TQA “in the same manner as a Judgement or Order of this Court”. Judgment was entered against MWP in the terms of the TQA and an application by MWP for a stay of enforcement of the TQA was dismissed.”

Background Leading to the ITPDO

8. Mr Shepherd QC appearing for Mr Emmott as Respondent on this appeal summarises the circumstances that led to the making of the ITPDO accurately and succinctly in these terms at para. 12 of his skeleton submissions:

“MWP had argued that certain moneys advanced by Mr Thomas Sinclair (“Mr Sinclair”) to Mr Emmott to fund his legal costs of the arbitration that resulted in the Award in favour of Mr Emmott

but which MWP refuses to pay were due and owing by Mr Emmott to Mr Sinclair even though no demand had been made for repayment. MWP argued that this should still be the subject of a final third party debt order and paid to MWP to satisfy certain debts owed by Mr Sinclair to MWP.”

9. Before the Registrar, it had been argued by Mr Emmott, that his liability to Mr Sinclair was governed by a Deed (“Deed”), the version of which was then and which is now available being unsigned. It is important to note that the Registrar was satisfied that the Deed had been signed and was operative, that there was no appeal from that conclusion and that it was not suggested by Mr Holland QC appearing on behalf of MWP at the hearing of the appeal that this document was not authentic or did not govern the transaction between Mr Sinclair and Mr Emmott.
10. In so far as is material the Deed provided as follows:

“**THIS DEED** is made on the [●] day of April 2007

BETWEEN:

(1) **THOMAS SINCLAIR** of 4 Park Place, London SW1A 1LP (“Mr Sinclair”); and

(2) **JOHN FORSTER EMMOTT** of 4 Chelwood Vachery, Millbrook Hill, Nutley, East Sussex TN22 3HR (“Mr Emmott”).

RECITALS:

A. MWP has commenced Arbitration Proceedings against Mr Emmott claiming breach of covenant and duties owed to MWP and in support thereof commenced the English Proceedings against Mr Emmott and Eagle wherein MWP obtained the Emmott Freezing Order and the Eagle Freezing Order over various assets, including the Shares.

B. Mr Sinclair has commenced the Bahamian Proceedings in which he seeks a declaration upholding his claim to ownership of the Shares and intends to rely upon such a declaration for the purpose of applying in the English Proceedings to have the Freezing Orders discharged insofar as they relate to the Shares.

C. In evidence filed in the Bahamian Proceedings, it is alleged on behalf of MWP that Mr Sinclair assisted the alleged breach of covenant and duties owed by Mr Emmott to MWP.

D. Mr Emmott denies the claims made against him by MWP as does Mr Sinclair and they agree that they share a common interest in successfully defending those claims and in Mr Sinclair regaining his Shares.

E. As Mr and Mrs Emmott have insufficient means to fund their Defence Costs, Mr Emmott has asked and Mr Sinclair has agreed to fund the same on the terms set out in this Deed.

IT IS AGREED:

1. Interpretation

1.1 Capitalised terms appearing in the Recitals are defined in clause 1.2 below.

1.2 In this Deed:

“Arbitration Proceedings” means the arbitration proceedings brought by MWP against Mr Emmott pursuant to the terms of the agreement between them dated 7 December 2001 in which MWP is believed to claim breach of covenant and duties owed by Mr Emmott to MWP;

...

“Defence Costs” means the reasonable legal charges, costs and expenses (including professional profit fees and disbursements together with any VAT or similar tax, duty or impost payable thereon) charged by legal advisers to Mr and Mrs Emmott in respect of their costs of advice and representation in the Proceedings;

...

“English Proceedings” means the proceedings brought by MWP in support of the Arbitration Proceedings in the High Court of Justice (Commercial Court, Queen’s Bench Division), bearing action number 2006 Folio 921, in which MWP seeks ancillary relief in the form of (among other things) the Freezing Order allegedly in connection with the Arbitration Proceedings; ...

“Proceedings” means the Arbitration Proceedings and the English Proceedings;

...

