IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2018] EWHC 3083 (Comm)

CL-2018-000096
CL-2018-000115
CL-2018-000116

Rolls Building

Tuesday 30 October 2018

Before:

MR JUSTICE ANDREW BAKER

B E T W E E N :

PREMIUM CREDIT LIMITED — Claimant

- and -

PRIMARY CARE MANAGEMENT SOLUTIONS LIMITED
and others

Defendants

MR J. ROSS (instructed by Ashurst LLP) appeared on behalf of the Claimant.

MR D. LEWIS (instructed by Francis Wilks & Jones) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE ANDREW BAKER:

1 These are three claims by the claimant, Premium Credit Limited, against GP practices, to recover debts said to be due under written fixed sum credit agreements (the 'Credit Agreements') concluded in late 2016. In each case summary judgment is now sought by the claimant. No issue arises between the parties as to the principles applicable to summary judgment applications or the approach therefore that the court should adopt.

2 The amounts claimed in the three cases differ, but otherwise it is common ground that they are materially identical. We have therefore looked in detail only at one of the three cases, claim CL-2018-000096, in which the defendant is Primary Care Management Solutions Limited.

3 The common thread linking the three defendants and the three claims is that Sheraz Khan managed the GP practices in question. He concluded the Credit Agreements for each of them. It is common ground that each defendant is, as a result, bound by the written Credit Agreement. The Credit Agreements in question were in a standard form used by the claimant.

4 In each case they were 'brokered' (to use at this stage a neutral term) as between the claimant and the respective defendant by Evolve Resource Solutions Limited, or it may be Primary Care People Limited, but (either way) trading as Primary Care People ('PCP').

5 PCP's business was, broadly speaking, a recruitment service for medical surgeries specialising in sourcing and providing locum GPs to support the practices where vacancies arose. PCP charged the surgeries an up-front fee for its services. That fee fell due, on the face of things, under the agreements PCP would reach with surgeries, on the date PCP was appointed to provide its locum service, regardless of whether at that point any locum was engaged or how long thereafter it was before any locum GPs were in place.

6 The claimant offered a form of financing in relation to those up-front PCP fees. The terms of that financing in any individual case would then be those of the standard form written Credit Agreement the claimant used.

7 On the face of things:

(i) The entire relationship between the claimant and PCP in respect of the making available to surgeries of financing from the claimant is contained in a written terms of trade in respect of the claimant's fixed sum Credit Agreements, signed for and on behalf of PCP by Christopher Baker, its Finance Director, and Tawhid Juneja, PCP's Managing Director, on 17 June 2016 and countersigned for and on behalf of the claimant on 22 June 2016. That latter date was also stated to be the commencement date of the agreement. That written contract has been referred to before me as the 'Trading Agreement', a term I shall adopt.

(ii) The entire relationship as between the claimant and each defendant was contained in the written fixed sum Credit Agreement in question, to which I have already referred and to which – again, adopting the usage of the parties – I shall try to refer to simply as the 'Credit Agreement' throughout.

8 The terms of those written contracts make it abundantly clear that the respective defendant, as Borrower, is liable for the repayment of the amount advanced by the claimant; and that

any rights the claimant may have against PCP do not alter the fact or diminish that primary liability of the respective defendant as Borrower.

9 Furthermore, on the face of things, they make clear that PCP was not the claimant's agent in relation to the Credit Agreement but, rather, to the extent that any agency was involved or contemplated, PCP was, if anything, the defendants' agent. To see that, it is necessary to summarise a number of the terms of the two contracts.

10 I start with the Trading Agreement. It defines, amongst other things, the Borrower as:

> "Any customer of the service provider who is approved by PCL for credit and who enters into a Credit Agreement with PCL".

PCL, unsurprisingly, is defined to be the claimant, Premium Credit Limited.

11 "Service provider" is defined to be:

> "The Service Provider whose particulars are set out in the signatory clause at the end of the agreement",

in this case therefore PCP.

