

Neutral Citation Number: [2024] EWHC 2232 (KB)

Case No: QB-2009-000127

# IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 28 August 2024

Before:

# MASTER DAGNALL

Between:

SEAN RICHARD ORMSBY LINDSAY

Claimant/ Applicant

- and -

(1) JARED MICHAEL O'LOUGHNANE
 (2) KAREN DRAYTON (on behalf of the estate of JAMES FRENCH deceased)
 (3) PAUL DRAYTON

(4) ANDREW HEAPHY

Respondents

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Brian Hurst (instructed by way of direct access) for the Claimant
The First Respondent Jared O'Loughnane appeared in person
Gary Pryce (instructed by Clarke Kiernan LLP) for the Second and Fourth Respondents
The Third Respondent Paul Drayton did not appear and was not represented
Mr Oldroyd of Browne Jacobson LLP appeared on behalf of Bates Wells & Braithwaite
London LLP (28 February and 1 March 2023 only)

Hearing dates: 28 February, 1-3, 6 March, 29, 30 November 2023, 20-22 March 2024 Written Submissions received subsequently and last on 29 May 2024

# **Approved Judgment**

This judgment was handed down in court (no attendance) at 2.12pm on 28 August 2024 and has been circulated on that day to the parties or their representatives by e-mail and released the next day to the National Archives.

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**MASTER DAGNALL** 

#### MASTER DAGNALL

### Introduction

- 1. This is my judgment in relation to Applications made by the applicant claimant Sean Lindsay ("the claimant") to have the proceeds of sale of various properties ("the Properties") to be paid out to him as the person entitled to the benefit of final charging orders obtained over the Properties securing a substantial judgment debt payable by the first defendant/respondent Jared O'Loughnane ("Jared") who was their registered owner. The second respondent (James French, "French") and the fourth respondent (Andrew Heaphy, "Heaphy") each contend (French having died during the trial now by Karen Drayton who has been appointed to represent his estate ("the French Estate") for these purposes) that they each have the benefit of equitable charges over the Properties which were created earlier in time than and so have priority over the claimant's charging orders.
- 2. The claimant contends that the asserted equitable charges do not have that effect as: (1) the relevant documents (or at least the loan agreements underpinning them) were only signed, at least by Jared, after the granting of the charging orders (2) the relevant documents did not give rise to equitable charges over the relevant properties for numerous reasons (3) the equitable charges were released as a consequence of law arising from a transaction relating to another property which was also the subject of their security (4) the equitable charges should not be enforced for various reasons including as (i) they were designed to prejudice the claimant in relation to his claims against the first defendant (ii) they were entered into in contravention of a worldwide freezing order ("the WFO") affecting the claimant (iii) the chargees intend to pay over any monies received to the first respondent (iv) the monies provided by the chargees did not belong to them (5) the equitable charges should be set aside as being transactions at an undervalue intended to defeat creditors under section 423 ("section 423") of the Insolvency Act 1986 ("the 1986 Act"). The claimant has also raised other contentions during the history of this part of the litigation but those other contentions have not been pursued.
- 3. The claimant has appeared before me by Mr Brian Hurst, direct access counsel. Jared has appeared before me by video link representing himself. French and then the French Estate and Heaphy have appeared before me by Mr Gary Pryce of counsel instructed by Clarke Kiernan solicitors.
- 4. This case raises important points with regard to the standard wordings of WFOs and property transactions entered into by a defendant designed to provide monies for their legal costs, but which have the effect of diminishing their assets other than by way of simple payment of monies to their lawyers (and where such simple payment of the defendant's monies is generally permitted by the standard wordings of WFOs). For those reasons, I have left my consideration of the WFO argument to the end of this judgment. In that section, I have also expanded various matters from the draft judgment which I circulated in order to make clear my reasoning in relation to certain matters raised by Mr Hurst in emails subsequent to it.
- 5. I have had before me some 18 lever-arch files of documents, multiple written submissions and numerous bundles of authorities, and the evidence and oral submissions took some 9 days of court time (although this was both affected and limited by the second respondent, French unfortunately losing mental capacity and then dying over the trial period before he could give oral evidence). Bearing in mind that this

dispute relates to claims of the second respondent for (now) £37,889 odd and from the fourth respondent for £24,999 (but in each case with interest from, perhaps, mid-2010 and which may add up to, say, another 100%), at first sight this process seems to have been at least potentially disproportionate. That seems to have occurred due to this being part of a larger war between the claimant and Jared (who has already been held to have defrauded the claimant as to which I refer below) into which it is relatively commonground that the other respondents have been dragged.

6. However, it does mean that in order to save court resource and to accord with the overriding objective (CPR1.1) I have sought to keep this judgment within bounds, and, in particular, to summarise both matters which I consider to be of limited relevance to what I have to decide and the parties' various submissions. Further, at an earlier stage in this litigation, I refused a summary judgment application brought by the Claimant and a transcript of my judgment has Neutral Citation Number [2022] EWHC 3712, and in order to save time, I have used elements of that transcript within this judgment. However, in preparing this judgment, I have reviewed the full documentary materials, witness evidence and the oral and written submissions before me in order to ensure accuracy and that this judgment represents a full fresh determination of all matters before me.

### History

### **Initial History**

- 7. This matter arises from underlying litigation brought by the claimant against the Jared alleging that Jared had made fraudulent misrepresentations causing the claimant to make failed investments and causing him very substantial loss. I set out below matters which are either not contested or were found to be the case by Flaux J in a trial in early 2010 and where the written judgment has Neutral Citation Number [2010] EWHC 529.
- 8. Jared has carried on various businesses including businesses supplying foreign exchange ("Forex") trading services; and enabling individuals and others to convert their monies from one currency to another (usually involving pounds sterling as either the sale or purchase currency). In 2000 he incorporated a company FX Solutions Ltd ("FXS") in which he was a director and shareholder, and his only co-shareholder (after another, Kevin Gunning, had left) and co-director was a Penny Compton ("Penny") his wife and who is also known as Penny O'Loughnane. Jared and Penny also were the sole shareholders and directors of another company Global FX Limited ("Global") but which was only to trade actively from 2008. Those companies used HSBC Bank Plc ("HSBC") as their bankers and including both to hold the monies provided to them by their customers and to purchase foreign currency *en bloc* which was then held in an HSBC account denominated in the relevant currency (e.g. Euros or US Dollars) before being paid out to particular customers.
- 9. The claimant originally traded satisfactorily with FXS during 2005-2007. However, by June 2008 FXS became insolvent and Jared (with Penny as co-director) was operating Global in its place. When the claimant sought to convert some £185,000 then, Jared did not inform the claimant of what was happening but supplied him with Global trading notes as if that was simply a new trading name of FXS. The claimant's monies were not used to purchase currency for the claimant but to pay other creditors and expenses of FXS and Jared. However, Jared told the claimant that there was simply a delay due to "banking errors"; although eventually the claimant was paid his monies from other customers' monies. The claimant then paid another total of £565,000 in

September 2008 to be converted into Euros for him, and again the claimant's monies were not used to purchase currency for the claimant but to pay other creditors and expenses of FXS and Jared, and this time nothing was paid to the claimant.

- 10. Flaux J was to hold, and which has not been challenged (except possibly by Jared who is bound by Flaux J's findings being the defendant at the relevant trial) that Jared induced the claimant to provide his monies by fraudulent misrepresentations and which were part of "a widespread pattern of deception [which] was committed on the clients of [FXS] of which [Jared] was the architect."
- 11. On 18 September 2008 FXS and Global entered into administration and are now in liquidation with a Mr Andrew Tate ("Tate") being one of the joint liquidators. Tate appears to have instructed and to continue to instruct Mr Hurst, who has appeared as counsel for the claimant, in relation to various matters. However, the respondents complain that Tate (and the claimant) have not provided them with general access to the documents in the liquidation, and that Mr Hurst has often taken the position that he will not volunteer or disclose documents and information because he says that he owes duties of confidentiality to Tate and the liquidation. Mr Hurst responds that the respondents should have made a third party disclosure application against Tate if they wanted documents from the liquidation. The respondents counter to say that the claimant should have obtained all the relevant documents (which apparently have been disclosed to him in other litigation but subject to the usual duty that such can only be used for an ulterior purpose, such as for this litigation, with the permission of the court or consent of the liquidators). I refer further to the disclosure positions below.
- 12. The claimant then brought this Claim against Jared alleging that he had suffered loss as a result of fraudulent misrepresentations on the part of Jared and instructing solicitors, Mishcon de Reya LLP ("MDR"), to act for him. Jared was to instruct Bates Wells & Braithwaite ("BWB" and who acted mainly through a Robert Oakley ("Oakley") although also a Martin Gunson ("Gunson") and an Alex De Jongh ("DeJongh")). The case was originally numbered HQ09X00691 before being changed to its present Queen's Bench number under the new CE-Filing system.
- 13. The claimant obtained a worldwide freezing order ("the WFO") from HHJ Seymour sitting as a Judge of the High Court on 19 February 2009. The WFO was granted on a personal freezing injunction (rather than as a proprietary freezing order, since the claimant's claim was only for damages) basis against Jared (as the respondent) and which:
  - i) Contained the usual penal notices including one directed to Jared (as respondent) and another that "Any other person who knows of this order and does anything which helps or permits the respondent to breach the terms of this order may also be held to be in contempt of court and may be imprisoned fined or have their assets seized"
  - Provided in paragraph 5(2) that "the Respondent must not- (1) remove from England and Wales any of his assets which are in England and Wales up to the value of £700,000... or (2) in any way dispose of, deal with or diminish the value of any of his assets whether they are in or outside England and Wales up to the same value" In paragraph 6 it was provided that "Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned..." In paragraph 7(a) it was stated that "This prohibition includes the following assets in particular- (a) the properties

- identified in Schedule 2 to the Affidavit of [the claimant] or the net sale money after payment of any mortgages if any property has been sold" the Properties referred to below were all so identified
- iii) Contained an exception in paragraph 8 if Jared had assets exceeding £700,000; but Jared claims now to have no assets, and no-one has suggested that this exception could apply to what is before me and so I disregard it
- iv) Provided in paragraph 11 that: "(1) This order does not prohibit the Respondent from spending £750 a week towards his ordinary living expenses and also a reasonable sum on legal advice and representation. But before spending any money the Respondent must tell [the claimant's] legal representatives where the money is to come from (2) This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business (3) The Respondent may agree with [the claimant's] legal representatives that the above spending limits should be increased or that this order should be varied in any other respect, but any agreement must be in writing."
- v) Provided in paragraph 13 that "Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform [the claimant's] solicitors..."
- 14. I note that those paragraphs are very much in standard form (and where any departure from the standard form has to be specifically notified to and decided upon by the Judge see presently paragraph 6 of CPR PD25A). Further, and as referred to in the case-law below, the wording of paragraph 11 arises from the general principle that the grant of a personal (as opposed to a proprietary) freezing injunction is not to prevent a defendant from spending their money or transacting in the ordinary course of business or spending reasonable amounts on legal costs of defending the claim or on living expenses.
- 15. At that point in time Jared owned or was beneficially interested in a number of properties in England. These included a property, Beacon Hill, Farley Common, Westerham, Kent, TN16 7UA ("Beacon Hill") owned by him jointly with Penny (and where it is common-ground before me that Jared and Penny each had 50% beneficial interests). These also included other properties (being "the Properties") owned by Jared in his own name, including: Flat 9, Worsley Grange, Kemnal Road, Chislehurst, BR7 6NL ("Worsley Grange") which was then subject to a third party mortgage; 4 Victoria Works, Orpington, Kent, BR5 1EG ("Victoria Works") which was also subject to a third party mortgage; and 155 White Horse Hill, Chislehurst, Kent, BR7 6DH ("White Horse"). These properties (i.e. Beacon Hill and the Properties) were all frozen by the worldwide freezing order which applied both to properties in the Jared's sole name and properties jointly owned by him. They were all registered at HM Land Registry and the claimant applied to HM Land Registry pursuant to sections 43(1) of the Land Registration Act 2002 ("the LRA") and Rules 91 and 93(h) (of the Land Registration Rules 2003 ("the LRR") to have entered onto their titles restrictions in Form AA of Schedule 4 to the LRR and this was done in each case in the form "Under an order of the High Court made on 19 February 2009 no disposition by the proprietor of the registered estate is to be registered except with the consent of [the claimant care of MDR]".

- 16. The WFO was continued with certain immaterial variations by orders of Beatson J on 25 September 2009 and Stadlen J on 24 October 2009.
- 17. The matter came on for trial before Flaux J (as he then was) whose judgment was delivered on 18 March 2010. In the judgment, amongst other things, Flaux J:
  - i) Described the claimant as an impressive witness and accepted his evidence (paragraph 12)
  - ii) Described Jared as arrogant, shameless and a liar (paragraphs 16-17, 30, 73, 79)
  - iii) Held that Jared and Penny knew from early 2008 onwards (at least) as to there being a massive deficit within FXS (paragraph 27-29)
  - iv) Held that Jared knew throughout that customer monies were held on trust and including when they were in the HSBC trading accounts, and had been even though Jared denied such knowledge (paragraphs 29-30)
  - v) Held that Jared had engaged in a scheme to hide assets of a Mr Richard Leahy ("Leahy") from Leahy's wife (paragraph 30)
  - vi) Held that Jared had misapplied customer and company monies and including by a directors' loan and had hidden that situation from audit (by avoiding instructing auditors) and the revenue and Barclays Bank including by fictitious accounting entries (paragraphs 31-40)
  - vii) Held that Jared and Penny had sought to inject monies into the business in 2008 but on the basis of a ring-fenced trust designed (at least by Jared) to protect them in the event of an insolvency (paragraphs 41 onwards)
  - viii) Held that Global was revived by Jared on the basis that FXS would be allowed to lapse into insolvency without revealing what was happening to customers (paragraphs 48-51) and with a plan to move the centre of operations to the USA (paragraph 52)
  - ix) Held that Jared and Penny knew about the insolvency of FXS and that there were in an untenable position if their USA operation (to be called Transparent Trading) did not proceed (paragraph 63)
  - x) Held that Jared knowingly misrepresented the position to the claimant and so that the claimant carried on with what the claimant thought were further trades (paragraphs 65 onwards and paragraphs 96, 117, 119 and 125)
  - xi) Held that Jared improperly used the claimant's monies to make payments to others (paragraphs 85 and 108)
  - xii) Held that there would be judgment for damages to be assessed with an interim payment of 82% of £565,000 with interest (paragraphs 141 onwards).
- 18. By Order of 18 March 2010 Flaux J granted a consequential judgment for damages and costs including for interim payments to be made by Jared of £491,33.49 on account of damages and interest and £495,000 on account of costs; and with the WFO to continue. The majority of those sums have not been discharged.

19. On 20 April 2010 Master Fontaine granted Interim Charging Orders over each of the Properties in relation to the interim payments ordered by Flaux J and Master Foster made them Final Charging Orders on 26 May 2010.

## The Asserted Loans and Equitable Charges

- 20. As I have said above, Jared was in 2009 and still is married to Penny. Penny is the daughter of an Anthony Compton "Anthony". However, Penny's mother married James French ("French") and French had a close relationship with Penny as her stepfather. French was the second respondent to this litigation until he died (after having become mentally incapable of conducting litigation) during the course of the Trial before me (and before he could be called to give evidence) and I have appointed his step-daughter, Karen Drayton, to represent his estate ("the French Estate"). Jared also had a close relationship with a cousin and boyhood friend, Andrew Heaphy ("Heaphy") who is the fourth respondent to this litigation. The third respondent, Paul Drayton ("Drayton" and who is married to Karen Drayton) has decided not to make any claim to relevant monies and has therefore not taken any recent part in this litigation.
- 21. In 2009 and 2010 Jared was instructing BWB who sought monies in relation to both their profit costs and the fees of counsel. Jared said that he did not have available sufficient monies of his own and agreed with BWB that they would take security over Beacon Hill and the Properties. The respondents say that Jared also sought to borrow monies from French and Heaphy for such purposes, and for living expenses, and on the basis that they would have security.
- 22. Prior to the institution of the proceedings, French had paid to Jared the sums of £48,000 on 27 November 2008 and £4120.56 on 21 January 2009 and £15,000 on 31 January 2009. On 31 January 2009 French paid the sum of £7,900 to Jared. After the institution of the proceedings, French paid to Jared the sum of £10,200 on 16 March 2009, the sum of £5,000 on 31 March 2009, and the sum of £364.43 on 24 November 2009. The French Estate (and Jared) say that these were all loan transactions (including a partial repayment) ("the French Pre-Charge Loans"). French paid a further £25,000 to BWB on 6 January 2010. It is, however, common-ground that the £48,000 and some of the other monies were all repaid, and so, the remaining unrepaid balance is £37.889 odd.
- 23. After the institution of the proceedings, Heaphy paid to Jared the sum of £9,999 on 1 June 2009, £5,000 on 18 September 2009 and £10,000 (by a company cheque) of 15 January 2010 ("the Heaphy January £10,000"). Heaphy (and Jared) say that this were all loan transactions ("the Heaphy Loans").
- 24. I describe first the documents which were or are said to have been the resulting transactional documents before setting out the history and material documents of this period.

### The BWB Charge

- 25. Jared and Penny granted an equitable charge ("the BWB Charge") to BWB by a Deed dated 14 December 2009 ("the BWB Deed") which granted BWB security over Beacon Hill, and which contained the following provisions:
  - i) In the opening words Jared and Penny were defined as "(together "the Chargor")"

- ii) Clause 1.1 contained definitions:
  - (a) "Charged Assets" means the assets charged/assigned to BWB under this deed
  - (b) "Jared's Liabilities" means all Jared's obligations to BWB of any kind... under the Retainer Agreement
  - (c) "Jared" means Jared O'Loughnane
  - (d) "Retainer Agreement" means [agreements between Jared and BWB for the provision of legal services]
  - (e) "Property" means the freehold property vested in or charged to the Chargor (with the Wife") as specified in the Schedule
  - (f) "Security" means the security constituted by this deed
- iii) Clause 1.2 was headed General Interpretation and read: "In this deed references to... (d) the Chargor are joint and several"
- iv) Clause 2 was headed "Secured Liabilities" and provided "The Chargor covenants with BWB that they will on demand: 2.1 pay Jared's Liabilities as and when they fall due..."
- v) Clause 3 provided: "As a continuing security for the discharge and payment of Jared's Liabilities... the Chargor: 31. Present freehold property charges to BWB by way of equitable mortgage all the Chargor's interest in the Property..."
- vi) The Schedule was headed "Freehold and leasehold property specifically charged by clause 3.1" It had three columns headed "Title Number" (and below it the registered title number of Beacon Hill), "Address or Description of Real Property" (and below it the address of Beacon Hill) and "Registered Proprietor" (and below it "Jared O'Loughnane and Penny O'Loughnane").
- 26. The BWB Deed has the date filled in by hand of 14 December 2009. It bears the signatures of Jared and Penny witnessed by a Christine David (stated by a stamp to be an attorney in Connecticut in the USA). It is also signed by Oakley and Gunson as members of BWB. The paper of the BWB Deed contains at the bottom the computer file reference of "206367/0001/000686747".
- While the BWB Deed contains various drafting errors (e.g. it refers at various points to "the Wife" which is not a defined term and unnecessary where Penny was within the definition of "the Chargor"), it has been common-ground that it was effective to charge the entire legal and beneficial interest to BWB for Jared's liabilities. Mr Hurst also points out that clause 2.1 contains a full personal covenant by Penny to pay Jared's Liabilities even though they were obligations of Jared and were continuing to accrue. However, as between Penny and Jared, and in the absence of other agreement, the ordinary principles of equity and marshalling would enable Penny to require that Jared should be the first, and his beneficial interest in Beacon Hill should be used first, to discharge Jared's liabilities. Further, Penny might well, although this would depend upon the precise contract between them, be able to call a halt to Jared incurring further liabilities for which she was responsible to BWB (as the mere entry into a guarantee or similar (here a primary obligation of the secondary party) does not, without more,

normally enable a principal debtor to incur liabilities without the continuing consent of the guarantor).

### The asserted French Charge and the asserted Heaphy Charge

- 28. The French Estate relies upon a Loan Agreement ("the French Loan Agreement") dated 17 December 2009 and an equitable charge purportedly granted by deed ("the French Charge") dated 30 December 2009. I only have copies and not the originals of these signed documents.
- 29. The French Loan Agreement is headed with French's name and address of "Brookside..." and an email address of French. It is addressed to Jared at Beacon Hill with the email <a href="mailto:jaredpenny@googlermail.com">jaredpenny@googlermail.com</a>. Mr Hurst points out that this email address contains an "r" in the middle of "googlermail" and thus would be wrong and ineffective. There is then set out "Dated 17th December 2009". It provides that "I am pleased to make available to you a loan facility on the terms and conditions set out in this letter." It then goes on to provide:
  - i) In Clause 1: "The principal amount of £150,000 including the sums mentioned below. In this letter, the principal amount for the time being outstanding under this facility is referred to as the "Loan". I have already advanced to you these sums which you acknowledge receipt of... [there are then set out the French Pre-Charge Loans
  - ii) In Clause 2: "Purpose... the further funds to be loaned is made to finance your living expenses and legal costs in connection with the claim in the High Court brought against you by [the claimant]..."
  - iii) In Clause 3: "Drawdown... Drawdown is conditional on satisfaction of the Conditions Precedent listed in the Schedule..."
  - In Clause 4: "Repayment... You will repay to me the Loan... on the later of (a) Payment to you of costs in the claim; (b) 25 July 2010... Any sum repaid may/not be redrawn. For the avoidance of doubt, the Loan will, if I need to call on the security, be repaid first from the proceeds of sale of your beneficial interests in the properties set out in the schedule. Penny's interest will only be utilised in the event that your interests realise insufficient funds to repay the Loan."
  - v) In clause 5: "Interest... In the event that repayment of the Loan is due under clause 4 above you will in addition to repayment of the Loan pay simple interest at the rate of 4% per annum above the base rate from time to time of Coutts & Co from the time repayment is due until payment."
  - vi) In clause 7: "Default... (a) If you fail to pay any sum payable under this letter on the due date; or (b) if you fail to observe or perform any other obligations under this letter or any of the Security Documents; or (c) if you become insolvent... or (d) if any security (or any part of it) given under this letter or in respect of this facility is not or ceases to be or is alleged by any person not to be for any reason a valid enforceable effective and continuing security... then and at any time thereafter I may by written notice to you demand immediate repayment of the Loan... and you will comply with such demand forthwith..."

- Clause 7 then continues with an indemnity provision but which ends on an "and/or"
- vii) The Loan Agreement is signed by French after the words "Please sign and return the enclosed copy of this letter by way of acceptance." and by Jared after the words "I agree to and accept the above." followed by the typed date of "Dated 17<sup>th</sup> December 2009"
- viii) There is no Schedule
- ix) There is no Computer file reference.
- 30. The French Charge commences in type with "This Charge is dated 30 December 2009 and made between (1) [Jared and Penny] of [Beacon Hill]... <a href="mailto:jardpenny@googlemail.com">jardpenny@googlemail.com</a> (the "Chargor"); and (2) "James French of Brookside..." as "("the Lender")". It goes on to provide as follows:
  - i) Clause 1.1 contained definitions:
    - (a) "Beacon Hill" means the first property listed in the Schedule
    - (b) "Charged Assets" means the assets charged/assigned to the Lender under this deed
    - (c) "Chargor's Liabilities" means all of the Chargor's obligations to the Lender of any kind... under the Loan Agreement
    - (d) "Existing Charges" means any existing charges over the Property and any charge in favour of [BWB]
    - (e) "Loan Agreement" means the agreement to advance monies between the Chargor and the Lender dated 30 December 2009 as may be varied from time to time
    - (f) "Penny" means Penny O'Loughnane
    - (g) "Property" means the freehold property vested in or charged to the Chargor specified in the Schedule
    - (h) "Security" means the security constituted by this deed
  - ii) Clause 1.2 was headed General Interpretation and read: "In this deed references to..." but contained no reference to joint liability or to several liability
  - iii) Clause 1.5 stated "Penny is only a party to this Deed insofar as she is a joint registered proprietor of Beacon Hill and so the charges covenants and obligations in this Deed shall only apply in relation to Beacon Hill and not any other part of the Property"
  - iv) Clause 2 was headed "Secured Liabilities" and provided "The Chargor covenants with BWB that they will on demand: 2.1 pay Jared's Liabilities as and when they fall due..."

- v) Clause 3 was headed "Security" and provided: "As a continuing security for the discharge and payment of Jared's Liabilities... the Chargor: 31. Present freehold property charges to BWB by way of equitable mortgage all the Chargor's interest in the Property..."
- vi) Clause 10.2 provided "Further assurance... The Chargor will... execute any deed or document and take any action required by the Lender... to perfect or protect this security..."
- vii) The Schedule was headed "Freehold and leasehold property specifically charged by clause 3.1" It had three columns headed "Title Number" (and below it the registered title numbers of Beacon Hill and each of the Properties), "Address or Description of Real Property" (and below it the address of Beacon Hill and each of the Properties starting with Beacon Hill opposite each of their registered title numbers) and "Registered Proprietor" (and below it opposite Beacon Hill "Jared O'Loughnane and Penny O'Loughnane" and opposite each of the Properties "Jared O'Loughnane"). At the end there were typed in the second column the addresses of a Spanish property and of an American property ("Apt 4503, 9055 Treasure Trove Lane, Kissimmee, Florida USA") with "Jared O'Loughnane" opposite each in the third column, but with the first column (Title Number) blank.
- viii) The deed bears the signature of Jared and Penny each witnessed by a Grant Davidson with an address in Greenwich, Connecticut and with a stamp of that name stating that they are a Notary Public whose commission expires on June 30, 2014
- ix) At the bottom of each paper page is the computer file reference "206367/0001/000710992/Ver 01".
- 31. Heaphy relies upon a Loan Agreement ("the Heaphy Loan Agreement") dated 30 December 2009 and an equitable charge purportedly granted by deed ("the Heaphy Charge") dated 30 December 2009. I only have copies and not the originals of these signed documents.
- 32. The Heaphy Loan Agreement is identical to the French Loan Agreement except that:
  - i) At the start it has Heaphy's name and address and the date "Dated 30<sup>th</sup> December 2009"
  - ii) In clause 1 it states: "The principal amount of £150,000 including the sums mentioned below. In this letter, the principal amount for the time being outstanding under this facility is referred to as the "Loan". I have already advanced to you these sums which you acknowledge receipt of:-the sums of £9,999 in June 2009, £5,000 in September 2009 and £9,999 in December 2009"
  - iii) It is signed by Heaphy and Jared and with the typed date of "Dated 17<sup>th</sup> December 2009"
  - iv) There is under that date the start of a Schedule (which continues over the next page) which is headed "Conditions Precedent" and reads "(1) Your acceptance of this loan agreement in accordance with the terms of this letter. (2) The following Security Documents duly executed and delivered by you: (a) a charge

- of your (and where she is a joint owner, your wife's) interest in all that freehold property known as..." and there then follows the same three completed columns as in the French Deed but without their headings of "Title Number... Address of Real Property... Registered Proprietor [there is no paragraph (b)]"
- v) The paper of the Heaphy Loan Agreement has at the bottom of each paper page the computer file reference "206367/0001/000681276/Ver.02".
- 33. The Heaphy Charge is identical to the French Charge except that:
  - i) At the start Heaphy is defined as "the Lender"
  - ii) At the bottom of each paper page is the computer file reference "206367/0001/000681275/Ver 01".
- 34. As I refer to below, unilateral notices were registered in relation to the various equitable charges on the title registers to Beacon Hill and the Properties in January 2010. That registration was not necessary to protect the equitable charges against subsequently granted (including by way of charging order) equitable interests but only against subsequent registered dispositions (transfers and legal charges). If those registrations had not taken place, the equitable charges (if otherwise valid and effective) would still have priority over the claimant's charging orders.

### The 2009 Asserted History and Other Documents

- 35. French's evidence given in witness statements alone (as French, during the trial before me, first became mentally incapable and then died before he could give oral evidence) was that: in 2008 Jared had said he was in financial difficulty and asked for a loan which was to be repaid in the future, and that French transferred £48,000 on 27 November 2008; in early 2009 French was told that all of Jared's accounts had been frozen by a freezing order made by the court; Jared then asked for assistance with legal fees and said that a charge could be put on the Properties so that the legal fees were secured; and French transferred £10,200 as then requested and a further £5,000 on 31 March 2009.
- 36. French said that he had signed two versions of the French Loan Agreement (dated 16<sup>th</sup> December 2009 and 17<sup>th</sup> December 2009, the latter because Jared or Penny had said there was some issue about signing off the first) and received a copy of the French Charge signed by Jared and Penny and following that transferred a further £25,000 to BWB as a further loan.
- 37. French asserted in his witness statements that all of those sums came from his own money. French also said in his witness statements that in 2003 he had invested in a property investment project in Dubai through Jared and had received £108,000 on its liquidation in 2008 ("the Dubai Monies").
- 38. French said that he had left the documentation up to his family and BWB and assumed that BWB were satisfied that what was being done was legitimate.
- 39. French also produced a manuscript note of his which is headed "Solicitors 12 March 2009". That contains bank details for BWB and Oakley's email address, and a schedule of payments which (which three figure numbers each time) states "Repaid 21 Jan 09 £48,000.00; Sole 12 March 09 £10,200.00; Sole 31 March 2009 £5,000.00; Joint 6 Jan

10 £25,000.00; 31 Jan 09 £15,000". French stated that he could find no record or bank statement of the £48,000 having been repaid. However, French accepted through solicitors (see the fourth witness statement of his solicitor Adrian Gillan ("Gillan") of 1 December 2022 at paragraph 28) that the £48,000 was repaid and it is not part of the claims of the French Estate.

- 40. Heaphy's evidence given in witness statements and oral evidence was that Jared approached him in 2009 and asked for monies to fund Jared's legal fees saying that there would be a loan agreement that protected the money.
- 41. Heaphy said that, following that discussion, in mid-2009, Heaphy met with Oakley at a point when Heaphy knew that Jared was subject to a freezing injunction and was told that BWB had been granted a charge, that Heaphy would be granted security over properties and that it would all be legal. Heaphy produced bank statements verifying his payments to BWB of £9,999 on 1 June 2009 (and Heaphy said that he handed that cheque to Oakley at his meeting with Oakley), £5,000 on 18 September 2009 and £10,000 on 15 January 2010.
- 42. Heaphy said that he signed the Heaphy Loan Agreement in late December and at some point, probably in January 2010, took the signed documents, including the Heaphy Charge which he would have received from Jared, with the further £10,000 cheque, to and gave them to BWB (although probably not to Oakley).
- 43. On 26 January 2010 and following submission of application forms UN1 dated 21 January 2010 by BWB (acting by Gunson), unilateral notices were registered on the titles of each of the Properties in relation to the French Charge (said to be "of 31 December 2009") and Heaphy Charge (said to be "of 31 December 2009"). The same occurred in relation to equitable charges said to have been created in favour of Drayton (also "of 31 December 2009"). However, none of the Charges (and no copies of them) were delivered to (or kept by) the Land Registrar with the UN1 forms or otherwise.

# The 2009 Correspondence between BWB and MDR

- 44. There is before me material correspondence between BWB and MDR relating to these matters in 2009.
- 45. On 27 April 2009 BWB wrote to MDR referring to the Properties and stating:
  - "[Jared] intends to fund further legal expenses by accepting a loan secured by a charge over the equity in Beacon Hill. [Jared's] father-in-law [i.e. French] is willing to loan moneys to [Jared] on this basis. Other third parties may be willing to make similar loans to him in the future. Please confirm that your client has no objection to [Jared] entering into such arrangements in order to fund his legal expenses."
- 46. Then on 1 May 2009 BWB wrote to MDR:
  - "... In particular, please confirm that your clients does not object to our client [i.e. Jared] borrowing funds from third parties to fund his legal expenses with such loans secured against the equity in Beacon Hill. Whilst [the claimant's] consent to such loans is not needed under the terms of the freezing order and you may therefore feel that it is unnecessary to provide it expressly [Jared's] potential funders have asked him to obtain such confirmation. We should therefore be grateful if you would take [the claimant's]

instructions as a matter of urgency in this regard and revert to us by midday on Tuesday 5 May 2009."

47. BWB wrote further to MDR on 4 June 2009 stating:

"On the issue of funding, our client has received a loan from his cousin Mr Andy Heaphy of £9,999 to be used towards his legal expenses. This sum has been transferred from Mr Heaphy to our client account and will be secured by a charge against the equity in Beacon Hill. For the avoidance of doubt, the sums loaned to [Jared] by his father-in-law Mr Jim French (and any other third parties) will be secured in the same way."

48. MDR responded to this in a letter of 4 June 2009 stating:

"We note that you say that Mister Andy Heapy (sic) has made a loan of £9,999 to your client for his legal expenses and that this sum has been transferred to your client account and will be secured by a charge against the equity in Beacon Hill. Our letter of 30 April 2009 [which has not been put in evidence before me] was entirely clear as to our client's position as to any such loans to be made to your client. As requested in that letter please inform us of the terms of the loan agreement and the terms of the security and provide to us copies of all proposed documents in this regard so that we may consider them in advance of their being granted... We note that you state that the sums loaned to your client by his father-in-law will be secured in the same way. Again we refer to you to the information requested in our letter of 30 April 2009 and request that it now be disclosed, together with copies of all documents."

