**[2021] EWHC 799 (Comm)**

**LM-2020-000090**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**LONDON CIRCUIT COMMERCIAL COURT (QBD)**

Date: 31/03/2021

**Before**:

**HIS HONOUR JUDGE PEARCE**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **BEDFORD INVESTMENTS LIMITED** | **Claimant** |
| **- and -** | |
| **MR NICHOLAS JAMES SELLMAN** | **Defendant** |
| **- and -** | |
| **MR GUILLAUME DE LA GORCE** | **Part 20 Defendant** |

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

**GILES WHEELER QC** (instructed by Freeths LLP) for the **Claimant**

**FRANCESCA PERSELLI** (instructed by Mr Mike Rattenbury, in house solicitor) for the **Defendant**

Hearing date: 11 February 2021

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

## JUDGMENT

This judgment was handed down in private at 10am on 31 March 2021. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

**His Honour Judge Pearce**:

**Note: Page references in this judgment are to the electronic (PDF) page number (not the page number printed on the page), are in bold and are preceded by "HB" to avoid confusion with the lettering on the printed page numbers.**

## Introduction

1. The Claimant brings this claim under a guarantee given by the Defendant as security for a loan of £1,072,500 made to Kingsway Land Development LLP ("Kingsway"). The loan fell due for repayment in full on 22 February 2018 but Kingsway fell into default by failing to repay any of the principal when it became due. Subsequent to Kingsway's default, the Claimant took an assignment of both the loan and the guarantee. By this application, the Claimant seeks summary judgment in respect of its claim against the Defendant as guarantor of Kingsway's obligations under the loan.

2. The Claimant relies on witness statements from Ms Lindsey Clegg dated 28 October 2020 and 15 January 2021. The Defendant relies on his own statement dated 17 December 2020.

## Background

3. Kingsway was incorporated by the Defendant and Mr Guillaume De la Gorce on 7 November 2014. The intended purpose of the company was to purchase land in Bedford (defined in the relevant agreements as "the Property") with a view to developing and selling it. Kingsway was owned in equal shares by Homes of England Ltd (a company which is solely owned by Mr De la Gorce) and Nick Sellman (Holdings) Ltd (a company solely owned by the Defendant until 16 July 2019, since when it has been solely owned by Res Progressio Holdings Ltd, a company which in turn is solely owned by the Defendant).

4. Mr De la Gorce has been named as the defendant to an additional claim in these proceedings that the Defendant has issued. The additional claim has not yet been served.

5. In 2015, Kingsway entered into a short-term bridging loan facility with Lendy Limited for £945,000. That loan was refinanced by a new loan facility agreement ("the Loan Agreement") entered into between Kingsway and LendInvest Private Finance General Partners Ltd ("LendInvest PF"), acting on behalf of LendInvest

Income Limited Partnership ("LendInvest ILP") on 23 May 2016 in the sum of £1,072,500 for a term of 12 months.

6. The terms of the Loan Agreement provided for two alternative bases for the calculation of interest, the Standard Rate (3% per month) and the Concessionary Rate (1.25% per month). The appropriate rate of interest to be applied is a significant argument within this litigation. The Loan Agreement was secured by a charge on the Property and by personal guarantees from the Defendant and Mr De la Gorce. The guarantee from the Defendant ("the Guarantee") appears in the hearing bundle. That from Mr De la Gorce does not. Insofar as it is relevant to the issue before the Court, I assume that his guarantee is in similar terms to that of the Defendant.

7. It is the Claimant's case that on 9 December 2016, LendInvest PF assigned its rights under the loan agreement and the guarantee to LendInvest Capital SARL ("LuxCo"). The term of the loan was extended by a written agreement between LuxCo, Kingsway, the Defendant and Mr De la Gorce so that repayment in full was due on 22 February 2018. Although Kingsway continued to make monthly payments of interest until June 2018 (albeit that some were made late), Kingsway defaulted on its obligation to repay the loan in full on 22 February 2018, as indicated above, and has not made any payments at all since June 2018.

8. On 13 December 2018, LuxCo purported to assign its rights under the loan and the guarantee to LendInvest Finance No. 1 Ltd which in turn and on the same day purported to assign those rights to the Claimant. By further written agreement dated 13 August 2019, LendInvest ILP, LendInvest PF, LuxCo, LendInvest Finance No 1 Ltd and the Claimant purported to agree for the avoidance of doubt that all rights under the Guarantee were assigned to the Claimant with effect from 13 December 2018.

9. On 4 June 2019, the Claimant made formal demand for repayment of the loan. The redemption figure given in that demand was £2,504,769.34, a figure based upon the Standard Rate. This demand was repeated on 18 June 2019.

10. The Claimant made a demand of the Defendant for payment of £2,805,454.81 under the Guarantee on 17 October 2019 (**HB 200**). The Defendant has not made any payment pursuant to the guarantee and Kingsway itself remains in default. By

these proceedings, the Claimant claims from the Defendant, as the guarantor of Kingsway's liabilities, the outstanding capital and interest which is due from Kingsway under the loan.

11. In the meantime, the Property has been marketed. On 3 February 2021, Kingsway exchanged contracts for the sale in the sum of £2.5 million. Completion is subject to certain conditions and has a long stop date of 16 April 2021.

12. It is common ground that, since the formation of Kingsway, the relationship between the Defendant and Mr De la Gorce has soured. Within these proceedings, the Defendant brings a counterclaim against the Claimant (and pleads the Additional Claim against Mr De la Gorce) contending that the claim on the guarantee is part of a lawful means conspiracy, alternatively unlawful means conspiracy, to injure the Defendant.

## The Loan Agreement

13. The terms of the Loan Agreement are contained in two documents:

    a) A document at **HB134** headed "Loan Particulars" dated 23 May 2016, which includes sections headed "Conditions Precedent" and "Special Conditions".

    b) A document at **HB140** headed "The LendInvest Loan Conditions."

14. Clause 7 of the LendInvest Loan Conditions provides:

> "***Interest***
>
> *7.1 The Borrower shall pay interest on the Loan for each Interest Period at the Standard Rate provided that if and for so long as:*
>
> *7.1.1 The Borrower makes punctual payment of all payments of Interest and other amounts due under this Agreement; and*
>
> *7.1.2 The Borrower does not otherwise breach the Agreement; and*
>
> *7.1.3 No Notification Event has occurred*
>
> *the Interest Rate will be reduced to the Concessionary Rate specified in the particulars subject to a minimum interest charge in respect of each Advance for the Minimum Loan Term.*

*7.2 It is agreed that the amount of Interest Retention specified in the Particulars deducted from the first Advance has been calculated on the assumption that the Concessionary Rate will apply with the Borrower to make punctual payment and not otherwise breach the Agreement and that no Notification Event will occur but, in the event that these conditions are not met the Interest Rate will increase to the Standard Rate with interest then backdated and charged at the Standard Rate for the whole of the period commencing on and including the Drawdown Date of the first Advance up to and including the Repayment date, including the Interest Retention Period, and will be paid:*

*7.2.1 immediately in respect of any Interest which is current or has already passed and*