12 The Trading Agreement then provides amongst other things, as follows:

> Clause 2.3:
>
> > "PCL shall not be liable to the Borrower for any act omission or default of the service provider …".
>
> Clause 4.1:
>
> > "In consideration of PCL agreeing to provide the service, the service provider agrees that:
> >
> > 4.1.1 It shall use all reasonable endeavours to promote the service to its customers.
> >
> > 4.1.2 All instructions howsoever provided from the service provider to PCL will:
> >
> > (i) be true and correct;
> >
> > (ii) accord with the instructions from the Borrower; and
> >
> > (iii) be provided to PCL only with the authority of the Borrower".

13 For these purposes, I should add, "the Service" is defined to be:

> "The funding service provided by PCL to Borrowers as contemplated by the Trading Agreement".
>
> Clause 4.1.11:

> "PCL shall be entitled at any time to take such action to enforce its rights under any Credit Agreement as PCL in its absolute discretion considers appropriate".

4.1.17:

> "The making of payments by PCL to the service provider in accordance with clause 6.1 does not discharge the liability of the Borrower to the service provider to pay fees or charges that have been incurred and any future fees or charges".

Clause 6.1 provides for payment by PCL to the service provider (so in this case that is to PCP) of the fee being financed. Thus in terms of cash flow, funds moved directly from PCL to PCP discharging what would otherwise have been the obligation of the Borrower, that is to say the underlying GP surgery, to pay PCP's fee up-front.

Clause 6.2:

> "If any direct debit or other payment by the Borrower is not met when presented for payment or if the Credit Agreement is cancelled, terminated, breached or suspended for any reason, PCL shall be entitled to offset and deduct from any payment due to the service provider any amount or balance due to PCL from the Borrower … and to pay only the balance to the service provider …. If, after having taken into account amounts that PCL shall be entitled to offset against payments due to the service provider there is a balance due to PCL, the service provider shall pay such balance to PCL in cleared funds without set-off or deduction within five business days of demand by PCL. The right of offset by PCL and payment obligations of the service provider set out herein are independent of whether the relevant Credit Agreement is enforceable and shall not be reduced, discharged or otherwise affected by any amendment or termination of any Credit Agreement or any order, judgment, decree or opinion of any court or governmental agency that any Credit Agreement is illegal, invalid or unenforceable".

Clause 8.6:

> "Notwithstanding termination of this agreement, the parties acknowledge that the Borrower will remain liable to pay to PCL any amount due to PCL under the Credit Agreement whether or not this agreement or any document or other agreement referred to in it are cancelled, terminated or breached".

Clause 11.1 was an entire agreement clause in terms that are familiar for such provisions.

Clause 11.2:

> "Nothing in this agreement shall create or be deemed to create a partnership, joint venture or legal relationship of any kind between the parties that would impose liability upon one party for the acts or failure to act of the other party, or authorise either party to act as agent for the other".

Clause 11.7 was a provision requiring variation, if any, of the Trading Agreement to be in writing and to comply with certain other particular formalities.

14 Turning then to the Credit Agreement, it identified the claimant as "Credit Provider", and indicated that references to "we", "us", or "our", would be to the claimant. It identified the Borrower, that is to say the underlying GP practice, as "the customer", and indicated that it would be referred to as "you" or "your" in various places in the Credit Agreement. PCP was identified and defined to be the "service provider". After setting out the lump sum credit amount provided by the claimant under the agreement and the fact that it would be repayable by specified monthly direct debit instalments with a date for the first instalment, the Credit Agreement then had a box entitled, "Important, please read carefully" which contained amongst others the following;

- "Before signing this agreement you should carefully read the terms and conditions set out in this agreement and in particular … clause C.3 'Missing payments' … and clause C.11, 'Authorisation by you';

- Schedule C (terms and conditions) apply to and form part of this agreement. You should not sign this agreement unless you have read and understand all the schedules. By entering into this agreement you agree to the terms and conditions of each of the schedules".

15 It is then signed for and on behalf of the claimant and above the provision for signature for and on behalf of the customer, it stated as follows:

> "This is a Credit Agreement. Sign it only if you wish to proceed with the loan and agree to be legally bound by its terms".

16 There is a note then indicating that the Consumer Credit Act 1974 does not apply to the agreement. I should have mentioned in that regard that the finance was on an interest-free basis.

17 The note continues that the agreement "constitutes an offer by the claimant to finance the purchase by the customer of services from the service provider" and continues that

> "you shall be deemed to have accepted this offer upon the earlier of—
>
> - you signing this agreement; or
>
> - payment of the deposit or first direct debit payment set out above; or
>
> - the service provider instructing us to finance the service on your behalf".