2. Defence Costs

2.1 Mr Sinclair will fund the Defence Costs up to a maximum amount of £250,000.

...

3. Security

3.1 Within 90 days of execution of this Deed, Mr Emmott shall procure that a second legal charge will be granted in favour of Mr Sinclair in a form acceptable to him over the property known as 4 Chelwood Vachery, Millbrook Hill, Nutley, East Sussex TN22 3HQ by way of security in respect of sums payable pursuant to this Deed.

...

4. Representations, warranties and acknowledgements

...

4.5 Mr Emmott represents and warrants that he has taken independent legal advice in relation to the nature and extent of his obligations pursuant to this Deed in to which he freely enters and in so doing he acknowledges that this Deed is enforceable in accordance with its terms.

5. Discharge or expiry of the Freezing Order

5.1 At any time on or after the expiry or discharge of the Emmott Freezing Order, Mr Sinclair may, by 30 days' prior written notice, require Mr Emmott to repay any and all sums paid pursuant to clause 2.1 above, together with interest thereon calculated in accordance with clause 5.2 below. For the avoidance of any doubt, Mr Emmott shall not be under any obligation to repay those sums while the Emmott Freezing Order would prevent him from doing so or it would otherwise be unlawful for him to do so.

5.2 Interest at the Prime Rate of 8.25% per annum shall accrue monthly in arrears in respect of all sums paid pursuant to clause 3 above and shall be payable as provided for in clause 5.1 above. Interest at the 1 Year London Inter-Bank Offered Rate at the time of any default in payment shall accrue daily in arrears in respect of any overdue sums.

...

7. Miscellaneous

7.1 This Deed constitutes the entire agreement between the parties in relation to its subject matter and supersedes any prior agreement whether oral or in writing.

7.2 This Deed shall not be varied, assigned or novated without the prior written consent of both parties.

”

Mr Registrar Kay's judgment

11. Having referred to the making of the ITPDO without notice to any of the Respondents, Mr Registrar Kay then recorded what he termed Mr Shepherd's primary argument as being:

"... that the requirements for ordering a TPDO are set out in CPR Part 72.2.1 which requires that the debts which are the subject of the ITPDO must be "due and owing" and that if there are conditions to be satisfied before the debt becomes payable then it cannot be the subject of an ITPDO.

9. Mr Shepherd drew the court's attention to the Deed entered into on about 21st May 2007 whereby Mr Sinclair agreed to make advances to assist Mr Emmott in funding the arbitration proceedings between the Claimant and Mr Emmott. Clause 5.1 of the Deed which provides for the repayment of sums advanced, and upon which Mr Emmott relies, states: *"At any time after the expiry of discharge of the Emmott Freezing Order, Mr Sinclair may, by 30 days prior written notice, require Mr Emmott to repay any and all sums paid pursuant to Clause 2.1 above, together with interest thereon"*. Although a signed copy of the Deed is not available a signed addendum, which specifically refers to the Deed, was executed on the 13th March 2008 which widened the basis of the advances and provides *"All provisions of the Deed save as amended by this Addendum shall apply to this Addendum mutatis mutandis"*.

10. Mr Shepherd submitted that, the evidence provided by the Deed witnessing the advances, was to the effect that the agreement made between Mr Sinclair was that the debt was not payable until Mr Sinclair had given notice that he wanted to be repaid and the sum which was to be repaid. Until that occurred Mr Shepherd submits that the debt was not "due".

12. The judgment went on to record Mr Shepherd's secondary submission as being that:

"11. Mr Shepherd's secondary argument is that it would be wholly unjust to do other than discharge the ITPDO because of the Claimant's conduct in the present case. In this respect he submitted:

a. That Mr Emmott has an arbitral award in his favour which has been made a judgment of the English High Court. Although the Claimant attempted to appeal the arbitral awards those applications have all been refused and there is no farther avenue open to the Claimant to challenge those awards.

