

Neutral citation number: [2023] EWHC 2096 (Comm)

Case No: CC-2021-LIV-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
CIRCUIT COMMERCIAL COURT (KBD)

Liverpool Civil & Family Courts,
35 Vernon Street,
Liverpool,
L2 2BX

Date: 28 June 2023

Start Time: 14.19 Finish Time: 16.47

Before:

HIS HONOUR JUDGE HODGE KC
(Sitting as a Judge of the High Court)

Between:

NECARCU LTD

Claimant

- and -

OLDHAM ATHLETIC (2004) ASSOCIATION
FOOTBALL CLUB LTD

Defendant

MR MARTIN BUDWORTH (instructed by **Dallas & Richardson Solicitors Limited**) for the **Claimant**
MR IAIN SHIPLEY (instructed by **Brandsmiths**) for the **Defendant**

APPROVED JUDGMENT

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE HODGE KC:

1. This is my extemporary judgment on the second day of the trial of a Part 7 claim issued by Necarcu Limited in the Circuit Commercial Court at Liverpool on 12 February 2021 against Oldham Athletic (2004) Association Football Club Limited. The claimant is represented by Mr Martin Budworth (of counsel) instructed by Dallas & Richardson Solicitors Ltd. The defendant is represented by Mr Iain Shipley (also of counsel) instructed by Brandsmiths.
2. The claim is for the repayment of loan monies allegedly due and owing to the claimant from the defendant pursuant to a written loan agreement dated January 2017 and secured by a debenture dated 10 February 2017. It is the claimant's case that, pursuant to that loan agreement, the claimant duly advanced sums or provided value totalling £350,000. As pleaded, the date of the defendant's receipt of the monies was 10 February 2017; but it is now clear that the monies were in fact advanced in stages between 31 January and 13 February 2017. The claimant contends that it is entitled to recover the outstanding indebtedness owed pursuant to the loan agreement in the principal sum of £160,000 as at 13 March 2018, together with simple interest at the agreed rate of 20% per annum thereafter.
3. The defendant admits the existence of the loan agreement but denies that the total sum advanced was £350,000 and also denies that it was received on 10 February 2017. The defendant contends that the loan agreement, and all liability thereunder, was novated to a Mr Simon Corney who, at the time, was the chairman, a director, and the 97% controlling shareholder of the defendant association football club. Alternatively, the defendant contends that there was a variation of the loan agreement whereby Mr Corney assumed the defendant's liability thereunder. The defendant contends that such agreement is evidenced by a letter which is at page 251 of the hearing bundle. The letter is addressed to Mr Corney at Oldham Athletic FC, Boundry Park, Oldham Lancashire OL1 2PA. It is dated 12 January 2018. The letter reads:

“Dear Mr Corney

Re: Debenture with Necarcu

We write to confirm that we have now made an agreement with Simon Corney.

We can confirm that upon completion of the sale of Oldham Athletic (2004) Association Football Club Ltd the debenture with ourselves will be satisfied personally by Simon Corney.

Yours sincerely,

Necarcu Ltd.”

4. The reference to a sale of the football club was a sale then in contemplation to a Dubai-based entity, RLJ Capital Global FZC, which was controlled by a Mr Lemsagam, who was represented by the defendant's present solicitors, Brandsmiths, and, in particular, by a Mr Adam Morallee, who is the founder of Brandsmiths and its chief executive officer.

5. The defendant's position is that the agreement evidenced by this letter had the legal effect of extinguishing the loan agreement and replacing it with a newly novated agreement under which the liability was borne exclusively by Mr Corney. Alternatively, that it had the effect of contractually varying the loan agreement so as to relieve the defendant of any liability under it. The defendant accepts that before the entry into this agreement, the football club had made a number of payments to Middleton Solicitors, who at all material times were the solicitors acting both for Mr Corney in his sale of the shares, and also for Necarcu. However, the defendant is unable to admit which, if any, payments were made to Middleton Solicitors for the purpose of being offset against any liability it might have had under the agreement. Middleton Solicitors was a solicitors' practice, now in liquidation, of which the principal was a Mr Alan Middleton who, as well as being a solicitor, was also a registered football association agent. His son, Mr Graeme Middleton, is the principal director and controlling shareholder of the claimant company, Necarcu Ltd.
6. The claimant disputes that there was any novation or variation of the loan agreement. It denies that the defendant was in any way released from its obligations under the loan agreement. It denies that any novation took place, absent consent from all three parties: the claimant, the defendant and Mr Corney. The claimant accepts that it had been prepared to countenance the possibility that Mr Corney might personally discharge the defendant's obligations; but all of that was conditional upon him receiving the consideration due to him for selling his shares in the defendant football club, and thereby being in a position to settle the indebtedness under the loan agreement. It is said that that situation never came about.
7. The trial was listed for two days, starting yesterday (Tuesday 27 June 2023) at 10.30. Unfortunately, the first hour and twenty minutes or so were taken up with an argument over whether the defendant might have permission to rely upon certain lately disclosed documents. Those documents were said only to have come to light on Sunday 25 June, and to have been supplied to the claimant's legal representatives late that evening. That late disclosure led to a flurry of activity on CE-file, and a supplemental bundle of documents was produced, including a third witness statement from Mr Morallee, dated 25 June 2023. That was responded to in a fifth witness statement from Mr Graeme Middleton, dated 26 June, to which Mr Morallee replied by way of a letter from his practice to Dallas & Richardson, also dated 26 June 2023.
8. Mr Budworth, for the claimant, had contested Mr Shipley's entitlement to rely upon those documents. After hearing full argument, I gave permission to the defendant to be entitled to rely on the documents for the reasons that I gave in an extempore judgment which I delivered yesterday morning. In the event of any appeal, the terms of that extempore judgment will need to be read in conjunction with this substantive extempore judgment. I had made it clear that I would, if asked, have been prepared to grant the claimant an adjournment to consider whether it wished, in the light of that further disclosure, to renew efforts to persuade Mr Corney, who has previously refused to co-operate with either party, to give evidence in these proceedings; and also to consider whether the claimant might wish, somewhat belatedly, to call Mr Ryan Melvin, a solicitor and fee earner at the relevant time with Middletons, who had drafted the letter of 12 January 2018, and is said to have drafted a later retraction letter of 15 January 2018, to be called to give evidence. I indicated that if I did grant such an adjournment, I would be reserving the costs so that the trial judge would be in

a position to take account of the cross-examination of Mr Morallee, and also any evidence from Mr Melvin or Mr Corney, at any adjourned trial. Mr Budworth, however, indicated that, for financial reasons, the claimant was not prepared to contemplate any adjournment of the trial. The claimant has already had to provide security for the defendant's costs of this litigation.