*7.2.2 in accordance with Clause 7.4 in respect of any future Interest period…*

15. The phrase "Notification Event" is defined in Schedule 3 of the LendInvest Loan Conditions and includes the failure to pay any sum due under the contract, a variety of other events relating to non-compliance by the Borrower with the contract, misrepresentations by the Borrower or any guarantor and various other acts of default. By no means all of the events there referred to would amount to any breach of the loan agreement by the Borrower. For example, clause 5.2 covers the situation where "*the Borrower commences negotiation, or enters into any composition or arrangement, with one or more of the Borrower's creditors with a view to rescheduling any of the Borrower's Indebtedness…"*

16. Clause 8 of the LendInvest Loan Conditions provides:

***"Standard Rate of Interest***

*8.1 If the Borrower fails:*

*8.1.1 to repay the Loan in full by 2pm on the Repayment Date (with any payment received after 2pm on the Repayment Date to be treated as not received until the next Business Day);*

*8.1.2 to pay any sum or amount which it is obliged to pay under this agreement or the Transaction Documents when it is due (and*

*repayment of such amount is received after 2pm on the date it is due for payment and is treated as not received until the next Business Day)*

*the Borrower shall pay interest on each and every amount which is overdue for payment (both before and after any judgment) at the Standard Rate, in respect of the period commencing on the date of the First Advance up to and including the date upon which it is paid with interest to accrue as if the overdue amount had, during the period of non-payment, constituted a Loan for successive Interest Periods."*

17. The Loan Particulars state, under the heading "Rate of Interest":

"*The Standard Rate (reduced to the Concessionary Rate in the event of punctual payment in provided that the Borrower does not breach this Agreement and that no Notification Event occurs and are set out in the Standard Terms and Conditions)."*

As noted above, the standard rate is 3% per month and the concessionary rate 1.25% per month. The interest retention period is said to be three months, with interest retention of £40,218.75.

**The Guarantee**

18. The Guarantee given by the Defendant was an all-monies guarantee in typically wide words. Within the Guarantee, the Lender is defined as LendInvest PF, the Borrower as Kingsway and the Guarantor as the Defendant. It provides at clause 2:

"***Guarantee and Indemnity***

*2.1 In consideration of the Lender making or continuing loans to, giving credit or granting loan and/or finance facilities, accommodation or time to the Borrower as the Lender in its absolute discretion sees fit, the Guarantor guarantees to the Lender:*

*2.1.1 the due and punctual performance and discharge by the Borrower of all its obligations and liabilities to the Lender; and*

*2.1.2 whenever the Borrower does not pay any of the Guaranteed Obligations when due, to pay on demand the Guarantee Obligations; and*

*2.2 If the Guaranteed Obligations are not recoverable from the Borrower by reason of illegality, incapacity, lack of or exceeding of powers, ineffectiveness of execution or any other reason, the Guarantor shall remain liable under this Guarantee for the Guaranteed obligations as if it were a principal debtor…"*

19. Clause 4.1 of the Guarantee provides:

"*The guarantor shall pay interest to the Lender after as well as before judgment at the rate of 3%*[1] *on all sums demanded under this guarantee from the date of demand by the Lender or, if earlier, the date on which the relevant damages, losses, costs or expenses arose in respect of which the demand has been made, until but excluding, the date of actual payment."*

20. Clause 9 of the Guarantee provides:

"*Payments*

*9.1 All sums payable by the Guarantor under this guarantee shall be paid in full to the Lender in the currency in which the Guaranteed Obligations are payable:*

*9.1.1 without any set-off, condition or counterclaim whatsoever; and*

*9.1.2 free and clear of any deductions or withholdings whatsoever except as may be required by law or regulation which is binding on the Guarantor."*

**The issues**

21. The Claimant sets out the history as above and contends, in consequence of the failure of Kingsway to repay the monies due under the loan and the terms of the guarantee that:

a) It is entitled to call for payment from the Defendant;

b) The Defendant has failed to meet the sum due under the guarantee;

c) It is therefore entitled to judgment.

22. The Defendant's pleaded case in defence of the claim is, in summary:

[1] Sic – no period is stated.

a) The Claimant fails to show a valid chain of assignments of the loan and guarantee from LendInvest PF through LuxCo and LendInvest Finance No 1 Ltd to it ("Issue 1 - validity of assignments")

b) The Defendant has a defence to the claim by way of set-off of his counterclaim against the Claimant ("Issue 2 – set off");

c) The Standard Rate of interest on the loan is unenforceable on the grounds that it constitutes a penalty ("Issue 3 – penalty interest");

d) The Standard Rate of interest on the loan constitutes an onerous term that is unenforceable ("Issue 4 – onerous term");

e) On the true construction of the loan agreement, in the events that came to pass, interest is payable at the Standard Rate from the date of first advance of the loan or only from a later date ("Issue 5 – construction of the interest clauses");

f) The Claimant is estopped from recovering interest at the Standard Rate ("Issue 6 – estoppel");

g) On the true construction of the guarantee, interest is payable on sums due and owing under the guarantee at 3% per annum ("Issue 7 – construction of the guarantee").

23. With regard to Issue 2 (set off), the value of the Counterclaim is not particularised, but would appear capable of exceeding the amount of the Claim itself. Further, the Claimant does not seek summary judgment on the Counterclaim. Accordingly, if the Defendant were to show that it has a right of set-off, the claim for summary judgment would inevitably fail.

24. On Issue 3 (penalty interest), the Claimant contends that no issue of enforceability arises because the relevant terms of the contract relating to the Standard Rate are not capable of amounting to a penalty clause. However, it concedes that, if it is wrong in this respect, the Defendant has an arguable case that those terms do amount to a penalty and accordingly summary judgment should not be given on that partial defence.

25. The Defendant contended in its skeleton argument that he not only showed that the relevant terms were capable of amounting to a penalty (thus defeating the Claimant's argument for summary judgment on that issue) but that it showed that

the terms were in fact a penalty and that he should have reverse summary judgment on the issue. This was a bold submission, given that no application for summary judgment had been made in advance of the hearing and the Defendant was unable to point to any statement made by him or on his behalf that the Claimant had no real prospect of succeeding on the issue (as would have been required for an application for summary judgment pursuant to CPR PD24, para 2(3)). When pushed on the point, counsel for the Defendant conceded that it was unlikely that the court would accede to such an application made without notice other than in a skeleton argument. Her concession was correct. I declined to permit such an application to be made without proper notice.

26. In oral submissions, the Defendant sought to emphasise his criticisms of the conduct of Mr De la Gorce (explored below) and stated that they amounted to a compelling reason why the case should be disposed of at trial rather than on a summary judgment application. His submissions on this point are closely connected with his submissions on Issue 2, but this amounts to a discrete basis for refusing summary judgment and I therefore deal with it separately as "Issue 8 – Other Compelling Reason."

**The Relevant Law**

27. On the issue of the applications for summary judgment, my attention is drawn to CPR 24.2(a) and the power to give summary judgment against a defendant where *"the defendant has no real prospect of succeeding on the claim or issue … and there is no other compelling reason why the claim or issue should be disposed of at trial."*

28. The relevant principles are summarised at paragraph 24.2.3 of the White Book thus:

> *"The following principles applicable to applications for summary judgment were formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) [15] and approved by the Court of Appeal in A C Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at 24:*
>
> *(i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All E.R. 91;*

*(ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

*(iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;*

*(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*

*(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No. 5) [2001] EWCA Civ 550;*

*(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 3;*

*(vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material*

*in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

29. The validity of the assignments of the Loan and the Guarantee are to be determined by reference to the requirements of Section 136 of the Law of Property Act 1925, which provides:

"*(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person for whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the light of the assignee) to pass and transfer from the date of such notice –*

(a) *the legal right to such debt or thing in action;*

(b) *all legal and other remedies the same; and*

(c) *the power to give a good discharge for the same without the concurrence of the assignor…"*

30. These requirements of a valid assignment are summarised in Smith and Leslie, Law of Assignment (Third Edition) as follows at paragraph 16-03:

a) It must be of a debt or other legal thing in action;

b) It must be absolute and not purport to be by way of charge only;

c) It must be in writing under the hand of the assignor; and

d) The debtor must be given express notice in writing of the assignment.