18 Schedule A provided at clause A1:

> "This agreement is a fixed sum fixed term credit facility which you can use to finance the purchase of the service from the service provider".

19 At schedule C, the detailed terms and conditions then provided amongst other things as follows:

At C1.2, that where the claimant allowed the customer to use the Credit Agreement to fund services provided by the service provider, "this is not a recommendation by us that you should purchase that service and nor should it be considered an endorsement of that service".

At C7:

> "A request to us from the service provider on your behalf in connection with the transaction shall be treated as a request made by you".

Clause C8.1:

> "You agree to pay us the monthly payments by the monthly payments dates".

C8.3:

> "Unless otherwise permitted by us, you must pay the monthly payments by direct debit. This should be from the bank account that you or the service provider tells us about. You must ensure that all direct debits are paid when first presented for payment and that a valid direct debit instruction is in place at all times for the bank account you have asked us to use for collecting your monthly payments".

C8.6:

> "You should make all payments under this agreement in full and without deduction or set-off".

C9.1(a):

> "You (or in accordance with clause C.11.3 the service provider on your behalf) may end this agreement immediately at any time …".

C9.2:

> "If you or we end this agreement you must immediately pay us the outstanding balance. If you don't make such payment we can tell the service provider about this under clause C9.5 which may result in the service being cancelled. Any such notification does not relieve you of your obligation to pay the outstanding balance. See clause C9.10".

C9.3:

> "Subject to any notice that we are required to serve on you under any legislation we may end this agreement in the following circumstances:
>
> a. If you fail or where applicable a third party fails to make a monthly payment or other payment when it is due …
>
> (…)
>
> c. If without our approval your direct debit instruction is cancelled or we are unable to set up a direct debit instruction, or if your direct debits are

being paid by a third party, that third party direct debit instruction is cancelled".

C9.4:

"If we end this agreement in any of the above circumstances, we may require you to immediately pay to us the outstanding balance. If you don't make any such payment, we can tell the service provider about this under clause C9.5 which may result in the service being cancelled".

C9.7:

"You acknowledge that we may have arrangements with the service provider under which the service provider must on request pay to us an amount equal to the outstanding balance [I interpose, for example, in this case clause 6.2 of the Trading Agreement]. You agree with us and the service provider that where we receive payment from the service provider, you shall be liable to pay the service provider an amount equal to the monies received by us from it and the service provider shall be entitled to recover any such sums directly from you and may exercise its rights under clause C9.5 without prejudice to any other rights it may have. This clause shall survive termination of this agreement and may apply even if this agreement has not ended".

C9.8:

"We will tell you on request whether we have arrangements as set out in clause C9.7 with the service provider".

20 In this case, as will be seen when I come on to the facts, PCP in fact provided Mr Khan on behalf of the defendants with a copy of the Trading Agreement. The evidence does not disclose directly whether that was at the defendants' request, effectively pursuant to what would become in the contract clause C9.8, but that does not matter. The fact is, which will matter, the defendants were shown precisely the terms applicable as between PCP and the claimant.

21 Continuing with my summary of schedule C to the Credit Agreement:

C9.10:

"If we exercise our rights under clauses C9.2, C9.5 or C9.7, we shall apply any sums that we receive against the outstanding balance. This shall not release you from your liability to pay any part of the outstanding balance that is still outstanding after we have received any such sums".

22 Then finally, from clause C11:

C11.2:

"You acknowledge and agree that the service provider has been selected by you to provide the service on your behalf and is not our agent".

C11.3:

> "You authorise the service provider to request us orally or in writing by whatever medium including email to cancel this facility on your behalf".

C11.4:

> "You authorise the service provider upon request by us to give us information about the status of your service or any account that you have with the service provider".

C11.10:

> "You warrant and represent to us that unless you give notice as set out in clause C11.11, the service provider is authorised and will at all times have authority to instruct us in your name and on your behalf as set out in clause C11.3 above".

C11.11:

> "You may revoke the authorisation set out in clauses C11.3 and C11.4 above at any time by giving written notice to the service provider and forwarding a copy of the notice to us. That notice shall not affect the validity of any credit previously made available by us under this agreement on the instructions of the service provider".