9. In the course of his closing submissions, Mr Budworth returned to his submission of yesterday morning that the claimant ought to have been entitled to have made a considered decision whether to summon Mr Ryan Melvin to give evidence. He said that the late disclosure had given the claimant no opportunity to revisit the issue of calling him as a witness; and that his absence should therefore not rebound against the claimant.
10. In his reply, Mr Budworth again adverted to what he described as the “pernicious effect” of the very late dumping of some 90 pages of documents on the claimant on the very eve of the trial. As a result, the claimant had not been able to contemplate, as a reality, the possibility of an adjournment, with costs reserved, placing it in a very difficult position. That was all said to be due to shortcomings in the defendant's disclosure. The difficulty with that is that the vital role of Mr Ryan Melvin in the events giving rise to this legal dispute must have been apparent from the outset. Mr Budworth also suggested in closing that the defendant was equally responsible for the failure to place any evidence from Mr Melvin before the court. However, as Mr Shipley pointed out, there would have been obvious difficulties, in terms of privilege and waiver, in the defendant calling the claimant's former transactional solicitor to give evidence in this case. Moreover, there would have been forensic difficulties in the defendant calling Mr Melvin without knowing what he had to say, and then possibly finding itself in the position of seeking to challenge Mr Melvin's evidence, effectively in-chief. If anyone was to call Mr Melvin, then it should have been the claimant, who had been in receipt of his services as solicitor at the relevant time.
11. Following the delivery of my extemporary judgment permitting the defendant to rely upon the late disclosure, I heard from the two live witnesses in this case. For the claimant, I heard from Mr Graeme Middleton, who gave evidence for about three-and-a-half hours from about 11.50 in the morning until about ten-past four, with a 50 minute break for the luncheon adjournment. I did not find Mr Graeme Middleton to be a particularly satisfactory witness. Mr Shipley made a number of criticisms of his evidence which I consider to be well-founded. He came over as a relatively unsophisticated businessman, who repeatedly referred to professional advisers, such as solicitors and accountants, for matters of detail in relation to the claimant's activities. He had certainly been equivocal in his earlier recollections as to who had been in attendance at the crucial meeting of 15 January 2018, to which I will return later in this judgment. I find that there is force in the criticism that, when critical questions were addressed to him in cross-examination, such as the errors in the figures stated for the indebtedness under the loan agreement in both the statutory demand and the particulars of claim, Mr Middleton sought to shift the blame onto his solicitors. He also, at times, sought to distance himself from the activities of the solicitor who had been acting for him, Mr Melvin. I find his evidence in relation to the letter of 15 January 2018 to be most unsatisfactory; and I fear, for reasons I will give, that I cannot accept it.

12. For the defendant, the only live witness was Mr Morallee. He had acted on the sale of Mr Corney's shares in the football club, representing the Dubai purchaser; and thereafter he had acted as a director of the football club from 29 July 2019 to 27 July 2022, at around which time there was a further sale of the controlling shares to an entity of the Rothwell family. He gave evidence for a little over an hour. I consider that there is force in Mr Budworth's criticism that Mr Morallee displayed a particular degree of reticence, amounting to coyness, in refusing to disclose a copy of the share purchase agreement relating to the purchase of Mr Corney's shares in the football club. However, subject to that, I did find him to be an honest and reliable witness, who was doing his best to assist the court.
13. However, as with the defendant's other witness, Mr Charles Peter Norbury, who had been a director of the defendant since 3 September 2022, and whose evidence was unchallenged, resulting in no need to call him as a witness, both of the defendant's witnesses had had no involvement in the affairs of the football club at the time relevant to the transactions in dispute in the present litigation. Although Mr Morallee was involved in the purchase of Mr Corney's shares, he had been acting on the other side of the transaction; and he had had no direct involvement in what was happening within the football club, or in relation to the claimant, at the material time. As a result, I derive little real assistance from the live evidence from the defendant.
14. Of perhaps more significance are the missing witnesses: Mr Alan Middleton, the father of the director and the controlling shareholder of the claimant, was the principal of Middletons, who were acting for the claimant, as well as for Mr Corney, at the material time. He was not called to give evidence. Mr Graeme Middleton, his son, explained that he was suffering from a lack of mental capacity which had prevented him from giving evidence. I accept that explanation, and I draw no adverse inferences from Mr Alan Middleton's absence from the witness box. I note, however, that Mr Shipley points out that it had been apparent from the time of the costs and case management hearing on 28 April 2022, before his Honour Judge Cadwallader, that Mr Alan Middleton was not going to be called as a witness for the claimant; and that, according to Mr Graeme Middleton, this pre-dated the onset of his father's lack of capacity. Whilst, therefore, I draw no adverse inference from the fact that Mr Alan Middleton has not given evidence in the witness box, I also bear in mind that there has never been any intention that he should do so, even if he were of appropriate capacity.
15. So far as Mr Simon Corney is concerned, he is clearly an important witness. I accept, however, that both parties have sought to secure his evidence without any success, and therefore I draw no adverse inferences from his absence; and I do not speculate as to what evidence he might have given the court had he been here.
16. Mr Budworth suggested in closing that Mr Lemsagam might have been called to give evidence in relation to the terms and requirements of the share purchase agreement. However, it is clear that he had had no direct dealings with the claimant, or with Mr Graeme Middleton; and I cannot see what relevant evidence he might have given, beyond the terms of the share purchase agreement itself. As I have already indicated, Mr Morallee has declined to produce a copy of the share purchase agreement. I indicated, during the course of his evidence, that the court might well be prepared to receive a suitably redacted version of that document, addressing only any requirement it might contain with regard to the loan agreement, and the debenture securing the

indebtedness thereunder; but that invitation was never taken up by the defendant. On that basis, I indicated at the outset of Mr Shipley's closing submissions that I would proceed on the footing that the share purchase agreement, and any related documentation, would have said nothing supportive of the defendant's case. I indicated that I would not speculate as to what they might have contained.

17. The final missing witness is Mr Ryan Melvin. As I have indicated, I do not consider that it would have been appropriate for the defendant to have summoned him to give evidence. I do, however, consider that he should have been called by the claimant. Mr Graeme Middleton was asked about that, and his answer was that Mr Melvin had moved on from Middletons following its liquidation to another solicitors' practice, and he had indicated an unwillingness to give evidence in relation to these matters voluntarily. It would, however, have been open to the claimant to have summoned him to give evidence and to have put in either a witness summary or to have sought to obtain a witness statement from him once he had received the witness summons. It did not do so. I will not speculate as to what evidence Mr Melvin might have given, but it means that I have been deprived of the opportunity to consider his answers to certain obvious questions that arise from the documents in the case.
18. The evidence concluded at about 5.30 yesterday afternoon, largely because of the delay in the start of the effective trial by an hour and twenty minutes. This morning I heard closing submissions: first, and for about an hour, from Mr Budworth for the claimant; then, after what turned out to be a somewhat longer break than I had originally contemplated, from Mr Shipley for about an hour-and-a-half; and then from Mr Budworth in reply for about 20 minutes, and then very briefly in rejoinder from Mr Shipley. The court rose just after 1.35 for me to deliver judgment today at 2.15. Unfortunately, the state of my diary is such that, whilst I might have wished to reserve judgment, that advantage is not available to me.
19. I have now summarised the background to the case and the evidence. I have had the benefit of written skeleton arguments, which I was able to pre-read, from both Mr Budworth and, at somewhat greater length, from Mr Shipley. I am assisted by a list of issues. These are eight in number, and are as follows:
 1. Did the claimant advance £350,000 to the defendant pursuant to the agreement dated January 2017 on 10 February 2017?
 2. Alternatively, how much money has the claimant advanced to the defendant pursuant to the agreement?
 3. How much money has been repaid by the defendant to the claimant to satisfy any liability pursuant to the agreement?
20. The answer to these three issues is relatively simple. Indeed, there was no challenge by Mr Shipley to Mr Middleton's evidence as to the payments made by the claimant, and the prepayments made by the defendant, under the loan agreement. That is not surprising because the defendant has no evidence to challenge the claimant's evidence on those three issues. Essentially, the position in that regard is summarised at paragraphs 11 and 12 of the skeleton argument of Mr Budworth. There had been a previous loan agreement from the claimant to the defendant under which £25,000 was still outstanding at the time of the January 2017 loan agreement. Part of the £350,000