31. My attention is drawn to the decision of Staughton J in Kaukomarkkinat O/Y v "Elbe" Transport-Union GMBH (the "Kelo") [1985] 2 Lloyd's Law Rep 85, at p.89, where the Judge stated: "*No particular form of words is needed for an*

*assignment provided that it satisfies the requirements of section 136 of the Law of Property Act 1925*." In that case, the purported assignment was headed "letter of subrogation". Staughton J held that this was not an accurate description of the document and that it in fact amounted to an assignment.

32. In Van Lynn Developments Ltd v Pelias Construction Co Ltd [1969] 1 QB 607, the Court of Appeal considered what notice of assignment was necessary. The court approved the interpretation given to Section 136 by Atkin J in Denny Gasquet and Metcalfe v Conklin [1913] 3 KB 177, that no formal requirement was required for an effective notice of assignment, so long as it brings "*to the notice of the debtor with reasonable certainty the fact that the deed does assign the debt due from the debtors so as to bind the debt in his hands and prevent him from paying the debt to the original creditor*." In Van Lynn itself, the document relied upon as good notice stated that notice of assignment had already been given. The Court of Appeal held that did not affect its validity as amounting in itself to valid notice of assignment.

33. In considering the defence by way of set-off, my attention is drawn to the following principles in respect of the clause which purports to prevent any set-of:

    a) The purpose of such clauses is to ensure that the payment obligations are treated independently of any other dispute arising between the parties (see Popplewell J as he then was in Gencorp Commodities Trading SA v Zeefacto Oil and Gas Co [2018] EWHC 3938 (Comm));

    b) In order for such clauses to be effective, they need to be capable of enforcement by way of application for summary judgment (see Miss Julia Dias QC in Venson Automotive Solutions Ltd v Morrisons' and others [2019] EWHC 3089 (Comm));

    c) The courts will usually give effect to the bargain made by the parties and enforce a no set-off clause (see Neill LJ in Coca-Cola v Finsat [1998] QB 43 at 52);

    d) Although the court has a discretion to grant a stay preventing enforcement of the claim, it is likely to require proof of exceptional circumstances before doing anything other than giving effect to the party's agreement (see Hamblen

J as he then was in Credit Suisse v Ramot Plana [2010] EWHC 2759 (Comm)).

34. The Defendant draws attention to the words of Neill LJ in Coca-Cola v Finsat at p.52B-D:

> *"I have come to the clear conclusion that the right of set-off can be excluded by agreement. In general English law permits the parties to a contract to include in it such terms as they consider to be appropriate. This freedom of contract is subject to a measure of control based on grounds of public policy and to some statutory restrictions such as those contained in the Unfair Contract Terms Act 19777. But I am unable to accept that a party is prevented from excluding the right of set-off by section 49(2) of the Supreme Court Act 1981 or by any ground of public policy."*

35. On the question of whether the provisions relating to Standard Rate of Interest amount to a penalty clause, my attention is drawn to Wallingford v Mutual Society (1889) 5 App Cas 685, in which Lord Hatherley at page 702 said:

> "*It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made at 5% to be reduced, in the event of your punctual payment, to 4%; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time."*

36. In Herbert v Salisbury and Yeovil Railway CO (1866) LR 2 Eq 221, Lord Romilly MR said to like effect:

> "*It is quite clear that if a mortgagor agrees to pay 5% or 6% interest and the mortgagee agrees to pay less, say 4% if it is paid punctually, that is a perfectly good agreement; but if the mortgage interest is at 4%, and there is an agreement that it is not paid punctually, 5% or 6% shall be paid, that is in the nature of a penalty, which this court will relieve against."*

The authors of Lewison on The Interpretation of Contracts (Seventh Edition) say at paragraph 17.89 of this passage, "*It may be thought that this is triumph of form over substance."*

37. The law in this field was reviewed and restated by the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 but usefully summarised by Nugee J (as he then was) in *Holyoake v Candy* [2017] EWHC 3397 (Ch) at [467]:

> "*(1) In English law the doctrine of penalties applies only to contractual provisions operating on a breach of contract; the penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary*

*obligations themselves: per Lords Neuberger and Sumption at [12]-[13], Lord Mance at [129], Lord Hodge at [241].*

*(2) The question whether a contractual provision is within the scope of the penalty rule depends on the substance of the term and not its form: per Lords Neuberger and Sumption at [15]. If the substance of the contractual arrangement is the imposition of punishment for breach of contract, the concept of a disguised penalty may enable a court to intervene: per Lord Hodge at [258].*

*(3) Nevertheless the Court recognised that the fact that the rule is limited to provisions operating on breach means that in some cases the application of the rule may depend on how the relevant obligation is framed in the instrument. The application of the penalty rule can thus turn on questions of drafting, or somewhat formal distinctions (per Lords Neuberger and Sumption at [14] and [43]); clever drafting may create apparent incongruities in some cases (per Lord Mance at [130]); the rule can be circumvented by careful drafting (per Lord Hodge at [258]).*

*(4) Where the rule applies, the test for whether a contractual provision is a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation (per Lords Neuberger and Sumption at [32]); what is necessary in each case is to consider first whether (and if so what) legitimate business interest is served and protected by the clause, and second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable* (per Lord Mance at *[152]); the correct test is whether the sum or remedy stipulated as a consequence of breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract (per Lord Hodge at [255]).*"

38. In *Lordsvale Finance Plc. v. Bank of Zambia* [1996] QB 952, Coleman J held that a clause applying a default interest rate retrospectively from the outset of a loan upon a later default, was an unenforceable penalty.

"*It is clear that, if a loan agreement were to provide that upon the happening of a default in payment by the borrower the rate of interest were to be increased with retrospective effect, that which would be payable on default would be a sum in addition to the amount of principal and interest outstanding which would be calculated by reference to a period of time during which the borrower was entitled to the use of the principal and which might vary in length depending upon when the default in payment occurred in relation to the period of borrowing. Moreover, the amount of interest which would be payable would be unrelated to the extent of default. If therefore default in payment triggered a retrospective increase in the rate of interest, it would be impossible to say in advance how much extra interest would become payable and what arithmetical relationship it would have to the amount of time during which the principal was outstanding. Moreover, assuming that any increase in the rate of interest was to continue into the future, the period of time during which the default was*

*continuing would be compensated by the continuing increased rate, but also by the accumulated increase in the interest derived from the period before default. Such a provision would therefore have all the indicia of a penalty.*

*Where, however, the loan agreement provides that the rate of interest will only increase prospectively from the time of default in payment, a rather different picture emerges. The additional amount payable is ex hypothesi directly proportional to the period of time during which the default in payment continues. Moreover, the borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated. Merely for the pre-existing rate of interest to continue to accrue on the outstanding amount of the debt would not reflect the fact that the borrower no longer has a clean record. Given that money is more expensive for a less good credit risk than for a good credit risk, there would in principle seem to be no reason to deduce that a small rateable increase in interest charged prospectively upon default would have the dominant purpose of deterring default. That is not because there is in any real sense a genuine pre-estimate of loss, but because there is a good commercial reason for deducing that deterrence of breach is not the dominant contractual purpose of the term.*

*… There would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach.*" (pp763-763).