23 If that were not enough to make abundantly clear on the face of things that under the written contracts apparently applicable PCP was no agent of the claimant and the respective defendant was primarily liable to the claimant as Borrower, then at all events the latter was further reinforced by the welcome letter, under cover of which each defendant was invited by the claimant on the introduction of PCP to conclude the Credit Agreement.

24 That welcome letter provided a summary of the financing arranged by PCP for the defendant in question. It provided instructions for the communication of the defendant's acceptance of the Credit Agreement as the terms applicable. It also provided details of the bank account the claimant now had for the defendant from which it was anticipating the collection of the monthly payments, and set out the payment schedule through to the complete discharge of the financing.

25 In the box setting out that list of payment dates the welcome letter said as follows:

> "If you miss a payment and do not take prompt action to remedy this, we may take steps to terminate your Credit Agreement with us. If we cancel your Credit Agreement, we will notify you and advise Primary Care People Limited that the Credit Agreement has been terminated. You will then need to arrange for an alternative payment to Primary Care People Limited for the outstanding amounts, otherwise your underlying insurance policy or service may be cancelled. Please note that while we will seek to recover the outstanding balance from the service provider, we still reserve the right to pursue you for any shortfall that is outstanding under your Credit Agreement".

26 Subject, then, to what the court makes of the one positive defence asserted, there is plainly no answer to the claimant's claims now to be paid the balances respectively outstanding

following each defendant's cancellation of its direct debit mandate and consequent failures to pay sums, instalments *prima facie* falling due under the Credit Agreement.

27 There is, of course, no mystery in one sense as to why that has happened: PCP has entered into administration. I do not have detailed evidence as to the extent of its financial difficulties, but there does not seem to be any expectation on the part of the parties before the court that there will be any or any substantial recovery by whoever needs to be making claims in that administration. This may well therefore be a case – as Mr Ross for the claimant was content to put it – in which there are before the court innocent parties on both sides, one or other of whom must bear the burden of the financial failure of the third party, PCP.

28 The question, as in my judgment Mr Ross equally fairly and accurately characterised it, is ultimately where the risk of any such financial failure on the part of PCP is allocated to lie as between the parties now before the court.

29 The one positive defence, then, that is asserted to what the claimant would say is its straightforward debt collection claim, is that prior to and in order to induce the entry into of the Credit Agreements and in fact inducing Mr Khan to agree to them on behalf of the defendants, PCP, principally by Mr Baker, its Finance Director, misrepresented to Mr Khan that there was and/or there would be no recourse to the defendants in respect of sums outstanding under the Credit Agreement should there ever be non-payments.

30 In that regard, whilst there is also pleaded reference to similar statements being made orally at meetings between Mr Khan and representatives of PCP, it is not said that anything said orally went further than what is set out in the email correspondence. That correspondence starts with an email of 13 October 2016 from Mr Baker to Mr Khan copying Mr Juneja and also Mark Winter of PCP. That email followed up a meeting and indicated that Mr Baker had spoken with somebody at the claimant, and as a result a financing package for £900,000 in total across the three defendants before me was being put together. Mr Baker's email concluded thus:

> "Finally, I have attached a copy of our agreement with Premium Credit to show that the facility has recourse to Primary Care People should we not provide the GPs, a payment not be made or the contract cancelled at the client end to give you the comfort you require. Clause 6.2 of the agreement refers to this protection to clients".

31 Taken at face value, that did no more than provide the reassurance to Mr Khan that PCP for its part also had a liability to the claimant in respect of the repayment of the financing extended. In that respect, Mr Baker was correct. That is one effect of clause 6.2 of the Trading Agreement and, as will be appreciated, this is the email to which I effectively referred earlier in saying that the Trading Agreement in copy was provided to Mr Khan on behalf of the defendants as part of the negotiation of the Credit Agreements.

32 Given what follows, it may be however that Mr Baker intended something more than what I have just said by his final paragraph, and there is the reference to giving Mr Khan, "the comfort you require", which may therefore take colour from the detail of the discussions that had been had, that detail not at this stage being in evidence.