advance was used to discharge that outstanding indebtedness. The loan agreement itself is equivocal as to the amount that was to be advanced. Although no one had picked up on the point in cross-examination, there is an inconsistency between the stated figures, and the sums stated in words, at recitals A and B, and clause 3.1, of the loan agreement. Those provisions refer to the sum of “£350,000” as the principal loan in figures, but to “three hundred thousand pounds sterling” in words. It is clear that the loan agreement in fact related to £350,000 sterling. The documents make it clear that £125,000 was paid on 31 January 2017, a second tranche of £86,300 was paid on 10 February 2017, and a third and final sum of £100,000 was paid on 13 February 2017. The balance of the £350,000 advance was accounted for by the payment of £25,000 in respect of the outstanding indebtedness under the first loan, £1,200 for the legal expenses of the loan agreement and debenture, and £12,500 went to discharge a debt owed by the defendant to a mutual acquaintance of Mr Middleton and Mr Corney, a Mr Mike Carnegie. This is all documented in an exchange of emails of 10 February 2017 (at pages 192 to 193 of the hearing bundle). There was no challenge to Mr Middleton’s evidence about those advances.

21. Mr Middleton also produced, although the precise date is unclear, a statement at page 938 showing various repayments under the loan agreement, the last of which was on 13 October 2017. In summary, of the £350,000 advanced £260,000 was repaid. In addition to the advance, however, there was to be interest at 20% per annum, which was quantified at £70,000. The result was that of a total of principal and interest of £420,000, £260,000 was repaid leaving £160,000 outstanding, which is the sum claimed in the amended particulars of claim. I find, therefore, that if the debt under the loan agreement remains the liability of the defendant, the indebtedness is £160,000. Mr Budworth is content to proceed on the footing that, since the loan was due to be repaid in full 13 months after the monies were advanced then, taking the final instalment as having been paid on 13 February 2017, the date for repayment should have been 13 March 2018. One would then apply simple interest at 20% per annum to that amount thereafter. That supplies the answer to issue number 8: what interest, if any, is due? It is a matter of arithmetical calculation to work out what the amount of interest is.
22. That then leaves issues 4 to 7:
 4. Who were the parties to, and what were the terms of, the agreement referred to in the claimant’s letter to the defendant dated 12 January 2018?
 5. Was there a novation of the agreement?
 6. Alternatively, was there a variation of the agreement and, if so, was it supported by consideration?
 7. Is the claimant estopped from pursuing the defendant for any balance due under the agreement?
23. In his skeleton argument, Mr Budworth had referred me to observations of Longmore LJ, speaking for the Court of Appeal, in the case of *Scicluna v Zippy Stitch Ltd* [2018] EWCA Civ 1320, reiterating the importance of the list of issues:

“Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case.”

24. There is some degree of irony about that reliance upon the importance of the list of issues because there would appear to me to be a further issue, which is that, whatever the effect of the agreement evidenced by the letter of 12 January 2018, it is part of the claimant’s case that any effect that letter may have had was negated by a further letter which, according to the claimant, was drafted by Mr Melvin and signed by Mr Middleton three days later, on 15 January 2018. That letter is at page 252 of the trial bundle. It is addressed to Mr S Corney, Oldham Athletic FC, Boundary Park, Oldham, Lancashire, with no post code. The date is 15 January 2018 rather than 15th January 2018. The letter reads:

“Dear Mr Corney,

Re: Debenture with Necarcu

We write further to our letter of the 12 January 2018 and write to confirm that the agreement referred to in our letter of the 12 January 2018 with Mr Corney is no longer effective. Necarcu Ltd will rely upon its security with Oldham Athletic (2004) Association Football Club Ltd until payment is made in full.”

It seems to me that a further issue arises, namely, what, if anything, is the effect of that letter? Indeed, a further preliminary issue to that is whether the letter was genuinely produced by Necarcu on 15 January, and delivered to Mr Corney on or about that date, as is Mr Middleton’s evidence and the claimant’s case, so I will need to deal with that as well.

25. This is a case, therefore, in which the burden is effectively upon the defendant to establish that it is not liable for the sums which I have found to be due under the original January 2017 loan agreement, and which, if due, would be secured by the debenture granted in February 2017. Thus, the focus must be upon the defence to that claim.
26. I therefore turn to Mr Shipley’s skeleton argument. Mr Shipley recognises that the case turns on a determination of the terms, the effect, and the validity of the oral agreement evidenced by the 12 January 2018 letter, to which he refers as the “repayment letter”, pursuant to which Mr Corney promised personally to satisfy the debenture upon completion of the then anticipated sale of shares in the defendant Football Club. The case also turns on a determination as to whether Mr Middleton subsequently handed Mr Corney the alleged cancellation letter of 15 January, pursuant to which the claimant asserts that the earlier letter was no longer effective, and that it would rely upon its security until payment was made in full, and, if the letter was indeed handed over, what was its effect.
27. Mr Shipley makes the point that a peculiarity of this matter is that, despite the continuous involvement of Middleton Solicitors, and despite the dealings between the parties, ostensibly being commercial dealings between sophisticated corporate

entities, the documentary record is frustratingly scant and fragmented. Mr Shipley points to the difficult position in which the defendant now finds itself due to the complete change of control which it has undergone, since the date of the loan agreement, following Mr Corney's sale of his 97% shareholding, his resignation as a director, and his subsequent refusal to co-operate with either party for the purposes of the instant litigation. Mr Shipley recognises that none of the defendant's current officers or employees have any personal knowledge of the negotiation or performance of the loan agreement; and, despite extensive searches, the defendant has, at least until very recently, been unable to discover any proper records of the conclusion of the loan agreement, its purpose, or the use of the loan monies. The defendant has therefore been heavily reliant upon the documentary records and evidence provided by the claimant, which he says has also been surprisingly limited.

28. Mr Shipley gives a brief overview of the defendant's case. In very broad terms, it is that:

1. The commercial context of the 12 January 2018 repayment agreement was that Mr Corney was in the process of negotiating the sale of his 97% controlling shareholding in the defendant to a third party.

2. During the due diligence process, the loan agreement had thrown up numerous red flags, including a 20% default interest rate, and the apparent close connection between Mr Corney and the claimant. It is said that the buyer refused to proceed with the share sale if the defendant remained liable for the loan, and required Mr Corney to arrange to take over any liability. In the course of his evidence, Mr Morallee explained that this was because of the known requirements of the English Football League, which would have required the repayment of this indebtedness before it would approve the sale of the football club to the proposed buyer.

3. As a result, and in order to progress the share sale, Mr Corney, both in his personal capacity and on behalf of the defendant, agreed with the claimant that he personally would take over liability for repayment under the loan agreement, as evidenced by the repayment letter. This resulted in a novation of the defendant's debt to the claimant, alternatively, a variation with the same effect.

