Neutral Citation Number: [2024] EWHC 1515 (Comm)

Case No: CL-2022-000345

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 21/06/2024

Before:

CHRISTOPHER HANCOCK KC sitting as a judge of the High Court

Between:

(1) RS LUXEMBOURG II, S.À.R.L. *(a company incorporated under the laws of Luxembourg)* **(2) RS GR REFI 1, S.À R.L.** *(a company incorporated under the laws of Luxembourg)*	**Claimants**
- and -	
DEBURO REAL ESTATE HOLDING GMBH *(a company incorporated in Germany) (formerly known as Solidare Real Estate Holding GmbH)*	**Defendant**

Nathaniel Bird (instructed by **Baker & McKenzie LLP**) for the **Claimants**
Nora Wannagat (instructed by **Zimmers Solicitors**) for the **Defendant**

Hearing dates: 20 and 21 February 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 21 June 2024.

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CHRISTOPHER HANCOCK KC:

Introduction and factual background.

1. In these proceedings, the Claimants (**RS Lux II** and **RS GR1** respectively, together **Cs**) seek to recover €14 million, together with interest and costs, said to be owed by the Defendant (**Deburo**) pursuant to a deed of *'Guarantee and Indemnity'* dated 6 May 2019 (**the Guarantee**). That guarantee was given in respect of borrowings by Deburo's subsidiary Pilatus SR Holding GmbH (**Pilatus**), and Pilatus' subsidiaries, to fund property acquisition and development under a loan facility (**the Facility**) granted by RS Lux II in May 2017.

2. On an earlier summary judgment application by Cs, HHJ Pelling KC dismissed all defences other than one. The sole issue which remained for determination before me was whether a *'Loan-to-value'* condition (**the LTV Condition**) in the Guarantee was or is satisfied.

3. The factual background was largely uncontentious. The key details and events are as follows.

   3.1 Cs are subsidiaries of an investment fund managed and advised by RS Partners that specialises in making asset-backed investments in northern and western Europe. Cs and RS Partners are together referred to as **RoundShield**.

   3.2 Deburo and Pilatus are part of what was known as the *'Solidare Real Estate Group'* (**the Solidare Group**) which sought to acquire, develop and sell or lease out *'micro-apartment'* properties in Germany and the Netherlands. Deburo was the parent company of the group and Pilatus was its main subsidiary. In turn, Pilatus held the shares in various special purpose vehicles which acquired the individual properties. Mr Zeki Anter was the main shareholder of the Group.

   3.3 The Solidare Group required financing to fund the acquisition and development of properties. On 23 May 2017, Pilatus entered into a facility agreement with RS Lux II (**the 2017 Facility Agreement**) which established a term loan facility with a limit of €50 million to be used by Pilatus and its subsidiaries to acquire and develop properties. The term of the Facility was five years. Deburo provided a guarantee and indemnity in respect of that facility with a limit of €10 million. Under the original 2017 facility agreement, every time Pilatus wished to use some of the facility, it had to put in a utilisation request. RoundShield then had to make the funds available within a certain time.

   3.4 Various properties were acquired by Pilatus' subsidiaries using the Facility including a dilapidated 15-storey tower block in Bonn (**the Bonn Property**). Prior to funds being drawn down under the Facility, at RoundShield's request a company within the Solidare Group instructed a firm of valuers—CBRE—to prepare a valuation of the property on the assumption that it had been redeveloped as planned and was fully let to market conditions. A written valuation report was obtained dated 1 March 2018 (**the 2018 Bonn Report**) valuing the existing property at €17.5m under those assumptions and valuing a proposed annex to that property which required construction at €12.9m, resulting in an overall valuation of €30.4m.

3.5 RoundShield was provided with a draft of the 2018 Bonn Report in February 2018 and provided comments on it, including that the purpose of the valuation should be stated to be for *"loan security purposes"*. This was accepted and incorporated in the final report. The evidence was that Mr Leeb made clear to CBRE during this process that *"this valuation is being provided purely for the benefit of RoundShield (being the financing party)"*. Accordingly, RS Partners and RS Lux II entered into a reliance letter with CBRE dated 1 March 2018 (**the Reliance Letter**) which permitted them to *"rely upon the information contained in the Report to the same extent as if we had been appointed directly by you to prepare the Report"*.

3.6 On 29 March 2018, Pilatus and its subsidiary Rigi Property GmbH submitted a signed *'Utilisation Request'* to RS Lux II in a form specified under the 2017 Facility Agreement requesting to draw down funds to complete the acquisition of the Bonn Property. At paragraph 3 of that request, they stated: *"We confirm that each condition precedent specified in clause 4 (Conditions of utilisation) is satisfied on the date of this Utilisation Request"*. In parallel to the request, lawyers acting for the parties exchanged comments on a *'Conditions Precedent Checklist'* which recorded that the requirement for *"A copy of the Valuation for the Additional German Property (dated no more than 30 days prior to the date of delivery)"* was *"Satisfied"*. It was submitted that this could only have been a reference to the 2018 Bonn Report, and Mr Rehberger accepted this in cross-examination. Accordingly I so find.

3.7 In early 2019, the Solidare Group requested an increase in the size of the Facility and the parties duly entered into an amended and restated facility agreement dated 6 May 2019 (**the Amended Facility Agreement**), which increased the limit of the Facility to €70 million. Deburo entered into the Guarantee on the same day, which replaced the previous guarantee and increased Deburo's potential primary liability to €14 million. Under the Facility Agreement, Pilatus was obliged to repay the loan fully by the Termination Date (22 May 2022) (clause 6.1), with the 'Termination Date' being defined as '*the date immediately preceding the fifth anniversary of the date of this Agreement*'.

3.8 In or around October 2019, RS Lux II acceded to a request to permit Pilatus to refinance some of its lending under the Facility with third party lenders at a lower interest rate. A subsidiary of Pilatus, Rigi Hahnstraße GmbH, duly entered into three loan agreements with companies within the Bayerische financial group for a total of €46 million (**the BBL Loans**). In return for RS Lux II permitting this refinancing, Pilatus and Rigi Hahnstraße GmbH entered into a *'Deed of agreement in respect of interest sharing'* dated 9 October 2019 (**the Interest Sharing Deed**), pursuant to which they agreed to pay RS Lux II a sum equivalent to 40 per cent of the interest saving realised.