"*In my judgment, weak as the English authorities are, there is every reason in principle for adopting the course which they suggest and for confining protection of the creditor by means of designation of default interest provisions as penalties to retrospectively-operating provisions…*" (p.767 B-C)

39. In <u>*Cavendish Square*</u> Lord Mance approved this reasoning, stating at paragraph 152:

"*…it is most easily explained on the basis that the dichotomy between the compensatory and the penal is not exclusive. There may be interests beyond the compensatory which justify the imposition on a party in breach of an additional financial burden….What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exists, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."*

40. The question as to whether the provisions are legitimate as commercially justified and also whether or not they are exorbitant or unconscionable in amount or in their

effect depends on evidence as to the circumstances in which the contract was agreed and evidence as to standard market rates, the latter being "*the most important evidence*" (per Bryan J in Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd [2019] EWHC 476 (Comm) at [63]).

41. In so far as the question of estoppel arises, the law is uncontroversial, at least in so far as it is relevant to a summary judgment application. The nature of the estoppel argued here is promissory. At paragraph 5-37, the authors of Phipson on Evidence, 19th Edition, refer to the following four features of such an estoppel:

    a) *"An assurance or a representation by the owner of, or the person entitled to, some form of property; the property in question is usually land or an interest in land but this is not necessarily the case since an assurance or a representation by the owner of a chattel or of a chose in action will equally satisfy this element."*

    b) *"Reliance on that assurance or representation by the person to whom it is made."*

    c) *"Some unconscionable disadvantage or detriment suffered by the person to whom the assurance or representation is made."*

    d) *"Failure to satisfy the minimum equity which is necessary in order to do justice to the person to whom the assurance or representation is made and in order to avoid an unconscionable or disproportionate result."*

42. Where a particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention (see Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433 and Goodlife Foods Limited v Hall Fire Production [2018] EWCA 1371). Whilst the usual application of this principle is in the context of consumer "ticket" cases, it can also apply to other standard contracts (see Bryan J in Cargill op cit at [87]).

43. However the court must have regard to the general principle of English law that a party who signs a written agreement knowing that it is intended to have legal effect will generally be treated as having read its terms and to be bound by them. As Moore-Bick LJ said in Peekay Intermark Ltd v Australia & New Zealand Banking

Group Ltd [2006] 2 Lloyd' Rep 511 at 520, this is an "*important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community."*

44. As Saini J points out in Higgins & Co Lawyers Ltd v Evans [2019] EWHC 2809 at [78]:

> "*It is important to note that the principle in Interfoto is not concerned with a general doctrine of unfairness in contract law. There is no common law doctrine of this nature…Interfoto and cases applying the principles to be derived from it and the earlier case low are concerned with a different question: whether the term in issue has been properly* incorporated *within the contract*…"

## The Submissions

### Issue 1 - validity of assignments

45. To understand this issue, it is helpful to look at the Defendant's case first. At paragraph 28 of her skeleton argument, counsel for the Defendant put the case on the issue of the validity of the assignments as follows:

> "*The Claimant ought to have made a demand for payment from the Defendant clearly setting out that (1) payment was required from the Defendant personally and (2) the chain of assignments pursuant to which the claimant was entitled to make that demand. The Claimant has not provided clear evidence of the point in time at which this took place which this court could assess summarily."*

This submission matches the assertion at paragraph 35 of the Defence that the notice of assignment referred to at paragraph 50 below was inadequate because "*it did not particularise the alleged chain of assignments between the various "assigning parties" to enable Mr Sellman to understand the same,"*

46. During oral submission, counsel for the Defendant conceded that the parties do not have to do much to give notice of assignment. However she maintained that the difficulty here was that the assignments took place during the course of negotiations between the parties and it was unclear when demand was being made of the Defendant. As her submissions developed, it became clear that she was not contending that the assignment of both loan and guarantee to the Claimant was ineffective, merely that the Defendant was entitled to know when the various assignments had taken place.

47. The Claimant says that the sequence of assignments and demands is perfectly clear:

a) On 23 May 2016, LendInvest PF made the original loan to the Kingsway – **HB134**;

b) On 9 December 2016, LendInvest PF assigned its rights under the loan to Luxco – see paragraph 35 of the first witness statement of Mr Clegg at **HB80**. Whilst no copy of that assignment has been provided, the fact if not the date of the assignment is acknowledged in an agreement of 17 October 2017, by which the term of the loan was extended and which describes Kingsway as the borrower and Luxco as the lender. This amendment was acknowledged by the Defendant through signing the agreement of 17 October 2017 as borrower, as personal guarantor and on behalf of Kingsway.

c) On 13 December 2018, Luxco assigned its interest in the loan to LendInvest No. 1 **- HB215.**

d) On 13 December 2018, LendInvest No. 1 assigned its interest in the loan to the Claimant – **HB227**.

48. This last agreement acknowledges the earlier assignments and each of LendInvest PF, Luxco and LendInvest No 1 signed this agreement. the Claimant contends that, even if the early assignments were not valid, these signatures would be sufficient to cause the loan to be assigned though each of the parties to the Claimant.

49. The Claimant contends that there is abundant evidence that notice of assignment was given both to Kingsway and to the Defendant:

a) Notice of assignment of the loan to LendInvest No 1 was given to Kingsway by a document dated 20 December 2018 – **HB242.**

b) Notice of assignment of the loan to the Claimant was given to Kingsway by a document dated 13 December 2018 – **HB243**.

c) Notice of assignment of the loan to the Claimant was also given to the Defendant on 28 August 2019 – **HB245**. (Notice to the guarantor of the assignment of the loan is of course not itself a requirement of the loan or the guarantee being enforceable.)

50. As to assignment of the guarantee, the Claimant relies on the deed of assignment dated 13 August 2019 (at **HB252**), which each of LendInvest PF, Luxco, LendInvest No 1 and the Claimant signed, as an effective assignment of the

guarantee. Again the Claimant relies on the document at **HB245** as effective notice of the assignment.