4. That is said to be supported by the wording of the repayment letter, and the commercial context of the agreement, and by the claimant thereafter failing to take any steps to chase the defendant for any allegedly outstanding sums from January 2018 until, according to paragraph 20 of Mr Morallee's witness statement, 3 September 2020.

5. The only evidence contradicting the defendant's version of events is Mr Graeme Middleton's witness evidence. He alleges that he and Mr Corney simply agreed that Mr Corney would make payment of the defendant's liability on its behalf. Mr Shipley says that that is not supported at all by the contemporaneous documentary evidence or the commercial context. He says it would render the agreement ineffectual and unnecessary.

6. Further, and in so far as the claimant seeks to rely upon the alleged cancellation letter of 15 January 2018:

(a) the defendant does not accept that this was sent or received since there is no contemporaneous documentary evidence, or disclosed correspondence, which refers to it, or to its alleged consequences;

(b) in any event, Mr Shipley says it amounts to a unilateral attempt to withdraw from a binding contract, and is ineffective accordingly; and

(c) the very fact that the defendant feels any need to rely upon it simply reinforces the point that the earlier repayment agreement of 12 January had been intended to be binding and effective.

29. Mr Shipley says that any argument that the defendant is prevented from relying upon a novation or variation of the loan agreement due to its terms, or the terms of the debenture, is misconceived. The clauses either do not apply, or they are ineffective in the circumstances, or the claimant is estopped from relying upon them.
30. Mr Shipley makes certain criticisms both of Mr Corney, at paragraph 8 of his skeleton argument, and of the conduct in this matter of Middletons, at paragraph 9. Mr Shipley also draws attention to the background to the loan agreement, and some peculiarities in relation thereto, at paragraphs 10 and following of his skeleton argument. These extend to apparent attempts to include provisions in the loan agreement for the personal benefit of Mr Alan Middleton, and also his solicitors' practice at Middletons; and the fact that a further draft agreement appears to have been sent after Mr Corney had already sent a photograph of the execution page of the loan agreement.
31. Mr Shipley also makes the point that the defendant's own documentary records of the loan agreement are completely unsatisfactory, in that there is no reference to it in any board minutes or email accounts of any of the defendant's employees, or of Mr Corney's email address at the defendant company. Mr Shipley also points to oddities regarding the disbursement of the loan monies. Mr Graeme Middleton explained that those oddities were attributable to the fact that Middletons was actually holding money in the claimant's client account arising from other property transactions. Effectively, Mr Middleton said that his father's solicitors' practice was acting as bankers to the claimant company.
32. Mr Shipley also makes the valid point that the commercial sense of entering into the loan agreement is not entirely clear. The 2017 loan agreement was entered into against the background of a previous loan agreement under which the claimant had at times struggled to obtain payment from the defendant, and under which £25,000 was still overdue for payment at the time the 2017 loan agreement was entered into, because that sum was deducted from the £350,000 advance to clear the first loan.
33. Mr Shipley makes the point that the defendant's financial statements for the year ended 30 June 2017 reveal that the defendant was hopelessly balance sheet insolvent at the relevant time. It had net current liabilities of over £2.5 million, and total net liabilities of over £9.1 million. Those figures would not have been available at the time of entry into the 2017 loan agreement because the relevant accounts were only filed on 7 September 2018. However, it is clear from those accounts that there was a similar state of balance sheet insolvency at the year ended 30 June 2016. The figure for net current liabilities was then some £11.4 million, and total net liabilities then were some £8.6 million. What appears to have happened is that between the 2016 and

2017 financial years the defendant football club had cleared current liabilities by consolidating them into long-term debt. That is apparent from the notes at 7 and 8 to the accounts. Moreover, note 9 discloses the existence of a loan from Brass Bank Ltd which pre-dated the claimant's loan agreement in a sum in excess of some £4.7 million, slightly less than the figure of some £4.85 million as at 2016. That indebtedness was secured by a fixed charge against the entire asset base of the defendant as well as a floating charge. Since this predated the debenture, and there is no evidence of any deed of priority, the Brass Bank security would appear to have enjoyed priority over the claimant's debenture. Given the size of the Brass Bank loan, Mr Shipley suggests that the claimant's debenture was effectively worthless.

34. Mr Budworth points to the dire consequences to a football club in the English Football League of entering into an insolvent state. It carries an automatic 12 point deduction, so the defendant could not have afforded to default on its liabilities to the claimant. However, the financial state of the defendant was clearly a matter of concern to any creditor.
35. Mr Shipley also points to the curious feature that all monies out from the claimant to the defendant, or flowing in as repayments from the defendant to the claimant, passed through Middleton's bank account rather than passing directly between the principal parties.
36. It is apparent that Mr Corney had been in negotiations over the sale of his shares to the eventual buyer from around at least September 2017. Mr Morallee explained at paragraph 18 of his witness statement that it was a clear and fundamental term of the deal for the sale of Mr Corney's shares that on completion, the defendant would not have to pay the loan to the claimant. Mr Morallee says that Mr Corney made it clear to him on many occasions that he would take care of the purported loan. It was also clear that this was accepted by the claimant, as Alan Middleton had been involved in the negotiations surrounding the sale of the shares by Mr Corney and was aware that it was a fundamental term of the deal that the defendant would not have to pay the loan. Mr Morallee says that Mr Alan Middleton had accepted this.
37. Mr Shipley emphasises that Mr Corney had agreed that any liability to repay loan monies would rest with him solely, and that this was known not only by Mr Corney, but also by Middletons as they were acting for Mr Corney in the share sale. Since Middletons were also acting as the claimant's solicitors in relation to the loan agreement, and indeed were receiving all payments from the defendant in relation to it on the claimant's behalf, and because Mr Graeme Middleton was being kept fully up-to-date on those negotiations by his father, the requirement for the liability for the loan to be passed to Mr Corney must have been clear to the claimant.
38. At about this time it is also clear that Mr Graeme Middleton was becoming concerned about the non-payment of the loan. At 2.16 on the afternoon of 27 October, Mr Graeme Middleton emailed his father asking him to speak to Simon Corney because he had still not paid. At 2.27 Mr Alan Middleton responded: "I spoke to him. I am trying to push the sale through. It should be completed in two weeks. I think it is better if you speak to them on this because he mentioned it to me and I will obviously take it out of the sale proceeds. I think we have to have client confidentiality so I think you say you know I am doing something for him that I cannot discuss with you. Have a think." Ten minutes later Mr Graeme Middleton responded: "That's fine

thanks. I will calculate all the interest when the time is ready. Surely he can't sell while there is a debenture over Club without paying it off anyway."