3.9 In late October 2019, a Dutch subsidiary of Pilatus, Yolufe Enschede 1 B.V., purchased a small plot of land situated at M.H. Tromplaan 51 in Enschede (**Tromplaan 51**), the Netherlands, for €400,000 using funds drawn down under the Facility. The land plot was next to other properties in Enschede that the Solidare Group was developing. Pursuant to a *'CP satisfaction and waivers'* letter dated 31 October 2019, Pilatus and Yolufe Enschede 1 B.V. confirmed to RS Lux II that *"all conditions precedent set out in Schedule 1, Part 4 of the*

Facility Agreement (Conditions Precedent) relating to Yolufe Enschede 1 B.V." were satisfied. The annexed *'Conditions Precedent Checklist'* duly recorded that the requirement for *"A copy of the Valuation for the Additional Dutch Property (dated no more than 30 days prior to the date of delivery)"* was satisfied, although no valuation satisfying the contractual requirements had in fact been provided.

3.10 In late December 2019, Yolufe Enschede 1 B.V. purchased another plot of land in Enschede (**Kortenaerstraat 21**), this time situated at Kortenaerstraat 21, for €160,000 again using funds drawn under the Facility. By a *'CP satisfaction and waivers'* letter dated 24 December 2019, Pilatus and Yolufe Enschede 1 B.V. confirmed to RS Lux II that *"all conditions precedent set out in Schedule 1, Part 4 of the Facility Agreement (Conditions Precedent) relating to Yolufe Enschede 1 B.V."* were satisfied. However, the annexed *'Conditions Precedent Checklist'* recorded that the requirement for *"A copy of the Valuation for the Additional Dutch Property (dated no more than 30 days prior to the date of delivery)"* was not applicable (*"RS confirmed N/A"*).

3.11 On 25 October 2021, Pilatus and RS Lux II entered into a *'Standstill Letter'* recording that an Event of Default under the Facility had occurred and was continuing because *"the As-ls Loan to Value has exceeded 75 per cent (75%) in breach of Clause 18.1 (As-ls Loan to Value) of the Facility Agreement"*. RS Lux II agreed to refrain from taking any action against Pilatus until 31 December 2021.

3.12 On 23 May 2022, the Facility fell due for repayment in full, but no repayment was received.

3.13 On 2 June 2022, RS Lux II demanded payment of all sums due in connection with the Facility in the amount then outstanding of €97,067,458. This amount included €5,930,506 due under the Interest Sharing Deed, as invoiced to Pilatus. RS Lux II made demand for payment by Deburo under the Guarantee on the same day in the amount of €14 million. Neither demand was satisfied.

3.14 On 4 July 2022, these proceedings were commenced. Deburo pointed out that the Particulars of Claim made no reference to the Loan to Value requirement, and that no case was pleaded as to how it was said to have been satisfied at the time the claim was issued.

3.15 At the date this claim was commenced, the following properties were owned by Pilatus' subsidiaries, having been purchased utilising financing provided by RoundShield.

3.15.1 Platanenweg 29, Bonn;

3.15.2 18 Raadhuisplein, Heerlen;

3.15.3 Tromplaan 55, Enschede;

3.15.4 Tromplaan 51, Enschede;

3.15.5 Kortenaertstraat 21, Enschede;

3.15.6 Emmastraat 190, Enschede;

3.15.7 Emmastraat 210, Enschede;

3.15.8 Kortumstrasse 46-48 Bochum;

3.15.9 Hahnstrasse 30-32, Frankfurt;

3.15.10 Apeldoorn Prins Willem-Alexanderlaan 201, Netherlands.

3.16 Deburo pointed out that Cs' Reply admits that Tromplaan 51 and Kortenaertstraat 21 are Additional Dutch Properties for the purpose of the Facility Agreement. The Re-Amended Particulars of Claim acknowledge that there are no Valuations for these Properties.

3.17 Shortly afterwards, Pilatus entered into an insolvency process in Germany.

3.18 In September 2022, the insolvency administrator of Pilatus sold its shares in the companies owning all of the Enschede properties to Anter Holding B.V. RS Lux II received €9,197,837 from the sale which has been credited in repayment of the Facility. A number of other properties have also subsequently been sold and all proceeds received by RS Lux II have been credited in reduction of the Facility.

3.19 Also in September 2022:

3.19.1 RS Lux II assigned its rights, title, interest and benefit in the Facility and the Guarantee to RS GR1. Notice of the assignment was subsequently given in April 2023.

3.19.2 Another subsidiary of RS Lux II, RS GR REFI 2 S.à.r.l., purchased and took assignment of the BBL Loans.

3.20 In July 2023, RS Lux II and RS GR1 obtained updated valuations of the remaining properties, which it is agreed show that they are valued at no more than circa. €68 million. On 25 July 2023, RS GR1 made a further demand for payment of the sums due in connection with the Facility, then standing at some €112 million, and made a further demand for payment under the Second Guarantee Demand in the amount of €14 million plus costs and interest. On 8 August 2023, Cs amended their claim to rely upon the updated valuations and the Second Guarantee Demand. The application to amend, which had been made in July 2023, was granted on paper on 2 August 2023.

The witnesses.

4. At the trial, I heard from:

4.1 Mr Maximillian Leeb, a partner in the investment team at RoundShield Partners LLP (**RS Partners**) which acted as investment advisor and manager to the fund of which Cs are subsidiaries. Mr Leeb gave evidence as to the factual background to the relevant agreements, the facts and matters on which he relied in permitting funds to be drawn down under the Facility (which are relevant to Cs' case on estoppel) and how Cs calculated the Loan to Value when making the First and Second Guarantee Demands.

4.2 Mr Zeki Anter, who was Deburo's managing director until July 2023. C's did not require him to attend for cross-examination.

4.3 Mr Patrick Rehberger, who was the managing director of Pilatus until July 2022 and co-managing director of Deburo until October 2022, after which he continued as an employee until mid-2023.

4.4 Mr Simon Anter, who was the managing director of certain of Pilatus' subsidiaries.

The contractual framework.

5. I was referred to a number of clauses of the Facility Agreement and the Guarantee, as follows:

5.1 First, the Guarantee contains some recitals as follows:

(A) RoundShield as lender has agreed to make the Facilities available to each Borrower pursuant to the terms of the Facility Agreement.

(B) The Facility Agreement will be amended on or about the date hereof.

(C) It is a condition precedent to the availability of the Facilities and the increase of the Commitment under the Facility Agreement that the Guarantor enters into this Deed.