49. BWB replied by letter of 23 June 2009 stating:

"As you're aware [Jared] has been loaned money to fund his legal representation by Mr Heaphy and Mr French. He has agreed in principle to take a further loan of £25,000 from [Leahy] to be secured by an equity charge over [Jared's] interest in Beacon Hill. It is intended that all other loans will be secured in a similar manner... We are not aware of any authority which would require Jared to disclose details of the terms on which these loans are made or copies of associated documentation. If you believe that such authority exists please let us know..."

- 50. MDR replied by letter of 26 June 2009 referring to the terms of the WFO and seeking information as to who had made various payments relating to the Properties and otherwise.
- 51. BWB wrote to MDR on 6 August 2009 stating that:

"We write to give you notice that [Jared] intends to dispose of part of his interest in Beacon Hill by way of a charge of security for this firm's costs in the sum of £60,000. We will confirm the position as and when the documents have been executed and the appropriate paperwork lodged with the Land Registry... We can also confirm that it is [Jared's] intention to secure funding from third parties secured against his beneficial interest in one or more of the properties. We will obviously let you know as soon as we have further details."

52. MDR replied on 13 August 2009 referring to proposed BWB security and stating that:

"It is of course a matter for you and your client to satisfy yourselves that the proposed transaction is appropriate from the perspective of insolvency law and that there are no

proprietary claims of our client to the assets with which you propose to deal. In advance of the proposed charge being executed please inform us who the charge will be in favour of from the terms of that security and provide copies of the relevant documents. In respect to the legal fees the charge is intended to cover have those fees already being incurred or are they yet to be incurred? Please confirm either the actual or projected period that they are intended to cover. In relation to [Jared's] intention to secure funding from third parties, we await receiving further details from you in good time before any assets are secured."

### 53. On 22 September 2009 BWB wrote to MDR saying:

"We write to inform you that [Jared] intends to provide security for monies advanced or to be advanced by way of loans in respect of litigation expenses from Mr J French and Mr C Heaphy. The exact details are yet to be agreed but our client anticipates that both Mr French and Mr Heaphy will advance up to a total of £50,000 each, such loans to be secured against [Jared's] interests in one or more of the properties of which your client is aware. We will notify you once terms have been agreed and the appropriate documentation lodged with the Land Registry."

# 54. MDR responded to BWB on 24 September 2009 writing:

"Our client is concerned that within in the last two months your client has granted or is intending to grant security over properties to a total sum of up to £160,000 in respect of legal expenses. We also note that your client has previously received loans of £25,000 and £9.999, an additional loan from Mr French (in an unknown amount) and has spent [reference was made to further sums and a costs budget]... Our client is concerned that the total of all the sums referred to in this letter almost reach the total of your client's costs estimate and is also understandably concerned that such a large proportion of this sum appears to be being catered for within such a short period. Please provide a full explanation for this. Please confirm whether the additional sums that your client is now seeking from Messrs French and Heaphy are in respect of legal costs that have already been incurred or are to be incurred and if in respect of both how they are split. In addition before any sums are advanced please confirm the exact sum to be advanced and the precise property on which it will be secured."

# 55. On 6 October 2009 MDR wrote to BWB to ask questions regarding Jared's income and borrowings and added:

"Your client of course requires our client's consent to the loans and charges proposed. Accordingly, please provide the information requested above so that our client can properly consider the position."

### 56. BWB wrote on 17 November 2009 to MDR to say:

"We write to inform you that our client intends to provide this firm with security in respect of his liability for our costs in the form of a charge in respect to Beacon Hill. We have agreed in principle that that such security will be in respect of our costs up to the sum of £135,000. Our client is still in the process of arranging for appropriate security to be given to a number of third parties who had loaned funds to him. Such security is likely to be in the form of charges over his beneficial interest in one or more of the properties in which he has an interest. We will write to you separately with further details."

57. BWB then wrote on 27 November 2009 to MDR. They said:

"You have asked us in a number of occasions to provide information concerning [Jared's] sources of income. Save to the extent that [Jared] wishes to use such income towards his ordinary living expenses and his legal advice and representation we do not consider that he is obliged to provide you with this information. Paragraph 11(2) of the [WFO] provides that he is not prohibited from dealing with or disposing of any of his assets "in the ordinary and proper course of business"."

Reference was then made to various income receipts of Jared.

It was then said that:

"Loans [Jared] has received a number of loans from third parties (Mr Jim French, Mr Andy Heaphy, Mr Paul Drayton and Mr Adrian Faiers) details of which are set out below: [there then following a table which included the French Pre-Charge Loans and from Heaphy the sums of £9,999 on 1 June 2009 and £5,000 on 18 September 2009]... We understand that Mr French is prepared to loan [Jared] up to £100,000, and that Mr Heaphy and Mr Drayton are also prepared to loan further sums."

"[Jared] intends to provide security in respects of these loans against his beneficial interest in his assets, including [the Properties]."

Reference was made to the loans from Heaphy and the fourth and fifth amounts from French having been used to assist with legal expenses, the first amount from French having been used for living and relocation expenses in the US, and the second and third amounts from French having been used in relation to a mortgage payment on Beacon Hill and to meet various expenses in the UK.

They also stated:

"You are, of course, aware that [Jared] has granted this firm a charge up to the value of £60,000 secured against his interest in the property at Beacon Hil, and that that cover will be extended to £135,000."

58. MDR responded by letter of 11 December 2009 which referred to a foreign exchange entity called "Piagi" of which the sole shareholder and director was Drayton and asked about Piagi and any involvement of Jared in it. They went on to say that:

"In respect to the third party loans we should say at the outset that we are surprised that third parties should be willing to lend your clients such large sums. Your client has already received loans in excess of £110,000 and you state that Mr French is prepared to learn your client up to a further £100,000 and that Mr Heaphy and Mr Drayton are also prepared to load further sums. Please provide all documentation relating to such loans including the terms of such loans.

Furthermore monies received by [Jared] from third parties of course become an asset of your client's and are therefore caught by the [WFO]. He is not entitled to deal with those monies except in the ordinary course of business. Furthermore, before spending any money on living expenses up to the limit provided for, or on legal advice and representation, [Jared] is required pursuant to paragraph 11(1) of the [WFO] to disclose where the money is to come from. We are therefore entitled to be informed of any payment that is proposed to be made to give our client the opportunity to consider it.

However, despite those clear requirements, in respect of the majority of the loans referred to in your letter we were not given any information whatsoever. We are considering this further and fully reserve our client's rights in this respect.

You also state that [Jared] intends to provide security in respect of those loans against his beneficial interest in his assets including [the Properties]. Under the [WFO] your client is clearly not entitled to provide any such security without our client's consent. Furthermore, and again for the avoidance of doubt, we also put your client on notice that he cannot repay any loan from third parties without our client's consent..."

"... In the light of our client's serious concerns regarding your client's compliance with the [WFO], please may we hear from you by return."

# 59. BWB responded by letter of 16 December 2009 to say:

"We write further to previous correspondence regarding the loans that [Jared] has been required to take out. We have previously advised you of the times amounts and parties involved in such arrangements and write to confirm that, following further discussions between them, [Jared] will be providing security in respect of funds advanced (and to be advanced to him) by Mr French and Mr Heaphy up to the sums of £125,000 and £75,000 respectively. These loans will be subject to a charge and secured against [Jared's] property interests.

You recently suggested that our client requires your client's consent to these arrangements. We disagree. Our client has given your client such notice as is required under the [WFO] and your client is required to co-operate in ensuring that there are no delays or difficulties in respect to those third parties registering their interest at the Land Registry. Please confirm, unequivocally, that your client will not do any act or make any omission that will prevent those third parties from registering their interests."

### 60. MDR replied to BWB on 18 December 2009 to say:

"Your client is clearly prohibited under the terms of the [WFO] from disposing of or dealing with or diminishing the value of his assets. Providing security over his properties in respect of third party loans clearly falls within that prohibition... [they then referred to the proposed sums to be advanced by Mr French and continued]... However, you have not informed us what the further monies to be advanced by Mr French are to be used for or exactly how much more is being advanced. Please do so by return. Furthermore you have not provided sufficient information about what the loans have been used for. In particular we require further information about... [they identified various aspects]... Please provide this information by return.

In respect of Mr Heaphy you informed us in your letter of 27 November that Mr Heaphy had loaned [Jared] approximately £15,000. However, you now say that he will be advancing up to a further £60,000. Again you have not informed us what those further monies are to be used for or exactly how much more is being advanced. Please now do so."

[Reference was then made to Piagi and Jared's possible work in the USA]

"As we have previously stated, your client is clearly not entitled to provide any security without our client's consent and similarly we need to be informed of any payment your client proposes to make from monies loaned from third parties to give our client the

opportunity to consider it. Our client will of course need a full response to all of the issues raised above in order to consider the position further. In the meantime, all of our clients rights are reserved."

### 61. BWB responded by letter of 22 December 2009, stating as follows:

"As you are aware the [WFO] does not prohibit our client from spending money on living expenses and a reasonable sum on legal advice and representation. The [WFO] requires our client tell you where the money has come from prior to it being spent and that is what our client has done. Further, the [WFO] does not prohibit our client from dealing with or disposing of any his assets in the ordinary and proper course of business.

We consider that our client is entitled to take out loans on commercial terms to enable him to pay for living expenses and to fund legal advice and representation, and is entitled to give appropriate security in respect of them, and we are instructed at the only basis upon which Mr French and Mr Heaphy are willing to provide further funding is that they have security in place.

In respect to Mr French you are aware that money was lent to our client in November 2008 well before the [WFO] was granted. We have requested on a number of occasions that you provide authority to support your client's claim to be entitled to the further information and documents your client has demanded, but you have declined to provide any.

For the avoidance of doubt, the arrangements with Mr French and Mr Heaphy involve written agreements on commercial terms, and it is a term of the agreements that any funding to be advanced may only be applied towards our client's living expenses or to fund legal advice and representation. Our client has confirmed that he will continue to provide your client with details of further funds that he has received and how they are applied.

In the meantime, we consider that there are no grounds upon which your client can properly object to our client providing security to third parties that are willing to loan him funds which are to be spent on living expenses and legal representation.

You (sic) client is also aware that this firm has taken security in respect of Beacon Hill, yet we are not aware of your client ever raising any objection. Indeed, we are not aware of any proper grounds on which he could object. Of course, if he has any objections you should have informed us of them months ago and must now do so by return.

It is clear to us that all these arrangements are ones which the court would, if asked, confirm are permissible. Accordingly if your client maintains that our client is not permitted to provide security for funding in the manner proposed, our client will have little option but to apply to court for an Order authorising the same, in which case he would be seeking costs against your client on an indemnity basis..."

[BWB went on to say that unless they heard with an acknowledgement that the transactions were permissible by 4:00 PM on 23 December 2009 they would issue an urgent application for a variation of the WFO and appropriate declarations, and they also warned the trial might have to be adjourned in those circumstances.]

# 62. MDR replied by letter of 23 December 2009 ("the December Letter") stating:

"We accept that the [WFO] does not prohibit your client from spending money on living expenses up to the agreed weekly limit and a reasonable sum on legal advice and representation. We further accept that, once notice has been given as to where those monies are to come from, our client's consent is not necessary for legitimate transactions (including the provision of security) which fall within those exceptions to the WFO. We further accept that the WFO does not prohibit your client from dealing with or disposing of any of his assets in the ordinary and proper course of business.

Notwithstanding this, you have asked our client to provide express confirmation that he does not object to your client effecting charges over his property in order to grant security to Mr French and Mr Heaphy for alleged commercial loans. In effect this amounts to asking our client to agree that these transactions are legitimate and in the ordinary and proper course of business. However, your client has refused to provide our client with basic information about the transaction and his relationship with these individuals (despite our repeated requests to be provided with that information).

In particular, you have still not informed us of the specific amount being advanced/secured. Although you have now asserted that the money should be used for living expenses and legal expenses, you have not informed us how the monies are to be split between those two purposes. We remind you that your client is only entitled to spend money on living expenses up to the agreed weekly limit. You also have not provided us with information as to whether the money should be used to cover legal costs already incurred or to be incurred or the split between them. We further note that you have not provided us with your client's Listing Questionnaire costs estimate. Please do so by return.

Furthermore, you have not provided copies of the documentation relating to the alleged loans. Our client is therefore not in a position to satisfy himself the agreements are on "commercial terms" as you assert. For example, our client does not know what the interest provisions under these agreements are. You have also yet to answer our clients queries regarding Transparent Trading, Piagi and your client's US visa.

In the absence of such basic information, our client is unable to satisfy himself as to whether the proposed transactions with Messrs French and Heaphy are legitimate or not. In these circumstances, your request for express confirmation from our client is inappropriate. Our client is not in a position to offer you or your client any assurances regarding the proposed transactions.

As we say above, we accept that our client's consent is not necessary for legitimate transactions which fall within the exceptions to the [WFO]. It is a matter for you and your client to satisfy yourselves that the transactions with Messrs French and Heaphy are legitimate transactions. If your client does go ahead with the proposed transactions, our client reserves all his rights in the event the transactions are subsequently revealed not to be legitimate.

Regarding your threatened application, we consider it entirely unreasonable to have demanded a response to your letter (received after close of business yesterday) by 4:00pm today. In light of what we say in this letter, we do not consider that such an application is necessary. However, if you do proceed to make an application, we will require full notice of that application will seek the costs from your client."

- 63. BWB responded by letter of 12 January 2010 to say "the further funds are being advanced by Mr Heaphy and Mr French in respect of Counsel's fees in the sum of £10,000 and £25,000 respectively."
- 64. MDR replied by letter of 28 January 2010 to say:

"We refer to your letter dated 12 January 2010 regarding further funds being advanced by Mr Heaphy and Mr French... We have already set out our client's position regarding third party loans in our letter dated 23 December 2009... Please confirm that the funds referred to in your letter of 12 January are part of the figures referred to in your letter dated 16 December and they are the only funds that have been advanced to your client since your letter dated 27 November 2009."

### Further 2010 and Subsequent Events

- 65. Following the obtaining of the final charging orders by the claimant in 2010, Penny (and Jared) instructed new solicitors Nigel Broadhead Mynard ("NBM") and sought to have Beacon Hill sold. The claimant sought to enforce them and to have the properties sold. NBM sought from MDR, for the claimant, to agree to a sale in view of the existence of the claimant's final charging order over that property.
- 66. By letter of 21 June 2010, MDR sought information as to the proposed sale and the various charges over the property and by letter of 16 July 2010 NBM referred to a first charge and an equity of a little less than £300,000 and that charges existed in favour of French, Heaphy and Drayton. By letter of 22 July 2010 MDR sought information as to and copies of those charges and as to other matters.
- 67. NBM responded by letter of 7 September 2010 to say that BWB were owed £139,606.04, Heaphy was owed £54,748, Drayton was owed £7,014.03 and French was owed £116,896.50. MDR sought further information by letter of 20 September 2010. By letter of 23 September 2010 NBM provided various documents saying "Please find enclosed copies of the Charges that relate to this property, in particular the ones for [BWB, French, Drayton and Heaphy]... As you can see from the documentation provided that once the Charges to the lender and [BWB] are paid there will be no funds left to discharge the debts in respect of [Drayton, French and Heaphy]."
- 68. MDR responded by a letter of 13 October 2010 referring to past correspondence and telephone calls to say that they had only been provided with unsigned loan documentation in relation to French, Drayton and Heaphy which did not have the dates contained in the unilateral notices.
- 69. BWB then became involved on behalf of Penny and Jared. On 15 October 2010 they sent copies of the Charges (BWB, French, Heaphy and also Drayton) to MDR. By email of 29 October 2010 they stated to MDR that the BWB Charge was on the basis that Penny's interest would only be called upon as security if Jared's was insufficient; that Jared's interest in Beacon Hill would be consumed by BWB's entitlement; and in the circumstances the rest of the Beacon Hill monies would go to Penny. They followed this with a letter of 5 November 2010 restating that, and saying that French had decided to take £11,000 from the proceeds of Beacon Hill and to look to Jared's interest in the others of the Properties to satisfy the rest of his secured debt.
- 70. MDR then allowed the sale of Beacon Hill to proceed with BWB being satisfied from the proceeds and Jared's share, any balance of Jared's share being taken by French, and

the balance (being Penny's 50% share of the beneficial interest equity) being paid to Penny. It is common-ground that that took place with the assent of French and Heaphy who allowed the sale and that distribution to take place notwithstanding their asserted equitable charges (and which they continued to assert against the others of the Properties).

- 71. The others of the Properties were each subsequently sold either by first mortgagees or under an order of the court. The proceeds were paid into court and the claimant applied for them all to be paid out to him by Application Notice dated 9 April 2020.
- 72. By order of 29 June 2020, I directed that the sum of £190,000 would be reserved from the sale proceeds (with the balance being paid to the claimant) in relation to French's and Heaphy's claims (Drayton having abandoned his) and that there should be statements of case, disclosure and witness statements in relation to the issues of whether the respondents had security in priority to the security and rights of the claimant to the proceeds of the Properties.
- 73. The statements of case have gone through various iterations and amendments. By order of 18 January 2023, I permitted the claimant to amend his statement of case to advance a claim under section 423 of the 1986 Act. I have subsisting applications before me by both sides to amend and including to introduce asserted limitation defences. In relation to these, the matter has been fully argued out, but the amendments proposed are "late" and I therefore have to consider carefully whether it is just to grant permissions allowing them to be introduced (and where there may various types of relevant prejudice including that a party has proceeded in litigation to an advanced stage on a potentially false basis) see White Book notes 17.3.8 and the cases cited therein.
- 74. There have also been numerous applications made (particularly, but not only, by the claimant) against the respondents and also BWB for disclosure and further information, and also to amend statements of case.
- 75. In relation to disclosure, Jared has refused to waive legal professional privilege and BWB has only provided limited disclosure as a result, and the claimant complains that French and Heaphy have only provided limited and late disclosure of bank statements, and French and Heaphy complain that the claimant has failed to obtain material documents (especially bank statements) from the liquidator. For reasons to which I will come, I do not think that the disclosure issues with regard to bank statements have any particular materiality to what I have to decide. It is, however, important to note that only a limited number of documents are available with regard to the genesis of the French and Heaphy Loan Agreements and the French and Heaphy Charges.

# The Other Documents and material relating to the asserted Loan Agreements and Charges

- 76. There are a number of additional documents which have been put before me which relate to the creation of the French and Heaphy Loan Agreements and Charges. I note that I do not have originals of the signed versions of them which are relied upon by the respondents.
- 77. There is an email from Oakley to Jared of 16 December 2009 which states that it "attaches as amended" all four documents. Oakley has confirmed in a witness statement that he was involved in the drafting of these documents. The email refers to attachments as:

"equitbabechargeheaphyfrench000681275,doc loanagreementheaphyfrench000681275.doc; loanagreementfrench00710449-V2.doc and draftchargefrench000710992-V1.doc"

- 78. The first of these is an unsigned version of the Heaphy Charge which:
  - i) Has the date as "dated [ ] December 2009"
  - ii) Has "Christopher Heaphy" as "the Lender"
  - iii) Bears computer file reference "206367/00001/000681275/Ver.01"
- 79. The second of these is an unsigned version of the Heaphy Loan Agreement which:
  - i) Has at the top "[Christopher Heaphy of [insert address]] [insert email address]"
  - ii) Has the date on the first page as "dated [ ] December 2009"
  - iii) Has in clause 1 "The principal amount of £50,000... I have already advanced you these sums which you acknowledge receipt of:- the sums of £9,999 in June 2009 and £5,000 in September 2009"
  - iv) Does not have in clause 4 the words "For the avoidance of doubt, the Loan will, if I need to call on the security, be repaid first from the proceeds of sale of your beneficial interests in the properties set out in the schedule. Penny's interest will only be utilised in the event that your interests realise insufficient funds to repay the Loan."
  - v) Has on the signature page "Christopher Heaphy" and "Dated [ ] December 2009"
  - vi) Bears computer file reference "206367/00001/000681276/Ver.01"
- 80. Heaphy's evidence was that he does not know of anyone called "Christopher Heaphy". No-one has identified any relevant individual with the name of "Christopher Heaphy".
- 81. The third of these is an unsigned version of the French Loan Agreement which:
  - i) Has at the top "James French of 23 Rectory Lane... [insert email address]"
  - ii) Has the date on the first page as "dated [ ] December 2009"
  - iii) Has in clause 1 "The principal amount of £125,000..."
  - iv) Does not have in clause 4 the words "For the avoidance of doubt, the Loan will, if I need to call on the security, be repaid first from the proceeds of sale of your beneficial interests in the properties set out in the schedule. Penny's interest will only be utilised in the event that your interests realise insufficient funds to repay the Loan."
  - v) Has on the signature page "Dated [ ] December 2009" and then the Schedule of Conditions Precedent and the Properties which appears in the Heaphy Loan Agreement

- vi) Bears computer file reference "206367/00001/0000710449/<del>Ver01</del>/<del>Ver02</del>"
- 82. The fourth of these is an unsigned version of the French Charge which:
  - i) Has the date as "dated [ ] December 2009"
  - ii) Has "James French of 23 Rectory Lane..." as "the Lender"
  - iii) Bears computer file reference "206367/00001/0000710992/Ver.01"
- 83. Oakley also says in his witness statement that BWB's electronic file suggests that Jared called Oakley at some point on 17 December 2009 and that as a result Oakley amended the draft Loan Agreements and sent them to Jared by email timed at 17.43pm on 17 December 2009. Those revised drafts:
  - i) Altered the previous draft Heaphy Loan Agreement so that it:
    - (a) Now had at the top "Andrew Heaphy [with his address and email as in the signed Heaphy Loan Agreement]"
    - (b) Now had the date on the first page as "Dated 16 December 2009"
    - (c) Still had in clause 1 "The principal amount of £50,000... I have already advanced you these sums which you acknowledge receipt of:- the sums of £9,999 in June 2009 and £5,000 in September 2009"
    - (d) Now had in clause 4 the words "For the avoidance of doubt, the Loan will, if I need to call on the security, be repaid first from the proceeds of sale of your beneficial interests in the properties set out in the schedule. Penny's interest will only be utilised in the event that your interests realise insufficient funds to repay the Loan."
    - (e) Now had on the signature page "Andrew Heaphy" and "Dated [ ] December 2009"
    - (f) Still bore computer file reference "206367/00001/000681276/Ver.01"
  - ii) Altered the previous draft French Loan Agreement so that it:
    - (a) Now had at the top "James French of Brookside... [and with his email address"
    - (b) Now had the date on the first page as "dated [ ] December 2009"
    - (c) Still had in clause 1 "The principal amount of £125,000..."
    - (d) Now had in clause 4 the words "For the avoidance of doubt, the Loan will, if I need to call on the security, be repaid first from the proceeds of sale of your beneficial interests in the properties set out in the schedule. Penny's interest will only be utilised in the event that your interests realise insufficient funds to repay the Loan."
    - (e) Now had a the signature page which ends with Jared's name; and on the next page "Dated [ ] December 2009" and then the Schedule of

- Conditions Precedent and the Properties which appears in the Heaphy Loan Agreement
- (f) Now bore computer file reference "206367/00001/0000710449/Ver02" with some form of tracked change altering it.
- 84. There is a BWB ledger note of 19 February 2020, seemingly prepared by DeJongh which records "... brief meeting with AH (letter signed but not witnessed)..." ("the February 2020 BWB File Note"). It also refers to a "query from CK" which may relate to Ciaran Keller (counsel for Jared at the Flaux J trial) but which I see as being immaterial.
- 85. There is an email from Oakley to Penny sent to Jared's and Penny's email addresses of 3 September 2010 headed "Re: Sale of Beacon Hill Linday v O'Loughnane" which sets out the monies received by BWB from French (£10,200 on 16.3.2009, £5,000 on 31.3.2009 and £25,000 on 6.1.2010) and Heaphy (£9,999 on 1.6.2009, £5,000 on 18.9.2009 and £10,000 (by cheque) on 13.1.2009).
- 86. There is an internal file note of 22 October 2010 of a Matthew Hancock of MDR which refers to the receipt of unexecuted loan agreements from BWB for French, Heaphy and Drayton.
- 87. The first was an unsigned version of the signed French Loan Agreement which only differs from it in having a final page which starts "Dated 17<sup>th</sup> December 2009" and then continues with the Schedule of Conditions Precedent and the Properties which appears in the Heaphy Loan Agreement.
- 88. The second was an unsigned version of the signed Heaphy Loan Agreement which is otherwise identical to it but with computer file reference "Ver.01". There was also a similar unsigned version of a Drayton Loan Agreement.
- 89. There are (which appear to have been sent by NBM or BWB to MDR in October 2010) also:
  - a signed by Jared (but not by French) signature page (but ending before the date) of some version (it appears to be the version dated 16<sup>th</sup> December 2009 to which I refer below as having been provided by Gillan) of the French Loan Agreement ("the MDR French Page") but which is not a copy of the French Loan Agreement relied upon by French before me;
  - ii) a signed by Jared (but not by Drayton) page of a Drayton Loan Agreement with a date of 17<sup>th</sup> December 2009 and the start of a Schedule (and which is similar to the signature page of the Heaphy Loan Agreement); and
  - iii) a signed by Jared (but not by Heaphy) signature page with a date of 17<sup>th</sup> December 2009 and the start of a Schedule and which seems identical to the signature page of the Heaphy Loan Agreement although Jared's signature takes a different form to that which appears on the version of the Heaphy Loan Agreement which is signed by both Heaphy and Jared, and there also appears at the bottom a computer file reference which looks like (but the final figure is unclear) "206367/0001/000681276/Ver.01".

- 90. There was attached to the third witness statement of Gillan of 5 November 2021 (and which Gillan, who no-one sought to call to give oral evidence or to be cross-examined said had been supplied to him by French but had overlooked when giving initial disclosure):
  - i) a version of the French Loan Agreement dated 16 December 2009 signed by French and Jared. It's terms are identical to the French Loan Agreement (dated 17 December 2009) except that:
    - (a) The pagination is different so that clauses appear on different pages from the later document
    - (b) The principal sum in clause 1 is £125,000 and not the £150,000 in the later document
    - (c) The signature page appears to be a fax print-out embossed with "15/10 2010 FAX 01732 459581 SEVENOAKS KALEIDOSCOPE 003" and to be the third page of a fax transmission from Sevenoaks library ("the Kaleidoscope Fax"). The respondents say that they do not have the first two pages. The signatures are of French and Jared but Jared's signature is somewhat different from the form in which it appears on the 17<sup>th</sup> December 2009 signed French Loan Agreement document relied upon by the French Estate
    - (d) There is a final page. It starts with "Dated [ ] December 2009" and there is then a Schedule in the same form as in the Heaphy Loan Agreement
    - (e) It has at the bottom of each page (except for the signature page where the bottom is unclear) the computer file reference (which may be incomplete) of "206167/0001/00710449/V".
  - ii) a signed version of the French Loan Agreement (dated 17<sup>th</sup> December 2009) which is identical to the French Loan Agreement (signed dated 17<sup>th</sup> December 2009) relied upon by the French Estate except that under the signatures and the date on the signature page commences a Schedule in the same form as in the Heaphy Loan Agreement and which proceeds over a further page. The type size on the two documents (this signed version and the version relied upon by the French Estate) appears different although this may be a copying matter
  - there is a separate page of what appears to be a signed by French alone signature page of the version of the French Loan Agreement dated 16<sup>th</sup> December 2009 where French's version of the signature is different from that which appears in the full document and which appears to be a fax print-out embossed with "15/10 2010 FAX 01732 459581 SEVENOAKS KALEIDOSCOPE 001"
  - there is a separate page of what appears to be a signed by French alone (and not by Jared) signature page of a version of the French Loan Agreement dated 17<sup>th</sup> December 2009, except that under the "Dated 17<sup>th</sup> December 2009" there has the start of the Schedule as appears in the Heaphy Loan Agreement, where French's version of the signature seems very similar (at least) to that which appears in the full document; and which appears to be a fax print-out embossed with "15/10 2010 FAX 01732 459581 SEVENOAKS KALEIDOSCOPE 002".

91. It is further common-ground, and in any event demonstrated by the emails and other documents, that in mid-December Jared was in the USA.

### The Witnesses

- 92. I have a witness statement from Oakley who attended the trial ready to give evidence but where the parties eventually agreed not to call him, and so that he was not cross-examined. He said that he was involved in the drafting of the Loan Agreements and Charges, and in particular those attached to the BWB email of 16 December 2009; and that he had sent revised loan agreements to Jared by email on 17 December 2009 and which were the last amendments that he, Oakley, had made to the loan agreements; and that he, Oakley, had not made any further amendments to them. Oakley and BWB have made clear that they do not have any originals of the signed Loan Agreements or Charges.
- 93. I heard the claimant, Jared (by remote link from the USA) and Heaphy give oral evidence. Each gave sworn evidence, doing so by examination or statements in chief, verifying their various witness statements, was cross-examined, re-examined and answered questions from me.
- 94. I have reminded myself that with regard to witnesses:
  - i) The Court's appreciation of a witness and of the reliability or weight of their evidence (and each part of it) is an holistic matter, involving considering all of their evidence as given together with the surrounding material (here including both documents and the inherent likelihoods of events), which is merely part of the wider holistic process of weighing together all the evidence and material before the court (including both documents and the inherent likelihoods of events) when deciding issues of fact (as to which I deal further below)
  - ii) Even where a witness is saying what they believe to be the accurate truth; the process of human memory is fallible and that it is easy for a witness to have misremembered or to have created a false memory by, for example, continually thinking about the subject or trying over-hard to remember it or discussing it with others or simply through the ordinary processes of the subconscious including the natural desire (to some extent) to justify oneself and one's past conduct. This is all the more so when events have taken place a substantial time ago (and in this case various key events took place over 10 years before the application with which I am dealing was issued), or were fleeting in nature, although it is possible for witnesses to refresh their memories helpfully, for example from contemporaneous documents. However, none of this means that a recollection should be simply disregarded as the memory may be perfectly genuine, and there may be particular reasons why a particular conversation or event may have "stuck", and accurately so, in a person's mind
  - iii) The actual giving of their evidence by a witness is important, and it needs to be assessed. Although there are dangers in seeking to assess a witness' demeanour when giving evidence as such an assessment may be affected by numerous factors (including cultural, educational, psychological and psychiatric), there may be matters affecting weight including whether and how they are prepared and able to engage with the questioning process

- iv) The mere fact that a witness is being actually or apparently evasive does not mean that the witness is being deceitful, and there may be alternative explanations including, for example, embarrassment; or simply (and which is often to be expected when relevant events occurred a long time ago) cannot remember
- v) The mere fact that a witness is being actually, or apparently, deceitful (or just evasive) regarding one or more matters does not necessarily mean that the witness is being deceitful (or just evasive) regarding other matters. It may affect the weight to be given regarding what is being said about those other matters, but a witness may often lie about one event while telling the truth about others.
- 95. The claimant gave his evidence calmly and impressively, answering the questions which were put to him. He was regarded as an impressive witness of truth by Flaux J. Although he is clearly dedicated to his various campaigns of seeking to recover monies for himself in relation to the frauds practised on him by Jared, and also, I think, for others who have been defrauded by Jared (or simply lost monies in relation to FXS and Global), and regards both Jared and Penny as having concealed assets from him, I also regard him as a witness of truth who believes what he said in evidence.
- 96. However, I regard the claimant's evidence, beyond its verifying various documents, as being of little assistance in relation to the issues before me. Those matters relate to documents and dealings between Jared, French and Heaphy and with which the claimant was not concerned.
- 97. Jared gave his evidence for nearly a day. He said that the French and Heaphy Loan Agreements and Charges were genuine. He said that his previous assets disclosures during 2009 had been genuine and that he had complied with the WFO; and that he now had no assets or monies at all now but relied on monies provided to him by Penny. He refused to answer questions regarding alleged dishonesty on his part on the grounds that they were irrelevant or hypothetical and/or that he was entitled to the benefit of privilege against self-incrimination (the taking of which benefit is not a reason for questioning the veracity of his evidence but simply a common-law and human rights privilege and right).
- 98. I find myself unable to place any reliance upon Jared's oral evidence and witness statements, in particular as:
  - i) Jared has already been held by Flaux J to:
    - (a) Have committed fraudulent misrepresentations
    - (b) Have told lies to both the claimant and the court
    - (c) Have knowingly misapplied known client and company monies including to have taken them for himself
    - (d) Be arrogant, shameless and a liar
    - (e) Have deliberately and in order not to reveal the true state of affairs caused FXS not to be audited, in known breach of company law, and not to report material matters to the Revenue, in order to avoid paying tax

- (f) Have caused Global to carry on FXS's operations when FXS became insolvent without telling customers what was happening
- (g) Have joined in with a dishonest scheme with Leahy to hide assets from Leahy's wife. In relation to Leahy, Jared blamed Leahy for stealing Jared's identity and cast Leahy as the sole wrongdoer, but Flaux J had held otherwise and that is binding on me

#### ii) Before me Jared:

- (a) Would often not answer questions (I ignore those which he did not answer due to his taking the privilege against self-incrimination)
- (b) Would engage in hyperbole. In particular his assertions that he had absolutely no money whatsoever seemed incredible
- (c) Continued to deny that client monies were held by FXS on trust
- (d) Equivocated, in my view, when asked questions as to how he had come to assert to USA immigration authorities that he was a high earning individual. He did explain this on the basis of it being a mere hope as to what his USA operations, once they commenced, would generate, but it demonstrates a desire to tell authorities whatever would best suit him even if lacks any foundation in reality
- (e) Equivocated, in my view, when asked questions about Transparent Trading and Piagi
- (f) Had no real answer to questions from Mr Hurst regarding Jared having sought to use Leahy to evade the effect of the WFO regarding Beacon Hill
- (g) Equivocated in relation to questions from Mr Hurst asserting that Jared had sought to ensure with regard to the French and Heaphy Loan Agreements and Charges (and the BWB Charge) that: it was Jared's assets which were used (indirectly) to fund the monies paid to BWB and the legal costs; and so as to avoid Penny's monies or assets being so used; and with an intention that, if Jared lost the litigation brought by the claimant, French and Heaphy (and Penny in relation to her 50% beneficial interest in Beacon Hill) would have priority over Jared's other creditors. It seems to me obvious (and as I refer below) that Jared had had (and still has) such intentions; and his equivocation did not reflect a desire to tell the truth in an open manner
- (h) Did not supply all of his USA tax returns as required by orders which I had made. Jared contended that various of these were submitted years ago and were no longer available, and, as I cannot be sure about this although it seems to me that it is likely that he could obtain them in some form or another, I place little weight on this
- (i) Had a generally combative, rather than an open and helpful, approach and demeanour.