33 By a further email on 21 October 2016 Mr Baker, again to Mr Khan and copying Mr Juneja only this time, reinforced the comfort he had sought to give. In this further email, Mr Baker indicated that the claimant would wish to have a copy of the last full accounts for the Borrower GP practices. On the face of things that is precisely consistent with the

expectation that the claimant, whatever its rights against PCP may have been, saw the underlying surgeries as its Borrowers and therefore would wish to have at least some evidence of their respective financial positions as part of any internal approval processes for extending credit to them. Mr Baker continued:

> "However, I should stress that there is no recourse to you or your Businesses as Tawhid [i.e. Mr Juneja] would have explained. The facility has full recourse to Primary Care People if a client facility is cancelled etc. Whilst they do not undertake any Credit checks on the Businesses or the owners, the underwriters like to have these [that is to say, accounts] on file on large-scale deals such as the one you have signed off with Tawhid … rest assured this is just for their files and nothing else and full recourse is with PCP as per my email document last week".

34 A few days later, 27 October 2016, Mr Khan by now, it would seem, in receipt of the terms and conditions for the Credit Agreement he would be signing with the claimant, asked Mr Baker as follows by email:

> "Also how should I interpret the T&Cs sent by Premium Credit which seem to indicate liability on me rather than the clause 6.2 in the T&Cs agreement document that you have with them?"

35 Mr Baker answered by email the same day:

> "The clause in your version of the contract with them is standardised as I also spotted this for another client, and it acts as a deterrent for clients not to cancel or stop an agreement mid-term. Ultimately, they simply cancel your agreement and revert back to us under clause 6.2 of our agreement which you have had sight of, so, no need to worry about this".

36 I am very conscious that neither Mr Baker nor anybody else at PCP who may have been aware of the making of such representations to these defendants is directly before the court. That said, it is difficult to envisage how Mr Baker could rationally or reasonably have believed the truth of what he said to Mr Khan by way of reassurance. For that matter, I also find it at all events *prima facie* surprising that Mr Khan took what Mr Baker said at face value and – so Mr Khan says in his evidence on these summary judgment applications – relied on it as being accurate when committing the defendants to the Credit Agreements. That, however, is not the basis upon which summary judgment is sought: that is to say for summary judgment purposes I take and am happy to take Mr Khan at his word, that he did indeed so rely.

37 It is not suggested that there is or is likely to emerge any basis for thinking that there was or may have been ostensible authority on the part of Mr Baker as an individual or PCP to act for the claimant as agents either generally or specifically in the making of any such representations. The proposed defence, as Mr Lewis has confirmed in argument today, asserts and requires that PCP had actual authority as an agent of the claimant appointed by the claimant to make those, if I may say so, somewhat outrageous mis-statements as to the effect of the Credit Agreement terms. On the evidence, in my judgment there is no real prospect of the court reaching that conclusion at trial. Nor is there any reason to require disclosure before pronouncing a judgment on that basis.

38 The suggestion that there might be material in disclosure to assist the positive defence asserted – indeed at one point Mr Lewis submitted that I could find there was likely to be helpful material – is, in my judgment, entirely speculative and without any real foundation.

39 As I have described, the Trading Agreement making quite explicit PCP's role and the fact that it was not agent for the claimant, was provided to Mr Khan on behalf of the defendants not only at the same time as but as part and parcel of the process of communications by which Mr Baker sought to reassure Mr Khan as to the effect of the agreement he, Mr Khan was being asked to sign. Indeed, although Mr Ross did not put his application for summary judgment on this basis independently of whether there was a real prospect of its being held that PCP had any authority from the claimant, in those circumstances it does not seem to me substantially arguable that any representation was made to Mr Khan or otherwise to the defendants purportedly on behalf of the claimant. Rather, what appears to have happened is simply this:

(i) The defendants through Mr Khan were told accurately of, and indeed provided with a copy of, the contract and terms governing the relationship between the claimant and PCP, but were then;

(ii) given as I have described them rather outrageous mis-statements by Mr Baker as to the effect of the Credit Agreement terms that the defendants would be asked to sign.