*(D) This Deed replaces the guarantee and indemnity deed dated 23 May 2017 (the "**Original Guarantee**") and the Guarantor is released from all obligations under the Original Guarantee.*

5.2 Next, the obligation undertaken under the Guarantee was as follows:

The Guarantor [Deburo] irrevocably and unconditionally:

(1) guarantees to RoundShield punctual performance by each other Transaction Obligor of all that Transaction Obligor's obligations under the Finance Documents; and

(2) undertakes with RoundShield that, whenever another Transaction Obligor does not pay any amount when due under or in connection with any Finance Document, the Guarantor shall immediately on demand pay that amount as if it was the principal obligor.

5.3 Clauses 2.1(B) and 2.1(C) provide as follows:

(B) Subject to paragraph (C) below but otherwise notwithstanding any other provision of this Deed to the contrary:

(1) the maximum aggregate amount that may be claimed by RoundShield against the Guarantor, and that the Guarantor may be required to pay to RoundShield, pursuant to paragraph (A) above shall be limited to EUR10,000,000; and

(2) RoundShield shall only be entitled to make a claim against the Guarantor pursuant to paragraph (A) above at any time that the Loan to Value exceeds 60 per cent.

(C) If and for as long as the amount of the Secured Obligations exceeds EUR50,000,000:

(1) the maximum aggregate amount that may be claimed by RoundShield against the Guarantor, and that the Guarantor may be required to pay to RoundShield, pursuant to paragraph (A) above shall be limited to EUR14,000,000; and

(2) RoundShield shall only be entitled to make a claim against the Guarantor pursuant to paragraph (A) above at any time that the Loan to Value exceeds 60 per cent.

5.4 The Guarantee defines Loan to Value as follows:

***"Loan to Value"** means, at any time:*
(A) the sum of all Financial Indebtedness incurred by members of the Borrower Group (including any interest which has, in accordance with the terms of the Facility Agreement, been capitalised to form part of the principal of any Loan), which is outstanding at that time and payable in priority to or pari passu with the Loans; as a percentage of
(B) the aggregate market value of each Property (determined by reference to the then most recent Valuation of each Property).

5.5 '*Members of the Borrower Group*' meant Pilatus and its subsidiaries.

5.6 '*Properties*' is defined in the Facility Agreement as (a) each Initial Property and (b) each Additional Property. '*Initial Property'* is defined as each property agreed between the Parent and the Original Lender (i.e. Pilatus and RoundShield). '*Additional Property'*, in turn, is defined as real property located in Germany, which is (or is to be developed into) a micro-apartment building or as otherwise approved in writing by the Lender; and is owned by an Additional Propco or acquired or to be acquired by an Additional Propco, in each case, in accordance with the terms of the Facility Agreement, and which has been approved in writing by the Lender acting in its absolute discretion.

5.7 '*Additional Propco*' is defined as a limited liability company – 'GmbH' or limited partnership with a limited liability company as its general partner – 'GmbH & Co. KG' incorporated in Germany that accedes to the Facility Agreement as an Additional Propco and Additional Borrower pursuant to and in accordance with clause 24.2 (*Propco Accession*).

5.8 *'Valuation'* and *'Valuer'* are defined in the Facility Agreement as follows:

> ***"Valuation"*** *means:*
> *(a) in respect of a Property, a valuation of an Obligor's interest in that Property; and*
> *(b) in respect of a property owned by the German Topco, a valuation of the German Topco's interest in that property,*
> *in each case, supplied by the Valuer at the request of, and addressed to, the Lender providing an "as-is" and stabilised valuation for that Property and prepared on the basis of the market value as that term is defined in the then current Statements of Asset Valuation Practice and Guidance Notes issued by the Royal Institution of Chartered Surveyors.*
> ***"Valuer"*** *means any independent surveyor or valuer appointed by the Lender.*

6. The *'Loan'* component of the Loan to Value calculation refers to *"the sum of all Financial Indebtedness incurred by members of the Borrower Group"*. These defined terms take their meaning from the Amended Facility Agreement pursuant to Clause 1.2(A) of the Guarantee. Thus:

   6.1 *'Financial Indebtedness'* means *"any indebtedness for or in respect of: (a) moneys borrowed..."*.

   6.2 The *'Borrower Group'* means Pilatus (as 'Parent') and each of its subsidiaries.

7. Accordingly, the *'Loan'* amount for the purposes of the LTV calculation includes the sums outstanding under the BBL Loans (as this Court has already determined as part of the summary judgment application) and the Interest Sharing Deed (since the sums due thereunder constitute *"indebtedness... in respect of... moneys borrowed"*), in addition to the sums outstanding under the Facility. This was accepted by Deburo in its opening submissions.

8. The *'Value'* component of the LTV calculation equates to *"the aggregate market value of each Property (determined by reference to the then most recent Valuation of each Property)"*. Again, these defined terms take their meaning from the Amended Facility Agreement, and are set out above.

The issues.

9. The following issues were argued before me:

   9.1 First, it was said that the LTV Condition cannot be shown to be satisfied when the claim was issued, because certain of the valuations relied on by Cs do not satisfy the contractual requirements for a *'Valuation'* (as set out above) and Cs did not possess valuations for two properties, such that the LTV could not be calculated.

   9.2 Secondly, the Loan to Value at any date later than the issuance of proceedings is irrelevant because the LTV Condition had to be met when the proceedings were first issued.

10. I deal with each issue in turn.

Issue 1.

General principles.

11. Before addressing the elements of the Loan to Value calculation, I was referred by Deburo to the general principles of contractual construction in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, at paragraphs 21 to 30. I also bear in mind the guidance given by the Supreme Court in *Arnold v Britton* [2015] AC 1619 and *Wood v Capita* [2017] AC 1173. The overall principles are conveniently summarised in Lewison on The Interpretation of Contracts, 8th ed, as follows:

"*Interpretation is the ascertainment of the objective meaning of the language in which the parties have chosen to express their agreement, in its documentary, factual and commercial context. That meaning is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. Both the text and the context are tools in the process of interpretation.*

The text must be assessed in the light of (i) the natural and ordinary meaning of the words, (ii) any other relevant provisions of the contract, and (iii) the overall purpose of the clause and the contract. The factual context includes facts and circumstances known or assumed by the parties at the time that the document was executed. It also includes background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

The process is a unitary and iterative one by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. The weight to be given to each will depend on a number of factors, including the formality of the agreement and the quality of the drafting.

If the language of the contract is unambiguous the court must apply it. But if there are two possible interpretations, the court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other. Nevertheless, the commercial consequences of one interpretation as against another do not detract from the importance of the words.

In exceptional circumstances the court may conclude that the parties have used the wrong words. If it is clear what the error is, and the nature of the correction required, the court may correct it.

In carrying out its task, the court must disregard the parties' subjective intentions, and (except for limited purposes) the negotiations that preceded the making of the contract."