- 99. However, although as a result I place no weight on Jared's evidence, I am still left with the documents, the other witness evidence and the inherent probabilities (including as to how I see it as having been likely that Jared would have thought, and in consequence behaved, in the past).
- 100. Heaphy gave evidence for two days. He was an impressive witness, who seemed very keen to assist the court. He gave his evidence in an open manner, conceded where he had made various errors, and seemed to me to answer the questions put to him in circumstances where he clearly felt that he had been dragged into a dispute between others (i.e. Jared and the claimant) and regretted having become involved.

## 101. He said in particular that:

- i) Jared was a cousin and a close friend from childhood
- ii) He had limited knowledge of the court case in 2009
- iii) He met Oakley (and DeJongh) in June 2009 and he had been told that there would be loan agreement and security. He also knew that there was a freezing injunction and relied on BWB to ensure that there was not a breach of it
- iv) He would not have lent the monies had he not thought that he would have had security, and especially as he would not have been able to justify lending unsecured to his wife
- v) He had just accepted the interest rate of 4% over base which was contained in the documents provided to him
- vi) He thought that he had a telephone conversation with Jared (who was then in the USA) in mid-December 2009 with a discussion of a total possible loan of £50,000, and following which a Loan Agreement document stating that was provided to him
- vii) He had read through the documents before signing the Heaphy Loan Agreement, which he thought was on 30 December 2009 but he could not recall exactly, and had simply accepted their contents without demur. He could not explain why the Heaphy Loan Agreement and the Heaphy Charge bore various different typed dates within them. He could not explain why the Heaphy Loan Agreement referred to a total loan facility of £150,000 or a December 2009 payment of £9,999
- viii) He denied that the documents were shams, and said that anything which was wrong in them was simply an error; but that he could have complied with their wordings even if he would not have wanted to do so
- ix) He had copies of the signed documents but did not have the originals
- x) He had taken the £10,000 cheque to BWB in January 2010 and thought he had taken the signed original documents to BWB then and had seen DeJongh
- xi) He had agreed to the release of his security over Beacon Hill as he knew that he had security over the Properties and that the remaining equity belonged to Penny. He could not explain the reference to his being owed £54,748 in the

- NBM letter of 7 September 2010 which was not the result of any involvement of his
- xii) He denied that the monies he had provided were repayment of loans made to him or obligations of his
- xiii) He always expected the Properties to be sold eventually and for his to receive the monies due to him then
- xiv) If he received monies from the Properties, he would keep them and not pay them over to Jared or anyone else.
- 102. Mr Hurst has submitted that I should not accept Heaphy's evidence generally for various reasons, being in particular (although I have considered them all) the following:
  - i) Heaphy was evasive in his statements of case
  - ii) There were many inconsistencies and errors in Heaphy's evidence
  - iii) Heaphy changed his position in relation to whether he would have lent £150,000 saying first that he would not and second that he would
  - iv) Heaphy has failed to search for documents and especially any held by Jared or BWB, and failed to ask banks for documents at the initial disclosure stages, and so that Heaphy's disclosure is incomplete
  - v) It is suspicious that Heaphy only found some bank documents at a very late stage close to the trial
  - vi) Heaphy was acting in 2009 and 2010 on the instructions with and in accordance with the desires of Jared and Penny
  - vii) Heaphy had provided monies to Piagi, a company which Mr Hurst said was a front for Jared.
- 103. Mr Hurst at first said that he was not suggesting to Heaphy that Heaphy had been dishonest in 2009 or 2010. However, he did then put to Heaphy that Heaphy knew full well that the documents had not been signed in December 2009 but later, and that such had occurred only in October 2010 and which was when Heaphy had signed the Heaphy Loan Agreement. Heaphy said his recollection was of signature in December 2009.
- 104. Mr Hurst further put to Heaphy that Heaphy had not asked BWB for the originals of the signed Loan Agreements (and possibly the Charges) as Heaphy knew that they were only signed in October 2010 and had not been passed to BWB. Heaphy denied this.
- 105. Mr Hurst further put to Heaphy that Heaphy signed the Heaphy Loan Agreement not caring whether its contents were accurate or not. Heaphy never really answered that question directly, and which question was rather lost at the time, but seemed to assent to a question to the effect that he signed it "really just accepting its contents whatever it said."
- 106. I do regard Heaphy as a witness of truth in terms of his believing his stated recollections, and in particular in the light of the following:

- i) His general demeanour and conduct was of a person who believed in his answers and was seeking to assist the court
- ii) I do not see anything evasive in Heaphy's statements of case and which were drafted by counsel (Mr Pryce). Mr Hurst asserts that various matters should have been pleaded but those are matters of law for lawyers, and Heaphy's core evidence and case has been clear from the start
- iii) He was giving evidence as to matters which had happened more than 10 years before the claimant brought this application; and where he had only had a limited involvement in those matters, and at a time (2009-early 2010) when the amounts of money involved were not great in comparison with his then income and assets. In those circumstances, it is to be expected that he would remember little of detail (in particular as to dates) as to what had occurred
- iv) His evidence was generally consistent and credible in terms of being an inherently likely set of events I have not seen anything to suggest that Heaphy was a knowing participant in Jared's frauds and wrongs. It seems more likely that Heaphy was a family member who trusted (as did others) his cousin and boyhood friend and including to draft agreements appropriately, and especially where lawyers (BWB whom Heaphy had met) appeared to be very involved
- v) His evidence was generally consistent with the documents
- which renders it in my view unreliable in itself; I do not see that as generally tainting Heaphy's evidence. There is no reason why a person in his position would wish to incur substantial legal costs in relation to a claim involving only some £24,999 (plus interest); and Penny was a person who would know much more about the underlying situation and history than Heaphy. It does seem to me that Heaphy was being highly naïve in not then proceeding on the basis that Jared (and, at least by extension in consequence, Penny) were not to be trusted; but Jared had been a close friend, and I regard this as more demonstrating Heaphy's tendency to trust Jared than anything else. In any event, elements of the witness statement is individual to and must have come from Heaphy (e.g. in relation to his having met with Oakley in mid 2009)
- vii) While the Heaphy Loan Agreement in its various drafts refer to sums of £50,000 and £150,000 which latter sum, at least, on Heaphy's evidence, was not a sum discussed with him and which he thought he would not have been prepared to lend (he did at one point say he could have afforded £150,000 and then retracted that, but my impression was that he simply could not remember and was answering "off the cuff" and not so as to taint his other evidence); I think that the fact that he did not object at the time and did sign the Heaphy Loan Agreement with a figure of £150,000 simply reflected his trust in Jared and the fact that he did not read the document closely (and where it is perfectly likely that a lay person would not engage in a scrutiny of it)
- viii) While Heaphy said he had discovered documents recently in his loft following his providing disclosure statements previously, I do not see that as at all suspicious. Documents are often located in this way and in those circumstances, and the documents are very historic

- while Heaphy has only provided disclosure of various bank statements gradually, they are historic and it is not surprising that they may have been difficult to obtain. In any event, I consider them of only having been of marginal relevance to what is before me, and I can see why Heaphy would have seen them of being of little if any relevance as not relating to the asserted loans or the loan documents or the security. The key banking documents were those evidencing the payments by Heaphy (by himself or, as is perfectly common, his company on his behalf) to BWB and which were provided from the start
- while Heaphy had not kept originals of the Heaphy Loan Agreement and the Heaphy Charge, his explanation that he had given them to BWB is credible, and, in any event, the documents were over ten years old and originals are often mislaid and I accept Heaphy's evidence (which was not challenged) that he had moved homes three times over the period
- xi) I do not see anything suspicious in Heaphy not having sought to take steps to obtain payments of the monies said to be due to him. It seems to me to have been perfectly natural for him to wait, and where there was continuing litigation between the claimant and Jared; and where to have been proactive in entering into that dispute (with associated expenditure and risk of time and cost) for the sum allegedly secured would seem (and very likely has been) simply uncommercial
- xii) I cannot see anything particularly suspicious in terms of Heaphy not having asked BWB for signed originals of the Loan Agreements. That is something which could have been done but Heaphy could perfectly well seek to rely upon a copy. In any event, it soon became clear that BWB did not hold any such documents
- xiii) Heaphy's explanations of trading foreign exchange with FXS and Piagi seems wholly credible where I accept that Heaphy had a USA property and need for US dollars and trusted Drayton (as family) and Jared.
- 107. I do, though, bear in mind that Heaphy's recollections are no more than that, and are themselves with regards to events which took place more than 10 years before Heaphy was given cause to seek to recollect the underlying matters by the claimant bringing this application. Therefore they are only of limited weight in my considering what has and has not been proven as a matter of fact.
- 108. As a result of his eventual loss of mental capacity and then death, I did not hear oral evidence from French. However, his witness statements (the first of which, distinctly similar in parts to that of Heaphy's first witness statement, seems to have been drafted to a considerable measure by Penny, and which may well be the case also with regard to the second witness statement; and so that I have given them little weight) set out that:
  - i) He was the step-father of Penny
  - ii) He had invested in a Dubai project with and at the behest of Jared and received £102,000 from it in 2008
  - iii) He had paid the £48,000 in 2008 and had the manuscript note recording repayment but no bank statement record of a repayment. As I say above, Gillam for French disclaimed any claim for repayment of those monies

- iv) He had agreed to assist with Jared's legal fees on the basis that the monies lent would be secured and provided £10,200 and £5,000. He was told that there was a freezing order but did not intend to breach it or by-pass it
- v) He probably received the loan and security documents by email, probably from Penny, and assumed that solicitors were dealing with the matter
- vi) He signed the French Loan Agreements dated 16<sup>th</sup> December 2009 and 17<sup>th</sup> December 2009 at the time in (he believed) December 2009; but does not know what he did with them
- vii) He received the French Charge signed by Jared and Penny and was told by one of them that it had been registered and the loans were secured, and then transferred the further £25,000 to BWB to further assist with Jared's legal expenses
- viii) He did not hold "wet ink" signed originals but may have given them to Jared or Penny or BWB
- ix) All monies provided by him were his own
- x) He had sent money to Penny as gifts but would have used any proceeds from the Properties for himself
- xi) At the time of sale of Beacon Hill he was content to take any proceeds which were part of Jared's beneficial interest share and for Penny to keep her share but on the basis that his loans would remain secured against the Properties.
- 109. It is common-ground that French's witness statements are admissible in evidence under the provisions of the Civil Evidence Act 1995 but with the Court to consider all the circumstances in deciding what weight to give them and especially where they have not been tested in cross-examination (section 4).
- 110. Mr Hurst has challenged French's evidence generally although he disclaimed any allegation of dishonesty on the part of French. This is including because:
  - i) The French Loan Agreements refer to the £48,000 but which was not an outstanding loan
  - ii) There are a series of versions of the French Loan Agreement and various inconsistencies in dating
  - iii) French did not explain the Kaleidoscope fax
  - iv) The £102,300 supposedly from the Dubai transaction had been stolen by Jared from FXS
  - v) French has been prepared to pay monies to Penny as gifts and therefore would not have ever intended to make loans.
- 111. While French's third witness statement has not been verified on oath or tested by cross-examination, and it is merely French's recollections over 10 years after the subject events (and where Gillan said in his fourth witness statement made in 2022 that French

was then aged 87), having considered all the material before me, I think that I should give it substantial weight in particular as:

- i) It is inherently credible in terms of events
- ii) It is inherently credible in terms of a family member providing loans to a relation who was being sued to assist with legal fees on a secured basis
- iii) I see nothing inconsistent with French being prepared to support Penny from time to time (especially after the Flaux J judgment) on a gift basis, and French accepting Jared's suggestion that French should lend monies on security. For French to reject that suggestion and insist on monies being given to a person (Jared) who was subject to substantial fraud litigation would seem distinctly unlikely
- iv) Where French was elderly (even in 2009), and the transactions were over 10 years before the claimant's application was made, it is hardly surprising that documents and recollections have been lost. The French Loan Agreement clearly went through iterations. I see nothing necessarily suspicious in French not having sought to answer every question in his witness statements, especially if he could not remember (which would be perfectly possible)
- v) The £48,000 had been paid to Jared originally, and French was open in both revealing his memorandum stating it had been repaid and that he did not have a bank statement evidencing that, and in deciding not to pursue that amount. In view of the facts that BWB drafted the various letters and documents on Jared's instructions and Jared then finalised the documents for his elderly father-in-law to sign; it seems most likely to me that French was an elderly man who trusted (as did others) his stepson-in-law and including to draft agreements appropriately, and especially where lawyers (BWB) appeared to be involved. I see it as perfectly likely that French as a lay person (and many lay people would not scrutinise documents of this nature closely) trusted Jared (and BWB) to have drafted something appropriate
- vi) I have not seen anything to suggest that French was a knowing participant in Jared's frauds and wrongs. Again, it seems more likely to me that French was an elderly man who trusted (as did others) his stepson-in-law and including to draft agreements appropriately, and especially where lawyers (BWB) appeared to be involved.
- vii) The general transaction and general timings of the documents and the various payments are generally consistent. Where Jared was inserting typed dates and proceeding himself to adapt BWB's drafts, I do not see it as at all unlikely that the typed dates did not reflect the actual dates on which documents were signed. It is a common problem with "homemade" legal documents, where a lay person has adjusted a lawyers' draft or template, that inconsistent dates and figures appear
- viii) It is unclear to me whether the £102,800 was "stolen" by Jared or represented real proceeds of a real investment in Dubai not linked to FXS. Jared did carry out transactions in his own right in Dubai. It is correct that the bank statements appear to suggest that customer (trust) monies of FXS were used to route the payments but there may have been matching inputs into the FXS client account.

In any event, I see no particular basis for French having had any reason to query the actual payment which was made to him. Again, I see the most likely situation as being one of a trusting elderly stepfather-in-law and a persuasive and apparently commercially astute and credible stepson-in-law.

### Disclosure and Other Evidential matters

- 112. Mr Hurst has criticised Heaphy and also the French Estate (and thus French) for failing to ask BWB to disclose documentation and suggested that I draw inferences adverse to them as a result. I see nothing in this. BWB have been asked during this litigation to make disclosures and have made some but otherwise stated that they cannot go further as Jared is asserting legal professional privilege (as is Jared's right) and which has not been challenged by the claimant (who could, for example, have made challenges based on the iniquity exception). I cannot see what else the respondents could have done.
- 113. Mr Hurst has also criticised Heaphy and also the French Estate (and thus French) for failing to adduce Drayton as a witness, and especially where the claimant asserts that (i) Jared and Drayton agreed that there should be a Drayton Loan Agreement and Drayton Charge in relation to fictitious loans (i.e. amounts which had never been provided by Drayton to Jared) and (ii) Drayton was Jared's illegitimate front in relation to Piagi; and the Mr Hurst suggested that I draw inferences adverse to them as a result. I see nothing in this. The claimant could have issued a witness summons against Drayton and, if appropriate, asked for Drayton to be treated as a hostile witness, but did not do so. Drayton's evidence would not be directly related to any part of Heaphy's or the French Estate's case, and they do not assert that any loans were made by Drayton or seek to rely upon him in any way. Further, Drayton has made clear from the start that he does not wish to be involved. I also do not see that Piagi has particular relevance to what is before me. While I do see on the evidence before me that it is likely that Piagi was a further Jared operation, it postdates the 2009-2010 transactions with which I am concerned.
- 114. Mr Hurst has also criticised Heaphy and the French Estate for various errors in disclosure statements and for only providing various bank statement disclosures late, if at all. Having heard Heaphy give oral evidence, and having considered all the material, I see little in this. The documents were historic (and potentially liable to have been lost, including in house moves etc.), likely to be difficult to obtain, and not, in my judgment, of obvious relevance to the issues before me (apart from the actual payments by Heaphy and French to Jared, and which (apart from the repayment of the £48,000) were evidenced at an early stage). I do not see that there has been any particularly material failure to search for or disclose any document which actually both exists and would be of significant materiality to what I have to decide.
- 115. Mr Hurst criticised Gillan for not disclosing the 16<sup>th</sup> December 2009 version of the French Loan Agreement earlier. It does seem to me that it should have been disclosed earlier as being a document which might be adverse to French's case in some way, but I do not see that any particular consequence should follow from that. I have no reason to reject Gillan's evidence that he had been provided with those documents by French, and I do not see why that should impact on French's credibility.
- 116. Mr Hurst also criticised Gillan for mis-stating the dates of various property acquisitions which is said to have caused the claimant a difficulty in carrying out a cash-flow analysis regarding the £102,300 received from French in relation to the Dubai transaction. Again, I do not see that this impacts upon French's credibility.

- 117. Mr Hurst has suggested that I draw inferences against Heaphy and the French Estate as a result of Jared's failure to waive legal professional privilege in relation to BWB's files. However, legal professional privilege is a human right, and a person is not to be criticised for relying on it. In any event, the privilege is that of Jared, and I cannot see any ground for drawing an adverse inference against Heaphy or the French Estate because Jared maintains it.
- 118. Heaphy and the French Estate have criticised the claimant for failing to provide material from the liquidator. Mr Hurst has responded that he acts for the liquidator but that the liquidator has not consented to disclosures and Heaphy and the French Estate should have made requests to the liquidators (of FXS and Global) and, if necessary, applied for disclosure from the liquidators. While it does seem to me that I should place little (if any) weight on statements from Mr Hurst (who cannot give evidence) or the claimant (whose evidence is at most hearsay, and may be hearsay of opinion) about what has been (supposedly) learnt in the liquidation, I do not see that such material is particularly relevant to what I have to decide (and especially where this litigation does not involve any claims of the insolvent companies or the liquidators).

### Approach to Factual Matters

- 119. In considering the factual issues between the parties, I have had to consider whether the relevant party, on whom the burden of proof lies, has shown to the civil standard of proof, being that on the balance of probabilities (i.e. whether it is simply more likely than not) that any particular historical fact or event occurred. That is something which I have had to do and have done taking into account all the evidence, oral and documentary, as well as counsel's submissions, and where I have been able to come in all respects to actual conclusions (i.e. that particular facts and matters have been proved i.e. been shown to have been more likely than not to have occurred) rather than ever being in a situation where I could not come to an actual conclusion either way and had to fall back on considering upon whom the burden of proof lay in relation to establishing the relevant asserted fact or matter.
- 120. In considering the issues regarding fact, I have borne in mind that the Court takes into account and tests all of the evidence, oral, hearsay, documentary and expert, considering what weight to give it and then weighing it altogether as an holistic exercise in coming to its conclusions. In doing this the Court, bears in mind:
  - i) with regard to witnesses, what I have already set out above
  - that contemporaneous documents are likely to have reflected what their creator was actually thinking at the time of their creation. Thus they can, to an extent, "speak from the past" although subject to the reliability of the creator's memory and their desire and ability to record accurately at that time. Likewise if the creator is recording what someone else has told them, if that was also contemporary then there is an increased likelihood that first the recording and second the communicated statement are accurate, although again subject to such matters as timing, general reliability and conscious or subconscious desires to influence. Thus, although the Court must be careful to avoid over-reliance upon them, contemporaneous documents can have an important weight
  - iii) Inherent likelihoods of events are also important (although these can only be assessed in the light of the other facts thus emphasising how this is an holistic exercise). If an event is inherently unlikely to have occurred then there should

be evidence of sufficient weight to displace that unlikelihood before the event will be proved to have occurred. This can be especially true in relation to certain types of misconduct, as it is usually likely that people will conduct themselves in accordance with their social norms, but again this is highly fact sensitive and especially where people's social norms may differ.

# **Pleading**

121. Mr Hurst has raised or sought to take numerous pleading points against French and Heaphy contending that they have failed to comply with the rules (in particular CPR16.5 although it is only applicable by way of analogy to Points of Defence) as to responding to each allegation made by the claimant and setting out details of alternative events and contentions. While there is a degree of non-engagement by French and Heaphy in their Points of Defence, that relates mainly to contentions of law and which do not necessarily need to be pleaded at all (as statements of case primarily contain facts, not law or argument or evidence). In any event, I do not see that any prejudice has been caused as matters have been able to be fully argued out, and I do not see that the claimant has been disadvantaged in any way. I therefore do not propose to take any step in consequence (and, if necessary, waive any non-compliance under CPR3.10).

## The Legal Issues

- 122. The French Estate and Heaphy assert that the signed French Loan Agreement, the French Charge, signed Heaphy Loan Agreement and the Heaphy Charge, were all properly executed in December 2009 or January 2010. They say that the documents created equitable charges over Jared's beneficial interest in each of Beacon Hill and the Properties to secure the actually advanced remaining net total capital sums of £40,200 (I think) for French and £24,999 for Heaphy, and where French and Heaphy had each advanced some monies expecting that there would be equitable charges and other monies on the faith of existing documents. They say that such equitable charges were created at a time before the grant of the interim charging orders on 20 April 2010 and therefore have priority over the claimant's charging orders. They say that French's and Heaphy's decisions to give up their equitable charges over Beacon Hill left the equitable charges and secured lending intact as against the Properties. They assert that interest has run since some point in 2010. They assert that those monies should be paid out from the proceeds of the Properties remaining in court.
- 123. The claimant has raised numerous points and arguments against these assertions. I have considered them holistically and not just one by one in coming to my conclusions. It seems to me to be possible to resolve the various factual issues (insofar as it is necessary for me to do so) as part of analysis of each legal argument advanced by the claimant rather than in a separate first section, and that is how I proceed below.

# Whether the (and what) Documents were signed prior to the grant of the Interim Charging Orders

124. The first argument advanced by the claimant is that various Documents relied on by the French Estate and Heaphy were only executed after April 2010, and probably in about October 2010, and therefore post-dated the charging orders and so that it is the charging orders which would have priority.

- 125. Mr Hurst in submitting this said in particular that while it was accepted that the Charge Documents came into existence by January 2010 that was not the case in relation to the signed Loan Agreement Documents, and that:
  - i) Oakley sent his final drafts to Jared (then in the USA) at 17.43pm on 17 December 2009 and Jared could only after then have sent his revised versions to Heaphy and French for signature
  - ii) If the documents were genuine, there would be only one copy of each of a French Loan Agreement and a French Charge, and a Heaphy Loan Agreement and a Heaphy Charge all bearing identical signatures; but instead there are many
  - NBM and BWB seemed to be incapable of sending properly signed executed documents to MDR in autumn 2010. The inference must be that properly signed and executed documents did not then exist, and must have been created or signed and executed subsequently
  - The computer file references are inconsistent, and there is no good explanation as to how the Heaphy Loan Agreement and the Heaphy Charge have "Ver 02". What must have happened in relation to them is that they were created on 19 February 2010 by BWB (probably by a Mr de Jongh) and that Heaphy (but not Jared) signed them (or at least the Heaphy Loan Agreement) on that occasion and that is what is meant by the contents of the February 2010 BWB File Note. Jared only signed them (or at least the Heaphy Loan Agreement) in autumn 2010. That also explains why unsigned documents were sent by NBM to MDR in October 2010
  - v) Something similar must have happened regarding the French Loan Agreement and the French Charge, and which explains the Kaleidoscope documents which bear a fax reference of 15/10/2010 and which the French Estate has not explained
  - vi) Heaphy and the French Estate have failed to call Drayton or to explain how whatever happened or did not happen regarding Drayton is consistent with their case.
- 126. Mr Pryce submitted that final form documents were all signed in December 2009 or early 2010 and further that:
  - i) This was Heaphy's and French's evidence
  - ii) Oakley had made clear that he had not amended the drafts after December 2009
  - iii) The claimant's case was pure speculation and inconsistent with the registrations.
- 127. I have considered all the material and submissions before me. Having considered matters holistically, I conclude that it is more likely than not (and therefore is proved on the balance of probabilities) that the following occurred.
- 128. Jared was the person who generally communicated with BWB. They were his solicitors and would transmit information (such as statements as to actual and intended loans) which he had communicated to them without checking, at least in any particular way, its truth (which, in general, they would have no reason to question in this context).

- 129. Heaphy did, however, meet with BWB in June 2009 (I accept his evidence as this) and at least once, and more probably twice, in January and February 2010 as that would explain both how his cheque for £10,000 came to BWB and the February 2010 BWB File Note. While Heaphy only referred to one such occasion, he was having to remember back over 10 years and that explanation is more consistent with the documents and inherent probabilities of events.
- 130. Jared having proposed and agreed (see below) that there would be secured loans, and some monies having already been provided, asked Oakley to provide appropriate forms of agreements based on instructions given by Jared to Oakley as to what had happened and what was intended. Oakley (which has not been challenged) sent the first drafts by his email of 16 December 2009. Jared then spoke to Oakley and gave Oakley further information (including as Jared's desire to protect Penny's interest and as to French's and Heaphy's correct names and addresses etc.) and so that Oakley sent the revised draft Loan Agreements to Jared by his email of 17 December 2009. All those documents bore BWB's computer file references.
- 131. Jared then revised the draft Loan Agreements and Charges without further reference to BWB. This is essentially common-ground and consistent with the fact that the BWB drafts were altered but not by BWB.
- 132. The matter now becomes more controversial. However, I find first with regard to French, although this is holistic with what I find with regard to Heaphy, that:
  - i) Jared revised the draft French Loan Agreement into the version which is dated 16<sup>th</sup> December 2009 and sent it to French on 17<sup>th</sup> December 2009, but with the date of 16<sup>th</sup> December 2009, to sign with a signature page which did include the Schedule. Jared sent two copies, one signed by him and one blank
  - ii) French responded having signed the version signed by Jared and the blank version having signed both versions with slightly different signatures. At some point French delivered these to Jared (or possibly BWB) but retaining a copy
  - Jared then decided that there was a problem with the document, including as he wished to it to record an agreement to loan up to £150,000, and returned to the BWB draft and altered it into the form of the 17<sup>th</sup> December French Loan Agreement. Jared removed the computer file references from it. That document omitted the Schedule which Jared failed to copy into it. Jared sent this to French on or about 17<sup>th</sup> December 2009
  - iv) French responded having signed the version signed by Jared. Jared countersigned this at the end of December 2009 (but before or at the same time as Jared executed the French Charge
  - v) At some point, but at the end of December 2009 or in early January 2010, and at a point when French and Jared had signed the 17<sup>th</sup> December French Loan Agreement, Jared executed the French Charge, and then notified BWB accordingly, and most probably delivered it (or a copy) and the 17<sup>th</sup> December French Loan Agreement to French or BWB in circumstances where French ended up with a copy

vi) At a later point, Jared realised that he had omitted the Schedule from the 17<sup>th</sup> December version of the Loan Agreement. He took versions of the signature page which French had signed and added in the Schedule.

# 133. I find in regard to Heaphy that:

- i) Jared around the time that he sent the 16<sup>th</sup> December 2009 version to French, altered the draft which he now had from BWB, into the form of the Heaphy Loan Agreement into a form which still bore the "Ver.01" computer file reference (and was dated 17<sup>th</sup> December 2010) and signed a copy but did not send it to Heaphy
- ii) Jared then created the form of the Heaphy Loan Agreement which is now relied on by Heaphy with the "Ver.02" file reference and on or around 17<sup>th</sup> December 2009 sent it in an unsigned version to Heaphy. Heaphy returned it signed to Jared. Jared counter-signed it
- iii) At some point, but at the end of December 2009 or in early January 2010, Jared executed the Heaphy Charge (being a point in time when Jared and Heaphy had both signed the Heaphy Loan Agreement), and then notified BWB accordingly, and delivered it (or a copy) to BWB during this period
- iv) Jared delivered the Heaphy Loan Agreement or a copy of it to BWB or Heaphy during this period and with the result that Heaphy ended up with a copy of it and discussed it briefly with DeJongh on 19 February 2010.
- 134. There are a number of possible variations on the above which I see as likely, but not as likely as the above (but more likely than the claimant's cases of each of the French Loan Agreement and of the Heaphy Loan Agreement only having been signed after April 2010 (and probably in October 2010), being:
  - Jared and French both signed the French Loan Agreement (dated 17<sup>th</sup> December 2009) in a form which incorporated the Schedule, and the copy which French has disclosed has had the element of the Schedule which includes the signature page obscured and the further page which contains the rest of the Schedule omitted. That would be most consistent with the documents (and in particular those eventually disclosed by Gillan which include the French Loan Agreement dated 17<sup>th</sup> December 2009 with the same signatures of both Jared and French but also the Schedule), but no-one has contended for that to have been the case
  - ii) Heaphy signed two versions of the Heaphy Loan Agreement, one bearing "Ver.01" and one bearing "Ver.02" and where the first has been lost. That would be consistent to some extent with the documents and the inherent likelihood that Heaphy would have signed any version of the Loan Agreement which was presented to him
  - iii) BWB prepared a further version of the Heaphy Loan Agreement in early 2010, being the version with the file reference "Ver.02", and which Jared and Heaphy signed, and which is the version upon which Heaphy relies. That would accord more with BWB's practice of numbering documents, although I have no evidence as to what automatic numbering may or may not have been embedded into BWB's word processing and management software in terms of file numbering and changes, and regard it as more likely that Jared had altered the

file reference earlier (and it is Oakley's evidence that BWB did not amend any document after 17 December 2009). If that is what occurred, I would find that Heaphy signed the document there and then, and that if Jared had not already signed it, Jared would have signed it shortly thereafter and before or at the trial (as Jared would have been in constant communication with BWB and was keen for these documents to be signed so that the transactions would provide French and Heaphy with security).

- 135. I do, however, regard it as being less likely than not that the documents relied on by Heaphy and the French Estate were created after 25 April 2010 and whether or not in October (or at another time in the autumn of) 2010.
- 136. This is all, in particular, as:
  - i) The documents relied upon bear what are accepted to be (and I regard as having been proved to be) genuine signatures
  - ii) The documents bear their own dates; that points towards them having been created at least around those dates
  - iii) There was clearly a process in December 2009 of ongoing creation of the documents through a drafting process; that again points towards them having been created at least around those dates
  - iv) Heaphy provided £10,000 and French provided £25,000 to BWB in January 2010. That again points towards the relevant agreements having been made before (or around then)
  - v) BWB were told that the French Charge and the Heaphy Charge had been created and so that they applied for registration of unilateral notices of them on 21 January 2010. Even though BWB gave a very slight incorrect dating (31 rather than 30 December 2009, a typical drafting mistake for a conveyancer) for the Charges, and could have applied without having then seen the documents (although usually a conveyancer would not), it seems unlikely that even Jared would have lied to BWB about that. Indeed, the claimant put his case, I think, on the basis that the Charges had been executed by this point
  - Vi) I can see no reason why Jared would have not had executed the Loan Agreements at this point and every reason why he would. He wanted to receive the further monies from French and Heaphy and who might well have queried their simply being given the Charges without Loan Agreements. Jared wanted French and Heaphy to have security interests and for such to be granted before the Trial before Flaux J took place (and see further below). Jared had actively progressed the drafting of the various security documents
  - vii) As stated above: I regard Heaphy as an honest witness, albeit that his recollections are somewhat unreliable as result of the passage of time; and think that I should give weight to French's evidence. Their respective evidence is credible in terms of how they say they behaved where they were being told that they were to have security documentation. One would have expected them to have complained and, Heaphy at least, not to have paid monies to BWB, if they did not have them

- viii) The February 2010 BWB File Note is very consistent with Jared and Heaphy having signed the Heaphy Loan Agreement. As stated in the file note, it is not witnessed. It is conceivable that Heaphy signed it then (and, as I say above, that Jared had already signed it or signed it shortly thereafter which I would hold to be the case were this hypothesis to be correct) although much more likely that he signed it when the Heaphy Charge was created.
- The insertion of the reference to "£9,999 in December 2009" in the Heaphy Loan Agreement is inconsistent with the document having been created in 2010 when it would have been known that it was £10,000 which was paid to BWB in January 2010. It is more consistent with the draftsperson considering that that sum was to have been paid by the time the document was executed. I add that although Heaphy engaged in a transaction with Piagi in the sum of £9,999 around December 2009, I accept Heaphy's evidence that it related to his USA property and had nothing to do with this
- The claimant's case as to the documents only being created in autumn 2010 and including by BWB (as, on the claimant's case, BWB would have been involved in creating the "Ver.2" version of the Heaphy Loan Agreement) would seem to involve BWB in falsifying dates and documents. That is a serious allegation, not put to BWB, and at first sight inherently improbable. Further, it is Oakley's evidence that there is nothing on BWB's files to suggest that they amended any document after 17 December 2009 and they were not challenged as to this (and so the only real candidate is Jared, and see below)
- while I am prepared to consider that Jared might be prepared to falsify documents, that does not mean that he did so in autumn 2010 where none existed before. I do not regard that as having been at all likely of Heaphy (whose oral evidence I have heard) and I do not see anything to suggest that it would be inherently probable that French (who Mr Hurst accepts was not dishonest) would have so acted (French may well have acted generally as Jared asked him to do and assumed that Jared's financial transactions were all legitimate and proper; but I have seen nothing where French acted where a reasonable lay person would have been obviously reluctant to do so, such as by forging documents)
- xii) The documents disclosed in autumn 2010 are not themselves consistent with their only having been created as part of a scheme in autumn 2010. In particular there was disclosed signature pages of the Loan Agreements which bore Jared's signature alone but which are not in the form of the signed documents upon which French and Heaphy rely; thus any scheme would not have involved those signature pages
- xiii) It is correct that BWB and NBM did not, seemingly, disclose full or accurate copies of the Loan Agreements in autumn 2010. However, they were acting for Penny and Jared, and not for French or Heaphy, and were relying on material supplied to them by Penny and Jared and who may only have had drafts. I do not see sufficient to suggest that Heaphy is (or French was) lying
- xiv) I do find confusing that in autumn 2010 were disclosed signature pages of the 17<sup>th</sup> December 2009 French Loan Agreement which contain the Schedule and which at first sight appear identical (including as to the signatures) with the signed version upon which the French Estate relies except for the absence of the

Schedule, but which Schedule appears perfectly formatted against those signatures on the signature page). That situation is not at first sight consistent with either side's arguments (or possibly is consistent with both) as, I ask myself rhetorically, why and how would there come to be the version upon which the French Estate relies which omits the Schedule? However, even if the true version did contain the Schedule, I do not see that that would lead me, when considering all the evidence, to conclude that it only came into existence in autumn 2010

- Although the actual dates of signing of the various documents are not clear to me, and Jared was in the USA in mid-December and probably still on 30 December 2009 (the date of the French Charge and of the Heaphy Charge and which were witnessed by an American Notary), it seems to me that the Loan Agreements could perfectly well have been signed by email but, in any event, they would have been signed by early January 2010 by the latest. The dates of the Charges would seem consistent with their having been sent or taken to the UK in early January and the unilateral notices only being submitted on 26 January 2010
- xvi) Jared wished for these transactions to take place and to be documented (even on the claimant's case, Jared wanted these transactions to have priority over the claimant's claims). I find it inherently improbable that Jared would not have ensured that full sets of documents had not been signed at the time, and, certainly, before the trial before Flaux J.
- 137. I therefore reject the claimant's argument as a matter of fact and hold that the Charges and Loan Agreements documents were executed by their signatories in late December 2009 or early 2010, and in any event before 20 April 2010.