b. The Claimant has failed to pay the sums due under the awards and the associated orders of costs, some of them on an indemnity basis. These sums have been due since June 2015. Mr Shepherd

drew attention to an observation of Wallbank J in the proceedings in the BVI that it was not the case that the Claimant could not pay the outstanding sum but that it would not do. so. In these circumstances Mr Shepherd submitted that the Claimant's failure to satisfy the awards and the orders made enforcing them is a flagrant disregard of a court order amounting to contempt.

c. Mr. Shepherd submitted that the Claimant was continuing to act in breach of a Freezing Order made by HHJ Mackie and varied by Sir Jeremy Cooke in 2017. The point being that the Claimant should not be spending money on legal fees without informing the Third Party as to the origin and the use of such monies. Mr Shepherd stated that his client's solicitor had asked for information on this aspect by a letter dated the 16th May 2018. The only response was dated the 18th May 2018, this stated "We have deliberately not replied . . ." so that the letter of the 1[6]th May 2018 remains effectively unanswered.

d. Mr Shepherd criticised the Claimant's counsel for not bringing to the attention of the Court the decision of Blair J in *Merchant International Company Limited v Natsionlna Aktsionerna Kompaniia Naftogaz Ukrainy and The Bank of New York Mellon* [2014] EWHC 391, the decision of the Court of Appeal in the same case [2014] EWCA Civ 1603 and the decision in *Dunlop & Ranken Limited v Henda! Steel Structures Limited* [1957] 3 All ER 344. He submitted that the skeleton provided by Claimant's counsel compounded the failure above because their skeleton flatly contradicted Mr Emmotts' submissions to the effect that the debt was not due or accruing due. In fact, in the light of the authorities Mr Emmott was right and Claimant's counsel was wrong.

e. Mr Shepherd also submitted that there was a fundamental flaw with the concept that the making of a TPDO would effectively act as a demand on the debtor thus making the debt a payable, Mr Shepherd submitted that this would result in the Claimant being put in a better position than the judgment debtor which is not permitted, see *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, para.90.

f. As to the quantum of the debt Mr. Emmott's 7th witness statement details what he has been loaned. On the 16th May 2018 Mr Doctor QC provided a schedule to which Mr Emmott responded on the 20th May 2018. Mr Shepherd submitted that Mr Doctor's schedule was unsupported by actual evidence and was demonstrably wrong as to £200,000 which can be seen to have been repaid as shown by Mr Emmott's witness statement dated 12th January 2018 and Mr Robinson's bank statement."

As will be apparent from this summary, if Mr Shepherd was correct in what the Registrar characterised as his primary argument, then the secondary argument does not arise.

13. Having recorded Mr Doctor QC's submission on behalf of MWP that the need for a demand was immaterial, the Registrar then set out various arguments advanced on behalf of MWP concerning the exercise of discretion and why it was submitted that Mr Shepherd's arguments in relation to the exercise of discretion were wrong.
14. In relation to the primary argument, Mr Registrar Kay concluded that:

“17. From the wording of the Deed I conclude that the terms of the Deed provided that repayment was not due until Mr Sinclair demanded payment and only then in such sum as Mr Sinclair might require. Having considered the decisions of Blair J and the Court of Appeal in *Merchant International Company Limited v Natsionlna Aktsionerna Kompaniia Naftogaz Ukrainy and The Bank of New York Mellon* I conclude that the wording of the Deed is sufficient, on its own, to place the "debt" outside the requirement that it must be "due or accruing due" as provided by CPR Part 72.2(1).

18. Further, although it is accepted that the whole agreement clause prevents any oral variation of the terms of the Deed nonetheless a further understanding or agreement, in this case that no such demand would be made until the arbitration proceedings had been concluded successfully and Mr Emmott had been paid by MWP, is evidence of the factual matrix against which the money had been advanced and explains why only a demand, and then only in the amounts requested, would render the debt due and owing when the demand for a specific sum is actually made. In my view this is also part of the 'context' against which a decision whether the terms of the 'debt' falls within the provisions of CPR Part 72.2(1) must be made.

19. Having come to these conclusions it follows that I consider that CPR Part 72.2(1) does not apply in respect of the sums advanced by Mr Sinclair to Mr Emmott so that the ITPDO should be discharged. ...”