39. On 1 December 2017 Graeme Middleton emailed his father and Ryan Melvin:
- "Hi dad. Please can you keep me informed with any developments on Oldham. Simon has not come back to me on email although I haven't chased him, am I correct that my charge over company means he has to clear this before the sale effectively completes? His interest calculates daily and therefore when we know exact date he is going to repay charge I can calculate the exact balance and confirm."
40. It was only on 4 January 2018 that Mr Simon Corney emailed Alan Middleton, Ryan Melvin and Graeme Middleton as follows: "For the avoidance of doubt, please be aware that I have no issue with details of my sale of Oldham Athletic and the loan outstanding to Necarcu being discussed amongst yourselves. Graeme, thanks for your message and I can confirm we will meet at 11 a.m. next Wednesday with Alan to discuss the outstanding debt." The "next Wednesday" was 10 January.
41. The lately disclosed documents in the supplemental bundle provide some insight into what was going on at this time. On 19 December 2021 Nick Craig, of the English Football League, had sent an email to Simon Corney regarding the sale of Oldham Athletic, summarising the EFL's current position and requirements. This email was later copied to Alan Middleton at Middleton Solicitors. Under the heading "Debentures", Mr Craig made it clear that the EFL required copies of all documentation relating to loans from the claimant, including all correspondence, facility agreements and the like. The EFL stated that they already had the debentures as filed at Companies House but they also required the bank statements. Separately, the EFL had received correspondence from the Oldham Athletic Supporters Foundation Trust in which they had suggested that there were currently two debentures on the Club that hold rights over Mr Corney's 97% shareholding, i.e. those from Brass Bank and the claimant. They were concerned that the debentures would prevent any ownership of those shares being transferred without the explicit consent of the debenture holders or settlement of the debentures. Mr Corney was asked to confirm whether there were any agreements between himself and/or the club and any third party (including the Brass Bank or Necarcu debentures) which required approval for any sale of the 97% shareholding and the registration of the purchaser as the owner of that shareholding in the club's register of members.
42. According to the lately disclosed documents, on 21 December Mr Ryan Melvin of Middletons replied to Mr Craig, with copies to Mr Alan Middleton and Mr Corney. In response to those specific queries he said that he had attached a copy of the facility agreement and "this will be satisfied personally by Simon upon completion of the sale". Later he stated: "In relation to Necarcu Ltd as previously mentioned this charge will be satisfied personally by Simon upon completion of the sale".
43. On 22 December Mr Ryan Melvin sent an email to Mr Morallee of Brandsmiths, with copies to Mr Corney and Mr Alan Middleton. In paragraph 3 it was said (in blue text): "The Necarcu and Brass Bank documents show the need to have those resolved given they each purport to grant a first charge over the 97% shareholding in the club which is proposed to be sold to the purchaser under the SPA. We will require

confirmation to that effect.” I understand that to be a query by Mr Morallee, acting for the purchaser. The response in red text, which I take to be from Mr Melvin, reads as follows: “We can confirm that upon payment of the first instalment Simon will be satisfying the Necarcu loan. In respect of Brass Bank, our understanding is that the buyer will be responsible for satisfying this loan, whether it be on completion or when Brass Bank request. Simon, has an arrangement been made with Brass Bank regarding the loan and repayment of the same? If you have any paperwork/emails to support, please provide us [with] a copy of the same.”

44. Amongst the late disclosure is a document entitled “Board minutes of the seller (simultaneous exchange and completion): asset purchases”. The document purports to be the minutes of a meeting of the board of directors of the defendant football club held at its ground. The minutes purport to be signed, apparently by Mr Corney as chairperson, on January 5 2018. The minutes record as present Mr Corney, as director and chairman, four directors, the chief executive and two solicitors, identified as Ryan Melvin and Adam Morallee.
45. Paragraph 6 of the minute is headed “Consideration of documents” and reads: “The terms of the Transaction Documents were carefully considered and the board have raised any concerns that they may have. The main concern being that once the sale completes, no liabilities will come back to the club. It is agreed that the club will be sold debt free. Simon will be satisfying the Necarcu debt personally and the issue with Brass Bank will be resolved prior to completion whether by an extension of time payment by Abdallah.”
46. On 4 January 2018 at 20.51, “following today’s meeting and receipt of the documents”, one of the directors of the defendant, Ian Hill, emailed another director, Barry Owen, with copies to Ryan Melvin, Mr Morallee and others. The email includes a paragraph which reads: “I understand that the SPA document has been approved by the proposed purchaser of the shares and is subject to the agreement over the debenture held by Blitz/Gazal. I further understand, confirmed in the minutes of the Board Meeting of the 13th December, that Simon Corney will take personal responsibility for the debenture held by Necarcu and that this will be formalised as part of the completion”. Mr Budworth places particular reliance upon the reference to formalisation as part of the completion. Mr Shipley points out that this was on 4 January, and therefore preceded the 12 January 2018 letter.
47. It is clear that on Friday 5 January, at 4.49 pm, Mr Ryan Melvin emailed the directors of the defendant, with a copy to Mr Morallee, stating: “I have attached the signed minutes for everybody’s attention and can confirm that the same has been sent to the EFL today”.
48. On 12 January 2018 Mr Melvin sent an email to Nick Craig at the EFL with a copy to Mr Morallee and to Mr Corney, stating: “Please see the attached letter confirming that the debenture with Necarcu will be satisfied”. That attached letter was a version of the 12 January 2018 letter bearing the signature of Mr Middleton on behalf of Necarcu.
49. It is quite clear, therefore, that, to the knowledge of the English Football League, and also the purchaser of the shares, the seller of the shares, Mr Corney, and Middletons, the whole transaction was proceeding on the footing that Mr Corney would be

satisfying the Necarcu debt personally. It is against that background that the letter of 12 January 2018 was produced.

50. That letter had been preceded by an exchange of WhatsApp messages between Mr Graeme Middleton and Mr Corney. At 11.12 on Thursday 11 January 2018 Mr Middleton had sent a message to Mr Corney stating: “Any news on the above? Just need to have an agreement in place today and I have limited availability today”. At 11.46 Mr Corney responded: “Ok, but can you take a call after 1 pm Just want to discuss something with you” to which, one minute later, Mr Graeme Middleton replied: “Yes of course”.
51. On 10th January at 15.40 Mr Graeme Middleton sent Mr Simon Corney an attached spreadsheet “for monies owed” and asked to know if there were any issues. The spreadsheet appears to be the document at page 247A. Earlier that afternoon, the accountant for the defendant football club (Grace Nuttall) had sent an email to Mr Corney attaching that spreadsheet and explained: “Payments you have made are on the left and any receipts and interest are posted on the right”. In his closing speech, Mr Budworth made the point that had it been intended that Mr Corney should assume the defendant’s liabilities, he would have been likely to have wished to know the extent of those liabilities. In fact, he does appear to have wanted to know them, and he had been supplied with such details.
52. It was against that background that the letter of 12 January, previously cited, was produced. The evidence about that, and about the later letter of 15 January, is to be found in Mr Graeme Middleton’s third witness statement, made for the purpose of this trial, at paragraphs 17 through to 23 (at pages 43 to 45 of the hearing bundle). Those paragraphs should be treated as incorporated within this judgment. Mr Graeme Middleton had made an earlier, first witness statement for the purpose of resisting the defendant’s application for security for costs on 28 October 2021. At paragraph 1.13 (at page 1114 of the hearing bundle) Mr Middleton had said this: “Before the sale of the Club happened, another meeting was held at the offices of Middleton Solicitors. That meeting took place on the 15 January 2018. At that meeting there was myself, Alan Middleton Senior Partner from Middleton Solicitors, Ryan Melvin (who was the assistant solicitor who was dealing with the sale of the Club for Simon) and Simon. There was a meeting with Simon and his lawyers and then I joined the meeting. At that meeting I was told that Simon was not getting paid in full when the Club was sold but that he was going to get paid in instalments or some form of deferred payment. I said that if my company was not getting paid from the sale of the Club then I was not prepared to give up my security as this puts the company funds at risk. Simon told me he would make sure I got the loan money back and he would personally make sure I got paid but I said I would not agree. I advised Middleton Solicitors to draft a letter straight away saying any consent that may have been previously given by Necarcu was cancelled. The letter was prepared by Middleton Solicitors, signed by me, and given to Simon and put with a pile of papers. I asked for a copy of the letter and was given a copy of the letter, the original Simon had. I exhibit a copy of that letter at GDM1.”
53. During the course of Mr Budworth’s closing, I was told that in fact the letter had been discovered by the claimant’s solicitors, Dallas & Richardson, when they had gone to inspect Middleton’s files. They had been told by Middletons that they did not have any file for Necarcu. They had then enquired whether there might be any Necarcu