#### Whether Equitable Charges were created

138. The claimant asserts that what occurred in December 2009 and early January 2010 was not effective to create equitable charges in relation to the Properties in relation to the monies allegedly lent on a number of different bases.

## Intent to contract

- 139. The claimant contends, first, that there was no sufficient intent to enter into legal relations or to contract. He contends that these were arrangements between family members where Heaphy and French were simply doing what Jared asked them to do and would have provided monies on an unsecured basis if asked; and relies on Jones v Padavatton 1969 1 WLR 328 as establishing a general approach that dealings between family members are not intended to create legal relations.
- 140. I reject this contention both as a matter of fact and as a matter of law. While I accept that Heaphy might and French probably would have been likely to fall in with Jared's wishes, I accept their evidence (which is very consistent with the documents and the communications between BWB and MDR) that the advancement of monies propositions were put to them on the basis that they would have the benefit of secured loans and thus legally enforceable transactions which had legal effect. I also hold that they signed documents to that effect; and Jared executed the Charges in their favour.

141. While a family provision of money can be on the basis that it is a gift, there is no presumption of advancement here (and therefore the burden would be on the claimant to show that there was an intention to give) but, in any event, it is clear that Heaphy and French were both told and thought they were to have legal entitlements. Intention to create legal relations is an objective test (although I find on the balance of probabilities that they both subjectively intended this to be a matter which gave rise to their having legal rights) and I hold that it is clear, on an objective basis, that this was a dealing where the parties intended there to be legally enforceable loans and security notwithstanding the family and friendly relationships. Jones v Padavatton was a very different case where there were no such written agreements or lawyers involved, and it was made clear in that case that there were no presumptions of law involved but only questions of fact to be seen in the context of how families usually (or often) behave when acting informally (and which was not the case here). I therefore reject this argument.

#### Sham

- 142. The claimant next contends that the documents were shams because they not only contained inaccuracies (e.g. as to dates and amounts) but also that French and Heaphy signed the Loan Agreements not caring about their contents and not having discussed or given any thought to much of them but rather just signing papers put to them by Jared.
- 143. Mr Hurst cites Snook v London and West Riding 1967 2QB 786 at 802, where it was said:
  - "As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a "sham," it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see Yorkshire Railway Wagon Co. v. Maclure and Stoneleigh Finance Ltd. v. Phillips), that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged "sham." So this contention fails."
- 144. Mr Hurst also cites Blue Sky v Blue Airways 2009 EWHC 3314 at paragraphs 263-267:
  - "263. The argument that the leases to BAW were shams was made (see Mahan's closing submissions, paragraph 76) to shed light on the parties' relationship and their intentions regarding the beneficial ownership of the aircraft. I have rejected the evidence of Mahan's witnesses that from the outset it was not intended that any payments would be made under the leases (see [134]) and given my reasons for concluding that Mahan has not established that the real agreement between the parties was other than that contained in the written documents. I can deal briefly with the submissions as to the relevant legal principles.

264. In determining whether a document amounts to a sham it is necessary to consider both the circumstances of the creation of the document and also the parties' conduct under it: Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform [2009] 3 All ER 790 at [82]. The fact that the parties have departed from the agreement, for example in the set-off arrangements in the present case, does not, however, justify a conclusion that the agreement is a sham or the term that has been departed from is not part of the contract: see Express and Echo Publications Ltd v Tanton [1999] IRLR 367 at [25] per Peter Gibson LJ and Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales[1992] BCLC 609 at 620, per Lord Scarman. In Autoclenz Ltd v Belcher [2009] EWCA Civ 1046 at [53] it was stated that the mere fact that parties conduct themselves in a particular way does not of itself mean that the conduct accurately reflects their legal rights and obligations.

265. A number of the decisions, including the Autoclenz and Neufeld cases, concern employment law where a court will be alive to the inequality of bargaining power and will take care that workers are not deprived of their rights by one party offering terms on a "take it or leave it" basis which describe the other party as an "independent contractor". In such cases conduct may be particularly important in showing the true bargain. However, even in that context it has been said that "if the term solemnly agreed in writing is to be rejected in favour of a different one, that can only be done by a clear finding that the real agreement was to that different effect": Consistent Group Ltd v Kalwak [2008] EWCA 430 at [40] per Rimer LJ.

266. The departures from the terms of the leases, for example, that payments due under them were set-off against sums due by the Balli parties under the loan agreements, are, for the reasons set out at [125] – [128] and [134], explicable without pointing to the leases being shams. There must be a common intention that the documents are not to create the legal rights and obligations which they give the appearance of creating: per Diplock LJ (as he then was) in Snook v London and West Riding Investments Ltd [1967] 2 QB 786 at 802. The factors which have led me to conclude that there was no intention to create an express trust, in particular the emails from the Alaghband brothers dated 13 and 15 February 2006 (see [91] – [95]) and the acceptance by Mahan's witnesses that the leases were necessary to enable the aircraft to be entered and maintained on the Armenian Register and that BAW was their operator are inconsistent with the common intention that is required.

267. Smith LJ in Autoclenz's case (at [43]) stated that although Snook's case provides a definition of a sham, the case is not of uniform assistance in determining whether an agreement is in fact a sham. While, particularly in the employment context, see Autoclenz's case at [49] per Smith LJ, there is no need "to show that there had been a common intention to mislead", what is necessary is the common intention that the document is not to create the legal rights and obligations which it gives the appearance of creating. In Snook's case Diplock LJ stated immediately after the passage which I have quoted that the unexpressed intentions of a "shammer" do not affect the rights of the other party and, in Autoclenz's case Aikens LJ warned about concentrating too much on the private intentions or expectations of the parties. He stated:

"What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms

- or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded." (at [91])"
- 145. I note the definition of sham as being a document which is effectively created so as not to reflect the parties' true intentions and to mislead the world.
- 146. I agree with Mr Pryce that these documents were not shams.
- 147. I hold as a matter of fact that on the balance of probabilities French and Heaphy signed them in circumstances where Jared had put them to French and Heaphy on the basis (which was true) that they were documents originally drafted by BWB which provided for secured loans, and which contained what BWB regarded as appropriate terms adjusted to reflect the particular circumstances of these loans; and that French and Heaphy subjectively assumed that that to be correct, even though they did not read the documents closely or fully understand them. That is even more so if (contrary to my primary findings) Heaphy only signed the Heaphy Loan Agreement in February 2010.
- 148. That does not render the documents shams. French and Heaphy signed them intending them to be the terms of the legal agreements which they were intending to make. There are massive numbers of binding legal agreements which are signed or assented to every day on that basis without one party bothering to read them closely or understanding them, but rather assuming that their contents are appropriate and being prepared to commit themselves in law (subject to any rights e.g. in consumer law, that they may have) whatever may turn out to be the actual legal effects and consequences. That may lead to a possible claim in misrepresentation or rectification (or an ability to invalidate in consumer law; or a claim to strike-down harsh and onerous clauses to which a party's attention has not been expressly drawn what is known as the "Interfoto" principle, see e.g. Higgins & Co Lawyers Ltd v Evans [2019] EWHC 2809 (QB) at paragraphs 69-74) if the person who has presented the document has not truthfully or correctly represented or drafted its contents, but there is still a genuine agreement on the terms of the document.
- 149. I do not find on the balance of probabilities that either French or Heaphy (or probably even Jared) consciously subjectively intended (knowing and understanding what was in the documents and what the relevant terms meant) that the documents (or any of the terms in them) should not represent the reality of the agreements being made between them. If one simply considers whether Jared could have escaped from the terms of the documents which he had presented (being a form of objective contractual offer) and the others had signed (being a form of objective contractual acceptance), on the basis that they did not represent the true agreements, the answer must be that he could not have done so. I further do not find that either French or Heaphy had any intent to deceive or misrepresent to the outside world, but rather (on the balance of probabilities) the contrary, they were simply lending monies on a secured basis to a person whom they trusted.

## Want of Certainty or otherwise Ineffective for failing to identify relevant liabilities

150. Mr Hurst next submits that the Charges are invalid for want of certainty or otherwise ineffective as they do not properly identify what is sought to be secured. He points out that they refer to "Jared's Liabilities" (in clause 2); and where clause 1 refers to "the Chargor's obligations to the Lender... under the terms of the Loan Agreement"; and where "the Chargor" is a definition of Jared and Penny; and where in the French Charge "the Loan Agreement" refers to the agreement dated "30 December 2009, as may be

varied from time to time" but the French Loan Agreement is dated 17 December 2009; albeit the same wording is used in the Heaphy Charge and where the Heaphy Loan Agreement was dated 30 December 2009 (whenever it was actually signed). He submits that the Charges do not properly identify what the respondents wish to say was secured.

- 151. Mr Pryce submits that the clear intention of the Charges is to refer to the French Loan Agreement and to the Heaphy Loan Agreement; and that is all the more clear when the court considers the factual matrix i.e. the matters of fact objectively known to the parties to each transaction.
- 152. As to this, and elsewhere, I have considered the well-known modern principles of construction of documents. The parties (and in particular Mr Hurst) have cited numerous text-books and authorities to me, and which I have considered, but I regard it as appropriate only to mention a few of them in this judgment as the principles are clear.
- 153. As stated in such cases as Arnold v Britton 2015 UKSC 36 and Lukoil Asia Pacific Pte Ltd v. Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm), the Court asks itself how a reasonable reader would interpret the document and the words used in the light of the factual matrix known to the parties and the apparent commercial purpose, giving proper weight to the words themselves and ignoring the parties' subjective understandings and subjective intentions, and weighing up the various possible interpretations together (as opposed to in some sort of order so as to leave a default meaning if others are not accepted) in order to come to the answer.
- 154. I note that Mr Hurst took me to Fisher and Lightwood's Law of Mortgage, 15th edition, pp.120 to 122 and, in particular, paras.7.28 and 7.29 of the work (and which I have fully considered) and which opine (correctly in my view) that these general principles apply to questions of construction of mortgage deeds.
- 155. In Arnold v Britton at paragraph 18, it was pointed out that the worse the standard of the drafting, the more prepared the court may be to depart from the words used.
- 156. In Chartbrook v Persimmon 2009 UKHL 38 at paragraphs 23-25, Lord Hoffmann discussed the court's approach to clear mistakes in wording as follows:
  - "22. In East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61 Brightman LJ stated the conditions for what he called "correction of mistakes by construction":
  - "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."
  - 23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said, at p 1351, para 50:

"Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."

- 24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ, paras 44–50, that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
- 25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."
- 157. This all follows on from Lord Hoffman's seminal judgment in Investor's Compensation Scheme v West Bromwich 1998 1 WLR 896 where he identifies the principled approach as being as follows:
  - "My Lords, I will say at once that I prefer the approach of the judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1384–1386 and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.
  - (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
  - (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
  - (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.
- (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

If one applies these principles, it seems to me that the judge must be right and, as we are dealing with one badly drafted clause which is happily no longer in use, there is little advantage in my repeating his reasons at greater length. The only remark of his which I would respectfully question is when he said that he was "doing violence" to the natural meaning of the words. This is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs. Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listeners....

Finally, on this part of the case, I must make some comments upon the judgment of the Court of Appeal. Leggatt L.J. said that his construction was "the natural and ordinary meaning of the words used." I do not think that the concept of natural and ordinary meaning is very helpful when, on any view, the words have not been used in a natural and ordinary way. In a case like this, the court is inevitably engaged in chosing between competing unnatural meanings. Secondly, Leggatt L.J. said that the judge's construction was not an "available meaning" of the words. If this means that judges cannot, short of rectification, decide that the parties must have made mistakes of meaning or syntax, I respectfully think he was wrong. The proposition is not, I would suggest, borne out by his citation from Through the Looking-Glass. Alice and Humpty-Dumpty were agreed that the word "glory" did not mean "a nice knock-down argument." Anyone with a dictionary could see that. Humpty-Dumpty's point was that "a nice knock-down argument" was what he meant by using the word "glory." He very fairly acknowledged that Alice, as a reasonable young woman, could not have realised this until he told her, but once he had told her, or if, without being expressly told, she could have inferred it from the background, she would have had no difficulty in understanding what he meant."

158. I have further raised in argument the long-standing principle of construction of deeds (and other documents) embodied in the Latin maxim *falsa demonstration non nocet* 

cum corpore constat i.e. that a mere incorrect description is not fatal where it is clear what was meant; and approach which led to the court's allowing the introduction of extrinsic material to identify to what was intended by references in a deed which did not make sense (see e.g. Chitty: Contracts 35<sup>th</sup> Edn at 16-108). That old principle regarding the construction of deeds is very much a precursor of the general modern principle of construction that where a clear mistake appears and what was actually intended is clear (at least from objective historic material other than current evidence of subjective intention and which remains inadmissible), the document will be read in accordance with the actual intention.

- 159. Mr Hurst, however, submitted that it was not permissible to introduce in extrinsic material when construing or considering the words of the Charges. He relied on what was said in Cherry Tree v Landmain 2012 EWCA 736. There, the majority of Lewison and Longmore LJJ (Arden LJ (as she then was) dissenting) refused to allow extrinsic material in the form of documents known to the parties to the transaction (i.e. a facility agreement which contained a power of sale) to be introduced in relation to the construction of a registered legal charge, and notwithstanding that the legal charge itself omitted to refer to what was secured by it (see paragraph 141 of Cherry Tree below), where it was contended that that would lead to the inclusion of the facility agreement and thus the power of sale contained within it. The majority held that the agreement to have a power of sale (as contained in the facility agreement) could only be introduced into a legal consideration of the effect of the transaction by use of the law of rectification and not that of construction, and which affected the priorities in that case (as a construction solution would give rise to a legal right, while a rectification solution could only give rise to an equitable right (which would not operate on the first in time basis due to the specific provisions of land registration law regarding registered dispositions) – and see paragraphs 121 and 122 of Cherry Tree).
- 160. Longmore LJ set out the key factual history and the construction/rectification context as follows:

"139. The short facts are that Landmain, the registered proprietor of 2 Battersea Rise SW11, charged the property to a finance company called Dancastle in return for a loan of £635,000. Disputes about repayment arose, Dancastle alleging and Landmain denying that there was a default. As between Dancastle and Landmain, that dispute did not matter since the facility agreement provided that Dancastle's power of sale arose on execution of the charge and was exercisable at any time after such execution. Pursuant to that power Dancastle sold the property to Cherry Tree who now wish to be registered as the freehold proprietor. Landmain contends that it is still the proprietor since the registered charge makes no reference to the facility agreement or its provisions about the power of sale. The power of sale implied into any charge pursuant to section 101(1)(i) of the Law of Property Act 1925 is only a power to sell when the mortgage money has become due. On the face of the charge as registered, therefore, there has been a potentially wrongful sale and Landmain say that they must remain the registered proprietors. The judge held that there was a mistake in the charge which, as a matter of construction, should be read as if it contained a power of sale arising immediately on execution because that is what the parties to it must have intended. No doubt the charge might be capable of rectification on a proper application but no such application has been made. The question therefore is whether the charge can be construed to express something which by mistake it does not say.

- 140. The question arises in this way because, as I understand the matter, registration of a freehold estate can only occur if the Land Registrar is of the opinion that a person's title is such as a willing buyer could properly be advised by a competent professional adviser to accept and all that the Registrar has to go on for the purpose of registering a new title after a sale by a mortgagee is the terms of the charge.
- 141. It can be said that something has gone wrong in the drawing up of the charge in the form CH1 in the present case because panel 7 contemplates that the sums, security for the payment of which the property at Battersea Rise is to be charged by way of legal mortgage, will be detailed in panel 9. They were not so detailed in panel 9 which has a side rubric:—

"Insert details of sums to be paid (amount and dates) and so on"

and a title:—

"Additional provisions"

- 142. The omission of the details of the sums to be paid may in one sense be a "mistake" but it is not a very important mistake. It was not suggested that the charge was legally ineffective because the sums, for which the property was to be charged, were omitted. The charge is effective to secure sums due from Landmain to Dancastle Ltd. That was initially the sum of £635,000 but that sum would, no doubt, increase over time by reason of the accrual of interest and, perhaps, also decrease by reason of repayment of capital and payment of interest to the extent that the parties agreed that repayment and payment could occur. If the sum of £635,000 had been inserted in panel 9 (as it could and should have been) no one would think of saying that anything had gone wrong with the language of the charge.
- 143. Panel 9's reference to "Additional provisions" indicates that it is in this panel of the standard form of charge that the parties can, if they wish, specify terms of the charge in addition to the terms of the form. If the parties wanted, moreover, to state in the charge as registered that the lender/mortgagee was entitled to exercise a power of sale at a time other than a time "when the mortgage money has become due" (as per section 101(1)(i) of the Law of Property Act 1925) e.g. at a time after execution of the legal charge (as per clause 12.3 of the Facility Agreement made between them), it would be in this panel 9 that the parties could make that clear.
- 144. In the present case the parties did not do that. If that was a mistake, it was not the same sort of mistake as failing to fill in the panel with information about the sums due under the mortgage required pursuant to panel 7. It is a mistake in failing to carry the terms of their agreement about the power of sale into the document which charges the property with the obligation to repay whatever sums are due when the power of sale is exercised. This is classic rectification territory."
- 161. Lewison LJ in his judgment first identified the law relating to legal charges and their registration under the 2002 Act:
  - "105. It is necessary, therefore, to set the contextual scene. In the present case the contextual scene is the grant of a legal charge intended to be registered at HM Land Registry under the Land Registration Act 2002. That Act was passed following six years' work by the Law Commission and the Land Registry. Its fundamental objective,

stated in paragraph 1.5 of the report which presented the draft bill, was expressed as follows:

"The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections."

106. The report called for a fundamental change in the perception of title. As explained in paragraph 1.10: "It will be the fact of registration and registration alone that confers title." The report went on to explain in paragraph 9.36:

"The ability to obtain information from the registers of title and cautions is an essential feature of the system of conveyancing that the Bill seeks to create. Easy and open access to information held by the Registry are the keys to speedier conveyancing."

- 107. These objectives were reflected in section 66 of the Act which provides:
- "(1) Any person may inspect and make copies of, or of any part of—
- (a) the register of title,
- (b) any document kept by the registrar which is referred to in the register of title,
- (c) any other document kept by the registrar which relates to an application to him, or
- (d) the register of cautions against first registration."
- 108. Thus a person who applies under this section will be supplied with documents kept by the registrar. Necessarily those documents are limited to documents with which the registrar was supplied in the first place. The facility agreement was not one of those documents. Section 120 has an important bearing on documents kept by the registrar. It says:
- "(1) This section applies where—
- (a) a disposition relates to land to which a registered estate relates, and
- (b) an entry in the register relating to the registered estate refers to a document kept by the registrar which is not an original.
- (2) As between the parties to the disposition, the document kept by the registrar is to be taken—
- (a) to be correct, and
- (b) to contain all the material parts of the original document.
- (3) No party to the disposition may require production of the original document.
- (4) No party to the disposition is to be affected by any provision of the original document which is not contained in the document kept by the registrar."

109. I draw attention in particular to section 120 (2) (b). It applies not only to a subsequent incumbrancer but also "as between the parties to the disposition"; that is to say as between the chargor and the chargee. In my judgment to treat the registered charge as containing a modification of the statutory power of sale contained only in the facility letter falls foul of that sub-section. In essence a document held by the Land Registry such as a registered charge may be inspected by a person contemplating some dealing with the land, although there are rules which permit the withholding of sensitive commercial information. But it is unlikely that the Registrar would agree to withholding information about a power of sale on the ground that it is commercially sensitive, because to do so would prejudice the keeping of the register: Ruoff & Roper Registered Conveyancing (§ 31.007). Moreover a person contemplating some dealing with the land must take copy documents held by the registrar as correct and containing all material provisions. In addition he is not entitled to call for the original so as to check the correctness of the copy. The clear intention of the joint report was that the copy document and the register would be conclusive (§ 9.52); and that the register would be "a barrier to further enquiry in relation to the documents referred to in it" (§ 9.53). Not only is this part of the general framework within which transactions are now conducted, it is a fact which is or should be known to the parties themselves. The charge in the present case was created by using the standard Land Registry form CH1. The standard form ends with a warning which includes:

"Under section 66 of the Land Registration Act 2002 most documents (including this form) kept by the registrar relating to an application to the registrar or referred to in the register are open to public inspection and copying. If you believe a document contains prejudicial information you may apply for that part of the information to be made exempt using form EX1 under rule 136 of the Land Registration Rules 2003."

- 110. The use of CH1 is not compulsory. Parties are free to use their own forms of charge. So the use of form CH1 is a question of choice. Here the parties chose to use it. Moreover, parties may choose to hive off their bargain into two separate documents (as was done in this case). Knowing that form CH1 is a public document the parties may choose which parts of their bargain they choose to put into the public domain and which parts they wish to keep private. Party autonomy is thus fully respected. They may, of course, choose to incorporate by reference the terms of another document (e.g. the Barsetshire Building Society's mortgage conditions 2012 edition); but that is a matter for them. If they do incorporate the terms of another document by reference, that will be apparent on the face of the document that the Registrar has retained, and which anyone may inspect. Moreover, in such a case the Registrar may refuse to proceed with the registration unless the incorporated document is produced for retention by him: Land Registration Rules 2003 r. 17; Ruoff & Roper Registered Conveyancing (§ 31.007).
- 111. The priority of interests under the Act is governed principally by section 29. That says:
- "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
- (2) For the purposes of subsection (1), the priority of an interest is protected—
- (a) in any case, if the interest—

- (i) is a registered charge or the subject of a notice in the register,
- (ii) falls within any of the paragraphs of Schedule 3, or
- (iii) appears from the register to be excepted from the effect of registration, and
- (b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate."
- 112. Schedule 3 contains the list of overriding interests which are not postponed to a registered disposition. They include (among others) certain rights of persons in actual occupation of the land. It is also necessary to refer to section 116 of the Act which provides:
- "It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following—
- (a) an equity by estoppel, and
- (b) a mere equity,

has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)."

- 113. A right to rectify is traditionally classified as a "mere equity". It therefore falls within section 116. Although it is capable of binding successors in title, whether it does so in fact will depend (as the section makes clear) on the same rules of priority as any other property right.
- 114. Charges are dealt with in Part 5 of the 2002 Act. Sections 48 to 50 deal with priorities. Section 49 says:
- "(3) The proprietor of a registered charge may ... make a further advance on the security of the charge ranking in priority to a subsequent charge if—
- (a) the advance is made in pursuance of an obligation, and
- (b) at the time of the creation of the subsequent charge the obligation was entered in the register in accordance with rules.
- (4) The proprietor of a registered charge may also make a further advance on the security of the charge ranking in priority to a subsequent charge if—
- (a) the parties to the prior charge have agreed a maximum amount for which the charge is security, and
- (b) at the time of the creation of the subsequent charge the agreement was entered in the register in accordance with rules."
- 115. It is to be noted in particular that these matters must be entered on the register if they are to affect third parties. Section 51 makes it clear that a charge by way of legal mortgage comes into effect on registration. Section 52 (1) provides that:

"Subject to any entry in the register to the contrary, the proprietor of a registered charge is to be taken to have, in relation to the property subject to the charge, the powers of disposition conferred by law on the owner of a legal mortgage."

116. It will be seen therefore that all these sections refer to registration or to entries on the register. The form of the register is prescribed by the Land Registration Rules 2003. Charges are entered in the charges register, whose form is prescribed by rule 9 of the Rules. This requires the charges register to contain (among other things) details of the charge, sufficient to enable it to be identified, and restrictions entered under section 40 of the Act. Section 49 (3) is picked up by rule 108 which enables (but does not require) a proprietor of a registered charge to apply to the registrar for an obligation to make further advances to be entered in the register. If such an application is made the registrar "must make an entry in the register in such terms as he considers appropriate to give effect to [the] application". Likewise section 49 (4) is picked up by rule 109, which is in similar terms."

- 162. Lewison LJ then later analysed what could be used in construing documents and said:
  - "124. Our courts have already drawn distinctions between the use of background material in the interpretation of what I might call "ordinary" commercial contracts on the one hand, and the interpretation of negotiable and registrable contracts or public documents on the other. It is true, as Arden LJ points out at [41], that in his speech in Chartbrook Lord Hoffmann did not expressly refer to documents in a public register. But he did refer to articles of association and to bills of lading; and made the point that the background relied on in Chartbrook would have been available to any prospective assignee or lender. The point about public documents did not arise for decision. If Lord Hoffmann had meant to exclude public documents from the kind of instrument where the role of background is limited, he would have had to have considered authority to contrary effect. In Opua Ferries Ltd v Fullers Bay of Islands Ltd [2003] UKPC 19 [2003] 3 NZLR 740 the Privy Council considered the scope of a licence to operate a ferry service. Opua argued for the admission of extrinsic evidence to explain the terms of the registered certificate. The Privy Council rejected that argument. Lord Hope said:
  - "19. There would much to be said in favour of this argument if the relevant documents were contained in a contract between the parties which the court was being asked to construe. If that were so the court would wish to put itself into the same position as the contracting parties were when they entered into their contract. As Lord Hoffmann said in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912H, when one is interpreting a document of that kind one is seeking to ascertain the meaning which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The parties' knowledge of how the ferry service was in fact being operated from day to day at the time when such a contract was entered into would be part of the background.
  - 20. But it does not follow that the same approach is to be taken when one is construing a public document. The documents included in the register maintained by a regional council under section 52(1) of the Act have that character. This is, and is intended to be, a public register of passenger transport services. Members of the public who consult the register may come from far and near. They may have some background knowledge, but they may have none at all. In Slough Estates Ltd v Slough Borough Council [1971] AC 958, 962 Lord Reid said that extrinsic evidence may be used to identify a thing or place referred to in a public document. But he went on to say that this was a very

different thing from using evidence of facts known to the maker of the document but which are not common knowledge to alter or qualify the apparent meaning of words or phrases used in it. As he put it, members of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence. Moreover, the only information which a regional council is obliged by section 53 to ensure is reasonably readily available to the public is that which gives details of the service which the council has registered. The statute makes the position clear. The register is expected to speak for itself."

125. This is not an isolated occurrence. The same principle has been applied to the meaning of planning permissions both by the House of Lords (Slough Estates Ltd v Slough Borough Council [1971] AC 958) and by this court (Secretary of State for Communities and Local Government v Bleaklow Industries Ltd [2009] EWCA Civ 206 [2009] 2 P & CR 21). It has been applied to a company's memorandum and articles of association (Egyptian Salt and Soda Co Ltd v Port Said Salt Association [1931] AC 677); and also to the interpretation of an injunction or receivership order (Masri v Consolidated Contractors (Oil and Gas) Company SAL [2009] EWCA Civ 36 [2009] 1 CLC 82). In all these cases the justification for the restrictive approach is that third parties might (not will) need to rely on the terms of the instrument under consideration without access to extraneous material.

126. The High Court of Australia has applied the same approach to the interpretation of conveyancing documents intended to be registered under the Australian Torrens system: Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45 (2007) 233 CLR 528. As the joint judgment in that case put it (§ 39):

"The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee."

127. It is true that even after the passing of the Land Registration Act 2002 ours is not a fully fledged Torrens system, where the registered title is indefeasible with very limited exceptions. We have more overriding interests, and greater opportunities to alter or rectify the register than would be acceptable under a true Torrens system. Despite these differences in my judgment the general approach of the High Court ought to apply to our system of land registration. It is also true that the High Court expressed itself in terms of admissibility. But as I have said admissibility is not the sole criterion. Even if the evidence is admitted, the question remains: what influence should it have?

128. There is, in fact, no conflict between this approach and the principles established in Investors Compensation Scheme. For the question is: what weight would the reasonable person with all the background knowledge of the parties attribute to background material which did not appear on the face of the charge itself? All this was elegantly explained by Campbell JA in Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council [2010] NSWCA 64 (§ 151):

"However, the way those principles come to be applied to a particular contract can be affected by aspects of the contract such as whether it is assignable, whether it will endure for a longer time rather than a shorter time, and whether the provision that is in question is one to which indefeasibility attaches by virtue of the contract being embodied in an instrument that is registered on a Torrens title register. All these are

matters that would be taken into account by the reasonable person seeking to understand what the words of the document conveyed. That is because the reasonable person seeking to understand what the words convey would understand that the meaning of the words of the document does not change with time or with the identity of the person who happens to be seeking to understand the document. That reasonable person would therefore understand that the sort of background knowledge that is able to be used as an aid to construction, has to be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document."

129. In Attorney General of Belize v Belize Telecom Ltd Lord Hoffmann himself said of an earlier decision of the Court of Appeal discussing a company's articles of association:

"Because the articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company."

130. In my judgment this is the key to the present case. The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. There is, in my judgment, a real difference between allowing the physical features of the land in question to influence the interpretation of a transfer or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not). Land is (almost) invariably registered with general boundaries only, so the register is not conclusive about the precise boundaries of what is transferred. Moreover, physical features are, after all, capable of being seen by anyone contemplating dealing with the land and who takes the trouble to inspect. But a third party contemplating dealing with the land has no access to collateral documents."...

135. Cherry Tree point out that there was in fact an obvious defect in the charge as registered, because panel 7 referred to the sum secured by the charge in panel 9; and panel 9 was blank. Cherry Tree accept that if the charge as registered appeared to be complete, then the facility agreement would not have influenced the interpretation of the charge. In other words, if the registered charge had specified the amount secured by the charge, but had failed to include the enlargement of the statutory power of sale, then the only means of remedying the defect would have been by rectification. But that is not the case here: the reader of the charge has no way of knowing how much is secured by it. Thus it is argued that the reasonable person with the background knowledge of the parties would have realised that there was something missing; and would have made further inquiries. Those inquiries would have led him to the facility agreement, and to the agreement that the mortgagee's power of sale should extend beyond the statutory

power. I do not accept this argument. It is one thing to say that the reasonable reader would perceive an obvious mistake in the document (call it "A") and that recourse to the background enables mistake A to be corrected. It is quite another to say that having perceived mistake A, recourse to the background enables the reasonable reader to identify another and unconnected mistake (call it "B") and then use the background to correct both mistake A and mistake B. I do not believe that there is any case that goes that far; and in my judgment it would be an unwarranted extension of the principles approved in Chartbrook . As Lord Hope explained in Melanesian Mission Trust Board v Australian Mutual Provident Society [1996] UKPC 53 (1997) 74 P & CR 297:

"The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

136. In my judgment in the particular contextual scene of a charge intended to be completed by registration at HM Land Registry, the insertion of the missing clause ought to have been effected (if at all) by way of a properly pleaded and proved claim for rectification. There was no such claim pleaded in the present case, and no attempt to prove one. In my judgment therefore the case should not have been decided summarily as a pure question of interpretation of the charge."