**Issue 2 – set off**

51. The Defendant concedes that a "no set-off" clause of the kind in Clause 9 of the Guarantee will usually be effective to prevent a counterclaim being raised in a claim on the guarantee. However, the Defendant contends that this is an exceptional case where the court should not hold the Defendant to the clause. A significant part of the Defendant's case within this litigation is that the Claimant is seeking to enforce terms as to the rate of interest on the loan by way of punishment, following the breakdown of the relationship between Mr De la Gorce and the Defendant. Within her skeleton argument, counsel for the Defendant puts it that Mr De la Gorce has *"placed himself in a direct conflict between his position as ultimate beneficial owner of the assignee lender on the one hand and ultimate beneficial co-*owner *of Kingsway and co-guarantor of the LendInvest Loan on the other. If* [Mr De la Gorce] *were to act in the best interests of the joint venture, he would not seek to enforce the loan at all, but utilise* [the funding that the Defendant presumes he obtained in order to purchase the Loan] *for the benefit of the joint venture. Instead he seeks to enforce the loan on extremely punitive terms against* [the Defendant] …"

52. The Defendant compares the position of LendInvest PF on the one hand with that of the Claimant on the other. The former never sought to enforce its right to recover interest at the Standard Rate; on the other hand, the Claimant has, in all of its demands, sought to apply the Standard Rate. In seeking to make good the significance of this to the argument that Mr De la Gorce has not acted in the best interests of the joint venture, the Defendant compares the outstanding balance of the loan, for which of course Kingsway is in principle liable, dependent upon whether the Concessionary Rate or the Standard Rate is applied in December 2018 and February 2021. I have added to the figures a line to compare the amount due if the Standard Rate is calculated as a percentage of the amount due applying the Concessionary Rate, in order to illustrate the Defendant's point that, with the passage of time, the effect of charging the Standard Rate rapidly compounds.

| | 22.12.18 | 11.2.21 |
|---|---|---|

| | | |
|---|---|---|
| Redemption figure applying Concessionary Rate[2] | £1,141,228.11 | £1,569,410.61 |
| Redemption figure applying Standard Rate[3] | £2,082,163.37 | £4,443,966.82 |
| Standard Rate figure as percentage of Concessionary Rate figure | 182% | 283% |

53. The Defendant makes the further point that, given the recent contract for sale of the Property, the security is clearly worth sufficient to repay either the entirety of Kingsway's borrowing (if the Concessionary Rate is applied throughout) or at least as a significant proportion of it (depending on when the Standard Rate is applied).

54. In these circumstances, the Defendant argues at paragraph 13 of his skeleton argument that the situation is "*highly irregular*," calling for full disclosure between the parties and oral evidence so as "t*o determine the true liabilities between*" the Claimant, Defendant and Mr De la Gorce. The Defendant is "*not inviting the Court to consider whether the corporate veil of the various entities should be pierced, but simply to note that there is significant factual and legal complexity behind the pleaded claims and cross claims that renders it* (sic) *unsuitable in its entirety for summary judgment and/or strike out."*

55. In response to this submission, the Claimant contends that it is open to it to rely on its contractual rights and they include an entitlement to the Standard Rate of interest in the circumstances that have come to pass. By October 2018, LendInvest PF was threatening to revert to the Standard Rate in its calculation of the outstanding loan (see email of 9 October 2018 at **HB183**) and it is not possible to know whether it would have continued to apply the Concessionary Rate had Kingsway remained in default of repayment for a further 2½ years.

56. Further, the Claimant cannot be accused of acting in an underhand fashion. In a letter of 14 September 2018 (**HB184**), solicitors acting for Homes of England Ltd wrote to solicitors for Nick Sellman (Holdings) Ltd, pointing out the inability of Kingsway to service the loan and the risk of repossession, and making two proposals: a first option that the two companies meet outstanding interest and costs and co-operate in an exercise to re-finance the lending; or a second option that Mr

[2] Drawn from the table at **HB288-289**

[3] Drawn from the table at **HB282-283**

De la Gorce refinance the loan, taking an assignment of it, without requiring the interest to be serviced monthly, but charging default interest at redemption. In a further letter form its solicitors of 15 October 2018, Homes of England Ltd sought to clarify the position with Nick Sellman (Holdings) Ltd. An offer had been received for the purchase of the Property which Homes of England Limited contended would lead to a loss to it and Nick Sellman (Holdings) Ltd of a total of £150,000. The previous two options were repeated, pointing out that LendInvest was now threating to charge the default interest rate and raising a third option, that Nick Sellman (Holdings) Ltd pay to Homes of England Limited the sum of £75,000 (the amount it was said each company would lose from accepting the offer for purchase of the property) and transfer its interest in Kingsway to Homes of England Limited with thereafter a release from liability for the loan. Nick Sellman (Holdings) Limited did not reply in a meaningful way to any of the proposed options.

57. Admittedly, the communications between the solicitors for Homes of England Limited and Nick Sellman (Holdings) Ltd did not expressly refer to an assignee of the loan enforcing the guarantee against the Defendant. However, an inevitable consequence of an effective assignment would be that this could happen.

58. In seeking to meet these arguments against allowing the Counterclaim to operate as a set-off, the Defendant invokes the so-called "prevention principle", pursuant to which a party is prevented from relying upon their own breaches of primary obligations under contract as bringing the contract to an end.

59. In Cheall v APEX [1983] 2 AC 180 at 189, Diplock LJ said:

> *"... except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated the contract by frustration, is often expressed in broad language as: 'a man cannot be permitted to take advantage of his own wrong'. But this may be misleading if it is adopted without defining the breach of duty to which the pejorative word 'wrong' is intended to refer the person to whom the duties owed*."

The Defendant argues that the same principle applies in the position where, as here, a common controlling mind acts on both sides of the loan agreement and is able to prevent or delay repayment of the loan by the borrower in order to trigger punitive default interest penalties which it then seeks to recover from a guarantor.

60. The Claimant expresses concern that the Defendant's approach involves not so much a piercing as a tearing of the corporate veil. Whilst it may be correct that Mr De la Gorce is the "controlling mind" behind both the Claimant and Homes of England Ltd, the company that holds a 50% interest in Kingsway, it is a giant step, and one that is impermissible, to conclude from this that the Claimant, as a limited company, is not able to exercise its contractual rights as against a guarantor such as the Defendant.

**Issue 3 – penalty interest**

61. The Claimant contends that, on its true interpretation, clause 7.1 cannot be seen as a disguised penalty clause. Rather it is a clause that sets out a contractual obligation (to pay the Standard Rate) then provides for a relaxation in certain circumstances. This provides "*an indulgence in the absence of default rather than imposing an in additional liability in the event of default"* to cite the words of HHJ Klein (then Mr Jonathan Klein sitting as a Deputy Judge of the High Court) in Aodhcon LLP v Bridgeco Ltd [2014] EWHC 535 (Ch) at [224]. That was a case in which the Judge held that the rule of penalty did not apply to a facility fee on a loan of 1.25% per month, which was waived if there were no arrears of interest or other breach of the terms of the loan. The decision on this issue is consistent with the judgment of the House of Lords in Wallingford v Mutual Society.

62. The Defendant points to the passage in the judgment of Coleman J in Lordsvale Finance v Bank of Zambia, cited at paragraph 38 above. A default interest rate provision such as this, which operates so as to apply a higher rate of interest retrospectively in the event of breach is a penalty clause which, at least arguably, is unenforceable. Case such as Aodhcon and Wallingford v Mutual Society can, he says, be distinguished because that did not involve circumstances where the withdrawal of a waiver had retrospective effect, as clause 7.1 does. The Claimant cannot escape that effect by drafting which purports to make the payment of a lower rate a waiver which is lost on breach rather than the payment of a higher rate

being a penalty on breach. The two are indistinguishable (as indeed Lord Hatherley virtually concedes in the passage from Wallingford cited at paragraph 35).

63. In oral submission, counsel for the Defendant drew attention to the fact that, of the 3 conditions for the application of the Concessionary Rate rather than the Standard Rate, two (clauses 7.1.1 and 7.1.2) related to circumstances which, if they came to pass, were unquestionably breaches of contract. Whilst the third in clause 7.1.3, the occurrence of a Notification Event, did not necessarily involve a breach of contract, this demonstrated that in reality the clause was acting *in terrorem* by way a penalty clause, imposing a higher liability on breach of the contract.