documents on any file belonging to Mr Corney. It was in response to that query, I was told, that a copy of the letter of 15 January 2018 had first been produced. Mr Budworth submits that that is not inconsistent with the statement by Mr Middleton that he was exhibiting a copy of the letter that he had been given. If it is not inconsistent with the account that Mr Budworth gave me, it is clear that Mr Middleton's account was, on any view, an incomplete one. Moreover, it is to be observed that at paragraph 1.13 in his witness statement of 28 October 2021 Mr Middleton had had no difficulty in placing Ryan Melvin at the meeting of 15 January.

54. However, only some four-and-a-half months earlier, in a letter to Brandsmiths of 4 June 2021, Dallas & Richardson had stated that those present at the 15 January meeting had been Mr Alan Middleton, Mr Simon Corney and Mr Graeme Middleton. The letter went on: "Our client is uncertain whether an assistant solicitor from Middleton Solicitors was also at the meeting." So, four-and-a-half months earlier, Mr Graeme Middleton had been unable to recall whether Mr Ryan Melvin had been present at the 15 January 2018 meeting.
55. The defendant does not accept Mr Middleton's evidence about the meeting of 15th January, or that the letter bearing that date was ever communicated to Mr Corney or to the defendant. That is made clear at paragraph 50 of Mr Shipley's skeleton argument. At paragraph 51, he points out that the claimant's case on the 15 January letter is problematic in a number of respects. First, the letter was not mentioned in pre-action correspondence between 3 September and 14 October 2020, even though the defendant had by then clearly raised the existence of, and its reliance upon, the letter of 12 January 2018. Nor was any reliance placed upon it in either the particulars of claim or the reply. The most that is said is at paragraph 6 of the particulars of claim, where it is pleaded: "There was no novation and the claimant does not recall there even being a response to the letter to Mr Corney which was withdrawn by the claimant in any event once it learned that the proposed consideration was not to be payable all at once". There is no reference there to a specific letter of 15 January 2018, or as to the manner in which the earlier letter was "withdrawn"; and there is no mention of any withdrawal in the reply. The first occasion on which the claimant raised the purported existence of the 15 January letter was in initial disclosure on 11 May 2021; that was over three years after it was allegedly handed to Mr Corney, and eight months after the parties had set out their cases in pre-action correspondence. As a result of this, the defendant queried the veracity of the alleged cancellation letter and requested a copy, in native electronic format, on 28 May 2021. The claimant's solicitors refused to provide this, on the basis that the letter was prepared by Middletons "on its case management system" and the claimant, it is said, is therefore unable to provide the letter in its native electronic format.
56. Despite extensive records of communications between Mr Corney and Mr Middleton and Middletons, there are no other disclosed records which refer to the meeting of 15 January, or to the letter of that date, or to there being any attempt by the claimant to withdraw from, or cancel, the repayment agreement.
57. To conclude the narrative, the final relevant, recently disclosed document is an email dated 5 February 2018, at 3.33 pm, from Mr Melvin to Mr Morallee at Brandsmiths, with a copy to the corporate solicitor there, Ms Victoria Willetts. It reads: "Good afternoon Adam/Victoria. I have been advised by my client that the sum of £78,000 is to be paid in respect of the £100,000 which remains outstanding. My client has

assured me that he is not worried about the payments being made, however, for my own confirmation and file, can you please confirm that the payment will be made by no later than 19th February 2018. Also, can you please confirm that the funds have already been accounted for. In respect of the sale, I am pleased to confirm that the discharge of Necarcu has now been satisfied and the charge will be removed. I understand that you are filing the rest of the documentation, but if you require any assistance, please do not hesitate to contact me.”

58. Mr Budworth relies heavily upon the fact that no such documentation was ever filed. In particular, the debenture in favour of Necarcu was not discharged until September 2019. The circumstances of such discharge are related by Mr Morallee at paragraph 21 of his witness statement. “On 26 September 2019 Ms Willetts filed a satisfaction of a charge form (MR04) at Companies House. I instructed her to do that as the liability for the Purported Loan and the debenture had been satisfied by Mr Corney and Mr Lemsagam had been informed by a third party that the charge was still on the register. There had been no communication from the claimant or Middleton Solicitors since the sale in January 2018 up to that point (or any at all until September 2020) that would demonstrate any difference to the agreed position between the Claimant, Defendant and Mr Corney, that the Purported Loan and any monies purportedly lent by Necarcu to the Defendant or Mr Corney would be repaid by him.” Mr Budworth points out that since the debenture included a legal charge, a deed would have been required validly to effect its discharge, and there is no suggestion of any such deed.
59. The end result of all this is that it is clear that there was some agreement reached on or around 11 January, as evidenced by the 12 January 2018 letter. The key questions for the court are, first, who were the parties to the agreement, and, secondly, what were its terms. The only witness who gives evidence directly as to that is Mr Graeme Middleton. Mr Shipley points out that it is well-established that human memory is fallible; and, especially in commercial cases, a court should pay particular care to contemporaneous documentary evidence rather than oral evidence as to a witness’s subjective recollection of events long past. Therefore, Mr Shipley invites the court to bear the following key points in mind. First, it is clear from the wording of the 12 January letter that the claimant and Mr Corney expressly reached an agreement, and that this agreement was sufficiently important that it needed to be formally recorded in a letter specifically addressed to Mr Corney on behalf of the defendant, the debtor under the loan agreement, and signed by Mr Middleton. It also appears that the letter was drafted by Mr Ryan Melvin of Middletons, who was still acting on behalf of the claimant in relation to the loan agreement, as well as for Mr Corney in relation to the share sale. Mr Melvin was therefore presumably acting on instructions from both the claimant and Mr Corney.
60. Second, the best evidence of the terms agreed are those set out in the repayment letter, i.e. “upon completion of the sale of Oldham Athletic (2004) Association Football Club Limited, the debenture with ourselves will be satisfied personally by Simon Corney”. There is no suggestion that payment in full of the price for those shares is required.
61. Third, the only other evidence as to the agreed terms are Mr Middleton’s subjective recollection, which Mr Shipley submits is far less reliable than the letter itself, especially as the letter was signed by Mr Middleton. Therefore, in effect, Mr Shipley

submits that the factual determination of the words used by the parties comes down to a construction of the repayment letter.