# 163. Longmore LJ agreed with Lewison LJ and added:

"147. Mr Pickering for Cherry Tree who is the purchaser from Landmain in the present case seeks to follow this fashion by saying that the background to the charge shows that the parties agreed the power of sale could be exercised at any time after execution of the charge. It must follow that the parties intended to express that agreement in the charge because they must have intended that agreement to be effective; it must further follow that their failure to express that agreement in the charge was a mistake and that the charge must therefore, as a matter of construction, mean that the power of sale could be exercised at any time after execution of the charge and that the power of sale conferred on the mortgage by section 101(1)(i) of the Law of Property Act 1925 has been "varied or extended by the mortgage deed" pursuant to section 101(3) of that Act; it would then follow yet further that a good title has been passed to the purported purchaser who is therefore entitled to be registered as the proprietor of the property.

148. This line of argument, it seems to me, goes too far in its reliance on the background relied on, even though that background was undoubtedly known to both of the parties to the charge. The legal charge in the present case is not just an agreement made by two parties to the transaction who are themselves alone affected. It is a public document on a public register open to inspection and potentially to be relied on by third parties. I do

not think that mistakes in such documents can be construed away by a process of construction of the kind envisaged in Lord Hoffmann's principle (5).

149. For my part I would respectfully approve the statement of principle at para 3.18 of Lewison on The Interpretation of Contracts (5th ed. (2011)):

"In the case of a standard form contract, a negotiable contract or a public document evidence of background to an individual contract has a more limited part to play."

My Lord is able to cite numerous authorities in support of this proposition culminating in the post-Chartbrook case of Re Sigma Finance Corporation [2010] 1 All ER 571. He then says that Lord Hoffmann "appears" to have taken a different view in para 40 of Chartbrook (where Lord Hoffmann says that ordinarily an assignee must take his chance). But it is perhaps noteworthy that that paragraph is part of a longer passage in which Lord Hoffmann is concerned to stress the attractions of (before going on to rebut) the heresy that pre-contract negotiations should be admissible as an aid to construction. It is part of the paragraph in which he recognised the force of Briggs J's objection to the admissibility of pre-contract negotiations that "it would be unfair to a third party who took an assignment of the contract or advanced money on its security". Lord Hoffmann says this proves too much because it is an argument against the admissibility of any such background. Before he says that an assignee must ordinarily take his chance, he instances two cases where first a company's articles of association and secondly a negotiable bill of lading had to be construed. He is therefore really accepting that public and negotiable documents are different from ordinary contracts which can, of course, be assigned but are not generally negotiable like a bill of lading is. So Lord Hoffmann's "different view" is perhaps more "apparent" than real.

- 150. It seems to me therefore, for these reasons and the reasons more fully given by my Lord, that the public nature of the charge which falls to be construed in this case must militate against the construction for which Cherry Tree contends."
- 164. Mr Pryce submits that the Loan Agreements are admissible to construe the Charges, and which should be regarded as referring to them and not be regarded as lacking sufficient certainty. I note that both Longmore LJ and Lewison LJ both said that in the circumstances of Cherry Tree, a remedy could exist in the law of rectification (and which would have potentially assisted French and Heaphy as, in my judgment, rectification would be likely to relate back to the time of the original transaction and therefore give rise to an equitable right which would be prior in time, and hence binding on, the claimant's charging orders (this point not being affected by the different law relating to registered dispositions) see paragraphs 121 and 122 of Cherry Tree) but I do not think that Mr Pryce has really sought to advance such a claim.
- 165. I disagree with Mr Hurst to the effect and hold, as a matter of law, that the actual signed Loan Agreements themselves are admissible in construing the French Charge and the Heaphy Charge. This is because:
  - i) The Charges only create equitable charges and not registered charges under the 2002 Act and so that there is no obligation for them to be registered to be completed and effective. They are not required to be and are not "registered dealings" or public documents. Thus the same policy considerations do not, in my judgment, apply to them as to the registered charge which was the subject of the Cherry Tree decision; and so it is the ordinary contractual approach

applying to ordinary contracts which is applicable. As to this see paragraphs 127, 130, 131 and 149

- ii) I do not see that it matters that the Charges were protected by unilateral notices on the Land Register for each of the Properties (and Beacon Hill), as:
  - (a) That is not the same mechanism as registration of a disposition (transfer or charge). It is simply protective and enables a person considering whether to engage in a registered disposition to know who it is that they have to contact about it
  - (b) While the position (in the light of section 120 of the 2002 Act, and which only operates when the Land Registrar keeps a copy of a disposition (and where I do not decide whether or not "disposition" under that section only extends to "registrable dispositions") might be different if the Land Registrar had been provided with and kept copies (or even originals) of the Charges, and so that the parties might be said to have treated them as being or being equivalent to public documents, that did not occur here (and, rather, the parties treated the Charges as not being public documents). As to this see paragraphs 109 and 130
- iii) The doctrine does not apply where either (i) the Charge itself refers to another document or (ii) a mistake appears on the face of a Charge, and where the ordinary principles of construction can be used to identify (1) that other document or (2) that there is a mistake and the answer to that mistake (as opposed to the answer to other mistakes which are not part of the apparent mistake). That is made clear in paragraphs 110 and 135
- iv) This is all the more so in relation to an omission to identify or a mistake in identifying what is secured see paragraphs 141-2 and 144 where Longmore LJ very clearly thought that an omission of what was secured by the Charge was clearly immaterial as it would be obvious that the intent was to secure whatever had been lent.

I regard the above (which is my own analysis) as being consistent with the analysis of Cherry Tree in Sahota v Sohal [2022] EWHC 2459 at paragraph 128 as applying to the facts of that case (although there the Deputy Master went somewhat further in limiting the principle of Cherry Tree).

- 166. Applying these various principles and the facts as I have found them to be, I consider first the Heaphy Charge. I consider that its true construction is to secure (under its clause 2.1) what is due from time to time under the Heaphy Loan Agreement. In coming to this conclusion, I have taken into account all the possible constructions, but it seems to me that that is what the reasonable reader would conclude, and in particular as:
  - i) The Heaphy Charge is something of a homemade document (as it contains at least one drafting error where it refers to "Jared's Liabilities") and therefore the reasonable reader will be less likely to approach the wording very strictly
  - ii) The reasonable reader, and thus the court, strives to avoid uncertainty so as to invalidate a contract. There is a considerable difference between the court choosing between two possible genuine (i.e. which translate into actual factual

applications) meanings and a court finding itself driven to hold that the words cannot be given any genuine meaning i.e. they can only be given a meaning which has no factual application at all. Mr Hurst contends that the latter is the case here, i.e. the words refer to something which simply does not exist and never did exist (i.e. a Loan Agreement dated 30 December 2009 which was entered into by both Jared and Penny as well as Heaphy). However, that is a classic instance of a clear and apparent mistake where the court (applying one of both of the falsa demonstratio principle and ordinary construction) will consider whether there is a clear answer as to what was intended

- iii) The phrase "Jared's Liabilities" suggests that the liabilities are those of Jared rather than of both Jared and Penny
- iv) The Heaphy Charge refers in its definition of "Loan Agreement" to "an agreement to advance monies between "the Chargor" and "the Lender" dated 30 December 2009." There never was any Loan Agreement at all between Heaphy and both Jared and Penny, but there was one between Heaphy and Jared and which was dated 30 December 2009, and considering the factual matrix it is clearly that to which reference was being made
- v) The commercial purpose of the Heaphy Charge was clearly to secure monies which were or were to be owed to Heaphy. The only one of Jared and Penny who had borrowed and who had stated an intention to borrow monies from Heaphy was Jared
- vi) There are thus clear mistakes on the face of the Heaphy Charge and it is clear what was actually meant. This is no different from the situations canvassed in Investor's Compensation Scheme and Chartbrook where a formulation of words have been used which were clearly not intended to have the meanings that they bear literally but to have a different and identified meaning.
- 167. I would add, although this does not arise on my primary findings of fact, that if there was no signed Loan Agreement between Heaphy and Jared at the time when the Charge was executed, and that such document was only executed after the Heaphy Charge (but before the Flaux J Trial) I would have been likely to have held that the obligations owed to Heaphy by Jared were secured by it on its wording. That is because:
  - i) If there was no signed Heaphy Loan Agreement at that point, I would have held that the reasonable reader would understand, and so I would construe, the Heaphy Charge to secure all liabilities of Jared to Heaphy (and where Heaphy had made loans to Jared by then). That is because the Heaphy Charge was plainly intended to secure Jared's liabilities to Heaphy and, if there was no then Loan Agreement, the obvious meaning would be that the Heaphy Charge was to secure whatever did exist from time to time. That is effectively what was held in an equivalent situation in Cherry Tree for similar reasons; but, whether or not that is right
  - ii) Once the signed Heaphy Loan Agreement did come into existence, and which refers to there to be a charge in favour of Heaphy, Jared would both have contracted that the Heaphy Charge would exist and would also, in equity, have been unable to deny the Heaphy Charge so extended to the liabilities under the Heaphy Loan Agreement. The Heaphy Charge would effectively have been "fed" (in estoppel) terms by the signed Heaphy Loan Agreement and Heaphy

would also have been able to rely upon the contract to create a charge contained in it.

- 168. The position regarding the French Charge is slightly different as it refers to a Loan Agreement "dated 30 December 2009" when the actual French Loan Agreement (on my primary findings of fact) which then existed was that dated 17 December 2009 (although there was also one dated 16 December 2009) and which does not contain any Schedule.
- 169. However, having considered the possible constructions of the documents, I come to the conclusion that the reasonable reader would again construe the French Charge as referring when it uses the expressions "Jared's Liabilities" and "Chargor's Liabilities" to Jared's obligations under the French Loan Agreement (i.e. that dated 17 December 2009"). That is for essentially the same reasons as have led me to the equivalent conclusion in relation to the Heaphy Charge, but also that:
  - i) As there was no French Loan Agreement dated 30 December 2009, there is a clear and obvious mistake, but
  - ii) There was a French Loan Agreement dated 17 December 2009 and which was later in date than that of 16 December 2009 and which was the only other document containing obligations of Jared (and where there was no document containing any obligations of Penny). Thus, it was clearly that document which was meant.
- 170. I add that I do not see a problem with regard to the omission of the Schedule from the (17 December 2009 version of the) French Loan Agreement. That was a clear mistake on the face of the document, and it is clear from the factual matrix, in the form of the signed by French and Jared 16 December 2009 version of the French Loan Agreement, as to what was intended by the parties to be included and was meant by "the Schedule".
- 171. I add that, if, contrary to my primary findings, no French Loan Agreement had been signed by the date of the French Charge, I would again have held that all Jared's obligations (where French had made loans to Jared, and see further below, by then) to French were secured by the French Charge, and thus eventually (once it was signed) those contained in the French Loan Agreement for equivalent reasons to my analysis of the Heaphy Charge.
- 172. I therefore reject the claimant's assertion that either the Charges or the Loan Agreements lacked certainty, and hold that their wordings (and the other circumstances) had and gave rise to the meanings and effects set out above.

#### What Loans were secured

173. The claimant contends that only loans after the signing of the Loan Agreements are subject to them and, hence, to the Charges. I disagree. The clauses 1 of the Loan Agreements each make clear that sums already advanced are encompassed within the definition of "the Loan". Further, it would be commercially unreal for not all the sums to be intended to be secured by the Charges.

What land was subject to the Heaphy Charge and to the French Charge

- 174. The claimant asserts that the Heaphy Charge and the French Charge did not create any charges in relation to any of the Properties but only (at most) in relation to Beacon Hill. Mr Hurst submits that as the expression "the Chargor" is defined as being Jared and Penny, and as there is no express wording (unlike in the BWB Charge) as to references to "the Chargor" being joint and several, and as the security provided for by their clauses 3.1 is "all the Chargor's interest in the Property"; the charges can only be over joint owned land (i.e. only Beacon Hill) and not over the Properties or Jared's (sole) interest in them.
- 175. Mr Hurst further relied upon the clauses 1.1 as defining "Property" as meaning the freehold property "vested in... the Chargor specified in the Schedule". He contended that (i) "the Chargor" meant both Jared and Penny together and thus the definition in the clauses 1.1 could not extend to the Properties which were, and as the Schedule itself set out, vested in only Jared; and (ii) this was made all the more clear by the wording of clause 1.5 with its reference to Penny only being the joint registered proprietor of Beacon Hill and "so the charges covenants and obligations of this Deed shall only apply in relation to Beacon Hill and not any other part of the Property." i.e. that the charge did not apply to the Properties but only to Beacon Hill. Mr Hurst further pointed out that French and Heaphy have made no claim to rectify the wording the Loan Agreements on the basis of a common intention that the Properties were to be the subject of the charge.
- 176. Mr Pryce submitted that the true construction of the Charges (and the Loan Agreements) was to charge the Properties (as well as Beacon Hill) and, in any event, whatever was the interest of Jared (100% in the Properties but 50% in Beacon Hill) or Penny (0% in the Properties but 50% in Beacon Hill) in them.
- 177. In relation to this aspect (but also in relation to his contentions that any charges over or debts relating to charges over the Properties have been released see below), Mr Hurst cited a number of authorities and other material.
- 178. Mr Hurst drew my attention to mortgage precedents in Fisher and Lightwood's 10th edition and in the Encyclopaedia of Forms and Precedents, 5th edition, and to the fact that, where it is intended that liability is joint and several, a specific clause can be introduced to say precisely that. In fact, such a clause appears in Bates Wells & Braithwaite's charge at clause 1.2(d).
- 179. I do not see that though as really being a matter on point here as, firstly, a precedent is no more than that. It is a way of doing things to make matters clear. I do not really see these encyclopaedias and textbooks as being part of the factual matrix in terms of documents created between lay parties and, even if they are, it does not seem to me that I should give them any particular real weight.
- 180. Secondly, because the question I am dealing with here is actually a different point. That is to say where, as often is the case, after mention of two people's names there is given a single word of definition, that definition as a single word can be read as being (i) either or both of the two people or (ii) each of them individually or (iii) whether it can only be read to mean the two of them together. I note that it often is the case that a provision is included within deeds or, for that matter, ordinary contracts, that a definition which extends to two people can be read as either or both and I will come on to an authority which deals with that question in due course.

- 181. Thirdly, because there is also before me a question as to how one construes a deed where one of two people included within a definition has an interest in a property purportedly being charged, but the other does not. It does not seem to me that the answer to the question as to whether liability is joint and several, or whether there is a clause dealing expressly with that, necessarily answers that further particular question, which I will come on to in more detail in due course.
- 182. However, in any event, the fact that precedents exist whereby particular points can be dealt with expressly does not seem to me to be a particular weighty feature of the factual matrix, notwithstanding that lay people could possibly in some way or other have access to the relevant books. A reasonable reader would consider that lay people are unlikely to have read such books (or the same books) or have taken them into account.
- 183. Mr Hurst also drew my attention to Chitty on Contracts, 33rd edition, and, in particular, section 17-001 on joint obligations and its following paragraphs. 17-001 reads:

"Introductory definitions

Several liability arises when two or more persons make separate promises to another, whether by the same instrument or by different instruments. Thus if A and B covenant with C that they will each pay him £100, each is liable to pay £100. Their promises are cumulative and payment by one does not discharge the other."

That being contrasted with the next paragraph, 17-002:

- "A joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation and consequently performance by one discharges the other. Joint liability is subject to a number of strict and technical rules of law which are discussed in the paragraphs as follows."
- 184. There is then a reference in 17-003 that joint and several liability arises when two or more persons promise jointly to do the same thing and severally make several promises to do the same thing.
- 185. 17-005 is headed "Creation of joint liability". It makes clear that there is a presumption that if two people make promises then, at first sight, their liability is joint and not several, but the wording can expressly or potentially impliedly provide for something else.
- 186. Mr Hurst then took me to the decision of Re Hodgson [1886] 31 Ch 177. That related to a decision in partnership law prior to the 1890 Act where partners were jointly liable and a judgment had been obtained against the estate of one. The matter was also before the provisions of the Civil Liability (Contribution) Act 1978. The question was whether, in those circumstances, there was a joint obligation as far as the liability was concerned and which joint obligation was discharged by a judgment having been entered against the estate of one partner so that the other partner could no longer be pursued.
- 187. Mr Hurst referred me to a section at the paragraph beginning at the end of p.187 of the report which runs as follows:
  - "The allegation of the appellants in this case is to the effect that the father and son [who I should say are the partners] being joint debtors only and not jointly and severally

liable. The banker's their creditors by the course which they have taken in proving against the estate of the son have put an end to their right any further to pursue a remedy against the father. In respect of this proposition, the appellants invoke, though I think they invoke unsuccessfully for the reasons I will mention, the judgment in Kendall v Hamilton. It appears to me to be of considerable importance to bear in mind exactly what Kendall v Hamilton did and what it did not decide. Now, in order to do that, in a few words I should like to consider the rights in equity as distinguished from the rights in law of creditors of a joint debtor. The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of King v. Hoare. There is in the case of joint contracts and joint debt, as distinguished from the cases of joint and several contracts and joint and several debt, only one course of action. The party injured may sue at law all the joint contractors or he may sue once subject in the latter case to the right of the single defendant to plead an abatement and whether an action in the case of a joint debt is brought against one debtor or against all the debtors or continued against one debtor or all the debtors it is for the same cause of action. There is only one cause of action. This rule, although the advantage or disadvantage of it may have been questioned in times long past has now long passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have (inaudible) to modern minds, the rule is no means a technical rule. It is based rightly or wrongly on the idea that a joint debtor has a right to demand as he pleases that he should be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead an abatement that the right is one of considerable business value and is so recognised by the law. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one as it is capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors only."

- 188. Thus the effect of this technical rule was that, notwithstanding that a creditor could have chosen to sue all the joint debtors at once, if the creditor only sued one of them, then, subject to various indirect ways of proceeding through any judgment eventually obtained against the joint debtor who had been sued, the creditor effectively lost their ability to pursue the other joint debtor, that being a technical consequence of the indivisibility of a joint cause of action. The actual consequence itself has been abolished by section 3 of the Civil Liability (Contribution) Act 1978. Mr Hurst submits that the underlying principle of joint obligation remains.
- 189. Mr Hurst also took me to the previous decision in Kendall v Hamilton 4 AC 504. Mr Hurst submitted that that showed the court cannot use equity to change the rule and in some way or other turn a joint obligation into a joint and several obligation to mitigate the harshness of the consequence which Re Hodgson was to further identify and affirm. He drew my attention, in particular, to the judgment of Lord Hatherley at p.521C-G, and the judgment of Lord Selborne at p.540C-G, both of which are clearly to that effect.
- 190. Mr Hurst then took me to the decision in White v Tyndall 13 AC 263. That judgment considered a lease to two tenants, "their executors, administrators and assigns," and the question that arose was as to whether the covenants were enforceable against the executors of one of the tenants where they were not also executors of the other one of the tenants, and whether the obligation was a joint one so that the common law rules as to privity of estate and contract would not render an individual's executors liable. It was common ground between the parties and accepted by the House of Lords that the

question depended on whether the covenants in the relevant lease were joint only or joint and several. At 274D of the report Lord Fitzgerald said:

"It has not been made apparent to us that there was any ambiguity in the language of these covenants. Indeed, counsel for the respondents admitted that if these covenants stood alone and uncontrolled by anything else in the instrument, they were free from ambiguity and were in form joint obligations and should be so interpreted. Being asked on what he relied as coercing us to depart from the words of the instrument and interpret that which was in form and language the joint covenant to the two lessees as being a separate covenant of each, in reply he pointed to the words of the habendum 'as tenants in common and not as joint tenants' as giving severally the undivided interest to the lessees coupled with unit of possession."

191. Lord Fitzgerald then went on to consider this argument that, in effect, the presumption of joint obligations had been displaced by other wording. At 275B he stated:

"The current and modern decision has been, as we think it ought to be, to adhere to the very words of the contract where they are plain and unambiguous and not to depart from them on grounds of hardship or inconvenience. The contract in such cases represents in its language the intention of the parties and if they intended otherwise, they should have said so. We ought to hold ourselves bound by the express and unambiguous covenant before us unless coerced by authority to put on it a different construction from which its words import."

192. He then went on to consider the argument in that particular case and, in the next paragraph, said:

"The argument was that we should mould the covenant to the lessees because of their separate interests in the subject matter of the grant but no decision has been cited going so far. The passage cited from Platt (p. 123) is expressed, 'shall be measured and moulded according to the interests of the covenantees.' No decision to which we have referred has gone beyond that."

193. He went on to conclude at the end of 276C:

"My Lords, I have on the whole come to the conclusion that the covenants in question are free from ambiguity and are in their language and form joint and not several, that there is nothing on the face of the instrument to warrant us putting on the covenants any other construction from that which their language imports."

And he came to a conclusion accordingly.

194. Lord Herschell at p.276 dealt with the matter as follows:

"I take it to be clear that where several persons covenant with another in terms which import without ambiguity a joint and not a several obligation, the covenant must be held to be a joint one. Where the terms are ambiguous and may import either a joint or a several obligation, you may no doubt look at other parts of the deed, the interests of the covenantors and, indeed, any other circumstances appearing on the face of the instrument which will aid in the determination of the intention of the parties.

In the present case, it appears to me to be free from doubt that the covenant is in form joint. I can see nothing to indicate any several obligation and if it be free from

ambiguity it must, as I have said, be held to be a joint covenant. The only ambiguity which could be suggested... the use of the word 'their' preceding the words "executors, administrators and assigns." The examination of the other parts of the deed indicates it being said that the word 'their' is used distributively as referring to each of the words, persons as referring to each of the persons named. My Lords, I think that this may be admitted without in the least interfering with the view which I have put before your Lordships, that this is a joint covenant. If the word "jointly" were introduced into the covenant you would still, I apprehend, find the words as you find them in the covenant as expressed, "do hereby for themselves their executors, administrators and assigns." In truth the word "their" in such a collocation must always be read distributively, because the parties do not anticipate that they will have the same executors, administrators and assigns, which could only happen in very exceptional cases."

- 195. He came to the conclusion that the additional words were not sufficient to depart from that, but he did, of course, make it clear that if there was some ambiguity it was possible to look at the rest of the deed; and that there was a distinction between reading a word in a "distributive" sense (i.e. any of the persons included within a general expression) and so as to give rise to a joint covenant or joint obligation.
- 196. Mr Hurst also took me to one more recent authority, being that of AIB v Martin [2002] 1 WLR 494. In that case a standard form bank mortgage deed described two people as "the mortgagor" who gave a covenant to pay all sums advanced "to the mortgagor". However, in the deed in its clause 1 as stated in para.24 of the judgment there was provided:
  - "If the expression 'the mortgagor' includes more than one person it shall be construed as referring to all and/or any one of those persons and the obligations of such persons hereunder shall be joint and several."
- 197. The question arose as to whether or not one mortgagor of the two mortgagors was liable for advances made only to the other mortgagor. The person to whom the advances had not been made said that that was not a sensible, appropriate, commercial construction. The House of Lords, however, came to the conclusion that that contention was simply inconsistent with the wording. Lord Scott resolved the matter in paras.38-44 of his judgment as follows:
  - "Mr Davidson accepts that the construction contended for by the bank, and accepted by the Court of Appeal, is a legitimate construction but argues that the distributive construction, too, is legitimate and that the court, in choosing which of two legitimate constructions to adopt, should choose that which is more appropriate having regard to the factual matrix. The factual matrix, he says, supplies no reason why Mr Gold should have been expected to undertake personal liability for Mr Martin's debts and that the distributive construction is, therefore, to be preferred.
  - 39. I am afraid that I do not find Mr Davidson's submissions in the least compelling or clause 2 in the least ambiguous. The clause starts with a joint covenant by Mr Gold and Mr Martin. It is not three separate covenants, one by them jointly and one by each of them individually. It is a single joint covenant. Their liability under this joint covenant is declared to be joint and several. This deals with the effect of their joint covenant. It does not turn a single covenant into three covenants.
  - 40. But the critical issue is not whether Mr Gold and Mr Martin, as well as jointly covenanting to pay, have severally covenanted to pay. The critical issue is what have

they covenanted to pay? Under sub-clause (1) they have covenanted to pay 'all sums of money... advanced to the mortgagor by the bank...' The mortgagor means the two of them and/or each of them. So they have covenanted to pay all sums of money advanced by the bank to the two of them and/or to each of them. I do not understand how any process of construction can avoid the conclusion that they have covenanted to pay the sums advanced by the bank to Mr Martin alone as well as the sums advanced by the bank to them jointly.

- 41. The point is the same under sub-clause (2). Mr Gold and Mr Martin have covenanted to pay or discharge 'all other indebtedness and/or liabilities whatsoever of the mortgagor to the bank... 'ie '... of the two of them and/or each of them...' So they have covenanted to pay or discharge the indebtedness of Mr Martin to the bank as well as their joint indebtedness to the bank.
- 42. The distributive construction, which treats the single joint covenant as three separate covenants, makes no sense of sub-clause (3). Mr Gold and Mr Martin covenant to pay 'all costs and expenses incurred by the bank... in relation to this legal mortgage...' This would cover the costs of proceedings taken by the bank to enforce payment of the indebtedness of Mr Martin alone as well as the cost of proceedings to enforce payment of any joint indebtedness. There is no reference in sub-clause (3) to 'the mortgagor' and no distributive construction can exclude Mr Gold's liability to pay all costs and expenses caught by the sub-clause, whether incurred in connection with the recovery of indebtedness for which Mr Martin is primarily liable or of any joint indebtedness. A construction that excludes Mr Gold from liability in respect of advances to Mr Martin alone but leaves him liable to pay the bank's costs of proceedings to recover those advances does not produce a result that could sensibly, or reasonably, have been intended.
- 43. In my opinion, there are no real difficulties of construction arising out of the reference to 'the mortgagor' in clause 2. As was succinctly put by Mr Cousins, following for the bank, clause 2 constitutes a covenant by Mr Gold and Mr Martin to pay their joint debts to the bank, to pay Mr Martin's debts to the bank and to pay Mr Gold's debts to the bank.
- 44. This simple construction may leave Mr Gold under obligations that he had not foreseen and had not intended at the time he signed the joint mortgage. But he has already succeeded in an action for negligence against the firm of solicitors who acted for him and, as I understand it, this appeal is being funded by their insurers."
- 198. Lord Scott thus identified that the question was what did the covenant say was the actual obligation. He said that the words were clear and that the factual matrix did not suffice to override the clear wording of the words where his conclusion is effectively summarised in para.43, being that where there was an express clause which said that where the expression "the mortgagor" was used it would refer to not only both of the two individuals but also to each of them, and that meant that they were both covenanting to discharge the obligations whether they were obligations of both of them or obligations of only one of them.
- 199. It does not seem to me that that case is about joint and several liability at all. Rather it is about construction of the relevant obligation, being the question who had promised to pay which loans, that is to say loans made to whom. I also note the conclusion that somebody had promised to pay a loan which had been made to somebody else was not regarded by the House of Lords in any way as being commercially inconceivable.

- 200. Mr Pryce submitted that it was clear looking at each Charge as a whole that there was being granted security over each of the Properties. He relied in particular on Chartbrook but also took me to Wickman v Schuler [1974] AC 235 which is also referred to in Arnold v Britton, where the words used by the parties in their contractual documentation were held to produce a result so contrary to common sense that, where it was clear what was intended, the court would reject a construction based on the words actually used and come to a different construction. Mr Hurst submits that, notwithstanding the authority of that judgment, such an approach would only be legitimate in a thoroughly exceptional case which he would submit that this one is not.
- 201. Mr Pryce further submitted, firstly, that when construing the Charges, I should see them in the context of the Loan Agreements, both in terms of the Loan Agreements being part of the factual matrix and also as being referred to expressly in the Charges themselves. Mr Hurst responded that in any event the Loan Agreements do not help French and Heaphy as on this aspect they state in their clauses 4 that the loan is to be repaid from Jared's beneficial interest in the various properties and that Jared as sole absolute owner of each of the Properties does not own a beneficial interest for these purposes but simply a legal interest.
- 202. Secondly, Mr Pryce submitted these documents were drawn by a layperson and not by a solicitor, and they contain features which would suggest that they have not been drawn by somebody who really knows what they are doing, and that, therefore, the court should not adopt an overly technical construction of them. Mr Hurst responded that, firstly, his construction is an accepted legal sense of words which ordinary people should and, indeed, would know have a technical legal meaning; secondly, that the language is unambiguous; thirdly, that there is no clear error or, if there is one, no obvious answer as to what it is; fourthly, the fact that the construction may produce a poor and unfortunate result for the French and Heaphy is simply a consequence of the words created by Jared to which they signed up or accepted.
- 203. Thirdly, Mr Pryce submits that there is a general principle of equity and, indeed, mortgage law, that if one charges a property which one does not fully own then the charge extends to the extent of one's interest in the property. He therefore says that Jared could not in equity say to French and Heaphy that, as Penny has no interest in any of the Properties, although there is a purported charge over those properties, that charge does not extend to his own interest. Mr Hurst says that that principle does not apply as the charges are clear and only extend to jointly owned properties and, indeed, that this is a somewhat different situation to that where one charges a property which one only owns an interest in rather than all of it, being rather the reverse situation of a charge which is purportedly over a partial interest where one in fact owns the total interest.
- 204. I regard this is a question of construction of the Charges, and, having considered the various possible constructions, and applied the principles for construing documents set out earlier in this judgment, conclude that the correct construction is that each of the Properties and all of Jared's (and also Penny's) interest in them was being charged.
- 205. This is for the following main reasons:
  - i) I do not see the question of whether obligations were joint or several as being of any particular weight. I am concerned with what is being charged by the document i.e. what is the subject-matter property of the security, not the nature of what are the relevant debts. It therefore seems to me that what is said in Re Hodgson and Kendall is not directly relevant to what I have to decide

- ii) I also do not see the question of whether "the Chargor" actually owns a property which is sought to be charged by their document as being in any way determinative. It is in fact perfectly possible for a person to agree jointly with somebody else, here Penny agreeing jointly with Jared, to do something that only the other person (i.e. Jared) can do, or even something which neither can do. Further, clause 3.1 makes clear that they are only charging "the Chargor's interest", and so not purporting to do something which is not within their power
- iii) I do bear in mind that the effect of the definition of "the Chargor" in clause 1.1 means that clause 3.1 is to be read as the charge being of "Jared and Penny's interest in the Property". However, I do not see it as necessarily following that that means only their joint interest; and it is perfectly consistent with the wording for it to read effectively "whatever interest Jared or Penny or both or either of them have in the Property". It seems to me that that wording is, at most, ambiguous
- I do bear in mind that the definition of "the Chargor" in clause 1.1 means that clause 1.1 is to be read so that the definition of "Property" is "... freehold property vested in... Jared and Penny specified in the Schedule". However, again I do not see it as necessarily following that that means only if the property is vested in them jointly; and it is perfectly consistent with the wording for it to read effectively "... freehold property vested in either or both of Jared and Penny specified in the Schedule". It seems to me that that wording is, at most, ambiguous; and that this meaning is merely a "distributive" one as allowed for by Lord Herschell in White v Tyndall
- What it seems to me clearly and obviously resolves all these matters is the wording of the Schedule itself. It opens with the words that it sets out "The freehold property... charged by clause 3.1" and then identified as set of properties stating which are owned by Jared and Penny jointly and which by Jared alone. I regard it as clearly stating that all of those properties (and thus including the Properties vested in Jared alone) are being charged by clause 3.1. I would regard it as clearly bizarre to the reasonable reader if the intent of the Schedule was to make clear that all but one of the properties specified in it were not to be charged. There would simply be no point in them appearing in the Schedule at all
- vi) I do bear in mind clause 1.5 which on one reading says that "the charges covenants and obligations" in the Charge only apply to Beacon Hill. However, it seems to me that that reading ignores both the remainder of the words of clause 1.5 and the Schedule; and in particular as:
  - (a) The Schedule clearly intends charges over each of the Properties (see above)
  - (b) Clause 1.5 is introduced by the words "Penny is only a party to this Deed insofar as she is joint registered proprietor of Beacon Hill." Thus clause 1.5 would, in my view, be read to be only about Penny and only about Beacon Hill. What it provides is that Penny is only to be affected by the Deed in relation to Beacon Hill i.e. that she is only joining in the Charge only to ensure that Beacon Hill (including her own interest in it) is fully charged and not for any other purpose (and see below in relation to Jared's debts). However, it does not provide that Jared and Jared's

- interest in the Properties are not to be charged and not to be subject to the Deed
- (c) Clause 1.5 ends with the words "and not any other part of the Property". However, clause 3.1 and the Schedule both purport to charge "the Property" without limit. Again it seems to me that that strongly points towards clause 1.5 only limiting the position with regard to Penny
- (d) It seems to me that there is at most (in favour of the claimant) an ambiguity which is easily resolved by reference to the other material, and, if that is wrong, a clear mistake (in Chartbrook terms) which is to be resolved by inserting (as I regard as being clearly intended after considering the factual matrix and commercial purpose see below) the words "to Penny" after the word "apply" in clause 1.5
- vii) It is proper to consider the Loan Agreements in this context as they are both referred to in the Charges and are part of the factual matrix. They make clear (see above) that all the Properties are being charged
- viii) It is further proper to consider the commercial purpose. That was, on the face of the Charges, to be provide security for the French and Heaphy by way of the grant of equitable charges to secure loans made by them to Jared, and which is clear from the face of the document. It can make no sense for the document to list (in the Schedule) properties on the basis that they are not to be charged; the obvious reason for listing them (as the Schedule itself says) is that they were agreed to be charged
- ix) The Charges are poorly drafted and somewhat homemade, and therefore the reasonable reader would give greater weight than they might do otherwise to the factual matrix and the commercial purpose
- Mr Hurst submits that his preferred construction is not commercially absurd as French and Heaphy would have been fully secured by way, in effect, of security over Penny's interest in Beacon Hill even without any of the Properties. I disagree. The clear intent of clause 1.5 (and clause 4 of the Loan Agreements) is that the security over Penny's interest was a last resort with Jared (and the other parties) intending that it would be Jared's beneficial interest in Beacon Hill and the Properties which would be the primary recourse for repayment of the secured lending. For Penny to have to pay (which would be the effect of Mr Hurst's construction) so that Jared's own assets (i.e. the Properties) would be available to Jared (or his creditors) was clearly not what was intended and, it seems to me, is what would have been commercially absurd.
- 206. I tend to agree with Mr Hurst that any principle of equity that a person who purports to charge an entire property which they jointly own will succeed in charging their own interest is not directly applicable here. I have decided this issue simply as a matter of construction as to what I see that a reasonable reader would think was clearly intended.