12. I did not understand there to be any dispute as to these general principles of construction.

13. Deburo also referred me to some general principles on the interpretation of guarantees. Generally, it was argued, guarantees are construed in favour of the guarantor: see e.g. *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, at 208-209. It follows, so it was said, that conditions precedent are generally strictly construed: *Law of Guarantees*, 7th ed, 4-023. The present law on the construction of conditions

precedent has also been described as '*allowing the guarantor to be discharged for the most trivial departure from the terms of the guarantee*' (*Modern Contract of Guarantee,* 4th ed, 8-013).

14. Again, I did not understand there to be any dispute as to these principles.

Deburo's submissions.

(i) Financial Indebtedness

15. The first element of the Loan to Value requirement is '*the sum of all Financial Indebtedness incurred by members of the Borrower Group (including any interest which has, in accordance with the terms of the Facility Agreement, been capitalised to form part of the principal of any Loan), which is outstanding at that time and payable in priority to or pari passu with the Loans*'.

16. In relation to the Financial Indebtedness, there are essentially three elements that have to be taken into account:

    16.1 The sum Pilatus owed under the Facility Agreement;

    16.2 The sum Pilatus owed under the Interest Sharing Deed;

    16.3 The sums Rigi Hahnstraße owes under the BBL loans which have since been assigned.

17. Deburo's submission was that, in accordance with the calculation from its accountants, the debt Pilatus owed under the Facility Agreement was a total of €97,067,458 as at 30 June 2022, shortly before the litigation commenced. Whilst I was told that there seems to be a slight difference between the parties, I was also told that it was unlikely to be significant to the current proceedings, and I proceed on this basis.

18. In relation to the Interest Sharing Deed, Deburo's position is limited to putting Cs to proof as to their exact calculation. I have concluded that Cs have indeed proved this case in this regard.

19. As to the BBL Loans, these do not appear in Cs' calculation, but instead, a sum is said to be owed to a third party, RS GR Refi 2 S.à.r.l. It appears from Cs' evidence that this sum was assigned to a third party, RS GR Refi 2 S.à.r.l.

20. Ultimately, on Deburo's case, the exact amount of the Financial Indebtedness was said not to be relevant, as Deburo's case was that there is a fundamental problem with the *Valuation* part of the calculation which Cs cannot overcome.

(ii) Reports

21. As per the definition set out above, a Valuation must:

    21.1 Be supplied by a Valuer at the request of, and addressed to, the Lender (i.e. RoundShield);

    21.2 Provide an 'as-is' valuation for the relevant Property;

21.3 Provide a stabilised valuation for the relevant Property;

21.4 Be based on the market value as that term is defined in the then current Statements of Asset Valuation Practice and Guidance Notes issued by the Royal Institute of Chartered Surveyors.

22. As at the date of commencement of proceedings, the following valuations had been obtained.

Property	Valuation	Admitted by Deburo?
Platanenweg 29, 53225 Bonn, Germany *(i.e. the Bonn Property)*	€17,500,000	No
Raadhuisplein 18, Heerlen, Netherlands	€4,110,000	Yes
55 MH Tromplaan, Enschede, Netherlands	€3,155,000	Yes
Emmastraat 190, Enschede, Netherlands	€850,000	Yes
Emmastraat 210, Enschede, Netherlands	€2,455,000	No
Kortumstrasse 46-48, Bochum, Germany	€3,350,000	Yes
Hahnstrasse 30-32, Frankfurt, Germany	€42,300,000	Yes
Prins Willem-Alexanderlaan 201, Apeldoorn, Netherlands	€1,990,000	Yes
M.H. Tromplaan 51, Enschede, Netherlands	None.	No
Kortenaerstraat 21, Enschede, Netherlands	None.	
TOTAL	**€75,710,000**	

23. Deburo relied on the fact that there is no report at all for Kortenaertstraat 21, Enschede, and there is only a desktop valuation in respect of Tromplaan 51. As noted above (at paragraph 3.16), the Re-Amended Particulars of Claim concede that there is no 'Valuation', within the meaning of the Facility Agreement, for either one of these properties.

24. Further, Deburo contended that there were some defects in some of the other reports:

24.1 The report for the Bonn Property, Bonn fails to comply with the above requirements in that it was not addressed to RoundShield. It was also stated to be '*exclusively for Solidare Service GmbH (the "Client")*'. Since guarantees fall to be considered strictly, and here there was no strict compliance, this report did not comply with the contractual provisions.

24.2 The report for Emmastraat 210 was merely a desktop valuation, and Cs were put to proof that this contained an 'as-is' as well as a stabilised valuation.[1]

(iii) Effect of missing and defective Valuations

25. Deburo says that where contract-compliant valuations are not available for all of the Properties, that prevents the Loan to Value ratio from being calculated. Therefore, it is not possible to be satisfied that it was over 60% at the relevant time.

26. As regards Cs' contentions, summarised below, on the construction of the contract, Deburo submitted that Cs' interpretation should be rejected for three reasons.

26.1 First, the relevant contracts (i.e. the Facility Agreement and the Guarantee) set out a clear mechanism for the calculation of the Loan to Value. That wording makes clear that the calculation must be based on 'Valuations', and that term is expressly defined. Cs effectively seek to suggest that the calculation can be based on something other than those Valuations. The Court should not make a finding that goes against the express and clear wording of the contractual documents.

26.2 Secondly, even if there were any ambiguity, Cs' interpretation does not accord with business common sense. The definition of 'Valuation' in the Facility Agreement makes clear that the lender is the party who is expected to arrange the Valuation (by instructing the relevant Valuer). From a point of enforcing the Guarantee, it is in Cs' best interest that the value of the Properties is as low as possible for the purposes of the Loan to Value calculation. If Cs' interpretation were correct, a lender under these arrangements could deliberately fail to arrange contract-compliant Valuations and would be rewarded for this by the relevant Properties either being taken out of the calculation entirely or being subject to an estimate that is completely within the lender's control.

27. In addition, Cs' interpretation cannot be reconciled with the case law on the strict interpretation of guarantees and with the equally strict interpretation of conditions precedent which the courts apply in this context.

27.1 There is an established line of cases to the effect that a lender cannot sue a guarantor if a condition precedent has not been met (see e.g. the 19th century case of *Re Brown's Estate* [1893] 2 Ch 300, where it was found that a cause of action against a surety did not accrue until a demand was made).