Mr Registrar Kay then turned to the exercise of discretion in case he was wrong on the primary point and concluded that in any event in the exercise of his discretion, he ought not to make the ITPDO final in the circumstances. I return to this part of the Registrar's judgment only if it is necessary to do so having considered the appeal on the primary point.

The Rules Applicable to the making of Third Party Debt Orders (“TPDOs”)

15. The making of TPDOs is governed by CPR, Part 72 – see CPR r.72.1(1). In so far as is relevant, CPR r.72.2 provides: provides:

“(1) Upon the application of a judgment creditor, the court may make an order (a ‘final third party debt order’) requiring a third party to pay to the judgment creditor –

(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or

(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.

...”

In those circumstances it was common ground that the primary issue on this appeal is whether any sum due by reference to the agreement contained in or evidenced by the Deed was a “ ... *debt due or accruing due to the judgment debtor* [Mr. Sinclair] *from the third party* [Mr. Emmott]... ” at any material time.

The Appeal Test

16. In order to succeed on this appeal MWP must establish that the decision of Mr Registrar Kay on each of the issues referred to above (Mr Shepherd’s primary and secondary submissions) was wrong – see CPRr.52.21(3)(a). It was not and could not be alleged that the Registrar’s order was unjust because of a serious irregularity.

The Parties’ Arguments

17. Mr Holland argued that the Registrar was wrong on the primary issue that arose before the Registrar for all the reasons that had been argued before, but rejected by, him. Mr Shepherd argued that the Registrar was right for all the reasons that the Registrar set out in his judgment. If Mr Shepherd is right on the primary issue considered by the Registrar, then no issue concerning discretion arises. It is not necessary that I set those arguments out in any more detail since they sufficiently appear from the parts of the Registrar’s judgment set out above and from what I say hereafter.

The Primary Issue

18. In my judgment the Registrar was correct in the conclusions he reached concerning the primary issue and in consequence this appeal fails and must be dismissed. My reasons for reaching that conclusion are as follows.
19. First, it is necessary to note as I have said already that it was not in dispute on the hearing of this appeal that the relevant relationship between Mr Emmott and Mr Sinclair was governed by the Deed. There is therefore no dispute between the parties that the Registrar was right to reach that conclusion for the reasons that he gives in the judgment, the relevant part of which is set out above.
20. Secondly it was common ground that the Deed had to be construed in accordance with what are now the well-established principles for the construction of a contract. In summary they are:

- i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;
- ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 21;
- iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;
- iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;
- v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;
- vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;
- vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v. Bank

of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

- viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.
21. Neither party sought to adduce or otherwise rely on any factual matrix evidence either before the Registrar or on this appeal other than what is apparent from the terms of the Deed itself.
22. In my judgment, applying these principles leads readily to the conclusion that as a matter of construction the requirement for notice in accordance with clause 5.1 of the Deed was (and was intended by both parties to be) a condition precedent to an obligation to repay the sums loaned. It was probably not the intention of the parties that Mr Sinclair would demand repayment as and when he chose to do so, although for present purposes it does not matter whether that is so or not and it would be wrong to reach any conclusions on that issue on an appeal of this sort. What is apparent is that the parties did not intend that the sums lent should be repayable otherwise than on the expiry of the agreed notice period. That much was plainly the bargain of the parties. That such was the intention of the parties is entirely consistent with the factual context in which the loan agreement the subject of the Deed came to be made. The purpose of the agreement of itself shows that both parties knew that at the date when the loan was made Mr Emmott was not in a position to repay the sum borrowed to help fund his legal expenses other than out of sums recovered as the fruit of the litigation being funded. If the position were otherwise then there is no obvious reason why Mr Emmott would be borrowing from Mr Sinclair and none was suggested. It is not suggested that the position has changed. Had it changed and had Mr Emmott obtained access to funds that would enable some or all of the loan to be repaid, no doubt Mr Sinclair would consider requiring repayment by serving a notice in accordance with clause 5.1 of the Deed but that situation has not arisen and no such notice has been served.
23. There is no room for the suggestion that the loan was in some way a loan on terms that were preferential when compared to other sources of borrowing. This was very plainly an arm's length transaction where all the terms had been carefully negotiated. This is apparent from the fact that the loan carried interest at 8.25% per annum. In 2007, UK bank rate was 5.5%, which means that the loan carried interest at base rate plus 2.75%. This is not a preferential rate. Not merely was that so, but the loan was to be secured against Mr Emmott's home – see clause 3.1 of the Deed. This issue is put beyond doubt by Recital E. The reason why Mr Sinclair would be prepared to lend at all is apparent from the Recitals when read as a whole – he had an interest in assisting Mr Emmott. Given the financial position that Mr Emmott found himself in when the agreement the subject of the Deed was entered into, it is plain that he would not be able to repay the sums borrowed that had then been expended on the litigation other than by raising finance from another source. It was in that context that it was agreed that repayment could be requested on 30 days prior notice. However, there is nothing in the terms of