#### Use of monies belonging to others

207. I think that the claimant contends that the Loan Agreements and Charges, or at least the security created by the Charges, should be invalid as a result of the monies provided by

French, and possibly also Heaphy, being or being the proceeds of monies "stolen" by Jared from FXS and Global.

- 208. Mr Hurst sought to impugn various transactions which had taken place between Heaphy and Piagi. However, I am satisfied on the balance of probabilities that I should accept Heaphy's explanation that he was simply trading with Piagi (fronted by Drayton and having the involvement of Jared whom Heaphy trusted) in relation to currency exchanges he required to take place in order to deal with his own property in the USA. In any event, I do not see how this would assist the claimant. Even if the monies lent by Heaphy belonged beneficially to others, it was not to the claimant. That would not enable the claimant to defeat Heaphy (even if those others might be able to claim any proceeds eventually received by Heaphy).
- 209. Mr Hurst also sought to impugn French's various payments of monies contending that they were derived from monies paid out of the client account of FXS in early 2008, and further that the alleged Dubai transaction never (or may never) have existed. He contended that French was merely being manipulated by Jared and had received monies which belonged to the company's customers, and, if not, to the company. I do not feel that I have sufficient material to decide those questions of fact. However, I reject Mr Hurst's arguments as a matter of law. Even if the monies lent by French belonged beneficially to others, it was not to the claimant (whose transactions were in 2009). That would not enable the claimant to defeat French (even if those others might be able to claim any proceeds eventually received by French).
- 210. It may also be that Mr Hurst asserted that the monies provided by French actually belonged to Jared, or were being advanced by way of repayment of a debt owed by French to Jared. If that was correct, then it would probably defeat French's claims. However, I do not find that as proved on the balance of probabilities but rather the contrary (and where there is also a presumption that monies provided by a person are owned by them). Even if Jared had given those monies to French in 2008, they would still be owned by French and capable of being lent (back) by French. However, having considered all the material, and in the light of my findings and approaches set out above, I consider that it is more likely than not that the monies did not belong to Jared and that French did not owe Jared any debts. For that to have been the case would simply be inconsistent with French having purported to provide monies on loan and French's own evidence (to which I give weight see above).

## Signatures and Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989

- 211. The claimant asserts in some way that the Heaphy Charge and the French Charge are ineffective because of non-compliance with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which reads as follows:
  - "2 Contracts for sale etc. of land to be made by signed writing.
  - (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
  - (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

- (3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.
- (4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order...
- (5) In this section—
- "disposition" has the same meaning as in the Law of Property Act 1925;
- "interest in land" means any estate, interest or charge in or over land or in or over the proceeds of sale of land."..."
- 212. I am unclear as to how this argument is being put precisely, although it seems to me that Mr Hurst advanced it on a factual basis (i.e. that the Loan Agreements were signed after the Charges) which is inconsistent with my primary findings of fact that the Loan Agreements were signed before the Charges.
- 213. In any event, the Charges were made by deed and are thus not contracts to create a legal charge but simply each an immediate effective charge in equity over the Properties and thus an immediate disposition rather than a contract for a disposition. If consideration were required, such is plainly being given by way of both additional lending and forbearance to call in the existing lending (which would be immediately recoverable if no valid equitable charges were granted). I would add that, in relation to the Properties at least, French and Heaphy would have immediate charges over Jared's 100% beneficial interests (there is no trust for sale in relation to them as the Properties were solely owned by Jared) in them as they are capable of being charged in equity (as they are interests in equity) by writing (here a deed) signed by Jared (see section 53(1)(c) of the Law of Property Act 1925). Further, in any event, the provision of further loans (in January 2010) by French and Heaphy on the basis that they had each an existing enforceable equitable charge (arising from Jared having executed the deeds) would give rise to estoppels and thus to equivalent equitable charges as Jared could not have asserted that the security which he had purported to grant was ineffective in such circumstances.
- 214. I add that, while this does not arise on my primary findings of fact, for the reasons given above, I think it likely that the French Charge and the Heaphy Charge would have secured all of Jared's liabilities to French and to Heaphy even if the Loan Agreements had only been signed after the Charges.
- 215. Further, once the Heaphy Loan Agreement was signed by Jared and Heaphy (on whatever date, as I have held that that was before the Flaux J Trial) it was itself a contract to create equitable charges in favour of Heaphy. It seems to me that the same would apply to the French Loan Agreement notwithstanding the omission of the Schedule since, in such circumstances, the reasonable reader would have to ask themselves what "Schedule" was meant and would answer that the reference was to "the Schedule" which appeared in the signed 16 December 2009 version, and in consequence that documentary provision would be incorporated by reference (section 2(2)).

216. It therefore seems to me that there is nothing in these section 2 points.

# Absence of Consideration

- 217. The claimant contends that the Charges were unenforceable as no consideration was given for them (by French or Heaphy). Mr Hurst has cited to me the general principle that equity does not aid a volunteer (see Kekewich v Manning 1851 2 De GM&G 176 at 188) and that a voluntary charge by deed does not confer an equitable charge (Hardinge v Cobden 45 ChD 470 although the authority does imply that if there is value provided that the charge will then be enforceable). Mr Hurst submits that there is no consideration or that it is simply past consideration. Mr Hurst also submitted that Heaphy (and French) simply provided monies on a voluntary family basis or would have done so had they been asked.
- 218. Mr Pryce submits that there is good consideration, or at least value, in the form of the Loan Agreements and French and Heaphy making the further loans in January 2010 and not calling in the monies owed to them.
- 219. I consider that Mr Pryce is correct, for the following various reasons:
  - i) Equity generally only requires value to be provided (which can include a forbearance)
  - ii) I have found that French and Heaphy provided loans on the agreed basis that they would be true enforceable loans in law. Whether French and Heaphy might have been prepared to make gifts (and I am not persuaded on the balance of probabilities having considered all the evidence before me that they would have been, but I see that as making no difference) is irrelevant as that was not the dealing which actually occurred between each of them and Jared
  - iii) On my primary findings of fact, value was provided by French and Heaphy in that:
    - (a) Legal obligations (i.e. to grant the Charges) which were owed by Jared to French and Heaphy under the then (at the time of execution of the Charges) Loan Agreements were performed and thus discharged
    - (b) French and Heaphy provided further monies in January 2010 to Jared by way of their payments to BWB on Jared's behalf
    - (c) French and Heaphy did not simply sue for the return of the monies advanced by them
  - iv) In any event, as French and Heaphy provided further monies on the faith of the existence of the then signed Charges, Jared would clearly be estopped from denying the validity of the Charges. For Jared to have asserted that there were no valid Charges would have been obviously unconscionable see e.g. Pennington v Waine 2002 1 WLR 2075 at paragraphs 64 and 117
  - v) The same would apply even if my primary findings of fact were incorrect and the Loan Agreements were signed after the Charges were executed (but before the Flaux J Trial). French and Heaphy would still have provided value by way of forbearance in not seeking the return of their loaned monies, and the estoppel and unconscionability argument would be even more clear

vi) In any event, French and Heaphy can simply rely on the Loan Agreements themselves which clearly contain consideration (including an inability to sue during the term of the loans) and provide for the equitable charges to be granted in respect of the Properties.

# Wrongful Intent

- 220. The claimant by Mr Hurst appears to contend that there were, or are, five types of wrongful intent involved in relation to the Loan Agreements and the Charges which should invalidate them, or at least the security created by them.
- 221. First, that French and Heaphy would have been prepared to provide monies to Jared by way of gift, or at least with only a moral (and not a legal) obligation, to repay; but instead chose to do so in a way which would mean that Jared's assets (being subject to their security) would not be available to Jared's creditors (including the claimant); and also to deal with matters to this end rather than insisting that Penny provide them with security (i.e. over her interest in Beacon Hill).
- 222. I do not accept that contention, which is wholly speculative, as a matter of fact. Although French has been prepared to provide monies to Penny (and by extension to Jared), and although Heaphy was a trusting friend of Jared, and although Penny did allow her interest in Beacon Hill to be provided by way of security, it seems to me that there are countervailing considerations which lead me on the balance of probabilities to hold that those outcomes would not have occurred, even had Jared asked for them to do so (which Jared did not) as:
  - i) It would have been clearly uncommercial for French and Heaphy to give monies at their own considerable cost, and when security was available
  - ii) It would have been clearly uncommercial for Penny to apply her own asset (her 50% in Beacon Hill) to discharge Jared's obligations to French and Heaphy when it was unnecessary to do so as the Properties, owned by Jared, were available for such purpose
  - iii) French and Heaphy each had no reason at all to benefit Jared's creditors (including the claimant) should Jared lose before Flaux J
  - iv) Penny had no reason at all to benefit Jared's creditors (including the claimant) should Jared lose before Flaux J.
- 223. In any event, I consider that the claimant's argument is misconceived in law. French and Heaphy provided their monies on the basis that they would have secured loans. Absent insolvency law (and I refer to section 423 below but insolvency law otherwise does not apply as Jared is not subject to any insolvency process) and injunctions (see below), French and Heaphy were entitled to deal with their own monies as they saw fit and to make secured loans to Jared, and I have no evidence to suggest that the interest rate was in any way uncommercial or unreasonable (and had actually been proposed by BWB). They had no obligation to be more generous
- 224. Second, Mr Hurst submitted that there was some common design between Jared and both French and Heaphy to use the Charges and the Loan Agreements to deplete Jared's assets by way of the 4% over base interest rate. Having considered all the evidence I do

not find that there has been proved on the balance of probabilities that there was any such common design but rather the contrary, and in particular as:

- i) I generally accept Heaphy's evidence and give weight to that of French (see above)
- to suggest that it was uncommercial or unreasonable for short-term lending, even though heavily secured, to a person in the position of Jared, and at first sight it would seem both reasonable and commercial (and I refer further to this aspect when considering section 423 below)
- iii) When base interest rates were very low (as they were), such an interest rate might well (and quite likely has been) turn out to be less than property price inflation, so that there would be no actual net depletion of the overall value of the assets (as opposed to them being sold immediately to discharge the capital and interest of the loans)
- There was no apparent reason (at the time of the entry into of the Charges and the Loan Agreements) to suppose that the realisation of the security would take as long as did occur. If Jared lost the Flaux J Trial (as he did), the claimant could (as he did) obtain charging orders immediately and would have been able (as the claimant was, and I have not had any explanation as to why this did not occur) to bring enforcement proceedings immediately which would (it would have been thought) have resulted in early sales and discharge of the capital and interest of the loans, and so that interest would not have mounted up. I note that interest would not even begin to run (should Jared lose the Flaux J Trial as he did) until 25 July 2010 at the earliest (see clauses 4 and 5 of the Loan Agreements and below).
- 225. Third, that there was no need for Jared to borrow from French and Heaphy as Penny had agreed by the BWB Charge to be jointly liable for Jared's legal costs owed to BWB and to charge her 50% interest in Beacon Hill as security and which would have been sufficient for all such costs.
- 226. It seems to me that this raises questions of fact as to what extent Penny had committed herself in relation to Jared's legal costs. Even if the BWB Charge should be construed so that Penny was simply bound to BWB for the amount of Jared's costs, whatever they might turn out to be, Penny might well have been able to object to Jared that he should not incur costs without her consent, and such an objection might have been binding upon or at least assented to by BWB. I can see no reason in law on the material before me as to why Penny would have had to commit herself to Jared's legal costs or why she should not have been able to call a halt to a commitment for future costs. It was, at first sight, up to Penny to decide whether or not to support her husband; and, on the material before me, if she had sought legal advice, a lawyer ought to have advised her that it was in her interest for Jared to fund his own legal costs from his own assets (or to provide her with security over the Properties for any monies which might be taken from the security she had granted over Beacon Hill).
- 227. However, even if Penny had committed herself to BWB fully, I do not see that that would in way stop Jared (and Penny) persuading French and Heaphy to lend monies on the basis that they would have security, and which would be dealt with as a primary

security, over the Properties. None of French, Heaphy or Penny (on the material before me, and assuming they had no direct liability of their own) owed any duties to the claimant (or Jared's general creditors) to use their own assets, rather than have Jared's own assets, to discharge Jared's obligations (including his legal costs). I consider that the claimant's argument is misconceived in law.

- 228. Fourth, that French and Heaphy intended, and Heaphy and the French Estate may still intend, to use any proceeds from this litigation to pay or otherwise benefit Jared (and Penny). Mr Hurst points to French's supporting Penny, and Heaphy's friendship with Jared, and says both would do whatever Jared asked them to do.
- 229. Having considered all the evidence before me, although I think that French may well have been prepared to advance more money to Penny following the Flaux J Trial if he had it available, I do not think that Heaphy would have done so or ever intended to give money to Penny or Jared. I find on the balance of probabilities, and where it was his own money, that Heaphy would only ever have lent money to Jared and not given it.
- 230. However, in any event, I find on the balance of probabilities, having considered all the material, that there never was any agreement between French or Heaphy with Jared to such effect. That would have been quite contrary to their evidence and the documents and commercial common-sense, and where there was no reason for either of them to commit to making gifts to Jared. On that basis, the claimant's arguments are simply misconceived in law. French and Heaphy were, and the French Estate (and beneficiaries) and Heaphy, are, and always were, entitled to deal with their own monies as they please. That includes giving them to Penny (or Jared), however much that may upset the claimant.
- 231. For the same reasons, absent insolvency law and any applicable injunction, there was nothing to stop French and Heaphy lending money to Jared for his legal costs on the basis of taking security over Jared's assets even if they subjectively intended (as long as they had not agreed with Jared; and which I find that they did not) to give equivalent amounts to Jared even if he lost the Flaux J Trial. They could have purchased Jared's assets on the same basis. That is simply all a matter of using Jared's own assets to fund Jared's legal costs (which is legitimate) and their deciding that they would like in due course to make gifts to Jared from their own monies (which is also legitimate). The fact that Jared's creditors are worse off than if Jared had not used his assets (which he was entitled to do, subject as aforesaid) to fund his legal costs is simply a consequence of Jared utilising his own assets towards his own legal costs.
- 232. Fifth, that the Loan Agreements overstated what had been lent by French and wrongly stated what had been lent by Heaphy; and further overstated what each had agreed to lend in the future. For the reasons given above, I do not see that the overstatements in anyway invalidate the Loan Agreements where there has been no attempt by French or Heaphy to say that they lent any more following the Loan Agreements than they actually did. The fact that the Heaphy Loan Agreement says that £9,999 was lent in December 2009 whereas in fact Heaphy was to lend £10,000 in January 2010 seems to me to be immaterial. Mr Hurst disclaimed any allegation of dishonesty against French and, in the light of French's evidence, it seems to me that French simply assumed that Jared had drafted the document correctly (as Heaphy did). I see no reason why French or Heaphy should not be able to enforce the document (should they otherwise be able to do so) because of this.

233. I therefore see nothing wrongful or sufficiently wrongful on the part of French or Heaphy in this area which has any material effect on the French Estate's or Heaphy's claims to enforce their security.

# Section 423

- 234. The claimant further seeks to have the French Charge and the Heaphy Charge (and any other security granted to French or Heaphy) set aside under section 423 of the 1986 Act.
- 235. Sections 423, 424 and 425 of the Insolvency Act 1996 read as follows:
  - "423 Transactions defrauding creditors.
  - (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—
    - (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration:
    - (b) he enters into a transaction with the other in consideration of marriage; or
    - (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
  - (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—
    - (a) restoring the position to what it would have been if the transaction had not been entered into, and
    - (b) protecting the interests of persons who are victims of the transaction.
  - (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—
    - (a)of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
    - (b)of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
  - (4) In this section 'the court' means the High Court or—
  - (a)if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;
  - (b)if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.

- (5)In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'.
- 424 Those who may apply for an order under s. 423.
- (1)An application for an order under section 423 shall not be made in relation to a transaction except—
- (a)in a case where the debtor has been made bankrupt or is a body corporate which is being wound up or is in administration, by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or (with the leave of the court) by a victim of the transaction;
- (b)in a case where a victim of the transaction is bound by a voluntary arrangement approved under Part I or Part VIII of this Act, by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim; or
- (c)in any other case, by a victim of the transaction.
- (2)An application made under any of the paragraphs of subsection (1) is to be treated as made on behalf of every victim of the transaction.
- 425 Provision which may be made by order under s. 423.
- (1)Without prejudice to the generality of section 423, an order made under that section with respect to a transaction may (subject as follows)—
- (a)require any property transferred as part of the transaction to be vested in any person, either absolutely or for the benefit of all the persons on whose behalf the application for the order is treated as made;
- (b)require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of the money so transferred;
- (c)release or discharge (in whole or in part) any security given by the debtor;
- (d)require any person to pay to any other person in respect of benefits received from the debtor such sums as the court may direct;
- (e)provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the court thinks appropriate;
- (f)provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for such security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction.
- (2)An order under section 423 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the debtor entered into the transaction; but such an order—

- (a)shall not prejudice any interest in property which was acquired from a person other than the debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or prejudice any interest deriving from such an interest, and
- (b)shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.
- (3)For the purposes of this section the relevant circumstances in relation to a transaction are the circumstances by virtue of which an order under section 423 may be made in respect of the transaction.
- (4)In this section 'security' means any mortgage, charge, lien or other security".
- 236. One question is as to in which Court an application under section 423 may be brought. The circumstances here is that there is no existing bankruptcy or insolvency process as far as Jared is concerned. It was held in TSB Bank Plc v Katz [1997] BPIR 147 at pages 149 to 150 that an application under section 423 can be brought in any part of the High Court. That includes the King's Bench Division. It seems to me to be plainly sensible to allow the section 423 application to be brought in these proceedings because, just as was the situation in the Katz litigation, the various actual and legal matters regarding the Property and the Property trust deed are all bound up together. As Arden J, as she then was, said at the end of her judgment, doing this will involve "costs saved on multiplicity of proceedings avoided". Other judges have taken the same course, such as in Sahota v Sahal [2022] EWHC 2049.
- 237. I reviewed the law in this area comprehensively in Messalti v Malik [2023] EWHC 553. In general:
  - i) Section 423 applies where:
    - (a) There is a transaction at an undervalue by a transactor; And
    - (b) Which is for the purpose of putting assets beyond reach of a specific creditor or class of creditors. Such must be a (but need not be the primary) subjective purpose (as opposed to a mere consequence) of the transactor. The creditor(s) need not have been identified by the transactor and they (and their debt) need not have existed at the time of the transaction
    - (c) A victim of the transaction, who need only be a creditor who as a result of it has the value of or ability to enforce their eventual debt eventually diminished
  - ii) If section 423 applies the Court has a discretion as to what relief to grant to be exercised in accordance with the policy of the section and what is just in all the circumstances. In Sahota v Sohal that resulted in the extent of a security granted by the transactor being reduced to the amount actually provided by the other party.
- 238. The claimant submits that he is a victim of the grant of the French Charge and of the Heaphy Charge as his rights as a creditor (and indeed those of other creditors of the

- claimant) are prejudiced by it. That does not seem to me to be contested by Mr Pryce and does seem to me to be correct.
- 239. The claimant submits that the French Charge and the Heaphy Charge, and the associated Loan Agreements, are each transactions at an undervalue. Mr Hurst refers to Sahota v Sohal and Malik v Messalti, and submits that such is the case as (i) the interest rate is 4% above base and is "inflated" (ii) French and Heaphy were granted security over a number of properties (iii) French and Heaphy would have been prepared to give Jared the monies or to lend without security. Mr Pryce submits that there is no undervalue.
- 240. I do not find there to be any undervalue in this case (and where, although I think I would have come to the same conclusion in any event had this not been so, the burden of proof on showing undervalue is on the claimant), as:
  - The interest rate of 4% above base for short-term lending at a time when base rates were very low indeed (in the region of 0-1%), and even in relation to a fully secured transaction, is not at first sight remotely "inflated" or out of accord with ordinary lending practice (or, at least, I have no evidence at all that it is). No evidence has been adduced by the claimant as to commercial rates either in relation to a transaction of this nature or generally. The court is used to seeing massively greater rates for short-term bridging secured finance. The court is used to seeing similar rates in residential leases. The court is also used to seeing rates in that range in solicitor's client care letters. I note that the interest rate itself appears to have first been included by BWB. While the court might award a lower interest rate when considering what to award under section 35A of the Senior Courts Act 1981 (discretionary interest on debt or damages), I note that the Judgments Act rate is and was 8%.
  - ii) Interest would not even start to run for a substantial number of months (see clauses 4 and 5 of the Loan Agreements, and also further below) so that the loans commenced on an interest-free basis
  - iii) The interest is expressly stated to be "simple" (see clauses 4 of the Loan Agreements)
  - iv) The fact that there was security granted over a number of Properties is only relevant to the debts being, seemingly, well secured. The overall value is not affected as there is only one total liability
  - v) In commercial terms, Jared, being the subject matter of a claim in fraud and the owner of highly insolvent trading companies from which he had extracted large amounts of money, would be regarded, at first sight, as a bad risk. Even if there is good and adequate security provided, a commercial lender will build such risk and the chances of having to spend time, cost and resource in enforcement into an interest rate level
  - vi) I find as a matter of fact against French's and Heaphy's having been prepared to give or to lend without security (see above). However, that is irrelevant to the question of whether or not their lending was at an undervalue
  - vii) I have been concerned that some of the lending was in advance of security being provided, and so that the security extended to that lending. However: (a) there

was substantial lending (in comparison with the overall totals) from each of French and Heaphy following the provision of the security (and thus substantial value) and which would not have been provided without it (in my judgment on the balance of probabilities, and if that is wrong there would have been no obligation to have provided such further lending without security); and (b) French and Heaphy could, if the security had not been provided, simply have sued for the return of their monies (and sought and obtained charging orders) and upon which, at first sight (but see below where I conclude effectively that such would have been permitted albeit that there is some doubt), they would simply have succeeded as this would not be contrary to the underlying purposes of the WFO – however, I place little weight upon this particular point.

- viii) I simply have no real evidence of undervalue i.e. of the value in money's worth of the Charges (and Loan Agreements) being provided by each of French and Heaphy as being "significantly less" than that provided by Jared (and Penny), and I certainly do not gain such an "impression" even after having considered the relative economic benefits for each side (the approach taken in Pena v Coyne (No. 1) 2004 EWHC 2684 at paragraphs 107 and 114-115. I add that if I had found such to be the case, I would have adopted the same approach as in Sahota v Sohal and only have reduced the security to the extent of the undervalue for the same reasons as given in that case.
- 241. As a result of my conclusion above, I reject the claim under section 423.
- 242. However, two further matters have been argued and I deal with them briefly.
- 243. First, that Jared did have a prohibited subjective purpose being that one purpose of the French Charge and the Heaphy Charge was to prejudice Jared's creditors including the claimant. Although Mr Pryce did not concede this, I would agree with Mr Hurst that this has been made out on the balance of probabilities as, having considered all the evidence (and including my criticisms of Jared above):
  - i) I regard Jared as someone who would arrange his affairs so as to defeat his creditors. He took such steps in relation to FXS and Global with a view to protecting his provisions of monies by way of trust from their creditors (see the Flaux J judgment). He has sought now to claim that he has no assets at all and if that is right (which I doubt) I regard him as having arranged matters accordingly in order to protect any family assets from creditors
  - ii) Flaux J's assessment of Jared is fully consistent with such a conclusion
  - iii) Jared was the proposer that the loans from French and Heaphy would be secured over Jared's assets. That was at least in part so that French and Heaphy would be protected from Jared's creditors, and therefore seems to me to have formed part of Jared's intention
  - iv) It was further perfectly sensible commercially and inherently probable that Jared was wishing to use his assets (and not Penny's or other family assets or resources) to fund his legal costs, and which would inevitably prejudice his creditors. I regard Jared as having been commercially astute enough to realise this

- v) In law all that is required is that Jared had such a purpose in mind even though his primary purpose was to receive monies from French and Heaphy, and may well have been to protect Penny and her interest (although he could have granted Penny security over the Properties in order with equivalent effect).
- 244. Second, as to whether any claim to set aside the security would have been limitation barred. I considered the competing authorities as to this in Messalti v Malik including at paragraphs 177-8.
- 245. Sections 8 and 9 of the Limitation Act 1980 ("the 1980 Act") provide as follows (a claim under a statute or a deed being a claim under "a speciality"; and section 8 being subject to section 9):
  - "8 Time limit for actions on a specialty.
  - (1) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.
  - (2) Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.
  - 9 Time limit for actions for sums recoverable by statute.
  - (1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
  - (2) Subsection (1) above shall not affect any action to which section 10 or 10A of this Act applies."
- 246. I note that the majority of the Court of Appeal in Hill v Spread Trustee 2006 EWCA 542 (see Messalt paragraphs 117-8) appear to have held that the limitation period for a creditor would run from the creation of the obligation owed to them, and may have implied that it would be 6 years although they also suggested that an application of a trustee in bankruptcy to set aside a settlement could be 12 years.
- 247. I further note that the Court of Appeal in JSC v Ablyazov [2018 EWCA 1176 (see Messalti at paragraphs 127-128) held that the limitation period was 6 years from the date of the underlying transaction which was sought to be impugned; that reasoning being without Hill v Spread being apparently cited or considered.
- 248. In Sahota v Sohal, the judge thought that the limitation period would be 12 years where the application was not for payment of money but to set aside a security, and said at paragraph 194:
  - "194 I add that the Limitation Act 1980 does not prevent me from granting relief under s.423 Insolvency Act 1980 in relation to the transaction effected by the 2012 Deed. On the authorities if the s.423 claim is for a sum of money, the limitation period is 6 years under s.9 Limitation Act 1980 as a claim to recover a sum of money by virtue of an enactment. Other claims are subject to a 12 year limitation period as actions upon a specialty under s.8 Limitation Act 1980. The claim in the present case is not a claim for the payment of a sum of money, or at least the relief which I am granting is not an order for the payment of a sum of money. Thus, the limitation period is the 12 year period. The earliest possible starting date for that 12 year period is the date of the 2012 Deed

- (5 October 2012). The latest possible end date is the date of the amendment to the Part 8 Claim Form. That may not formally yet have occurred, but it is likely to occur well within the 12 year period from 5 October 2012. This timing makes it unnecessary for me to consider or rule upon the subtleties of whether the limitation period could start to run before Mr Sahota became a creditor of Mr Rajan Sohal. It is possible that the amendment for which I have given permission will never be effected. To cover off that possibility I will make my s.423 order in respect of the transaction effected by the 2012 Deed (including my order below in respect of the transaction effected with Mrs Veena Sohal under the 2019 Deed) conditional on compliance by Mr Sahota before the 12th anniversary of the 2012 Deed, that is by 5th October 2024, with the requirements of CPR Practice Direction 17 paragraphs 1.3 (filing) and 1.5 (service). Accordingly limitation is not a bar to my granting relief under s.423 as above."
- 249. Mr Hurst contends that the limitation period is 12 years as he contends that the section 423 claim is to set aside a security and not a claim for money and so that the action is one for a speciality (section 8(1) of the 1980 Act 12 years) and not for money under a statute (section 9 of the 1980 Act 6 years). He further relies on the fact that an amendment has been permitted to his statement of case to contend that his section 423 claim is to be treated as having been made on the date of his original application which would put the claimant within a 12 year period and relies on section 35(1) of the 1980 Act which provides:
  - "35 New claims in pending actions: rules of court.
  - (1)For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
  - (a)in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
  - (b)in the case of any other new claim, on the same date as the original action.
  - (2)In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
  - (a) the addition or substitution of a new cause of action; or
  - (b) the addition or substitution of a new party;
  - and "third party proceedings" means any proceedings brought in the course of any action by any party to the action against a person not previously a party to the action, other than proceedings brought by joining any such person as defendant to any claim already made in the original action by the party bringing the proceedings
  - (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.
    - For the purposes of this subsection, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action."

- 250. He also points out that Mr Pryce requires permission (his clients have made a subsisting application) to take a limitation point at all.
- 251. Mr Pryce contends for a shorter limitation period of 6 years, saying in reality this is a claim for money, and also says that there is no relation back.
- 252. I am slightly concerned that if Mr Hurst is correct about relation back that I should not have granted permission to the claimant to amend to take the section 423 point as that might have been prohibited by section 35(3) of the 1980 Act and CPR17.4(2); but the amendment has been permitted and it is too late for Mr Pryce now to object to it.
- 253. I do not need to decide whether the relevant limitation period would run from the date of the creation of the obligations owed to the claimant creditor or of the underlying impugned transaction as all were more than 6 and less than 12 years before the claimant's application of 9 April 2020. I therefore do not do so and where the authorities are not consistent.
- 254. I have come to the conclusions that the section 423 claim is treated to have been commenced for limitation purposes under section 35 of the 1980 Act as on the date of the application notice of 9 April 2020. This is because:
  - i) It was a new claim, but
  - ii) It was not a claim made by way of third party proceedings as it was by a person already a party (the claimant) against persons who were already parties (French and Heaphy), and
  - Was made in the course of "an action". For these purposes it seems to me that the words "an action" are sufficiently wide to extend to, and should apply here to, the application notice of 9 April 2020 which is somewhat freestanding in nature as it is merely an enforcement mechanism of a charging order and no part of the original claim against Jared. The alternative is that the relevant "action" is the entire claim against Jared and so that the relation is back to the issuing of the Claim Form in 2010. No-one has sought to persuade me of that, and I think that that is correct as the application notice of 9 April 2020, being against new parties (i.e. French and Heaphy (and also Drayton)) was itself a "new claim" and "third party proceedings" for the purposes of section 35(2)(b)
  - iv) Accordingly, section 35(1)(b) applies to relate the section 423 claim back to the date of the application notice of 9 April 2020.
- 255. I have also concluded that Mr Hurst is right to say that the limitation period is 12 years. Although I reach that conclusion only on balance as the claimant creditor is seeking a payment of money (which would tend to suggest that section 9 of the 1980 Act applies with its 6 year time period), my essential reasons are as follows:
  - i) The relief sought under section 423 is to set aside the French Charge and the Heaphy Charge. That is not "An action to recover any sum recoverable by virtue of any enactment" which is the wording of section 9. In Sahota v Sohal, the judge came to a similar conclusion

- ii) The fact that the creditor claimant is seeking payment out from a sum now held by the court seems to me to be coincidental. The claim for money is against Jared and under a judgment and now a charging order, rather than under a statute
- iii) The decisions in Hill and JSC were on different facts, where sums of monies were being claimed, and did not consider this type of situation.
- 256. I add that, as stated above, if I had found that the transactions were at an undervalue, I would only have set aside the securities in favour of French and Heaphy to the extent of the undervalue, and as was done in Sahota v Sohal. It seems to be that, for similar reasons to those expressed in Sahota, it would be unjust to deprive the creditor (the French Estate and Heaphy) of the value which they had provided (to include interest as they have lost the use of the monies in the meantime).