27.2 A more modern example of this principle can be found in the decision in *Martin v McLaren Construction Ltd* [2019] EWHC 2059 (Ch), an insolvency case in which the relevant debt was based on a guarantee. The guarantee in that case stated that payment had to be made 'immediately on demand'. At paragraph 20, ICC Judge Barber confirmed that the legal principles applicable to 'on demand' guarantees were well established and that, where a guarantee requires that a demand be made in writing before liability arises on the part of the guarantor,

[1] In relation to Kortumstraße 46-48, there appeared to be an issue in relation to the addressee and the party instructing the Valuer. The letter of engagement which was in evidence before me does show that the report was prepared for RoundShield's use. Therefore, Deburo did not pursue this point.

no cause of action arises – and nothing is due from the guarantor to the lender – unless and until such demand is made. Serving a statutory demand was not good enough for the purpose of satisfying the demand provision, and nor was an e-mail (paragraphs 32 and 34).

27.3 In *Oval (717) Ltd v Aegon Insurance Co (UK) Ltd* 1997 WL 1103311, the claimant (a company owned/controlled by the University of Bristol) sued an insurance company under a performance bond. The claimant had hired contractors in relation to the construction of new halls of residence. The purpose of the bond was to guarantee a contractor's due performance of a construction contract. The terms of the guarantee enabled the employer to recover from the defendant whatever damage it may sustain as a result of the contractor's default, up to a stipulated limit. The bond contained a condition precedent as to notification. The defendant in that case argued that, due to the failure on the claimant's part to comply with the above notification requirement, the claim should be dismissed. Recorder Collins Reece QC noted that the notification requirement had '*a discernable commercial purpose*' and that this was '*an obligation the Plaintiff accepted*' and found in the Defendant's favour. Deburo submitted that the condition in the present Guarantee, which prevents RoundShield from 'making a claim' unless and until a certain conditions are satisfied, is similar to the requirements in these earlier cases.

27.4 Finally, I was referred to the Australian case of *Tricontinental Corporation Ltd v HDFI Ltd* (1990) 21 N.S.W.L.R. 689, which is cited in several current editions of English textbooks (e.g. *Law of Guarantees*, 7th ed, 4-002, footnote 8 and *The Modern Law of Guarantees*, 10-007, footnote 11). In that case, a guarantee was expressed to be '*upon the terms and conditions and at the time and in the manner herein provided*', which included '*pre-conditions to entitlement to make demand*' (*inter alia* notice provisions). The dispute was as to whether the provisions had to be complied with strictly or only substantially. Such pre-conditions were held to be conditions precedent with which literal compliance was required. Samuels JA distinguished (at page 703) between promissory conditions and conditions precedent. Having summarised both English and Australian case law, he said at 705 that '*it is meaningless to speak of the substantial performance of a condition precedent. Either it has been performed, or it has not*'.

28. Deburo referred to the cross-examination of Mr Rehberger, relied on by Cs to show that he knew, when he signed the standstill letter dated 25 October 2021 and, when signing the letter on behalf of Pilatus, that the 'As-is Loan to Value' under the Facility Agreement was over 75% in October 2021, and whether it followed from this that the Loan to Value under the Guarantee was more than 75% in July 2022. In re-examination, said Deburo, Mr Rehberger was unable to recall whether there was any difference between the figures in those valuations and any previous valuations that there may have been for those properties. The position therefore may or may not have changed, it was submitted, as a matter of fact, between October 2021 and July 2022. Deburo submitted that there was insufficient evidence for me to determine the point either way. Ultimately, however, Deburo submitted, it is entirely irrelevant what Pilatus/Mr Rehberger thought about the As-Is Loan to Value under the Facility Agreement in 2021 (or, indeed, about the Loan to Value under the Guarantee). The question whether it is,

on the proper construction of the LTV Condition, possible to calculate the Loan to Value without a full set of Valuations is a question of law, absent any allegation of waiver or estoppel, which I deal with later in this judgment.

Cs' submissions.

29. Cs' first argument was that the LTV Condition was satisfied, as a matter of fact, as at the date of the issue of the Claim Form. They argued that:

29.1 The '*Loan'* component of the Loan to Value calculation was at least €144,318,847.41 as at the date of the issue of the Claim Form (4 July 2022), comprising:

29.1.1 €98,794,778 owed under or in connection with the Facility, namely €92,864,272 owed under the Facility itself and €5,930,506 owed under the Interest Sharing Deed; and

29.1.2 at least €45,524,069.41 owed by Rigi Hahnstraße GmbH under the BBL Loans.

29.2 The *'Value'* component was no more than €75,710,000. Cs relied on the valuations of the relevant properties set out above.

30. Cs pointed out that Deburo does not advance any positive case that the Loan to Value was below 60 per cent when the claim was issued, and further relied on the fact that Deburo's own, now abandoned, positive case as to the value of the properties was that they were worth €155 million, which was a gross overvaluation but in any event was substantially less than €240 million (the figure necessary to lead to the conclusion that the LTV Condition was not satisfied).

31. Cs submitted that I could properly find that the LTV Condition was satisfied when these proceedings were issued. Cs argued that I was not required to take a blinkered approach which ignores the obvious realities and common sense; that there is no credible basis to infer that the properties could have been worth anywhere close to €240 million when the claim was commenced, as would be necessary for the LTV Condition not to have been satisfied; that Deburo has not adduced any evidence suggesting that this is even remotely possible; and that all the evidence points to the contrary conclusion. In this regard, Cs submitted as follows:

31.1 In October 2021 Pilatus accepted that "the As-Is Loan to Value has exceeded 75 per cent (75%) in breach of Clause 18.1 (As-Is Loan to Value) of the Facility Agreement" such that an Event of Default had occurred under the Facility. Mr Rehberger accepted (as is indisputably true as a matter of logic) that if the As-Is Loan to Value under the Facility had exceeded 75 per cent in October 2021 then the Loan to Value under the Guarantee must also have exceeded 75 per cent at that time and that he appreciated this fact. He also accepted that nothing had materially changed by July 2022, such that it was most likely that the Loan to Value under the Guarantee also exceeded 75 per cent in July 2022.

31.2 Further, the Valuations for the properties which do exist show that they were worth no more than €75.7 million when the proceedings were issued (or €86.1

million if the valuation for the Bonn Property as at 31 May 2022 contained in the report dated 29 July 2022 is used). It is beyond fanciful to suggest that if Valuations had existed for Tromplaan 51 and Kortenaerstraat 21, they would have shown that the Loan to Value did not exceed 60 per cent. These two properties were purchased in late 2019 for €560,000 and Mr Simon Anter accepted that they would not have been worth very much more in July 2022.