**Issue 4 – onerous term**

64. The Defendant asserts that the provisions for Standard Rate interest are "highly unusual and unduly onerous by comparison with usual default rate provisions." It is asserted that the court lacks the relevant material to determine whether this was sufficiently drawn to the Defendant's attention.

65. The Claimant responds that the circumstances of this case are a far cry from the line of cases where onerous clauses have been found to be unenforceable. Those cases relate to whether the allegedly onerous term has been brought to the attention of the contracting party who is operating on the standard terms, hence it typically applies to the "ticket" cases where contractual terms are provided at the time of the contract being executed. There is no scope for the doctrine to apply here where the relevant terms appear on the face of a contract and there is no argument that the contracting party did not have adequate opportunity to read those terms.

**Issue 5 – construction of the interest clauses**

66. At paragraph 19 of the Particulars of Claim, the Claimant pleads that, by reason of the default by Kingsway, interest fell due on the entirety to the loan at 3% per month from the date that the money was first advanced. As an alternative, the Claimant pleads at paragraph 20 that it is entitled to interest at the standard rate after 23 October 2016.

67. An issue therefore arises as to whether, on the true construction of the Loan Agreement, a party in default on repayment is liable to pay interest at the Standard Rate from the date on which it was first advance to the date of repayment (the Claimant's case) or merely from the earliest date of late payment (which is agreed

to be 23 October 2016). In his Defence at paragraph 55, the Defendant admits that, in principle (and subject to other arguments), the late payment of interest in October **2018**[4] gave rise to an entitlement to interest at the Standard Rate.

68. The Claimant contends that the wording of Clause 8.1 of the Loan Agreement is entirely unambiguous. Consistent with clause 7.2 of the agreement, its consequence is that, as soon as any payment is overdue, interest becomes payable upon it at the Standard Right from the date of First Advance.

69. The Defendants pleaded response to this is that "payments already made could not be 'overdue' and could not retrospectively have the default rate applied to them" (see paragraph 12 of the Defence). However, counsel for the Defendant did not address this issue within her skeleton argument.

70. In oral submission, counsel for the Defendant expanded upon the argument in the pleading, contending that there were inconsistencies between parts 7 and 8 of the Loan Agreement, in that clauses 7.1, 7.2 and 8.3 do not refer to the backdating of the application of the Standard Rate to a period before any default in payment, yet clause 8.1 does.

**Issue 6 – estoppel**

71. The Defendant's case on estoppel is set out at paragraphs 73 to 77 of the Defence **(HB35-36)**. The Defendant pleads that, notwithstanding the late payment of some of the monthly interest payments by Kingsway, neither LendInvest PF nor Luxco demanded payment at the Standard Rate. Indeed on 17 January 2018, Kingsway received a letter from "LendInvest Ltd" (at which time, on the Claimant's case, the lender's interest in the loan had been assigned to LuxCo), reference was made to the fact that the loan was due to terminate on 22 February 2018 and that the amount outstanding as of 17 January 2018 was a figure based upon the original loan amount and prorated monthly interest at the Concessionary Rate.

72. The Defendant pleads at paragraph 74 of the Defence that this was a representation that the lender would not apply the Standard Rate for historic late payments,

[4] My emphasis. The reference to October 2018 appears to be an error, since the paragraph in which that date is mentioned is a response to paragraph 20 of the Particulars of Claim which pleads late payment of interest in October 2016, without suggesting that there is any issue as to the date rather than the construction of the contract. I had not identified this issue in the hearing. I proceed on the basis that paragraph 55 of the defence contains a typographical error as to the year, though if that is in fact not the Defendant's position, the point will need to be addressed further.

reliance upon which Kingsway and the Defendant acted to their detriment "*by continuing to make interest payments until June 2018 and declining to sell the properties owned by Kingsway and/or take other steps to realise sums to repay the loan so as to avoid a rapid increase in the sums owed by them pursuant to the Standard Interest rate provisions".* The Defendant argues that, by reason of this, any assignee of the lender is estopped from applying the Standard Interest rate save on the provision of reasonable notice. The first notification that Standard Interest will be charged was the demand referred to at paragraph 9 above on 4 June 2019.

73. In response to this, the Claimant asserts:

a) The letter of 17 January 2018 did not contain a clear and unequivocal promise that it would not insist on its right to charge interest at the Standard Rate;

b) Subsequently LendInvest (in an email of 9 October 2028) notified Kingsway of the possibility that it might withdraw the discounted rate and apply the standard rate **(**see email at **HB183** communicated to the Defendant at **HB184).**

c) In any event, there was no reliance on the alleged promise. The mere act of Kingsway continuing to make payments under the loan that it was obliged to make could not be a reliance on the promise; further the failure to repay the principal sum due could not be reliance – LendInvest stressed the importance of punctual repayment in its letter of 17 January 2018.

d) Yet further, the alleged estoppel could only avail Kingsway because the alleged promise was made to it.

74. In oral submissions, the Defendant argued the estoppel point differently. It was accepted that, in fact, the letter of 17 January 2018 was neutral on the interest rate to be charged. The Defendant in oral submission pointed to the letter from solicitors for Homes of England Ltd to solicitors for Nick Sellman (Holdings) Ltd dated 15 October 2018 at **HB188**. That document refers to the prospective sale of the Property and asserts that, if the property were sold on 12 March 2019, the sum due to the lender would be £1,330,000 (a figure based on the Concessionary Rate) but that the bank was threatening to move from the Concessionary to the standard Rate. There is however no suggestion that the Standard Rate would be backdated

to the time that the loan was taken out. That is said to be a representation by the Claimant, as the person about to take the assignment, as to the indebtedness and therefore as to the application of the Concessionary Rate. In the event, the price for the assignment of the loan to the Defendant was £1,154,965.48 (see **HB229**). In the schedule of securities to that agreement, no reference is made to the Defendant's Guarantee (see **HB235**).

75. The Defendant contends that this material taken separately or together amounts to representations that:

    a) The guarantee would not be enforced against the Defendant; and/or

    b) Standard Rate interest would not be sought from the lender and/or the guarantor, at least until the Claimant first demanded payment on the basis of Standard Rate interest in the demand of 4 June 2019 referred to at paragraph 9 above.

76. The Claimant notes that this revised case is not pleaded. In any event, it says that it is no more coherent than the previous case on estoppel. The Defendant is unable to identify either an unequivocal statement that Concessionary Rate interest only will be charged or any evidence to show reliance upon any representation.

**Issue 7 – construction of the guarantee**

77. I have noted above the omission in clause 4.1 of the guarantee to state the period to which 3% relates. The Claimant contends that it is obvious that it is to be read as 3% per month.

    a) The Loan agreement as part of the relevant background material in the context of which the Guarantee should be construed. That expressly states 3% per month.

    b) The Guarantee is expressed to provide a full guarantee of Kingsway's obligations under the Loan, including's obligation to pay interest. For the guarantee to be called upon, Kingsway has by definition defaulted on its loans and therefore become liable to pay interest at the Standard Rate of 3% per month. If the interest rate under the Guarantee were any different to this, the Claimant would always be entitled to call upon the guarantor to make up the interest to 3% per month by calling upon the guarantee. It would be

> illogical to construe the Guarantee in the manner contended for by the Defendant, that is requiring the payment of interest at 3% per annum when in any event the Claimant could pursuant to the terms of the Guarantee require the Defendant to pay interest at 3% per month on what are of necessity the same outstanding sums as are due under the guarantee. (Of course, the Claimant concedes that it cannot have interest twice over both under the Loan Agreement and under the Guarantee.)