Whether the Rights were lost altogether or as to interest as a result of the Beacon Hill transaction

- 257. The claimant next asserts that French and Heaphy lost any rights which they had as a result of their allowing their unilateral notices to be removed on the sale of Beacon Hill and for Penny to take her 50% share of the equity of Beacon Hill. This has to be in the context that I have held (see above) that the security granted by the French Charge and the Heaphy Charge extended to Jared's interests in the Properties, and that the clauses 1.5 provided that Penny was only affected by those Charges in relation to Beacon Hill.
- 258. Mr Hurst submits that French and Heaphy's conduct is such as to release all their security as:
  - i) The obligations of Jared and Penny as "the Chargor" under the Charges are joint, and not joint and several; and they include the covenant of "the Chargor" to pay "Jared's liabilities" under clause 2.1
  - ii) A release of a joint debtor (although Mr Hurst accepts, correctly in my view, that this does not include a covenant not to sue a joint debtor) will release their co-debtor see Deanplan v Mahmoud 1993 Ch 151
  - iii) French and Heaphy must be taken to have released Penny, and hence they released Jared, and hence there are no longer any obligations of "the Chargor" which are secured.
- 259. Mr Pryce submits that what occurred was at most a covenant not to sue Penny, and that French's and Heaphy's conduct was only consistent with them retaining their rights against Jared and the Properties.
- 260. I am not satisfied that the doctrine of release of joint debtors could apply in this situation at all as I do not think that Penny was truly such a joint debtor for it to be capable of applying. I do accept that in principle in view of the definitions wording of the Charges and the absence of any reference (unlike the BWB charge) to obligations being joint and several, at first sight the obligations of "the Chargor" are simply joint. However:
  - i) The Charges relate to "Jared's Liabilities" and which are the obligations of Jared (and not of Penny) under the Loan Agreements. This is a situation of a principal debtor and another person joining in as, at most, quasi-guarantor; and that does

not generally give rise to a true joint liability – see LEP v Rolloswin 1971 1 WLR 934 at 946

- Clauses 1.5 of the Charges make clear that they, and this expressly includes their covenants and obligations (which include their clauses 2.1), only affect Penny in relation to Beacon Hill. Further clause 4 of the Loan Agreements states that the loans are to be repaid from the Properties and Jared's interest in Beacon Hill, and that recourse will only be had to Penny's interest in Beacon Hill if those are all insufficient (and does not suggest that any personal claim could exist against Penny at all). I conclude that a reasonable reader would, having seen all these words and considered the factual matrix and commercial purpose:
  - (a) Not consider that Penny could be personally liable at all. Rather they would construe the Charges and their clauses 2.1 and 3.1 as simply providing that Penny was charging her interest in Beacon Hill as a secondary security (the Properties and Jared's interest in Beacon Hill being the primary security); without Penny being personally liable for Jared's debts at all; but and whether or not that is right
  - (b) Consider that the security over the Properties (and Jared's interest in Beacon Hill) was simply freestanding. They would construe the Charges as providing that Penny had charged her interest in Beacon Hill to secure liabilities which were solely of Jared; and Jared had charged the Properties (and his interest in Beacon Hill) to secure liabilities which were solely of Jared; and that there was no single joint debt
- Even if Penny is obliged to pay what Jared owes as a result of clause 2.1 of the Charges, and Penny was released, there would not be a release of Jared's obligations under the Loan Agreements (which obligations are not joint but solely those of Jared). In those circumstances, I do not see that Jared would be able to assert that his assets (i.e. the Properties) were no longer secured in relation to his obligations. That would be both unconscionable on Jared's part and not how I would consider that a reasonable reader would construe the Charges rather the reasonable reader would consider that they were intended to continue to secure Jared's liabilities on Jared's assets
- iv) There never was any question of Jared having a right of contribution against Penny should enforcement take place against Jared or the Properties. That is made clear by clauses 1.5 of the Charges and 4 of the Loan Agreements. The primary liability was always of Jared and of his assets, and he had no recourse against Penny. Thus a release of Penny does not prejudice Jared.
- 261. However, and whether or not the above is correct, in any event I agree with Mr Pryce, and hold that there was only, at most, a covenant not to sue Penny, and actually not even that but only a release of the security over Beacon Hill; for the following main reasons:
  - i) There is nothing in the documentary evidence which expresses any release of Penny at all. The furthest that the documentary evidence goes is such documents as the 29 October 2010 email from BWB stating that French was releasing Beacon Hill but and because he was going to look to the Properties

- ii) I accept Heaphy's evidence and give weight to French's evidence that they each gave up their equitable charges on Beacon Hill on the basis that they were maintaining the rest of their security and Jared's obligations to repay the debts, and were looking to the Properties for its satisfaction
- This all has to be seen in the context of clauses 4 of the Loan Agreements and clauses 1.5 of the Charges which are to the effect that the Properties are to the primary security (and to which recourse is first to be had) and Beacon Hill only the secondary security, and that Penny is only involved in her capacity as 50% joint owner of Beacon Hill. The clear objective (as well as subjective) context of French and Heaphy's releases of their security over Beacon Hill is that they were maintaining their rights in relation to the Properties, and hence against Jared.
- 262. I add that I do not see that a release of the security over Beacon Hill could affect the security which existed over the Properties as a matter of pure property law (and I do not think that Mr Hurst contended that it could). The effect of clauses 4 of the Loan Agreements and clauses 1.5 of the Charges is that the Properties were to be the primary security and Beacon Hill only the secondary security. The claimant earlier in the litigation has raised the question of marshalling (where a later chargee can take advantage of an earlier chargee's decision as to which security to enforce against to take-over an alternative security of the earlier chargee) but:
  - i) Marshalling does not prevent the first chargee (here French and Heaphy) from realising against whichever security they see fit. Rather it enables a second chargee to pursue against securities which were not the subject of their own charge
  - ii) The claimant has not pursued this argument; and which would probably be have to be made against Penny who is not a party to this application
  - The clauses provide that Penny's interest in Beacon Hill is a secondary security, and that the debts should be realised if possible (and which has proved to be the case if the security is otherwise enforceable) from the Properties, and so, at first sight (although I do not decide this in any way), the claimant would have a difficulty in using the marshalling doctrine against Penny's interest in Beacon Hill.
- 263. The claimant has, however, raised a further argument regarding interest. Mr Hurst contends that, by allowing Beacon Hill to be sold and then doing nothing, French and Heaphy waived the right to claim continuing interest, and where no demands for repayment were made by them to Jared. Mr Pryce contends that there is nothing which could amount to such a waiver.
- 264. It seemed to be common-ground that interest had otherwise started to run. There is a potential difficulty with that proposition as clauses 4 of the Loan Agreements each provide that the monies fall due (and so that interest commences under clause 5) on "the <u>later</u> of (a) payment to you of the costs in the Claim; (b) 25 July 2010". The result of the Flaux J Trial was that Jared had to pay costs (and not that any costs were ever to be payable to Jared).
- 265. As to this, it seems to me that the reasonable reader construing the Charges would see the word "later" as being an obvious error for "earlier" on the basis that the word "later"

makes no commercial sense. There is no rational reason why French and Heaphy should not be repaid if Jared was to lose against the claimant (and an obvious rationale for their being granted security was in case Jared did lose); and no obvious reason why they would have to wait until 25 July 2010 if Jared was paid his costs of the claim earlier than then. This is a clear and obvious mistake where it is clear and obvious what was intended, and falls within the principles of Chartbrook (and also Wickman v Schuler). I think that Mr Hurst was right not to seek to contend otherwise.

I do not see that there has been any waiver by French or Heaphy of their rights to interest. A waiver requires a positive unequivocal act. Nothing has been identified which could possibly amount to such except an acceptance by Heaphy that he decided to wait until realisation of the Properties for his monies. I do not regard that as any sort of unequivocal waiver of the right to claim interest while he waited. A lender is perfectly entitled (subject to the law of limitation) to wait for interest to accrue and to delay in enforcing their security. The borrower and any subsequent chargee has the remedy of applying for an order for sale open to them, and if a sale is ordered then it will have the effect of discharging the loan (and preventing further interest arising) to the extent of the sale proceeds.

#### Limitation

- 267. At a late point in the litigation, Mr Hurst sought to amend the claimant's case to assert that French (and now the French Estate) and Heaphy are limitation barred from seeking repayment (of capital or interest) or enforcing their security by reason of section 5, 8 and 20 of the 1980 Act providing for time limits for bringing actions in contract (6 years), on a speciality (12 years) and for sums secured by a charge (12 years for capital and 6 years for interest). There is before me a subsisting (but opposed) application by the claimant to amend. However, Mr Hurst did not pursue this aspect in his closing submissions, and so I deal with it shortly.
- 268. I have considerable doubts as to whether such a limitation response would have real prospects of success (a usual pre-condition for permitting an amendment); and in particular as:
  - i) My Order of 29 June 2020 (and in particular its paragraph 7) provided that the £190,000 in court should be held "pending the outcome of the [claimant's application for payment out to him] and the Issues [defined as French's and Heaphy's contentions that they were entitled to payment out in priority to the claimant] and, in particular, resolution of whether the [Charges] do or did secure the sums contended by them..." At first sight this order would negate need for French and Heaphy to bring any action at all; and it seems to me that they have not done so on the (correct) basis that it obviated any need for them to do so. In consequence, the 1980 Act has no application
  - ii) If French and Heaphy did need to bring any "action", and assuming their making contentions (as recorded in my order of 29 June 2020) was not sufficient, it seems to me that they could still make a simple counter-application to that of the claimant, and which would be a "new claim" by existing parties against existing parties (and hence not "third party proceedings"), and where they had not brought any claim before. It would thus be an original counterclaim and both have relation back effect (to the date of the claimant's application 9 April 2020 which was less than 12 years from 2010) under section 35(1) and be permissible under section 35(3) of the 1980 Act. I can see no reason why I

would not give permission for such a counterclaim application to be brought if I was to permit the claimant to raise limitation as it would be simply responsive and just (and all the more so where the claimant had not insisted upon French and Heaphy making an application earlier). That would answer the limitation points at least as to capital.

269. However, and not only for those reasons, I would have refused the claimant permission to amend. The court scrutinises late amendment applications carefully (see cases cited at White Book notes 17.3.8). Further, it seems to me that the French Estate and Heaphy might well have been prejudiced both by their conducting the proceedings on a false basis (prior to limitation being raised at a late stage) and in terms of being disadvantaged in seeking evidence to counter such an argument (for example, evidence of acknowledgments of the debt obligations which would satisfy section 29 of the 1980 Act and start new limitation periods running).

# Proceeds of Crime Act

270. The Proceeds of Crime Act has been raised by the claimant in pleadings with some assertion that the loans were the proceeds of crime and cannot be relied upon. Mr Hurst did not pursue this in argument. I remain wholly unclear as to why it would be said that the claimant should be able to take such a point (there is no suggestion that the loans were funded from his monies) and, as it has not been pursued, say no more about it.

### The WFO

- 271. The claimant, however, contends that the Charges are unenforceable (or should not be enforced) because they were granted in breach of the WFO. Mr Hurst submits:
  - i) The WFO prevented the grant of disposals or dealings with or the diminishing of the values of the Properties by Jared (paragraph 7) unless the transaction was permitted under the exceptions in paragraphs 11(2) and paragraph 11(3); and even if its purpose was to raise monies to pay legal costs or fund living expenses within paragraph 11(1)
  - ii) The Charges were such dealings etc. within paragraph 7 of the WFO and (a) were not disposals in the ordinary course of business within paragraph 11(a); and (b) did not have the consent of the claimant by MDR within paragraph 11(3)
  - iii) The Charges were therefore granted in breach of the WFO
  - iv) French and Heaphy each knew of the WFO or are deemed to have known of the WFO and its terms and effect through (a) BWB (b) the registration by the claimant of his unilateral notices at the Land Registry
  - v) As a result the Charges should be unenforceable as a matter of law and/or equity.

#### 272. Mr Pryce contended that:

- i) The Charges were granted in the ordinary course of business within paragraph 11(2) of the WFO
- ii) The Charges were consented to in writing by MDR within paragraph 11(3) of the WFO, and so as also to create an estoppel

- iii) French and Heaphy each did not know and are not to be taken as having known of the terms of the WFO, and in particular where BWB told Heaphy expressly and French (impliedly) that the Charges did not involve any breach
- iv) The Court has a discretion and evaluative exercise to carry out even if there is breach and consequent illegality, and it would not be appropriate to prevent the enforcement of the Charges in the particular circumstances where Heaphy (expressly) and French (impliedly) had been told by BWB that there was no breach, and MDR (for the claimant) had written as they had.
- 273. The parties adduced various authorities to me, all of which I have considered but in particular the following.
- 274. Mr Hurst asserted that the WFO should be construed as should all injunctions, and that implications should not be permitted, citing Law Society v Shanks 1988 1 FLR 504, citing the following passage (and which is of some general importance):

"Read literally — and injunctions are meant to be read literally, particularly when they have a penal notice attached saying that he will be sent to prison if he does not comply — this would have prevented Mr Shanks from buying himself a loaf of bread or indeed incurring any expenditure at all in the course of his ordinary life. It is plainly wrong in that respect. Mareva injunctions addressed to natural persons should always make provision for the defendant's living expenses unless there is reason to believe that the defendant has other assets to which the order does not attach and which would be available for that purpose.

Furthermore, there should always be provision for the payment of ordinary debts as they become due, because the purpose of a Mareva injunction is not to establish a potential or actual judgment creditor as a priority creditor. Its purpose is solely to prevent the defendant evading the due processes of execution by salting away assets or otherwise making himself judgment-proof."

- 275. I note that Mareva injunctions (now known as "personal freezing injunctions" see CPR25.1 and of which the WFO is one) have, as well as provision for living expenses, contained an exception for payment of reasonable legal costs.
- 276. Mr Hurst also cited Banca Generali v CFE [2023] EWHC 323 where it was said at paragraphs 18-22 in relation to a freezing order:
  - "The proper approach to construction of the Order
  - 18. In determining this question of construction, I will apply the principles that are set out in paragraph 41 of Flaux LJ's judgment in Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd & Ors [2017] EWCA Civ 1525. Flaux LJ's summary drew on the judgment of Lord Clarke in the Supreme Court's judgment in JSC BTA Bank v Ablyazov (No. 10) [2015] UKSC 64 and that is the "judgment" referred to in the following quote:
  - "1. The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of the judgment).

- 2. In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of the judgment, approving inter alia the statements of principle to that effect in the Court of Appeal by Mummery and Nourse LJJ in Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695).
- 3. The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]-[26] of the judgment, again citing with approval what Mummery LJ said in Hadkinson)."
- 19. Point 1 of Flaux LJ's summary set out a caution against using perceptions as to whether an order should have been granted and if so in what terms as an aid to construction. Lord Clarke, with whom the rest of the Supreme Court agreed, warned in his judgment in JSC BTA Bank v Ablyazov against succumbing to any temptation to stretch legal analysis to capture what are seen as the merits or lack of merits of a case. Therefore, the question is simply what the Order means. If it is desirable to give the Order a broader meaning, the solution is to vary it for the future.
- 20. Point 3 of Flaux LJ's summary highlights the need to consider "context" when construing the Order. Some authorities give guidance on how relevant context is to be ascertained. In Sans Souci Ltd v VRL Services Ltd (Jamaica) [2012] UKPC 6, a case involving construction of a court order that did not contain an injunction, Lord Sumption said at [13] of his judgment:

"The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order."

- 21. The authorities indicate that caution should be exercised in using the parties' submissions in a case as providing context that illuminates the meaning of an order. In SDI Retail Services Ltd v Rangers Football Club [2021] EWCA Civ 790, Phillips LJ and Baker LJ, who were in the majority, expressed caution on this matter, with Phillips LJ saying:
- "Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities"
- 22. Underhill LJ had a slightly different perception on this matter but I will follow the approach of Phillips LJ, summarised in the quote above, since he was in the majority and Baker LJ echoed his concern."
- 277. Mr Hurst further submitted that the phrase "ordinary course of business" required both a business and a consideration as to what was "ordinary" within it. He cited a series of cases the latest being Koza v Ipek 2019 EWCA 891 where at paragraph 42 it was said:
  - "42 That brings me to the question of whether we should nevertheless hold that the expenditure is outside the ordinary course of business of Koza Ltd for the reasons

advanced by the respondent in its first additional ground. I agree with Mr Crow that it does not follow from the fact that a particular activity will benefit the company that it will be in the ordinary course of the company's business. An unprecedented new venture for a company, though deemed beneficial, would not necessarily be in the ordinary course. It is necessary to examine the existing business of the company, and decide whether, in the light of all the circumstances prevailing at the time when the activity is embarked on, it can properly be described, objectively, as within the ordinary course."

- 278. Mr Hurst asserted that all that was necessary for knowledge of the WFO was that French and Heaphy knew of its existence either directly or by BWB who he contended was acting as their agent by registering their unilateral notices or from the Land Registry if they had made reasonable enquiries. He submitted that they were bound by constructive notice, citing Kahrmann v Harrison-Morgan 2019 EWCA 2094 at paragraphs 116-126, a case dealing with whether a person was a bona fide purchaser without notice and so taking property free from equitable rights.
- 279. Mr Hurst submitted that if a person (such as French and Heaphy) had knowledge of a freezing injunction, they were bound not to engage in any prohibited disposal by the defendant (Jared) and that if they did so they would be committing a contempt of court. He referred to Taylor v Van Dutch [2017] EWHC 636 where at paragraph 14 it was said:
  - "14. Thus Colman J seems to have thought that the bank was under some sort of duty to apply for permission to exercise its security, in default of which it would be in contempt of court. Despite the respect which has to be given to the views of such an experienced Commercial Court judge, I respectfully disagree with that analysis. The source of Colman J's views seems to be Z Ltd v A-Z and AA-LL [1982] QB 558, the case referred to in para 15 of his judgment. In that case Lord Denning MR set out the basis of a freezing order (then a Mareva injunction). He described the "usual type of case" and said, at p 572, that:

"Every person who has knowledge of [the injunction] must do what he reasonably can to preserve the asset. He must not assist in any way to the disposal of it. Otherwise he is guilty of a contempt of court."

In my view, in saying that Lord Denning MR is referring to disposal by the defendant. He was not intending to refer to all disposals (though, of course, the most obvious case is one affected by or on behalf of the defendant)..."

280. Mr Hurst asserted that if there was a breach of an injunction, that was a contempt, and both law and equity would prevent French and Heaphy deriving a benefit, such as the enforcement of a security from such, and cited Clarke v Chadburn 1985 1 WLR 78 at 82A:

"I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a

meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

281. Mr Pryce took me to Normid v Ralphs 1989 1 LLR 265 and 274 (note) in support of his contention that these transactions were in the ordinary course of (Jared's) business even though regarding claims made against him personally in relation to the business of FXS/Global. In the first judgment, the Court of Appeal considered that a Mareva injunction might be granted to preserve certain rights and proceeds under insurance policies. In the second judgment the Court of Appeal said when considering an appeal against the Mareva which a first instance judge had granted and whether it permitted a settlement of a claim:

"Mr Colman's distinction between the disposal of a tangible asset and the disposal of a chose in action may or may not be correct. It is unnecessary for us to decide. For it is preferable to dispose of this appeal on a simpler ground. The courts have never allowed the Mareva jurisdiction, beneficial though it be, to inhibit the ordinary course of business or to interfere with a defendant's ordinary transactions, especially where third parties are involved. This was decided so far as concerns the payment of debts in the ordinary course of business in the case which is usually known as the Angel Bell [1981] Q.B. at page 65, even though it was arguable on the facts of that case that the debt in question was irrecoverable as a money lending transaction. It was decided, so far as the ordinary living expenses of individuals are concerned - even though the living expenses were on the grand scale - in p.c.w. v. Dixon [1983] 2 Lloyds Reports, 197 as varied on appeal.

But the principle extends beyond the payment of debts, or the incurring of ordinary living expenses. It applies also to all ordinary transactions in the course of business or, I would add, in the course of life. That appears from the decision of the Court of Appeal in Avant Petroleum Inc. v. Gatoil Overseas Inc. [1986] 2 Lloyd's Reports, 236. I need not refer to the facts of that case. The relevant passage is to be found in the judgment of Lord Justice Neill at page 243 where he said: "... the Mareva jurisdiction should not be used if the effect of the injunction which is granted is to bring to an end entirely a bona fide and established method of trading unless some wholly new arrangements are made between the party enjoined and some third party"."

282. Mr Pryce further referred in this context to JSC v A [2010] EWCA 1141 at paragraph 74 where Leggatt LJ said:

"74. Teare J's rejection of these submissions was based in large part on his construction of paragraph 9(b). He refers in his judgment to the definition of "ordinary course of business" by Lloyd LJ in Normid Housing quoted earlier but, as already explained, the focus of the Court of Appeal in that case was on whether the settlement of the issued claim justified the grant of Mareva relief. In that context the description of a disposal in the ordinary course of business as being the obverse of the dissipation of assets makes sense because that was the issue in relation to the grant or not of the injunction. We do not, however, accept that any transaction (even if not dissipatory in nature) can properly be described as one in the ordinary course of business. As explained earlier, the standard exception on which paragraph 9(b) is modelled provides a limitation on the scope of the injunction thereby enabling routine business transactions to be conducted without reference to the court. But dealings or disposals which are not part of the ordinary

business of the defendant in that sense do not necessarily fall foul of the purpose of the freezing order. They merely require the approval of the court or the claimant before they are carried out and so enable the court to scrutinise what, on its face, may not appear to be a routine or regular transaction."

# 283. I note that Leggatt LJ went on to say that:

- "75. The judge relied on the judgment in Normid Housing as providing support for his view that the paragraph 9(b) exception should be construed widely and not narrowly. It should, he said, be construed as extending to the activity of holding and managing assets so long as it is not aimed at dissipating a defendant's assets. We think that this is too widely stated. Literally applied, it would entitle any defendant to dispose of or deal with his investments free of the scrutiny of the court and is inconsistent with the form and structure of a freezing order which, for the reasons stated earlier, deliberately does not limit the scope of the injunction to transactions carried out with an intention to dissipate. The need to protect a claimant from this risk (in a case which by definition must have involved a prior finding by the judge that there is a real risk of dissipation but for the grant of the injunction) is achieved by prohibiting all disposals of assets except those permitted by the express exceptions to the order and by giving the defendant a general liberty to apply in respect of any particular intended disposal. Transactions can therefore be sanctioned by the court and if found to be unobjectionable then permitted: see Atlas Maritime Co SA v Avalon Maritime Ltd ("The Coral Rose") [1991] 1 Lloyd's Rep 563.
- 76. This format points, in our view, to the standard exception about disposals in the ordinary course of business being given a narrower rather than a wide meaning. Transactions in the ordinary course of business in the case (e.g.) of a trading company will include all its usual purchases and disposals and the payment of its trade and other liabilities as they fall due. A regulated investment company which acquires and sells shares and other securities on behalf of its clients would be treated in the same way. But we do not consider that the concept of the ordinary course of business would, as a general rule, comprehend alterations in investments by a private investor however wealthy he may be. For them to qualify it would be necessary to show that the investor was himself running a business by making the changes in his holdings rather than merely re-organising his investments to obtain a better outcome."
- 284. In relation to the permitted use of funds for the payment of legal expenses, Mr Pryce took me to Tidewater v Phoenixtide [2015] EWHC 2748. There the question was where a Mareva permitting expenditure on legal expenses existed, the court should make a request to a Swiss court which had granted an attachment order freezing monies in a Swiss account without provision for use for legal expenses for that attachment order to be varied to permit such use. At paragraphs 33-47 Males J (as he then was) said:

# "Legal principles

- 33. Although there was only a limited area of dispute, it is convenient to summarise the legal principles applicable to an application of this nature.
- 34. The standard freezing order provides that a Respondent is entitled to spend a reasonable sum on legal advice and representation without obtaining the Applicant's permission, but the requirement to tell the Applicant's legal representatives where the money is to come from gives the Applicant an opportunity, if it objects, to bring the matter before the court. Once it does so, the principles summarised below apply. (This

is not a case where a proprietary claim over the Respondents' assets is asserted). In the present case the effect of the Swiss attachment order is that the funds in the Otunba's Bank Julius Baer account cannot be used by the Respondents without a variation of that order, which will only be made if Tidewater either volunteers its agreement or is directed by this court to join in an application for such a variation to be made. It was not suggested, however, that this feature of the present case makes any difference to the principles to be applied to this application.

- 35. The starting point is that a freezing order has been made against the defendant. Otherwise the question of use of frozen funds to pay legal expenses could not arise. This means that the court has already concluded that, even before the claimant's claim has been established, justice requires that the defendant's freedom to dispose of its own assets as it sees fit should be restrained. However, a freezing order is not intended to provide a claimant with security for its claim but only to prevent the dissipation of assets outside of the ordinary course of business in a way which would render any future judgment unenforceable. While the disposal of assets outside of the ordinary course of business is prohibited as being contrary to the interests of justice, payments in the ordinary course of business are permitted even if the consequence will be that the defendant's assets are completely depleted before the claimant is able to obtain its judgment. This has been clear since the decision of Robert Goff J in The Angel Bell [1981] 1 QB 65 in the early days of what were then called Mareva injunctions. Moreover, so long as the payment is made in good faith, the court does not enquire as to whether it is made in order to discharge a legal obligation or whether it represents good or bad business on the defendant's part.
- 36. A further principle is that a defendant is entitled to defend itself and, if necessary, to spend the frozen funds, which are after all its own money, on legal advice and representation in order to do so. This is recognised by the standard wording of the usual freezing order, although the defendant's right to spend its own money on legal advice and representation is limited to expenditure of "a reasonable sum". (Despite the substantial figures for legal expenditure in this case, it was not submitted on this application that the sums which the Respondents propose to expend were unreasonable). It was held by Sir Thomas Bingham MR in Sundt Wrigley Co Ltd v Wrigley (unreported, 23 June 1995) to be "the ordinary rule" in a non-proprietary case. He put it this way:
- "In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence."
- 37. Two points should be noticed here. The first is that even where the defendant has no other assets, its right to use the frozen funds is only "the ordinary rule". It is therefore capable of being outweighed in an appropriate case by other considerations. Ultimately it is the interests of justice which must be decisive. The second point represents an important qualification on the defendant's right to choose how it spends its own money. That qualification is necessary in order to strike a fair balance between the parties. It is that in order to be permitted to use the frozen funds, the defendant must demonstrate "that he has no other assets with which to fund the litigation". This places an onus on the defendant to demonstrate that there are no other assets available, not frozen by the order, which he could use to pay for legal advice and representation in defence of the claim.

- 38. This second point has been adopted in many later cases, for example Halifax Plc v Chandler [2001] EWCA Civ 1750 where Clarke LJ said at [17]:
- "... in the Mareva case, in order to be allowed to spend frozen monies, the defendant must show that he has no other assets which he can use."
- 39. He added at [27] that:
- "... it is incumbent on a defendant, like any applicant, to put the facts fully and fairly before the court."
- 40. The burden on the defendant to put the facts before the court has been emphasised in further cases. It was described as "the burden of persuasion" by Sir Anthony Clarke MR in Serious Fraud Office v X [2005] EWCA Civ 1564 at [35] and [43], a case concerned with a restraint order made under section 77(1) of the Criminal Justice Act 1988 to which the same principles were held to apply. It is necessary that the defendant should have this burden in part because it is the defendant, not the claimant (at any rate in the usual case), who knows the facts, but also because the court has already concluded that there is a risk of disposal of assets outside the ordinary course of business or it would not have granted the injunction in the first place. Judges are entitled in an appropriate case to have a "very healthy scepticism" about unsupported assertions made by a defendant about the absence of assets, as Sir John Donaldson MR noted in Campbell Mussels v Thompson (1985) 135 NLJ 1012.
- 41. At [43] of his judgment in Serious Fraud Office v X, Sir Anthony Clarke MR identified the issue in these terms:
- "43. ... The question for the judge was whether X discharged the burden of proof or, as I would prefer to put it, the burden of persuasion. That depends upon an analysis of the facts. As I see it, on an application to vary a restraint order in a case of this kind, where the order relates to all the defendant's assets, the position in principle is that it is for the defendants to satisfy the court that it would be just to permit him to use funds which are identified as being caught by the order. If the court concludes that there is every prospect of the defendant being able to call on assets which are not specifically identified in the order, or assets which others will provide for him, I do not think that the court is bound to vary the order in the terms sought."
- 42. Thus it is relevant to consider not only the defendant's own assets, but whether there are others who may be willing to assist the defendant to obtain legal advice and representation. In this respect the position is similar to that which obtains when the court is considering an argument that security for costs should not be ordered on the ground that it would stifle the claim (cf. Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534, where Peter Gibson LJ referred to consideration of whether a claimant "can raise the money needed from its directors, shareholders or other backers or interested investors", pointing out that "as this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation").
- 43. Clarke LJ went on in Serious Fraud Office v X, at [46] and [47], to approve statements of principle contained in the 5th Edition (2004) of Gee on Commercial Injunctions. These were as follows:

"20.054 ... Therefore, the principle is that a defendant can use his own money which is frozen under a Mareva injunction to fund the defence provided that it is apparent that there are no other funds or source of payment which should as a matter of objective fairness be used to pay for the defence rather than the frozen funds. This may require the defendant to adduce 'credible evidence' about his other assets before the court can be satisfied that it is just that he should be able to use the particular frozen assets...

20.056 The same principle of objective fairness applies when an injunction is granted worldwide and the question arises whether the defendant should be at liberty to pay an expense using his English assets or assets safely frozen outside the jurisdiction by a local court, or whether he should be left to make the payment from assets which are not effectively frozen or may not be available for execution or satisfaction of the judgment."

44. It is inherent in this approach that, because the court is dealing with risks and prospects rather than certainties, and is doing so at an interlocutory stage, there is a real risk that the court, even doing the best it can on the material available, may reach what is in fact a wrong conclusion. It may conclude that a defendant has failed to adduce credible evidence that it has no other available assets and has therefore failed to discharge the burden of persuasion even if, in fact, the defendant has no other assets. It may conclude that there is a reasonable prospect that a defendant's friends or associates will rally to his support, but that prospect may not materialise. In such circumstances the court will refuse to allow the frozen funds to be used, even if that means that in fact the defendant is left unable to pay for legal representation to defend the claim. However, this is no different from any other situation in which there is a risk that the court may make a mistaken interlocutory assessment, for example when it concludes that an order for security for costs will not stifle a claim. It should not deter the court from making the best assessment it can on the material available and imposing on the defendant the burden of persuasion for the valid reasons identified above.

45. Immediately before the passage quoted above and approved in Serious Fraud Office v X, paragraph 20.054 of Gee puts the matter in this way:

"In exercising the discretion whether or not to grant an application to vary an injunction the court acts in accordance with what is 'just and convenient'. This is the test laid down in s.37(1) of the Supreme Court Act 1981. On an application for a variation, the claimant has already established a real risk of dissipation and a good arguable case. The principles which apply in considering whether to grant a variation are the same as those which apply when considering whether or not to grant Mareva relief. ...

The correct test is to consider objectively the overall justice of allowing the payment to be made including the likely consequences of permitting it on the prospects of a future judgment being left unsatisfied, and bearing in mind that the assets belong to the defendant and that the injunction is not intended to provide the claimant with security for his claim or to create an untouchable pot which will be available to satisfy an eventual judgment."

46. I accept this as an accurate summary. Its value, in my judgment, is the emphasis which it rightly gives to the need for an assessment of "the overall justice" of the case. The principle that a defendant bears the burden of persuading the court that there are no other assets available to fund the litigation is one aspect of that assessment, but not the only aspect. In most cases the absence of other assets will be decisive. Justice will require that such assets as there are should be available to fund the defendant's defence.

But in what is likely to be an exceptional case, this is capable of being outweighed by other considerations.

47. In the present case Tidewater relies upon what it says is the injustice of allowing Respondents who have flouted orders of the court when it suits them to do so and who remain in contempt of court to invoke the court's discretion, as a matter of justice and convenience, to permit a variation of the injunction. Mr Hossain for the Respondents submitted that this is an irrelevant consideration and that the present application should be confined to an examination of whether the Respondents have access to funds which are not effectively frozen by the order. I do not agree. In my judgment the overall justice of the case needs to be considered, and that is capable of extending to the wider considerations relied on by Tidewater.

### Availability of other sources of funds

48. In accordance with these principles I turn to consider whether the Respondents have discharged the burden of showing that they have no funds available to pay for legal advice and representation other than the funds in the Otunba's Bank Julius Baer account. They do of course have funds held in Nigerian bank accounts as well as other assets in Nigeria, but they have provided evidence that Nigerian foreign exchange permission would not be available to pay for ongoing litigation expenses, although apparently it would be permitted for payment of a judgment debt. This seems surprising, but it is evidence which Tidewater has not challenged. I proceed, therefore, on the basis that their Nigerian assets are not available to the Respondents to pay for legal advice and representation in this action. However, as Mr Allen pointed out, there appears to be no reason on the Respondents' own evidence why their Nigerian funds should not be used to pay the costs of £60,000 which they have been ordered to pay, which are in effect a judgment debt..."

And Males J held that those Respondents had not discharged the burden upon them and refused to make the order sought.

- 285. In relation to the consequences of any breach of the WFO, Mr Pryce and Mr Hurst) relied upon Patel v Mirza [2016] UKSC 42 and the modern discretionary evaluative approach to the consequences of illegality including as set out in paragraphs 107-9 and 120 of Lord Toulson's judgment:
  - "107. In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.
  - 108. The integrity and harmony of the law permit and I would say require such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest

requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. ParkingEye is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract. Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate.

109. The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted....

120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

- 286. Mr Pryce contended that even if there was a technical breach of the WFO, and that MDR had not consented to the Charges, a variation of the WFO would have been granted if such had been sought, and MDR had led BWB into not seeking a variation from the court, and it would be wrong and unjust for the Charges not to be enforced in the circumstances of this case.
- 287. I have considered the parties' various submissions, and the authorities, and my analysis and conclusions are as follows.
- 288. It is common-ground, and in my view rightly, that the grant of the Charges fell within paragraph 7 of the WFO. They involve dealing with Jared's assets (the Properties and his interest in Beacon Hill) and also diminishing their values by way of having had security granted over them.
- 289. I do not consider that the grant of the Charges fell within the "ordinary course of business" exception. That is because:

- i) The wording of this exception is narrowly construed (see paragraph 76 of JSC and the other cases cited).
- ii) They were not transactions which related to any business of Jared. Although a transaction of one entity carried out as part of its business which is designed to enable the funding of the legal costs of another entity can be a transaction within the ordinary business of the first entity (see e.g. Moss v Martin 2022 EWHC 3258 at paragraphs 26-29) and the same applies to a transaction designed to enable the funding of legal costs of the defendant entity in relation to a different matter from that which was the subject of the litigation (see e.g. Halifax v Chandler 2001 EWCA 1750); that is not this case. Jared was not and never had been carrying on any business; and these legal costs (and thus the transactions to fund them) related to litigation brought against Jared in relation to what he had done when conducting FXS and Global's businesses. Jared held the Properties as a private investor in his own right, and these transactions were not part of any investment business (and cf. the analysis in JSC at paragraphs 75-76)
- iii) Although it can be argued that the transactions were each an "ordinary transaction" "in the course of life" (see Normid and JSC)
  - (a) The exception in paragraph 11(2) is for transactions "in the ordinary course of business" which requires identification of a relevant business (of Jared) and which never existed
  - (b) Injunctions are to be construed strictly (see Law Society v Shanks) and especially where the relevant person has the availability of an application to the court (Law Society and JSC)
  - (c) I do not see this these transactions as being either "ordinary" or "routine" (Normid and JSC). While in one sense it is "ordinary" for a person to pay lawyers when a legal claim is brought against them; it is not usual or any part of ordinary life (unlike reaching settlements in a business context) to have to defend the sort of fraud claims advanced by the claimant
  - (d) In any event, when looking at the WFO as a whole, I cannot see that paragraph 11(2) was intended to extend to transactions to fund Jared's legal costs. It does not say so. Even though it is a standard freezing order wording, and which should not be departed from without appropriate reason, applying a strict approach to the usual principles of construction (see above), I do not consider that a reasonable reader would so extend the meaning. Further, for that to occur would be inconsistent with at least the thrust of the Tidewater decision as such a construction would simply enable a defendant subject to a WFO to realise their assets to fund their legal costs but Tidewater appears to consider (and paragraph 35 cites the "ordinary course of business" exception) that a permission is required
- iv) This is all notwithstanding that injunctions are restrictively construed (see Banca Generali) although this provision is itself narrowly construed (see JSC). Once there is a focus on the word "business" it seems to me clear, bearing in mind the policy underlying these injunctions of not restricting ordinary business

life, that there has to be a "business" of the defendant in the context and "ordinary course" of which the transaction is taking place.