the relationship as disclosed by the terms of the Deed that suggests repayment was expected or could be sought otherwise than on strict compliance with clause 5.1. The 30 day period was the protection accorded to Mr Emmott to enable him to raise funds or attempt to raise funds to repay Mr Sinclair. It was a condition precedent to Mr Emmott becoming obliged to pay that he should have received 30 days' notice to do so in accordance with clause 5.1.

24. Against that background it is necessary to turn to the true meaning of the phrase "... *the amount of any debt due or accruing due to the judgment debtor from the third party ...*". In my judgment when the meaning of that phrase is properly understood there can be no question of any sum being either due or having accruing due unless and until a notice is served on Mr. Emmott by Mr. Sinclair (or his trustee in bankruptcy, if ever he is made bankrupt).
25. The most recent Court of Appeal authority on this issue is that referred to by the Registrar in his judgment - Merchant International v Nationalna Aktionerna [2014] EWCA Civ 1603. The relevant principles are those set out by Davies LJ at para. 28:

"It is well established for this purpose that the debt must either be due (in the sense of instantly payable) or accruing due (in the sense of being payable in the future but by reason of an existing obligation). As stated by Lindley LJ in *Webb v Stenton* (1883) 11 QBD 518 at p.527:

"I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

There are other authorities to like effect. I need not set them out, as the legal position was agreed before us for the purposes of this appeal.

Further, and as a reflection of that principle, there ordinarily can be no attachment of a debt under Part 72 if the sum is only payable subject first to satisfaction of a condition precedent. This is demonstrated by *Dunlop & Ranken Limited v Hendall Steel Structures Limited* [1957] 3 All ER 344. In that case, payment was not due to a subcontractor until receipt of an architect's final certificate. At the time the garnishee order was sought and made a final certificate from the architect was outstanding. It was thus held that, until such certificate was issued, there was no debt due or accruing due to which a garnishee order could attach. Until such certificate was issued there was no right to be paid."

26. In the circumstances of this case there is no sum due in the sense identified because no notice to repay has been served that has expired without payment having been made

and there is no sum accruing due because no notice had been served that had not yet expired.

27. In my judgment the position in this case is closely akin to Bagley v. Winsome and National Provincial Bank Limited [1952] 2 QB 236. The facts of that case as summarised in the head note were that a creditor obtained judgment at a county court against a debtor for the sum owing of £32 and £18 costs. The judgment debtor had money in excess of £50 lying on deposit with the National Provincial Bank. The judgment debtor gave notice to the bank to withdraw his money on deposit, and that notice took effect on January 11 1952. On that date the judgment creditor took out a garnishee summons which was heard on January 29, and a garnishee order was refused. The conditions on which the bank accepted deposit accounts included the following term: "Personal application must be made and this book produced at the time when the money is withdrawn. All withdrawals are subject to fourteen days' notice". As Lord Evershed MR observed at 239:

“It therefore follows, as I think, tolerably clearly, that the bargain between the banker and the customer in this case was that the bank would credit the depositor with interest on the sums deposited as stated in the terms I have read, and that the bank should only be liable to pay the whole or any part of the sums deposited upon two conditions being satisfied (unless of course they were waived by the bank): first, that 14 days' notice should be given of any withdrawal, that is, of any claim to repayment, and, secondly, that when the time came for repayment the depositor should attend personally and produce the deposit book.”