78. In oral submission, counsel for the Defendant drew attention to the fact that the Guarantee, when referring to 3%, does not refer to the Standard Rate in the Loan Agreement. She says there is ambiguity as to the correct rate.

**Issue 8 – other compelling reason**

79. The Defendant's case on Issue 8, that there is a compelling reason why the case (or issue) should be the disposed of at trial is based upon the same material as that giving rise to the argument that effect should not be given to the "no set-off" clause. Again, the Defendant expresses concern about how Mr De la Gorce is alleged to have acted to the detriment of the joint venture between him and the Defendant.

80. The Claimant contends that this simply a rehash of the same argument as that relating to the "no set off" clause. If the Claimant succeeds on the "no set off" clause, the Defendant should not be able to circumvent that effect of what the parties have agree within the contract. On the other hand, if the "no set off" argument fails, there is no need for the court separately to consider this issue.

**Discussion**

**Issue 1 - validity of assignment**

81. I have no hesitation in accepting the Claimant's argument and concluding that, at the very least, the agreement at **HB227** dated 13 December 2018 amounted to an effective assignment of the loan to the Claimant, given that the original lender and intermediary assignees were all signatories to that and having regard to the judgment of Staughton J in The Kelo. Equally, the agreement dated 13 August 2019 at **HB252** amounts to effective assignment of the guarantee.

82. Further, having regard to the judgment of the Court of Appeal in Van Lynn Developments Ltd v Pelias Construction Co Ltd, I am satisfied that the email at **HB 245** gives adequate notice of the assignment both of the loan and of the guarantee.

**Issue 2 – set off**

83. There is no doubting that clause 9 of the Guarantee is wont to prevent a defence by way of set-off here. Whilst the court retains a power to decline to give effect to such a clause, whether by treating the relationship of the parties as an "*other compelling reason*" why a case should go to trial or by staying execution of the claim to enable the counterclaim to be litigated, the authorities emphasise that this should only happen in exceptional cases. The dispute here is in no sense exceptional. Parties in a joint venture have fallen out and unfortunately the express terms of their joint venture do not provide a clear and effective route to bring it to conclusion. As I have indicated above, Mr De la Gorce has acted in an open fashion in taking an assignment of the loan through his company and then seeking to enforce the Standard Rate of interest. As is said on his behalf, it is not possible to predict what line LendInvest would have taken but for the assignment. Their threat to revert to the Standard Rate suggests that they may well have done so, in which case neither Kingsway nor the Defendant are in any worse position than they would have been in any event.

84. If the court declines to give effect to the "no set-off' is clause, it is interfering with the freedom of the parties to contract on terms that they consider to be appropriate. The "no set-off" clause is in perfectly standard terms and is there to be seen on the face of the Guarantee. The Defendant can therefore be taken to have contracted in the knowledge that a fallout between the lender and Kingsway was unlikely to provide any defence to a claim on the Guarantee.

85. Whilst Neill LJ in Coca-Cola v Finsat accepted that freedom of parties to contract may be controlled by consideration of issues of public policy, he went on in the fourth sentence of the passage cited above to state that public policy is not a ground to fail to give effect to a "no set-off" clause. His reference to public policy acting as some constraint on the freedom of parties to contract as they wish must therefore be taken not to extend to such a clause.

86. A failure to give effect to the "no set-off" clause would have a further potentially unfortunate consequence. The court does not have detail of the negotiations between the Claimant and LendInvest leading to the assignment of the loan and guarantee. However, it is probable that those negotiations, and the purchase price for the assignment, reflected the express terms of the Guarantee, including the "no set-off" clause. The Claimant has, on the basis of well-established law, a reasonable expectation that effect would be given to that clause. A failure to do so is an unjustified interference in the legitimate expectations of contracting parties.

87. Insofar as the Defendant invokes the "prevention principle", the argument goes some way beyond the proper application of that principle. It could only apply if one directly identified Mr De la Gorce with both the Claimant (a company of which he can be set properly to be the "controlling mind") and Kingsway (a LLP 50% owned by a company of which he is properly called the "controlling mind"). In my judgment, to allow that would indeed be an impermissible piercing of the corporate veil. Even if it were permissible so to identify the companies with him, I have some doubt that in any event the principle would apply here. The "breach of primary obligation" relied on is that of Kingsway. It is clear from the correspondence referred to at paragraph 56 above that Mr De la Gorce was, through Homes of England Limited, offering various options to the Defendant's company, only one of which was even capable of falling within the extended version of the prevention principle proposed by the Defendant. I have considerable difficulty in seeing that the principal could have any application to such circumstances.

88. It follows that there are no good grounds to fail to give effect to the "no set-off" clause.

**Issue 3 – penalty interest**

89. The question as to whether clause 7.1 is capable of amounting to a penalty clause (in which case it is accepted by the Claimant that there is a triable issue as to its enforceability) may seem a "short point of law or constriction" that is in principle capable of being suitable for determination a summary judgment application. The point may not be easy, but that does not make it other than short. If this issue were to be held over to a trial, it might be said that the trial Judge would be any better

placed than I am to determine it. No evidence that can be adduced will assist the court in determining the issue. Further, the parties have had adequate opportunity to address the issue. Accordingly, the court must consider whether it should grasp the nettle on the issue as to whether the clause is capable of being interpreted as a penalty clause.

90. The Defendant's reliance on the judgement of Colman J in *Lordsvale Finance Pic. v. Bank of Zambia* does not directly assist on this issue. If the clause does have the characteristic of a penalty clause, that passage is strong support for the Defendant's argument that it is in fact penal in nature, though it is possible to contemplate an alternative argument that in fact an apparent windfall that a lender gets on breach is in fact part of the potential benefit for which it is willing to pay in making the loan, such that a clause of this nature should in fact be enforced so as to give rise to the bargain freely entered into by the parties. But, if the clause is properly treated as a concession, the fact that it applies both retrospectively and prospectively does not necessarily assist the Defendant since, even if one applies a realistic rather than formalistic approach to the nature of the clause, one may conclude that it is not a penalty.

91. As is acknowledged in Cavendish Square, the rule against penalties is an interference with freedom to contract (see for example paragraph 43 of the judgement of Lords Neuberger and Sumption and paragraph 259 of the judgment of Lord Hodge). Whether it should be allowed to do so at least arguably turns on the egregiousness of the breach (see paragraph 266 of the judgment of Lord Hodge in Cavendish Square). This being so, it is at least possible to argue that the wider context in which the Loan Agreement was entered into, including the true nature of the credit risk that the lender was taking and availability of alternative lending facilities on different terms, might be relevant not only to the question as to whether the clause is in fact penal in nature but also the prior question of whether having regard to the decision of the Supreme Court in Cavendish Square, this clause is capable of amounting to a penalty clause.

92. In these circumstances I conclude that the Defendant has an arguable case that the application of Standard Rate interest, at least retrospectively, is both capable of amounting to a penalty clause and if so (as the Claimant concedes as an arguable case) is penal in nature.