- 290. I further consider that it is not clear (even though on the evidence before me I think it might well have been the case) that, if an application had been made to the court for a specific variation to the WFO (as was effectively done in the Law Society case) to permit the Charges to be granted, such would have succeeded. This is because:
  - i) Tidewater makes clear that there is a substantial burden on the defendant to demonstrate both (a) that they do not have other assets of their own available, even abroad and (b) that others are not willing to assist the defendant on a voluntary basis see paragraphs 37 onwards
  - ii) Mr Hurst submits with force that:
    - (a) The claimant would have contended that Jared had disclosed assets available in America and Spain (indeed some are listed in the Schedule to the Charges) and that such should be used to fund legal costs first so that UK assets (i.e. the Properties) would remain frozen and available to satisfy an eventual judgment (such as the claimant was to obtain). At first sight, this is potentially persuasive
    - (b) The claimant would have contended that Jared had other undisclosed assets available, and would also have (as MDR were seeking to do in 2009) demanded that Jared provide further information. In the light of the history and findings (including of Flaux J) as set out above, and my own assessment of Jared and his evidence, it seems to me that the outcome of such contentions cannot now be predicted with any certainty
    - (c) The claimant would have contended that Penny (at least, and she had already entered into the BWB Charge) and possibly French, Heaphy and/or Drayton or others would assist with funding Jared's legal expenses. This argument leads to a (somewhat common) conundrum that (1) it is impossible to conclusively answer the question of whether others would fund if the variation did not occur without refusing the variation as otherwise the situation and their asserted refusals cannot be tested (2) it is obviously uncommercial for others to fund if their doing so means that the court will not grant a variation – if they so volunteer they will simply be at risk, while if they do not volunteer the court will grant the variation (3) any lawyer advising any potential funder, and in particular Penny but also the others, would (or should) advise them that it is contrary to their financial interest in such circumstances to volunteer funding and that they should not do so without especial reason. Nevertheless, Tidewater makes it clear that the burden is on the defendant to show that such sources are not available, and the outcomes are likely to be unpredictable.
  - iii) I therefore cannot see that it is at all clear that a variation application would have succeeded, although I can see substantial reason as to why it might have done.
- 291. I would add that I canvassed in argument something of a concern that there might be an incongruity between the standard paragraph 11(1) of the WFO which permits the defendant to expend their monies on reasonable legal costs (and which accords with the

principles underlying the grant of Mareva injunctions i.e. that they do not exist to grant security but to prevent dissipation of assets or their removal from the jurisdiction, and that a party is entitled to devote their assets towards the (reasonable) costs of defending the index proceedings and to choose which assets to use for which purposes) and the defendant being prohibited from using their assets (e.g. by paying lawyers by transferring the assets (e.g. a diamond ring) in specie or selling them or charging them at proper open market prices or on proper open market terms so as to generate funds with which to pay lawyers) towards their (reasonable) legal costs simply because someone else might support them voluntarily. That approach places money (which the standard form order allows to be spent even though others might provide voluntary support) into a wholly different category from other assets (where the defendant has to prove that others will not voluntarily support). However, that seems to me to be the effect of Tidewater and the case-law cited in it, all of which is binding upon me, and a matter of long and well established principle.

- 292. I further consider that French and Heaphy are to be treated for these purposes as having knowledge of both the WFO and of its terms. That is the for the following reasons:
  - i) It was accepted by both French and Heaphy (see above) that they knew that a freezing order existed. It was actually discussed by Heaphy with BWB. That, it seems to me is sufficient. If a person knows that a freezing order exists, it is for them to ascertain and clarify its terms before entering into a transaction with the person (Jared) who they know is its subject. All they have to do is to obtain a copy of the WFO from that person (Jared) or their lawyers, which would not have been a matter of difficulty, and, if they wished to proceed, have read it (although they might also seek appropriate advice). That is a matter of their own choice; but it does not seem to me that they can escape the effect of the WFO by not taking such steps or by relying on statements or advice from others (which they would do at their own risk and with the potential, in appropriate circumstances, of suing such others should the advice be incorrect). For the position to be otherwise would be contrary to the usual strict rules regarding injunctions and to the strong public and legal policies that they should be complied with
  - ii) In such circumstances, I do not need to explore the matters raised of imputed knowledge through an agent or the Land Register and constructive notice. My initial views as to such are as follows:
    - (a) I do not see that BWB acted sufficiently as French and Heaphy's agents for knowledge to be imputed to French and Heaphy through BWB. Imputation depends very much on the nature of the agency. BWB appear to have been communicating with Heaphy and French as agents for Jared. Even if (which is unclear) BWB were acting as agents for Heaphy and French, rather than just for Jared, in registering the unilateral notices, that was a very self-contained specific task and I do not think that it wide enough to impute BWB's knowledge of the WFO and its terms to Heaphy and French
    - (b) I add in relation to BWB that I do not think that it is necessarily the case that BWB did not owe any duties of care or otherwise in the law of negligence (including the law of misrepresentation) to Heaphy (and perhaps even French) in relation to what they said and did regarding the WFO and the Charges. Whether there is sufficient for there to be an

- assumption of responsibility or (mis)representation is highly factsensitive. However, I do not have to explore that aspect
- (c) I think that the existence of the claimant's unilateral notices on the Land Register was probably enough to amount to notice to anyone dealing with the relevant land of the existence of a freezing injunction. That is because the relevant wording is that prescribed by statute (see above) to appear if a freezing injunction exists. I would add that it would seem unfortunate that the statutory wording does not use the expression "freezing injunction" or similar but only refers to an order of the High Court preventing registration of dispositions; and which makes no reference to, or restriction of, dealings which do not require registration such as the grant of an equitable charge. I think that this point may have led to some academic criticism of the statutory wording. However, I do not have to explore this aspect further
- (d) I do not see the law of constructive notice as being of any particular relevance. The concept of bona fide purchaser for value for notice (and what was discussed in Kahrmann) relates to whether a purchaser of a legal estate takes free of equitable interests; that is something wholly different from whether a person is affected by a freezing injunction. Mr Hurst also relied on section 199 of the Law of Property Act 1925 but it seems to me that that is to do with priority of interests in land, and has nothing to do with the consequences of freezing injunctions (which do not create any interests in land). It does seem to me to be likely that a person who has subjectively deliberately closed a blind eye to (what is termed "Nelsonian" knowledge) the likely existence of a freezing injunction would, or at least could, be held to be subject to it; and which would accord with the general principle that a person needs to have some form of actual knowledge of a freezing injunction to be bound by it; and that at least that is required; but I do not have to explore this aspect further.
- 293. I further consider that, in principle, the court would treat a breach of a known (as here) freezing order a something which could potentially render a charge granted in such breach to be unenforceable. That would either be under the general law of illegality (as set out in Patel) or under the equitable doctrine that a person relying on equity (such as an equitable chargee and thus French and Heaphy) must have "clean hands".
- 294. That does, however, leave two questions and where the second overlaps to a degree with and is affected by the first.
- 295. The first question is whether MDR consented to (or to variations enabling) the grant of the Charges in a meaningful way (so that they did not contravene the WFO) or acted so that they were estopped from contending that the Charges were breaches of the WFO; and in particular by their letter of 23 December 2009 (and which was effectively repeated by their letter of 12 January 2010) and which has to read in the light of the earlier correspondence. Here:
  - i) MDR say that they will not provide BWB with any assurances regarding the proposed transactions (and say that they do not have information as to amounts and relationships with the chargees or as to how the monies are to be split between legal costs and living expenses)

- ii) MDR accept that consent is not necessary "for legitimate commercial transactions which fall within the exceptions to the [WFO]" and say that BWB must satisfy themselves that the transactions are "legitimate" and that the claimant reserves his rights should the transactions not prove to be "legitimate"
- iii) MDR say that "In the light of what we say in this letter, we do not consider that such an application [for a variation to the WFO] is necessary."
- 296. Mr Hurst has submitted, in particular by an email following circulation of my draft judgment (although he had previously complained that the respondents had not properly engaged with his statements of case or set out their cases) that it is not open to the court to deal with Mr Pryce's contentions that MDR did consent (or agree an equivalent variation) and, further and alternatively, that the claimant is barred (it seems to me that that would be by estoppel) from advancing his contentions of breach and absence of consent (or equivalent variation). He:
  - Contends that such matters are not pleaded or advanced in the statements of case which I directed should be provided; and
  - ii) Relies on Primeo v Bank of Bermuda [2023] UKPC 40 in particular at paragraph 148:

"148. The adversarial system of justice imposes on the parties the obligation to identify the issues that arise for determination in the litigation so that each party has the opportunity to respond to the points which the other party makes. The function of the judge is to adjudicate on those issues alone: Al-Medenni v Mars UK Ltd [2005] EWCA Civ 1041 ("Al Medenni"), para 21 per Dyson LJ. The lawyers representing each party adduce evidence, both oral and documentary, and cross-examine the witnesses of the other party in order to establish the case which they are advancing and to counter the case which the other party is making. The lawyers in their submissions at the end of the trial address the cases which have been put to the court. In The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith, the Owners of the Ship "City of Corinth" (1890) 15 App. Cas. 223 ("The Tasmania"), 225 Lord Herschell stated:

"The conduct of a cause at trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them."

As Dyson LJ stated in Al-Medenni, the judge may, in the course of a trial, invite or encourage the parties to recast or modify the issues but must respect a party's decision if the party refuses to do so. The consequence is that a judge may be compelled to reject a claim on the basis that it was advanced although the judge may think that the claim would have succeeded if it had been advanced on a different basis. In an adversarial system, fairness dictates that outcome. In Air Canada v Secretary of State for Trade [1983] 2 AC 394, 438 Lord Wilberforce stated:

"In a contest purely between one litigant and another ... the task of the court is to do, and be seen to be doing, justice between the parties ... There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made

which is not, and is known not to be, the whole truth of the matter: yet if the decision has been made in accordance with the available evidence and with the law, justice will have been fairly done."

to contend that if such matters are not pleaded the court should not consider them.

- 297. I regard it as appropriate to consider and deal with these matters substantively rather than simply to refuse to consider them altogether, and in particular as:
  - The court's decisions as to procedure are governed by the overriding objective of dealing with cases justly and at proportionate cost (CPR1.1) which I have considered in its entirety. That includes enabling a party to participate fully (CPR1.1(2)(a)) and to deal with a case fairly (CPR1.1(2)(d)) although also enforcing compliance with orders (CPR1.1(2)(f))
  - ii) Generally the court permits amendments in the absence of prejudice which outweighs the ordinary justice of enabling a party to put forward their entire case; although there is a further heavy burden if an amendment is made very late (see White Book notes at 17.3.8); although amendments can be made at any point before an order is drawn up and sealed (see White Book notes at 17.3.9)
  - iii) Amendments which are essentially arguments of law (which includes arguments of construction of documents) and/or are based on obvious facts (being facts which are clearly not capable of being challenged), and where there is no question that, if they had been advanced earlier, the other party would have sought and been able to introduce material evidence to counter them which has not been introduced as yet, are often allowed notwithstanding their lateness. They are often allowed to be advanced on such a basis even where the first occasion is on an appeal; see paragraph 150 of the Primeo decision:
    - "150. These considerations are relevant to new points being taken on appeal. There is no absolute bar on the taking of a new point on appeal. Where the new point is a pure point of law which can be argued on the basis of the facts as found by the judge at first instance, an appellate court may allow the point to be taken if satisfied that the other party has had an opportunity to meet the point and will not suffer prejudice. But an appellate court must exercise great caution before allowing a party to take a new point on appeal after there has been a full trial involving live evidence and cross-examination. In Pitallis v Grant [1989] QB 605 Nourse LJ explained the rule which operates as a norm, quoting from the judgment of Sir George Jessel MR in Ex p Firth, In re Cowburn (1882) 19 Ch D 419, 429:

"the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

iv) However, as made clear in the Primeo decision (e.g. at paragraphs 148, 149 and 151), it is for the parties to advance their various contentions; and, although the court may raise points with the parties, it is generally not for the court to construct their cases for them. While I apply that general rule, I do think that it

is dependent upon all of the circumstances and the nature of the case. Where, as here, the claimant's case is that what would otherwise be French's and Heaphy's rights are defeated by an illegality being a contravention of an order of the court amounting to a contempt of court; it seems to me that the court as guardian of its own process should be careful before coming to that conclusion and should be hesitant before coming to such a conclusion on what the material before it may indicate to be a false basis; that being a matter of both public and judicial policy and appropriate to protect the integrity of the court process

- v) The French and Heaphy Re-Amended Points of Defence stated simply that their paragraphs 46 and 47 that the Charges were prepared by BWB and that it was denied that they did not amount to appropriate security. There was no express pleading of any variation or consent or estoppel; but it was being said, in effect, that BWB had caused there to be what was appropriate
- vi) In paragraph 38 of Mr Pryce's Skeleton for the Trial it was said that "The 23/12/09 letter plainly recognised that what was being proposed was in accordance with freezing order purposes, subject to the underlying loan transactions being a (sic) legitimate." In paragraph 40 it was said that "... the action of granting charges in order to obtain funding for legal advice and representation in the 2009 claim was within the freezing order jurisdiction and did not require an application to court. At the time of the transaction in December 2009 [the claimant's] solicitors agreed with this stance as a matter of principle in correspondence." That seems and at the opening of the Trial seemed to me to clearly raise the construction argument that there was a consent/variation and, in effect the estoppel argument (which is simply a permutation of it)
- vii) Mr Hurst took me through the BWB-MDR correspondence in opening and through the 23 December 2009 letter in detail, and made submissions regarding it and Mr Pryce's arguments in his Skeleton, and without then taking a pleading point
- viii) Mr Pryce in his closing oral submissions said (on 21 March 2024) that MDR had made clear by the 23 December 2009 letter that they agreed to the Charges (as long as they were legitimate) and had represented to BWB, so that BWB could reasonably take it as confirmed, that the claimant had no objection to the Charges (on that basis). That seems and seemed to me to be advancing both the construction/variation and estoppel arguments. Mr Hurst responded orally on 22 March 2024 that there was no consent and nothing sufficient to enable the court to grant relief. In paragraphs 77-86 onwards of his written closing submissions, Mr Pryce set out that the claimant had changed his position from that stated by MDR in the 23 December 2009 letter (and indeed from the claimant's own understanding of their having been granted a consent set out in paragraphs 25-30 of his second witness statement; albeit that the claimant had said that was a mistake and, in any event, his present subjective understanding is not directly in point)
- ix) Mr Hurst in his responsive written submissions then had a section beginning at their paragraph 18 entitled "[Mr Pryce] seeks to argue some form of "estoppel" arises from the MDR correspondence" and sought to refute that any consent was given or waiver/estoppel arose

- In paragraphs 34-36 of his further written closing submissions Mr Pryce reiterated that a reasonable reader, in the position of BWB, of the 23 December 2009 letter would conclude that the claimant accepted that the Charges "if legitimate" would not contravene the WFO. Although the word "estoppel" was not used, it seems to me that what was being advanced was an estoppel argument as well as a pure construction/variation argument i.e. the 23 December 2009 letter meant that the claimant could not now successfully complain about a "legitimate" transaction. Mr Pryce was clearly stating that by writing what they did MDR was barring the claimant from taking a point that a "legitimate" Charge contravened the WFO, and that is a submission which in law would be one of estoppel. At each point Mr Hurst advanced his counter-submission that the letter was insufficient to amount to any consent/variation and that, in any event, the transactions were not "legitimate" within its wording
- It seems to me that the points were raised clearly by Mr Pryce in argument, and that Mr Hurst had a full opportunity to engage with them and contest them (as he did, in particular with regard to the key question of how the letter of 23 December 2009 should be construed). It further seems to me to be clear and obvious that BWB proceeded on the basis that they thought that MDR were accepting that the grant of a "legitimate" Charge would not breach the WFO because that is why they did not apply to the court for a variation as they had threatened to do and as MDR had said in the letter that they did not need to do. I do not see that there is any further relevant evidence that the claimant could have adduced (and I note that it was after the provision of Mr Pryce's original Skeleton and the oral opening that Mr Hurst chose not to cross-examine Mr Oakley). I have further (see below) taken account of case-law on estoppel which Mr Hurst has now advanced following circulation of my draft judgment
- xii) In all these circumstances, it seems to me clearly just and appropriate to permit any amendment should such be necessary; and most particularly as:
  - (a) The arguments were clearly deployed at and from the start of the Trial
  - (b) The arguments are either of law (construction of the 23 December 2009 letter) or based on law and the clear and obvious fact as to how BWB behaved having received that letter (and the subsequent letter of 28 January 2010)
  - (c) I do not see there as having been any material prejudice caused by any failure to plead in detail. The claimant's side has been able to engage and has engaged fully with the arguments including, it seems to me, understanding that both consent and estoppel arguments were being relied upon. Any pure procedural prejudice (if there is any such) can be compensated for in costs
  - (d) (and also although I would have come to the same decision without this) the court should be reluctant to strike down an otherwise legitimate transaction on the grounds that it contravened the court's own WFO without considering all the material and arguments to the effect that it did not. Otherwise, the court could itself (by way of its application of its own WFO) invalidating a proper transaction on a false basis

- xiii) I further do not see any need to have further argument or submissions as to this. The parties have not sought for such to take place, Mr Hurst stating that he wishes to reserve his position for any appeal. The issue of construction was argued out fully. Although case-law on estoppel was not advanced, the principles are well known, and Mr Hurst has cited (see below) recent authority summarising them, and his essential argument, it seems to me, remains one of construction; and, further, the estoppel argument is, it seems to me, essentially a consequence of my decision as to construction and which would lead to the same conclusion without the estoppel argument.
- 298. Mr Hurst submits that MDR were in the 23 December 2009 letter essentially saying nothing except that BWB must consider the transactions against the wording of the WFO as if they do not fall within the exceptions to it they would not be "legitimate". Mr Pryce submits that MDR are saying that as long as the terms of the transactions are reasonably commercial, giving that meaning to the use of the word "legitimate", MDR accept that they would not amount to any breach of the WFO.
- 299. As far as this is concerned, I again have to construe the document, in the light of the factual matrix and commercial purpose on an objective basis, and where paragraph 11(3) of the WFO provides that the claimant (here acting by MDR) can agree a variation to the WFO in writing (and JSC holds that all that is required is the approval of the claimant), and ask what the reasonable reader would regard as being the most appropriate and hence actual construction.
- 300. Although my mind has wavered as to this, it seems to me that MDR's letter should be construed to say that they accept and agree that Jared could grant the Charges as long as they were on proper (i.e. reasonable commercial) terms giving that meaning to the word "legitimate". That is for the following reasons:
  - i) This is in a context where BWB had explained that loans were being obtained and security was intended to be granted by way of the Charges and that was for what consent was sought; and BWB had threatened an application to the court should MDR not consent
  - ii) MDR's letter did accept that the grant of charges could fall within the exceptions to the WFO. However, MDR went on to say that consent is not necessary "for legitimate commercial transactions which fall within the exceptions to the [WFO]" but then stated only that the transactions had to be "legitimate"
  - iii) MDR knew, and obviously knew perfectly well, and which was part of the factual matrix, that Jared had not been carrying on any business in his own right; but said nothing to the effect that in consequence of that (which is only now the claimant's case) the exceptions to the WFO could not apply and therefore the proposed transactions would be a breach of the WFO. Rather they very clearly implied, and effectively stated, that as long as the transactions were "legitimate" the WFO would not prohibit them <u>and</u> therefore that BWB should not apply to the court for a variation (by obvious implication) because BWB did not need to do so
  - iv) In such circumstances, it seems to me that the MDR letter is proceeding on the basis, and to communicate, that it did not matter that Jared was not carrying on any business. Rather what mattered was, and was only (assuming that the

monies were actually spent on (reasonable) legal costs and living expenses [as to which there is no issue]), that the transactions were "legitimate" and which was a <u>separate</u> aspect from the question of the ambit of the exceptions in the WFO

- v) In those circumstances, "legitimate" must relate to the terms of the transactions, the obvious meaning being that the terms were reasonable commercial ones
- vi) It is correct that earlier in the letter MDR make say that they recognise that the WFO "does not prevent your client from dealing with or disposing of any of his assets in the ordinary and proper course of business." and that BWB were "asking our client to agree that those transactions are legitimate and in the ordinary and proper course of business", and later refer to the exceptions, but they go on to say that what Jared and BWB need to do is to satisfy themselves that the transactions are "legitimate", and they only reserve the claimant's rights if the transactions are "subsequently revealed not to be legitimate" and say that an application is not necessary. Where part of the factual matrix was that MDR knew that this was not a "business" matter of Jared's; I think that the reasonable reader would say and think that MDR were accepting that the "business" aspect was distinct from the "legitimate" aspect and was either satisfied or did not matter
- vii) I accept that this conclusion involves at least a likelihood that both BWB and MDR had misunderstood the nature of the "ordinary and proper course of business" exception in paragraph 11(2) of the WFO. However, as I have no reason to think that MDR were trying in some way to mislead BWB, it seems to me more likely than not that that was the case. It is not surprising as even a lawyer may give a number of different meanings to "business" in this context (and, indeed, in Normid there does not seem to have been much a difference drawn between "business" and "ordinary life" in this context). More importantly, I simply have to construe the words used.
- 301. In my judgment, the Charges were on reasonable commercial terms (being not at undervalues (see above), and where the terms were drafted by BWB and seem to me to have been of a standard nature). I add that in the context as disclosed to and known by MDR they were also entered into in good faith notwithstanding that they involved Jared diminishing his assets by their grant that is exactly what BWB told MDR and what MDR must be taken to have known. I add that MDR had been told and knew perfectly well that the Charges extended to previous loans for living expenses and legal costs and that they were being granted by family members.
- 302. In these circumstances, it seems to me that the claimant, by MDR, consented to the Charges, and also that there was made a sufficient writing to amount to an agreed variation of the WFO so as to permit the Charges.
- 303. I add that Mr Hurst did, I think, seek to contend that any consent on the part of the claimant would be vitiated by misrepresentation on the part of Jared (through BWB) as to his need for funding from French and Heaphy where Penny had entered into the BWB Charge and provided sufficient security for all of the likely legal costs and Jared may also have had other available assets, and Jared was not revealing his full roles etc. in relation to Piagi. I do not agree, as:

- i) Even if there was a misrepresentation (which would have been on the part of Jared, and would not, in my judgment on the facts and evidence, have been shared or made by French and Heaphy), such would not invalidate the consent. The fact of a misrepresentation only renders a transaction voidable, not void, and the claimant did not take any such point until (at least) the making of the application now before me in 2020
- ii) I do not in any event see there as being any misrepresentation. This was simply Jared using his own assets to fund his own costs, and presented on that basis
- iii) I add that I do not agree that it is remotely clear that Penny would have agreed for her assets to be used to fund legal costs in circumstances where French and Heaphy were prepared to fund some of them by way of loan with their being granted security over Jared's property assets. Penny would have had every reason to refuse (or to demand her own security over Jared's other property assets i.e. the Properties)
- iv) I do not have sufficient evidence to conclude that Jared had other available assets. However, on the claimant's case, their use would have contravened the WFO, and so that they were not available
- v) I do not see how Piagi and whatever Jared did or ran through it impacts on these particular matters.
- 304. In the above circumstances, it also seemed to me when preparing my draft judgment, and still seems to me, that MDR clearly led BWB into the belief and shared assumption that the claimant was accepting that as long as the transactions were on reasonable commercial terms [and as was the case], the claimant would not contend that they contravened the WFO; and that BWB (and by extension Jared, French and Heaphy) all acted on that basis.
- 305. It seemed to me when preparing my draft judgment that that was a classic circumstance for the application of the doctrine of estoppel by convention, where persons have acted on the basis of a communicated and shared (albeit mistaken) belief as to the effect of a document (see e.g. ING v Ros Roca [2011] EWCA 353). MDR told BWB that they did not need to make an application (subject to the "legitimate" point) and it seemed to me that it must now be unconscionable for the claimant now to contend that BWB did need to make an application where the terms of the Charges were reasonable and commercial.
- 306. It also seems to me that the estoppel could also be said to be one of estoppel by representation (i.e. where MDR had represented that the claimant could not, and hence would not, object to the Charges provided that they were "legitimate", and upon which representations BWB (and by extension French and Heaphy) had relied by entering into and proceeding with the Charges and further loans and not applying to the court for a variation); and where it would be said that the general principles barring a party (here the claimant) from acting in an unconscionable manner (as set out in ING v Ros Roca) would apply.
- 307. However, Mr Hurst has, following the circulation of my draft judgment, and by way, I think, of challenge to the above, cited Avondale v Miss Delaney's [2023] EWCA Civ 641 where at paragraphs 38 and 39 it was stated that:

# "Estoppel by convention

38. The applicable law is authoritatively summarised by Lord Burrows in *Tinkler v HMRC* [2021] UKSC 39, [2022] AC 886 at [45], approving with minor modifications Briggs J's summary of principle in *HMRC v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All ER 174. I have made the modification in the italicised part of the quotation that follows:

"In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings ... are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. There must be words or conduct which crosses the line between the parties from which the necessary sharing may be inferred. (ii) The expression of the common

Judgment Approved by the court for handing down. Avondale Park v Miss Delaney's Nursery Schools

assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

- 39. It is therefore not enough if both parties share the same assumption but arrive at their conclusions independently of the other. Lord Burrows went on to say:
  - "[51] It may be helpful if I explain in my own words the important ideas that lie behind the first three principles of *Benchdollar*. Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.
    - [52] It will be apparent from that explanation of the ideas underpinning the first three *Benchdollar* principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance."
- 308. I see those citations as simply fully stating the law as I had already considered it to be, and, although I have further considered this aspect when finalising this judgment, I see each of the various requirements as being satisfied, and in particular as:
  - i) The assumption that the Charges (if "legitimate" in the sense in which I interpret the 23 December 2009 letter) would not contravene the WFO was:
    - (a) Held by BWB (see their letter of 22 December 2009 and their subsequent conduct in proceeding with the Charges and not making any application to court and their letter of 12 January 2010)

- (b) Communicated by BWB (see their letters of 22 December 2009 and 12 January 2010)
- (c) Communicated, expressed and affirmed (and also held) by MDR (see their letters of 23 December 2009 and then 28 January 2010)
- (d) Thus objectively shared and communicated between the parties
- ii) The letter of 23 December 2009 both in its terms generally but in particular by saying that an application was not necessary (and if one was made that costs would be sought) for a "legitimate" transaction clearly "crossed the line". It (and thus MDR, and thus the claimant) clearly expressed and conveyed an objective understanding and expectation and intention (and which I consider on the facts and evidence, and in particular the wording of the document, also clearly existed subjectively) that BWB would rely upon it, in particular by not making the threatened application to the court, and assumed a responsibility. It seems to me that it would also amount to representations to the same effect i.e. that the Charges (if "legitimate" in the sense in which I interpret the 23 December 2009 letter) would not contravene the WFO, and that the claimant would not contend that they did
- BWB did rely upon what was said by the letter of 23 December 2009 and the shared assumptions (and representations). They had previously said in their letter of 22 December 2009 (and in my judgment on the evidence and facts clearly intended that) they would make an application unless given satisfaction by MDR; and it is clear (in my judgment on the evidence and facts) that the reason why they did not make an application and proceeded as they did was because of MDR's letter of 23 December 2009 and what was stated, and the shared assumptions, in it (and which were impliedly reiterated by the letter of 28 January 2010), and that, but for the letter of 23 December 2009 and its contents, they would have made an application to the court (and if it had failed the transactions and further loans would not have proceeded, and what had happened would have been sought to have been undone). BWB did not proceed simply on their own independent view, and as can be seen from the fact that MDR successfully dissuaded BWB from making their threatened application
- iv) In these circumstances, where (as I find as facts on all the evidence, and which seems to me to be clear and obvious) French and Heaphy (and Jared) were relying on BWB to ensure that the grants of the Charges did not contravene the Freezing Order, and the correspondence with MDR was clearly and expressly designed to achieve precisely that, it seems to me that, for these purposes, the assumptions were shared and the lines were crossed with regard to (and the representations were made to) French and Heaphy and not just BWB (and Jared)
- V) I find as facts on the evidence, and which seems to me to be clear and obvious, BWB (and Jared) and French and Heaphy relied to their detriment on the shared assumptions (and the representations) in entering into the Charges, and proceeding with them and the further loans of £10,000 and £25,000, and in not applying to the court for variations of the WFO (and which applications might well have succeeded see above), and in not seeking to undo the transactions and have the monies returned prior to the Trial before Flaux J

- vi) Although there was, strictly speaking, no further dealing between the claimant and French/Heaphy; French and Heaphy took their steps in connection with a dealing which was taking place relating to the claimant, being the litigation (and its funding) between the claimant and Jared. I do not see this as taking the matter outside the law of estoppel by convention. However, even if it did, I consider that the law of estoppel by representation would apply
- vii) In any event, I consider that the above circumstances render it clearly unjust and unconscionable for the claimant now to resile to assert the (otherwise) true legal position that what I consider to be "legitimate" Charges (within the meaning of the 23 December 2009) were breaches of the WFO such that they should be set aside (or at least lose their priority).
- 309. Accordingly, I hold that there was no breach of the WFO, as the claimant has either consented to what occurred (and agreed a variation in writing) or is estopped from denying that he had or that there has been a breach of the WFO, and therefore this argument of the claimant fails.
- 310. However, if I was wrong about that, I come to the second question as to whether it would be appropriate applying the Patel analysis and approach not to enforce the Charges. Considering the three matters raised in paragraph 120 of Lord Toulson's judgment, I think that I would have refused to enforce the Charges, and in particular as:
  - i) To enforce the Charges would, it seems to me, be harmful to the integrity of the legal system where compliance with injunctions is integral to it, a breach of an injunction is a contempt of court, and the underlying purpose of the Mareva jurisdiction would be infringed if transactions entered into with knowledge of a WFO but in breach of it were to be upheld. The position might well be different if I had been satisfied that it was clear that a variation to the WFO would have been obtained had such been sought but I am not so satisfied (see above)
  - ii) The only other relevant public policies would seem to be those that a defendant subject to a Mareva is entitled to apply their assets towards legal costs (and living expenses). However, that is subject to the need to show that no other assets or resource is available and I am not satisfied either that that was the case, and also to the need to obtain a variation and I am not satisfied that one would have been granted (see above)
  - iii) Although a breach of a WFO is a criminal offence punishable by committal; it does seem to me that depriving those who have breached a WFO of the benefit of their transaction is a proportionate response. That accords with what was said in Clarke; those who breach freezing orders should not derive the benefit of the prohibited transactions. Again, the answer would probably be different if it was clear that a variation would have been granted (as that result would then seem to be disproportionate) but I am not satisfied that one would have been granted (see above)
  - iv) I have considered in regard to this that Mr Pryce would still submit that BWB were led into a false position by MDR even if my construction of the MDR letters is incorrect. However, it seems to me that either my construction is correct, in which case there is no breach of the WFO, or Mr Hurst is right in

which case MDR simply did not consent or vary the WFO or in any way prejudice the claimant.

# Conclusion

- 311. For all these reasons, I will provide that the net amounts (after repayments) advanced by French and Heaphy with simple interest at 4% over Coutts base rate from 25 July 2010 should be paid to them out of the proceeds of the Properties in court. I grant the French and Heaphy application to advance limitation in relation to the section 423 claim (although I have rejected that defence substantively) and refuse the claimant's application to advance limitation in relation to the French and Heaphy claims.
- 312. As stated in my draft judgment, I am handingd-down this Judgment (at 2pm on 28 August 2024) without attendance from the parties but with an adjournment of the hearing and of (with general extensions of time until further order) all questions of permission to appeal and time to appeal, form of orders and costs to a further date; with the parties to liaise and having until 4.30pm on 27 September 2024 to submit their proposed orders and any applications (including for permission to appeal and time to appeal) and a statement of whether they seek an oral hearing (and if so with dates to avoid until 2 February 2025).

Approved Master 28/8/2024