62. Fourth, in construing the words of that letter, the court should prefer a construction which validates, and gives effect, to its apparent object, in light of its commercial purpose and background, rather than rendering the agreement void, ineffective or meaningless. Therefore, the court should avoid a construction of the repayment agreement which would have no practical impact, or which would fail to satisfy the requirements of the share purchase and the EFL.
63. Fifth, the commercial background, and the purpose, of the repayment agreement was to put in place an arrangement which met the requirements of both the share purchaser and also the EFL and therefore allowed the sale to proceed. The only explanation for Mr Corney voluntarily agreeing personally to discharge the defendant's liability under the loan agreement was to comply with those requirements. The parties also contemplated that Mr Corney would be making payment out of the proceeds of the share sale, which was Mr Corney's personal money, as generated by the sale of his shares in the defendant. There is no credible explanation regarding the claimant's agreement to the 12 January letter other than that it was acceding to Mr Corney's request for an agreement which would satisfy the requirements of both the purchaser and the EFL. Mr Shipley submits that it is commercially understandable that the claimant should have agreed to this arrangement. Because of the defendant's hopeless balance sheet insolvency, and its cash flow issues, and the prior Brass Bank loan and debenture, there must have been perceived to be a high risk that the defendant would be unable to repay its loan. Conversely, Mr Corney was expecting to receive a large payout as a result of the share sale, provided that he arranged for the defendant's debt to the claimant to be discharged. The claimant was therefore effectively being offered the chance to trade a debt from a balance sheet insolvent company, with cash flow issues, backed by a useless debenture, and where no payment had been received since 13 October 2017, for a debt owed by the owner of a football club which he was about to sell for a large sum, provided only that the claimant formally agreed to give up its debt from the company in order to allow the sale to go through.
64. Sixth, in relation to the parties to the repayment agreement, it was concluded between Mr Corney and the claimant. Mr Corney was both personally undertaking a liability, and he was also contracting with the purpose of arranging for the discharge of the loan liability of the defendant, of which he was the controlling shareholder, a director and the chairman. By this stage, there was already the board minute of 5 January 2018 (previously cited). It therefore appears likely, so Mr Shipley submits, that he was acting in a dual capacity. In that regard, it is noteworthy that the repayment letter specifically refers to Mr Corney as satisfying the debenture personally. It is also addressed to Mr Corney at the address of the football club, thereby highlighting his dual capacity. On Mr Middleton's case, the repayment was also discussed on 15 January, and both parties accepted that an agreement had been concluded, although Mr Middleton says that he then sought to withdraw from that agreement on behalf of the claimant. The defendant clearly consented to the repayment arrangement because it was negotiated by Mr Corney, its director and chairman, effectively for its benefit, and in accordance with the terms of the board minute of 5 January.
65. Seventh, even though the claimant was well-aware that the share sale had completed, and that Mr Corney had not received the full purchase price, and was in fact involved

in litigation against the buyer, the claimant never took any steps to correspond with either the defendant or the buyer to question when the defendant would repay the long overdue loan monies. The first occasion the claimant got into contact with the defendant was on 20 September 2020, some 32 months after the share sale and the alleged cancellation letter. Mr Graeme Middleton's explanation for that is that he took the view that he was fully secured by the debenture, and that interest on the unpaid loan was running at the rate of 20% per annum. That, however, is not consistent with the anxiety that Mr Middleton had been showing, in his communications with his father in October 2017 onwards, about seeking to ensure that he received payment of the loan. Even if that was related to Mr Corney's share sale, the fact is that the share sale had gone through.

66. During the course of his closing, Mr Shipley produced, for the first time, a copy of particulars of claim of proceedings in the Circuit Commercial Court in Manchester between Mr Corney, as claimant, and Mr Lemsagam and RLJ Capital Global FZC, as defendants. From that, it is apparent that the share purchase agreement had provided for a consideration to be paid to Mr Corney on completion of only £1. However, there was a collateral agreement, dated on or around 24 January 2018, whereby the purchaser and Mr Lemsagam had agreed to pay a further £1.6 million to Mr Corney, which was to be paid, in three instalments of £600,000 on the date of completion of the share sale, £600,000 six months thereafter, and £400,000 12 months after that. Mr Shipley points out that £600,000 would have been more than enough to pay off the loan to the claimant. In fact, what appears to have happened, from paragraphs 20 (1) and 21 of the particulars of claim, is that Mr Corney was paid only £500,000 of the first instalment, leaving £100,000 outstanding. That explains the reference in the first paragraph of Mr Melvin's email of 5 February 2018 to having been advised by Mr Corney that the sum of £78,000 was to be paid in respect of the £100,000 which then remained outstanding.
67. Mr Graeme Middleton says that he was well-aware of the failure to pay Mr Corney in full because he lent Mr Corney money to finance his litigation against the buyer of the shares and Mr Lemsagam. This is all against a background where the defendant had made no payments under the loan agreement to the claimant following the completion of the sale of Mr Corney's shares. The last payment had been made as long before as 13 October 2017, according to Mr Graeme Middleton's own schedule.
68. In those circumstances, on a balance of probabilities, Mr Shipley invites the court to find that there was an agreement between Mr Corney, acting both personally and on behalf of the defendant, that he would personally take over the defendant's liability under the loan agreement, and that he would make payment of the same upon completion of the share sale. Mr Shipley invites the court to find that the effect of that agreement was that any liability of the defendant was discharged. Mr Shipley suggests that the discharge took place either at the date of the repayment agreement, or alternatively, on completion of the share sale. I have no doubt that that is correct, although I am also entirely satisfied that the agreement was only to take effect upon completion of the sale of the Football Club. That took place on 28 January 2018.
69. I reject the claims advanced by the claimant that it was agreed that Mr Corney would make payment on behalf of the defendant once the share sale completed, but that he would do so on the Club's behalf. That is not consistent with either the terms of the letter or the inherent probabilities. It would be wholly inconsistent with the way in

which both the buyer of the shares, and the English Football League, were requiring the matter to proceed; and it would be entirely contrary to the terms of the board minute.

70. I am satisfied that Mr Graeme Middleton agreed with Mr Corney that, upon completion of the sale of the football club, Mr Corney personally would assume liability for payment of the sums due under the loan agreement, and secured by the debenture. That is also entirely consistent with Mr Melvin's email of 5 February. In confirming that the discharge of Necarcu had now been satisfied, I am entirely satisfied that Mr Melvin was proceeding on the footing that the discharge had been effected by Mr Corney assuming the personal liability for discharge of the debt, in the place of the defendant football club. Mr Melvin recognised that the charge needed to be removed. That was not done until September 2019; but I am satisfied that that was something that had simply been overlooked as part of the mechanics of completing the discharge when, in his email of 4 January 2018, Mr Hill had referred to the need to formalise Mr Simon Corney taking personal responsibility for the debenture as part of the completion process. I am satisfied that this was fulfilled by the letter of 12 January.
71. What then was the effect of that letter? I am satisfied that the agreement embodied in the letter amounted to an express novation of the debt from the defendant company to Mr Corney. It is unnecessary to rely upon conduct to effect the novation. I am satisfied that there was an express agreement that, upon completion of the sale of the football club, the defendant's liability was immediately discharged, and Mr Corney thereupon assumed that liability.
72. I was referred to the recent statement of the law governing the novation of contracts to be found in the judgment of Falk LJ, with which Peter Jackson and Whipple LJ both agreed, in the case of *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2023] EWCA Civ 128 at paragraphs 54 through to 60. There was apparently no dispute as to the relevant legal principles to apply in determining whether a novation had occurred, which I would summarise as follows:
1. A novation takes place where a new contract is substituted for an existing contract. This typically occurs where an existing contract between A and B is replaced by a contract between A and C, with C assuming B's rights and obligations. Consideration is provided by the discharge of the old contract, specifically by A agreeing to release B, B providing C in its stead, and C agreeing to be bound.
 2. The consent of all parties is required for a novation. Consent can either be provided expressly or can be inferred from conduct. Whether consent has been provided is a question of fact.
 3. However, a novation will only be inferred from conduct if that inference is required to give business efficacy to what has happened.
 4. Where there is an established contract in existence, clear evidence of an intention to produce a novation is likely to be needed if the civil standard of proof is to be discharged.