**Issue 4 – onerous term**

93. In my judgment, there is nothing in the facts of this case that even arguably brings into that exceptional class of case where, notwhstainding the express reference to a term of the contract (here the provisions as to interest), the Court should hold the term not to be incorporated because it is onerous and has not been sufficiently brought to the attention of the party who is being held to it. In the first place, terms of this nature as to interest are by no means unheard of in commercial lending. It might be questioned whether it is in fact therefore particularly onerous, though for the purpose of a summary judgment application I would tend to the view that it is arguable.

94. But more importantly, the term is readily apparent on the face of the contract. Indeed, it is difficult to see how anyone taking out this loan and concerned to know what the interest rate was can fail to have appreciated that there was a standard rate of interest to which a concession was allowed in certain circumstances. That is exactly what the Loan Particulars at **HB134** say. To anyone reading that page, the Standard Rate of interest of 3% per month would stand out, both because it is mentioned first and because it is called "Standard". One would have to suppose someone not reading the document at all (or at least not reading the particulars of the interest to be charged) to suppose that they might have failed to identify circumstances in which a rate of 3% per month was charged.

95. As the authorities referred to above make clear, it is not the purpose of the principle of law as to onerous clauses invoked by the Defendant that parties should be saved from their decision to enter into a contract on terms that are plain for all to see. To do would interfere with the very principle referred to by Moore-Bick LJ in Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd.

**Issue 5 – construction of the interest clauses**

96. This issue of construction is exactly the kind of discrete issue that may be suitable for determination on a summary judgment application.

97. In my judgment there is no ambiguity in the Loan Agreement. In the event either that the Borrower fails to repay the loan in full on the Repayment Date or that the Borrower fails to pay any sum due under the Loan Agreement when it is due, interest is payable on that sum at the Standard Rate from the date of First Advance

up to the date of final repayment. That is the clear wording of clause 8.1. The wording of clause 8.3 is not relevant to this, since it is simply a mechanism for the compounding of interest when Standard Rate interest is due on any overdue amount.

98. Clause 7.1 is consistent with this interpretation of clause 8.1, dealing as it does with the liability to pay the Concessionary Rate provided that the Borrower "*makes punctual payment of all payments of interest and other amounts due under this agreement"*, thus indicating that in the event of default in payment the Concessionary Rate will not apply. It is not to the point that clause 7.1 does not deal with the date from which Standard Rate interest is payable in the event of default, since clause 8.1 expressly deals with that point. Further, clause 7.2 deals with the calculation of Interest Retention to be deducted from the first advance, again making clear that if there is a default in payment, Standard Rate interest not only applies to the future but also is backdated to the date of First Advance. This is consistent with the clear and unambiguous meaning of clause 8.1.

99. It follows that the true construction of clause 8.1 is that advanced by the Claimant.

**Issue 6 – estoppel**

100. The Defendant's argument on estoppel has no merit. Putting aside the pleading point, which would not necessarily be fatal were the Defendant to identify an arguable case, in fact the Defendant has simply been unable to identify any unequivocal representation of the interest rate that would be charged. Given that the loan agreement gave the lender a right to charge interest at the Standard Rate in the circumstances of default that came to pass, a statement of the current indebtedness based upon the Concessionary Rate is not without more a representation as to what interest rate would be charged in the future. At no point did the lender (in its various guises) make any such statement.

101. Further, the argument advanced orally that it would be "natural" for the Defendant to believe that the benefit of his guarantee was not assigned to the Claimant because of its omission from the list of securities annexed to the assignment has no evidential basis. The Defendant has never either pleaded or put in evidence that he placed any reliance on the terms of the schedule to the document assigning the loan to the Claimant.

102. In any event, the Defendant's case on reliance lacks coherence. His own statement fails to identify any reliance upon the alleged representations. The evidence clearly shows that the application of the Standard Rate of interest being applied was at least in contemplation from the receipt by the Defendant of the letter at **HB184**, that is to say 14 September 2018. Yet neither Kingsway nor the Defendant sought to repay the loan to avoid that risk. I can see no material from which the court could draw the inference that, but for the alleged representation, the Kingsway and/or the Defendant would have taken steps toy repay the loan, so as to avoid the Standard Rate being charge.

**Issue 7 – construction of the guarantee**

103. The failure at clause 4.1 of the Guarantee to state the period to which the interest rate of 3% applies, 1 is a clear case of patent ambiguity as a result of a failure properly to define the interest rate. In Chapter 8, section 3, Lewison on the Interpretation of Contracts (7th edition), it is stated: "*A patent ambiguity may arise because the contract is self-contradictory, or because it expresses alternative intentions without choosing between them, or because it lacks essential definition. In none of these cases is direct evidence of the intention of the parties admissible to resolve the ambiguity, and the court must do the best it can. In reaching a conclusion the court may, however, have regard to such extrinsic evidence as is admissible to construe any contract. In the last resort the clause in question (or the contract as a whole) will be declared void for uncertainty."*

104. The Defendant makes a fair point that the Guarantee does not expressly refer to the Standard Rate within the Loan Agreement and therefore it is not self-evident that the reference to 3% is intended as a reference to 3% per month. On the other hand, the Loan Agreement is clearly relevant background material to the entering into of the Guarantee. Further, the Claimant makes a very good point about the circularity that would arise if the rate under the Guarantee were 3% per annum. Essentially, every payment of interest under the Guarantee will be inadequate to discharge the remaining liability of Kingsway under the Loan Agreement and therefore would give rise to a further right of recovery under the Guarantee. Ultimately the shortfall would be less than 1p and would therefore not be recoverable. However, the effect of such repeated calls on the guarantee would be that the Defendant would in due course have to satisfy the liability Kingsway in a manner which is equivalent to his

having paid interest of 3% per month under the guarantee. In those circumstances, it seems to me self-evident that the true meaning of the contract is that interest is payable of 3% per month.

**Issue 8 – other compelling reason**

105. It is clear from the material before the Court that there has been a catastrophic breakdown in the relationship between Mr Salman and Mr De la Gorce. I am not in a position to identify where any blame lies, nor do I have the material to judge whether the Defendant's allegations in the Counterclaim that Mr De la Gorce has been involved in lawful and/or unlawful means conspiracy to harm the Defendant are justifiable. There is a superficial attraction in maintaining the status quo until it is possible for those issues to be resolved. That can be achieved, for example by holding that in the exceptional circumstances of this case there is an "*other compelling reason*" why the case should be disposed of at a trial.

106. However I am conscious that such a finding would be tantamount to disregarding the "*no set off*" clause which I have found above to be enforceable. The parties have exercised their freedom to contract on terms that, in the event that the Defendant is liable under the Guarantee, other disputes should not stand in the way of the guarantee being enforced. Harsh as it may seem to the Defendant, in my judgment the terms of the Guarantee that the Defendant has signed mean that the court should not exceed to the superficial attraction of maintaining the status quo to the extent that I have found the Claimant is otherwise entitled to recover under the Guarantee.

**Conclusion**

107. The Claimant is entitled to summary judgement on the claim, save in so far as it seeks to recover interest on the loan at the Standard Rate rather than the Concessionary Rate. It follows that the Claimant is entitled to the capital and interest at the Concessionary Rate remaining due under the Loan. Having regard to clause 4.1 of the guarantee, it is entitled to interest pursuant to the Guarantee at the higher rate of 3% per month from 23 February 2018, the day after the date on which the loan fell due for repayment (22 February 2018).

108. I leave it to the parties to seek to agree an order consequential upon this judgment, in particular as to the amount of the judgment.