32. Second, in any event, Cs argued that the Loan to Value could be calculated as at the date of issue of these proceedings in accordance with the contractual requirements. Two principal issues, it was said, arose for determination in this regard. The first was whether certain of the valuation reports relied on by Cs accord with the contractual definition of a *'Valuation'*. The second was whether the Loan to Value could be calculated in the absence of Valuations for the properties at Tromplaan 51 and Kortenaerstraat 21.

33. As to the first issue, this concerns the reports relied on by Cs in respect of the Bonn Property and Emmastraat 210.

33.1 Dealing first with the Bonn property, Cs relied on the valuation set out in the 2018 Bonn Report of €17.5m. They sought to address Deburo's contention that this report is not a 'Valuation' because "the report was not addressed to RoundShield" and "the valuer was appointed by someone other than RoundShield". As to this the definition of a 'Valuation' states that the valuation should be "supplied by the Valuer at the request of, and addressed to, [RS Lux II]". Cs put forward 2 contentions:

33.1.1 The first was that RS Lux II was entitled to be provided with a copy of the report and to *"rely upon the information contained in the Report to the same extent as if we had been appointed directly by you to prepare the Report"*. As a result, RS Lux II was entitled to use the 2018 Bonn Report in the same manner as if it had been supplied to it directly by CBRE, including therefore by relying on it as a Valuation. Mr Rehberger in his evidence agreed that the purpose of the Reliance Letter was to allow RoundShield to rely on CBRE's report as satisfying the condition precedent for utilising the Facility that a Valuation be provided and Mr Leeb confirmed that RoundShield also believed this to be the effect of the Reliance Letter.

33.1.2 Alternatively, it was said that the parties agreed that the 2018 Bonn Report could be relied on as a *'Valuation'*, and that this introduced questions of waiver and estoppel. I deal with this issue below.

34. As to Emmastraat 210, Cs argued that the report satisfies the contractual requirements. In particular:

34.1 It was prepared at the instruction of and addressed to RS Lux II.

34.2 It was prepared on the basis of the market value as defined by RICS.

34.3 It provided an *'as-is'* and a *'stabilised'* valuation of the property.

35. The second issue is whether the Loan to Value can be calculated in the absence of Valuations for the other two properties.

36. Cs' primary case was that the value of these two properties is so *de minimis* that the Court can properly conclude that the LTV Condition was satisfied when the claim was issued, since there can be no credible suggestion that if contractual Valuations of these properties had been obtained they would have made any material difference to the calculation of the Loan to Value. In particular:

    36.1 Tromplaan 51 was purchased in late October 2019 for €400,000. It can be assumed that the purchase price was representative of its market value at this time. Mr Rehberger accepted that it was not a valuable property.

    36.2 A desktop valuation of Tromplaan 51 prepared by CBRE on 18 October 2019 showed that the property would have a market value of €1 million on an assumption of *"refurbishment to market standard and split into two dwellings"*. The market value of the unimproved property could therefore not have been more than €1 million on any view.

    36.3 Kortenaerstraat 21 was purchased in late December 2019 for €160,000. Again, it can be assumed that the purchase price was representative of its market value at this time. Mr Rehberger also accepted that this was not a valuable property and that it would not have been worth much more than its purchase price in July 2022.

    36.4 Mr Simon Anter's evidence was that no significant improvements were made to these properties after their purchase and he accepted that they were therefore unlikely to have been worth much more than their purchase price in July 2022.

    36.5 Even if the market value of the properties had risen by July 2022, there is no credible scenario in which such a rise could have any material impact on the Loan to Value. The properties would have needed to rise in value to approximately €165 million (an increase of some 29,000 per cent) for the Loan to Value not to have exceeded 60 per cent when the claim was issued. That is simply fanciful.

37. By way of alternative, Cs suggested that Deburo's submissions were wrong as a matter of law, for the following reasons.

    37.1 In construing a contract there is a presumption that the parties do not require the performance of the impossible: Cuckow v AXA Insurance UK Plc [2023] EWHC 701 (KB) at [114]–[119]. A construction of the *'Loan to Value'* definition which required the market value of Tromplaan 51 and Kortenaerstraat 21 to be included in that calculation in the absence of Valuations for those properties would result in an impossibility, since the market value could not be *"determined by reference to the then most recent Valuation of each Property"* without such a Valuation existing. The better construction of the *'Loan to Value'* definition is therefore that if there is no Valuation for a particular property, the market value of that property should be disregarded or treated as nil.

37.2 Alternatively, a term falls to be implied[2] into the definition of *'Loan to Value'* by reason of business efficacy that if no Valuation for a property exists, RS Lux II should make a good faith estimate of that property's market value. Such a term is necessary to give business efficacy to the Guarantee if (contrary to Cs' submission above) the Loan to Value could not otherwise be calculated in the absence of a Valuation for a particular property. Any such good faith estimate of the value of Tromplaan 51 and Kortenaerstraat 21 would have been *de minimis* for the reasons already given above.

Discussion and conclusions.

38. I deal with matters in the following order:

38.1 The express and allegedly implied terms of the contract.

38.2 The allegation that, as a matter of fact, the LTV condition was met at the date of commencement of these proceedings.

39. Dealing first with the express terms of the contract, then in my judgment Deburo is correct to say that strict compliance with the requirements of the contract is necessary, and that, in turn, this means that contractual valuations had to be produced for each property. The express terms of the contract make clear, in my view, that valuations of the properties are indeed necessary and that such valuations have to have particular characteristics. This is clear from the definitions of loan to value, valuation and valuer, as set out above.

40. In these circumstances, then, in my judgment, there is no room for the implication of the terms contended for by Cs. The suggestion that the valuation might be on a good faith basis by Cs is at odds with the definitions in the contract. Further, the suggestion that the lack of a valuation made it impossible to apply the contract requirements, bringing into play the impossibility doctrine relied on by Cs is in my view ill founded. It was not impossible to obtain such valuations; and the fact that this may make it impossible to apply the contract formula is neither here nor there. This latter fact simply meant that, on the face of the contract, Cs could not establish what was necessary to make a claim on the guarantee.

41. Accordingly, I have concluded that the contract means what it says, and that strict compliance with the terms of that contract is necessary.

42. I turn next to the suggestion that it is plain that the LTV condition was in fact met as at the date of commencement of these proceedings.

43. I can deal with this briefly in the light of my conclusions in the previous section of this judgment.

[2] The test for the implication of terms is well known and was authoritatively stated by the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742 at [15]–[21].

43.1 In the absence of any valuations which accorded with the requirements of the guarantee for Tromplaan 51 and Kortenaerstraat 21 then there was, in my view, no compliance with the terms of the guarantee.