5. A novation differs from an assignment in a number of respects, including the requirement for consent by all parties, the feature that rights and obligations are extinguished and replaced, and the fact that not only rights but also obligations are taken over by the new party.
6. A novation need not be of an entire contract, and C may be substituted for B only in some respects, with some obligations being novated and others remaining.
73. In the present case, it seems to me that there is no need to rely upon a novation by inference. If it were necessary to do so, then I would be satisfied that such inference was required to give business efficacy to the requirements of the purchaser and of the EFL that Mr Corney should assume liability for the defendant's indebtedness to the claimant; but I am satisfied that here there was an express agreement. I am satisfied that it was made by Mr Corney in a dual capacity, both personally and on behalf of the defendant company, in accordance with the minutes of the board meeting of 5 January 2018. I am satisfied that the defendant gave good consideration for such novation; the claimant agreed to release the defendant, in return for which the defendant provided Mr Corney to take on the liability in its stead, and Mr Corney agreed to be bound. Effectively, the claimant received a personal debtor who was expected to receive money from the sale of shares, initially £600,000, which was considerably in excess of the amount of the debt previously owed by the defendant company, and towards which it had paid nothing since 13 October 2017. That company was, according to its accounts, at high risk of default, and with a substantial prior secured creditor. Mr Corney achieved the opportunity of selling his shares. The defendant in return received the discharge of its existing debt.
74. I am satisfied that there is nothing in either the loan agreement or the debenture that prevented such novation, for the reasons that Mr Shipley provides at paragraphs 42 to 47 of his skeleton argument. This is not a case where there was a mere unilateral notification by one party to the other. I would accept that in such a case there cannot be a variation or novation of a contract. For a variation or a novation to be effected, and to be effective, there needs to be mutual agreement between the parties: in the case of a variation between the two original contracting parties, in the case of a novation between the original contracting parties and the new contracting party; but here there was a tripartite agreement, supported by consideration provided by Mr Corney's personal assumption of liability. In those circumstances, it is unnecessary for the defendant to rely upon any estoppel; but, had it been necessary, I would have found that there was an estoppel for the reasons given by Mr Shipley at paragraphs 46.7, 46.8 and 46.9 of his written skeleton argument.
75. I turn then, finally, to the alleged cancellation letter. In my judgment, even if this was a genuine document, it was ineffective to remove the effect of the previous novation. Mr Budworth contends that this was a case where the claimant had an unrestricted right to withdraw from the 12 January agreement. I disagree. The law is clearly set out at paragraphs 4-197 through to 4-199 of the 34th edition of *Chitty on Contracts*, Volume 1. In this case, I am satisfied that the novation agreement was subject to the contingent condition precedent of completion of the sale of the defendant football club. Where an agreement is subject to such a condition, the question whether either party may withdraw from the agreement is a question of the true construction of the agreement itself. One possibility is that before the event occurs, each party is free to withdraw from the agreement. But a second possibility is that, before the event

occurs, and the main obligations have not accrued, so long as the event can still occur, one or both of the parties are prevented from withdrawing. That is the situation considered at paragraph 4-199 of *Chitty on Contracts*. I am satisfied that that is the case here, contrary to Mr Budworth's submissions.

76. Mr Budworth submits that Mr Middleton was entitled to say that the claimant would withdraw from the agreement as soon as he discovered that Mr Corney was not going to receive all of the money on completion. However, the agreement itself was that the debenture would be satisfied personally upon completion of the sale. It said nothing about the payment of the sale consideration and, in particular, as to how much of the sale consideration needed to be paid before the novation would take effect. In my judgment, it would have defeated the whole purpose of the novation agreement for Mr Graeme Middleton, on behalf of the claimant, to have been entitled to withdraw before completion took place. Clearly, if completion did not take place, then the novation would not take effect; but, given the background to the novation agreement, in terms of the requirements of the purchaser, the needs of the seller, and the requirements of the English Football League, it was, in my judgment, never the intention of the parties that three days after the agreement of 12 January, the claimant should be in any position to withdraw. So, even if the letter were genuine, in my judgment, it did not alter the effects of the letter of 12 January.
77. However, I am entirely satisfied that the letter is not genuine. Mr Shipley, in closing, limited his submissions to inviting the court to conclude that there was no satisfactory evidence that anyone was aware of the letter, or that it was delivered to Mr Corney, or that it ever had any effect. However, Mr Middleton has given clear evidence that the letter was drawn up by Mr Melvin. I am entirely satisfied that Mr Melvin could not have drawn that letter up, in light of his involvement in the sale of the shares to the buyer, his involvement in the board meeting of 5 January, his submission of the board minutes of that meeting to the English Football League, to the fact that he then participated in completion of the share sale, and he then composed the email of 5 February. In the absence of any explanation as to how he could have done that consistently with his authorship of the letter of 15 January 2018, I cannot accept that Mr Melvin was involved in its authorship. Since it is Mr Middleton's clear evidence that Mr Melvin was the author of that letter, and since I am entirely satisfied that Mr Melvin did not write it, I must conclude that the letter is a fabrication. It may well have been produced in a misguided attempt to bolster what the claimant conceived to be a valid case that there had been no novation of the loan agreement; but I am satisfied, first, that there was a valid novation, and, secondly, that the letter of 15 January was never written, and was never delivered to Mr Corney at the time. That conclusion is consistent with the fact that at no stage thereafter did the claimant seek to recover any monies from the defendant.
78. Mr Budworth submits that it is most unlikely that the claimant would ever have lent any money to Mr Corney if he had assumed a personal liability for the defendant's debt. I prefer the alternative analysis of Mr Shipley, that the claimant's advance of monies to Mr Corney was done with a view to assisting him to receive the balance of the monies due for the sale of his shares, and with a view to him then being able to discharge his debt under the loan agreement to the claimant which he had assumed on the sale of his shares in the defendant company.

79. At considerable length, those are my reasons for dismissing the claim against the defendant. In terms of the outstanding issues, I find that the parties to the agreement referred to in the letter of 12 January were the claimant, the defendant, and also Mr Corney personally. I find that the agreement effected a novation of the original loan agreement whereby the position of debtor changed from the defendant to Mr Corney. As a result, there is no need to consider the alternative analyses of either variation of the agreement or estoppel. Although not one of the agreed list of issues, I also find, first, that there was no withdrawal, or purported withdrawal, of the 12 January letter on 15 January, and, secondly, that even if there had been, it would have been of no legal effect.
80. That concludes this extemporary judgment.

(This Judgment has been approved by HHJ Hodge KC.)

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com