It was held that there was no debt due and owing. Notice had been given so the requirement for a debt to be accruing due would have been satisfied but the requirement for personal attendance had not been complied with.

28. There was no suggestion anywhere within the judgments that the making of an ITPDO or its then equivalent would have operated as a notice to repay as is suggested by Mr Holland to be the position here. To reach such a conclusion would be an unwarranted interference with the bargain of the parties. There is no doubt that if Mr Sinclair had given notice, then a debt would have been accruing so as to satisfy the requirement of CPR r. 72.2(1). Indeed, Mr Shepherd accepts as much. But unless and until that occurs, no debt is accruing due. As Jenkins LJ observed:

“Prima facie it would be wrong in principle for garnishee-proceedings to have the effect of putting the judgment creditor in a better position as against the garnishee than the judgment debtor himself would have been.”

29. Mr Holland sought to argue that this principle was of no application where the only condition that had to be satisfied was the giving of notice to repay. On analysis, there is no authority that supports such a proposition and any such proposition would be contrary to the general principle identified by Davies LJ set out above. All the

authorities relied on by Mr Holland are plainly distinguishable from the facts of this case.

30. The first authority Mr Holland relied on was Re Brown's Estate [1893] 2 Ch. 300. It is authority for the proposition that the question in each case is whether as a matter of construction the obligation relied on is a present debt payable on demand or subject to a condition precedent to payment. Mr Emmott's obligation to pay Mr Sinclair was, as Chitty J put it in Re Brown's Estate (ibid.), an obligation subject to a "...*demand precedent to the bringing of any action*" and so was not due or had not accrued due until the precedent was satisfied.
31. Mr Holland also relied on O'Driscoll v. Manchester Insurance Committee [1915] 3 KB 499. In my judgment that case does not assist either. That authority is concerned with whether a sum has to be ascertained before it can become attachable. It was held that it was, because although it was a sum that had yet to be ascertained and therefore could not be due, it had nonetheless accruing due because the debtor was absolutely and not contingently entitled to the yet to be ascertained sum. That is not the position here. As a matter of construction no sum becomes due until notice to pay has been given and the period of notice has expired without payment being made and no sum can accrue due unless and until such a notice is given by Mr Sinclair.
32. Finally Mr Holland relied on the decision of the Court of Appeal in Joachimson v. Swiss Bank Corporation [1921] 3 KB 110. That case was concerned with funds standing to the credit of a bank's customer in a current account, which is payable to the customer on demand. As Bankes LJ says at 117, "... *the test must be whether the parties have or have not agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt.*" Nothing more can be obtained from that authority that is helpful to the resolution of this case since it is thereafter exclusively concerned with a banker customer relationship in relation to a current account. The special nature of such accounts has been consistently emphasised in the authorities including Bagley v. Winsome and National provincial Bank Limited (ibid.) mentioned earlier – see Lord Evershed's judgment at 240-241 and 243, which clearly shows that sums standing to the credit of a customer on a current account are treated as a special way for essentially practical reasons.. In those circumstances, Joachimson v. Swiss Bank Corporation (ibid.) provides no assistance in the circumstances of this case.
33. In the result I consider that this appeal fails and must be dismissed on the basis that Mr Registrar Kay was correct to conclude that there was no debt due or that was accruing due from Mr. Emmott to Mr. Sinclair and thus that the application for the ITPDO to be made final had to be dismissed.

The Discretion Issue

34. Given my conclusions on the primary issue it is not necessary or desirable that I consider further what I might have concluded in respect of the discretion issue on the counterfactual basis that a debt was due or had accrued due.

Disposal

35. This appeal fails and is dismissed.