43.2 I reject the submission that the absence of such valuations could be ignored because they were of so little value. I do not think that, absent considerations of waiver, it is open to a party simply to ignore a provision of a guarantee such as this one on the grounds of unimportance.

43.3 That leaves the other two properties. In the light of my earlier conclusions, I can deal with these briefly.

43.3.1 In relation to the Bonn property, I hold that there was a contractual valuation. It was addressed to the lender, by virtue of the letter of reliance.

43.3.2 As far as the Emmastraat property is concerned, Deburo did not deny that this valuation was contractual, choosing only to put Cs to proof, and I conclude that Cs' case is proven.

44. Overall, therefore, I reject the submission that there was sufficient contractual compliance at the date of the issue of these proceedings, subject to the arguments on waiver, to which I now turn.

Alleged waiver or estoppel in relation to Valuations

The legal principles involved.

45. Cs referred me to *Chitty on Contracts* (35th ed), at ¶7-005 dealing with estoppel by representation and ¶7-016, dealing with estoppel by convention.

46. For its part, Deburo referred me to the decision of the Supreme Court in Tinkler v Revenue and Customs Commissioners [2022] AC 886, [28ff]. Further, for an example of how estoppel by representation is applied, I was referred to Steria v Hutchinson [2007] ICR 445.

47. As regards waiver, I understood Cs to rely in this regard on the doctrine of "pure" waiver (as opposed to election or estoppel). The requirements for this are set out at Chitty, at 26-043, as follows:

> "*Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has* waived *his right to require that the contract be performed in this respect according to its original tenor.*"

48. I apply the principles set out in these authorities.

Cs' submissions.

49. Cs submitted that it was a condition precedent to RS Lux II making funds available under the Facility for the purchase of the *Bonn Property* that a *'Valuation'* be provided in respect of that property. That was the context in which RS Lux II entered into the

Reliance Letter with CBRE at the beginning of March 2018 (as Mr Rehberger agreed). When, a few weeks later, Pilatus and Rigi Property GmbH submitted Form UTR5 to draw down the funds to purchase the Bonn Property they confirmed that each applicable condition precedent, including necessarily the requirement for a Valuation, had been satisfied: "*We confirm that each condition precedent specified in clause 4 (Conditions of utilisation) is satisfied on the date of this Utilisation Request"*. This was also reflected in the *'Conditions Precedent Checklist'* exchanged between the parties' lawyers, which marked the requirement for a Valuation as *'Satisfied'*. The only valuation report to which this could refer is the 2018 Bonn Report.

50. Cs argued that this constituted an implied agreement to waive or amend the definition of *'Valuation'* so as to apply to the 2018 Bonn Report, as permitted by Clause 33 of the 2017 Facility Agreement (which appears in the same terms in the Amended Facility Agreement).

51. Alternatively, it gave rise to an estoppel by representation or convention preventing either party from subsequently contending that the 2018 Bonn Report is not a *'Valuation'*. In particular the statement in UTR5 that "*each condition precedent specified in clause 4 (Conditions of utilisation) is satisfied"* was, for the reasons given above, a representation that the 2018 Bonn Report was, or could be relied on as, a *'Valuation'*. Mr Leeb's evidence that he understood such a representation to have been made by this statement and that he relied upon it in permitting funds to be drawn down under the Facility went unchallenged. Mr Rehberger confirmed that he understood that RoundShield would rely on the statements made in UTR5. Deburo was aware of and acquiesced in that representation: it was Mr Rehberger who signed UTR5 and in practice no distinction was drawn between Deburo and the other Solidare Group companies. Further, the marking of the requirement for a *'Valuation'* in the *'Conditions Precedent Checklist'* as *'Satisfied'* demonstrates that the parties were acting on the shared assumption or belief that the 2018 Bonn Report was, or could be treated as, a *'Valuation'*. Mr Rehberger confirmed that this checklist was a joint document which was exchanged between the parties' lawyers and reviewed by himself and Zeki and Simon Anter. Mr Leeb also confirmed that the checklist would have been reviewed on a call between the parties' lawyers and principals and that the requirement would only have been marked satisfied if the principals had agreed and instructed their lawyers accordingly. Mr Leeb's unchallenged evidence is that he relied on this representation and/or the parties' shared assumption or belief in permitting funds to be drawn down under the Facility to purchase the Bonn Property. Deburo benefitted from this, since it enabled its subsidiaries to acquire valuable real estate without incurring the costs of obtaining a further valuation. In those circumstances, it would be inequitable now to permit Deburo to resile from that position by contending that the 2018 Bonn Report is not a *'Valuation'*.

52. Cs also made reference to Deburo's contention that the relevant valuation for the Bonn Property is €30.4 million, but submitted that this submission could readily be rejected since the figure of €30.4 million in the report comprised the value of the existing property as redeveloped (€17.5m) and of a proposed annex to that property which required construction (€12.9m). The proposed annex was never built, so the relevant valuation for the purposes of determining the market value is that of the existing building. This was accepted by Mr Rehberger. In any event, even if the higher valuation

of €27.9 million contained in the report dated 29 July 2022 was used, the LTV Condition would remain more than satisfied.

53. Second, turning to Tromplaan 51 and Kortenaerstraat 21, the parties have dealt with each other on the basis that there was no requirement to obtain Valuations in respect of those properties. In particular:

53.1 RS Lux II permitted funds to be drawn down to purchase Tromplaan 51 and Kortenaerstraat 21 without Valuations being supplied. This was because there was an agreement between Mr Leeb and Mr Simon Anter that Valuations did not need to be obtained because of the low value of these properties.

53.2 When RoundShield sought to obtain valuations for the Enschede properties (i.e. including Tromplaan 51 and Kortenaerstraat 21) in late 2021, Mr Rehberger resisted this, stating that *"In our view, it does not make any sense to create any new expert reports since the Enschede properties are all to be sold and we do not want to generate any further costs and expenses here"*. Mr Rehberger accepted that this represented Deburo's position on the matter. As a result, no valuations were obtained.

53.3 In conducting themselves on this basis, the parties waived any requirement to obtain Valuations for these properties. In the premises, Deburo cannot now contend that the Loan to Value is incapable of calculation in the absence of such Valuations.

Deburo's submissions.

54. Cs' pleaded estoppel case in relation to the Bonn property is that any defects in the 2018 Bonn Report were waived by an 'implied agreement' or an estoppel by representation or convention arose. Cs say this is because it was a condition precedent for payment out under the Facility Agreements that a Valuation of the relevant property be provided by the Borrower, under clause 4 of the Facility Agreement, para 2.1 of Part 4 of the Schedule and para 2.1 of Part 5 of the Schedule. Cs also rely on a utilisation request dated 29 March 2018 submitted by Pilatus and Rigi Property GmbH which stated that '*each condition specified in clause 4 (Conditions of utilisation) is satisfied on the date of this Utilisation Request'*.