40 Furthermore, the defendants somewhat belatedly (under the timetable applicable to these applications) obtained and provided to the court evidence from a number of relatively senior former employees of PCP. Those employees describe a degree of closeness of interaction between PCP and the claimant in and about the marketing of PCP's locum GP services and as an adjunct to that the claimant's financing services. It seems to me, however, that none of the matters raised by way of factual evidence by any of those witnesses indicates any reason at all to suppose that the relationship between the claimant and PCP was governed by anything other than the written Trading Agreement. The interactions described are entirely consistent with PCP acting either simply as independent service provider, and to an extent as broker in between the claimant and the defendant borrowers, or, as indeed provided for by the contractual documents, as the agent of the borrowers to the extent it acted as agent at all.

41 Mr Lewis urges that this is a summary judgment application and not a trial. On that basis he contends that equally that evidence of the factual interactions between the claimant and PCP is not positively inconsistent with the notion that, contrary to and by way of departure from the Trading Agreement, some agency or specific authorisation in relation to describing the effect of the Credit Agreement had been afforded to PCP between the signature of the Trading Agreement and the negotiation of the Credit Agreements four to five months later with the defendants. In my judgment, there may be something in that, however it cannot take Mr Lewis far enough for present purposes. In particular it does not mean that there is, on the material as it stands, any reason to suppose that upon further enquiry material assisting a possible case of a grant of authority or agency departing from the Trading Agreement would emerge. To the contrary, mentioning it one more time, it is clear on the documentary record that as the relationship with the defendants was being brokered, the terms of relationship applicable between the claimant and the PCP were expressly identified to the defendants as being those of the Trading Agreement.

42 In those circumstances there is in my judgment no substance in the criticism made of the claimant's evidence in support of its summary judgment applications that the evidence in question comes from Miss Higgins who is a recovery manager – that is to say responsible for the collection of outstanding amounts pursuant to Credit Agreements such as are in issue in this case. She therefore does not claim to have had personal involvement in the negotiation of either the Trading Agreement with PCP or the Credit Agreement as concluded with the defendants. She has conducted an initial review of email

correspondence retained at the claimant for the purpose of checking aspects of the factual case advanced by the defendants' evidence, particularly checking whether that email correspondence gives any indication that there was an awareness at the claimant's end of the misrepresentations being made by Mr Baker.

43 So it is said by Mr Lewis – and I follow this, up to a point – that if the positive evidence that the defendants are in a position to deploy and the possibilities that that evidence indicates may exist, provided the court with some reason to suppose that there might be a real prospect of defending the claim, it perhaps may then be that Miss Higgins would not be in a position of her own knowledge or on the basis of the review of documents she has yet done, to destroy utterly the possible prospect of there being a defence.

44 However, in fact, the material obtained by the defendants does not in my judgment give rise to any appearance of a real prospect of a defence, or any reason to suppose that there is material waiting to be produced that would assist the defendants. In all those circumstances – and bearing in mind throughout the overarching submission made by Mr Lewis that this is a case in which, if there had been, contrary to or by way of departure from the Trading Agreement, some different arrangement put in place between the claimant and PCP, it might be that as between the claimant and the defendants only the claimant had evidence of that – nonetheless in my judgment there is nothing other than a speculative prospect that that might be the position. That is not a basis upon which the court will ever conclude that there is a real prospect of success at trial in any defence. Nor is it a reason to require disclosure rather than pronounce a summary judgment.

45 I deal finally with two other points:

46 Firstly, in his witness statement resisting the summary judgment – this being the evidence to which as I have indicated Miss Higgins has sought in a limited time because of the lateness of Mr Khan's evidence to respond by an initial review of the claimant's documents – Mr Khan asserts as follows:

> "I intend to call evidence to show that not only did Mr Baker know that I would rely upon what he told me, but that also PCL knew that Mr Baker was making those representations, and were content to allow him to continue to do so".

47 That, I have to say, is unsatisfactory evidence. If, as Mr Ross indicates I should conclude, it is intended to do no more than refer to evidence of the sort obtained by the defendants and served along with Mr Khan's evidence from former employees of PCP and thus amounts only to Mr Khan's attempt to assess what the court might make of that evidence, then in my judgment it is a misjudged claim. Nothing in any of that evidence as obtained comes anywhere near even the beginnings of a case to the effect that the claimant had any knowledge of the rather extraordinary statements being made by Mr Baker. In fact, as Mr Ross submitted, it is now significant that, the defendants having obtained evidence from relatively senior figures at PCP and indicating candidly on instructions that they are not in a position to hold out any hope that they would ever have evidence from Mr Baker or Mr Juneja, it is significant that none of the evidence in fact obtained does speak to any such knowledge or awareness on the part of the claimant.

48 If, on the other hand, what Mr Khan was intending by that claim in his evidence was not so much to refer to the evidence or evidence similar to the evidence that has already been obtained, making an evaluative comment about it, but rather he had in mind that he would be in a position to call other evidence if allowed on behalf of the defendants to defend these claims beyond these applications through to a trial, then the claim in his witness statement is

entirely inadequate for failure even to identify the most basic particulars what evidence from whom or from what type of source it was that he had in mind, and what basis if any he had to suppose that any such evidence existed.

49 In those circumstances, in my judgment, whatever Mr Khan did intend by that particular claim and whatever, if any, line or lines of defence any such knowledge on behalf of the claimant might possibly have given rise to, it is not a possibility that need to detain the court or deter it from granting summary judgment on the basis of the evidence as it stands today.

50 Secondly, the other additional point to deal with was that by reference to clause C11.2, a term of the Credit Agreement as concluded between the claimant and each of the defendants, it was agreed that PCP had been selected by the respective defendant as its service provider and was not the claimant's agent. On the basis of that contractual provision, Mr Ross submitted that the defendants were bound by way of what has come to be known as a 'contractual estoppel', as discussed, for example, in *Peekay Intermark Limited & Anor v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.

51 In my judgment, if Mr Ross needed to rely on that argument of law to found the claimant's summary judgment applications he would have been correct to do so. Mr Lewis suggests the distinction that whereas in *Peekay* the statement said to give rise to a contractual estoppel was as to the pre-contractual dealings directly between the parties to the contract in respects, as he submitted, that the parties said to be bound by the contractual estoppel could and could be expected reasonably to have checked for itself, rendering it appropriate for it to be held bound, this case involved a statement as between contracting parties A and B concerning whether a third party (C) was or was not in the position of agent for one or other of the contracting parties. In my judgment there is no sound such distinction. Indeed, and to the contrary, if anything, the degree to which the contractual estoppel doctrine of *Peekay* is, at all events in some academic quarters, still somewhat controversial, concerns entirely the fact that it applies even as between contracting parties so as to bind one to be unable to say that it had been induced by representations by the other to enter into the contract in question. All of the considerations leading to the appropriateness of the doctrine of contractual estoppel in my judgment apply all the more so in the case of the setting by A and B, parties to the contract, of the basis upon which they are agreeing to contract with each other as regards the role that some third party, C, who has had an involvement in setting up the contract is to be regarded as having played.

52 That allows the claimant to extend the financing aware that and on the basis that the defendant Borrower has agreed by contract precisely not to assert that which is now asserted before the court by way of defence: namely that things said by the third party – here PCP – are to be regarded as in some way statements made by or affecting the legal rights of the claimant.

53 For those reasons, had Mr Ross needed an argument of pure law to found his summary judgment application because the court had concluded that there was some real prospect on the facts of its being held that the claimant had granted some agency or authority to PCP, I would have held that his argument on the basis of *Peekay* was well-founded and summary judgment would still therefore have followed.

54 In all those circumstances, I am satisfied that there is no real prospect of the defendants resisting the claimant's claims in these three sets of proceedings. Nor is there any other reason to require or allow a trial or to require the claimant to go through a full disclosure exercise.

55 There will therefore be summary judgment in each claim for the full sum claimed I apprehend. I did not understand any point to arise as to quantum.

MR JUSTICE ANDREW BAKER: Mr Ross.

MR ROSS: My Lord, I'm grateful. We also seek summary judgment in respect of the counterclaims in each case, those are just counterclaims on the basis of the misrepresentations made as agents, for completeness.

MR JUSTICE ANDREW BAKER: Yes.

MR ROSS: I, I have a----

MR JUSTICE ANDREW BAKER: I think that, that must follow therefore that to the extent that counterclaims are made premised upon the same allegation, misrepresentation, they fail on the summary judgment test, and are dismissed.

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CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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