55. Deburo addressed Cs' case in relation to the Bonn Property only briefly, because, it was said, the omission of contract-compliant Valuations of the two Enschede properties had already been conceded by Cs, so that it was unlikely to affect the outcome of the present case whether there is any estoppel in relation to the Bonn Property defect.

55.1 First, as to '*implied agreement*', Deburo said it was unclear on what basis Cs say communications between Pilatus and RoundShield about the Facility Agreement would have led to a valid variation of the Guarantee between RoundShield and Deburo.

55.2 During cross-examination, Mr Rehberger was questioned about the letter of reliance (which stated that RoundShield could rely on the 2018 Bonn Report) and specifically about e-mails on the subject. It was established that Mr Rehberger did use Deburo's (then) e-mail signature in those e-mails. They were

nevertheless discussions about the 2017 Facility Agreement, in the context of a drawdown of funds pursuant to that agreement. Further, these e-mails were all from 2018, as was the reliance letter. They cannot, it was contended, have waived any conditions in the (current version of) the Guarantee, which only came into existence in May 2019.

55.3 In any event, Mr Leeb also said in evidence, about the Bonn report, '*There is no e-mail that Deburo is representing anything about the valuation, indeed*'.

56. Deburo submitted:

56.1 Cs would have to satisfy the Court that they – while being legally represented – reasonably relied on Pilatus's statement (if it is to be interpreted in the way Cs contend) that the Facility Agreement meant something other than it said.

56.2 Further, it was contended that any representation was made by Pilatus, not Deburo, and not in any context addressing the Guarantee. This leads to a third issue, in that the scope of any estoppel would not be wide enough to affect the Loan to Value calculation.

57. Finally, it should be noted that Mr Rehberger was questioned about the condition precedent checklist and it was suggested to him that the 'valuation' box had been marked 'satisfied' because he and RoundShield were agreed that a contractually-compliant valuation had been provided. He answered this in the affirmative. However, as pointed out in re-examination, there was a translation error in that, in German, the witness had only been asked whether a 'valuation' had been provided, not whether it was contractually-compliant. When the question was re-asked in full, Mr Rehberger said, '*If the valuation met the requirements that had been agreed, I am not sure*'.

58. In relation to Tromplaan 51 and Kortenaertstraat 21, Deburo objected to any plea of estoppel being put forward, but in fact, during opening submissions, counsel for Cs clarified that he was not advancing a case of estoppel in respect of these two Enschede properties, but was instead relying on a contractual waiver.

59. Deburo submitted that very clear words would have been needed to waive any of the conditions within the Guarantee. Mr Leeb, who was working on this on behalf of RoundShield, conceded in evidence that when it was decided that there should be no valuations for the two Enschede properties, the Guarantee was not discussed in that context. Nor was there ever any request to vary the Guarantee to change the valuation requirement in any way.

60. Cs also rely on the CP Satisfaction and Waiver letters dated 31 October 2019 and 24 December 2019. These specifically refer to the lender waiving conditions. Deburo submitted that this highlights a point that became quite clear during the course of Mr Leeb's evidence: it was a matter for RoundShield alone whether it was content to accept the documents provided for the purpose of releasing funds under the Facility Agreement. RoundShield as the lender could, at any point, waive conditions precedent in a utilisation. This illustrates very well that the purpose of a Valuation under the Facility Agreement is to benefit the lender, as it assists the lender in making decisions about whether a utilisation request should be granted.

61. Under the Guarantee, on the other hand, said Deburo, the Valuation requirement has a protective effect for the guarantor, as it is relevant to the Loan to Value calculation. Therefore, it would not make sense for the lender's decision to waive any conditions precedent under the Facility Agreement – or the parties' communications about such decision – to vary the terms of the Guarantee. In other words, the lender's willingness to waive a specific requirement under the Facility Agreement does not automatically result in the guarantor foregoing the protection afforded by the LTV Condition under the Guarantee, which is a different contract, in the context of which the Valuation requirement has a different function.

62. In that regard, Mr Rehberger was taken to an e-mail questioning the commerciality of obtaining valuations for the Enschede properties. However, that e-mail also has to be read in the context that for the purposes of utilisation under the Facility Agreement, it is RoundShield who ultimately decides whether they are content to release funds without a Valuation. The fact that they were content to do so cannot affect Deburo's rights under the Guarantee.

Discussion and conclusions.

63. I deal with each of the properties in turn.

    63.1 I start with Tromplaan 51 and Kortenaertstraat 21. I have concluded that there was no waiver by Deburo of its right to have contractually compliant valuations. The request relied on by Cs was from the borrower, not the guarantor, and, although there was commonality between the individuals involved, I do not think that this suffices to lead to the conclusion that Mr Rehberger was speaking on behalf of Deburo in making this request. Moreover, as the citation from Chitty makes clear, where a request is made from A to B to allow a contract to be performed in a manner other than that laid down, which B accedes to, it is B who waives its rights, not A (let alone C).

    63.2 This makes it strictly unnecessary to deal with the Bonn property. I am satisfied that there was a representation by *Pilatus* that the valuation provided complied with the requirements of the Facility. However, it is not clear that the representation extended to Deburo, and I am not wholly satisfied that it would be inequitable to allow Deburo to rely on its strict rights under the guarantee on the facts of this case. However, since the point does not arise, I prefer to express no final, concluded, view on the point.

64. For the reasons set out in this part of my judgment, I hold that, as at the commencement of these proceedings, the conditions for claiming on the guarantee were not met.

Issue 2.

65. The second issue which I have to decide is whether, as Deburo contends, the words *"[RS Lux II] shall only be entitled to make a claim... at any time that the Loan to Value exceeds 60 per cent"* mean that the LTV Condition had to be satisfied when these proceedings were issued and that it is irrelevant that the LTV Condition can be shown to be satisfied at any later date.

Cs' submissions.

66. Cs point out that Deburo admits that the valuations obtained by Cs in July 2023 of the properties then still owned by Pilatus and its subsidiaries satisfy the contractual requirements and that they show that the relevant properties were at that date worth no more than circa. €68 million. They drew attention to the fact that Deburo also accepts that as at the date of the Second Guarantee Demand at least €91.9 million was outstanding under the Facility and in fact the true figure is much higher. It follows, say Cs, that even on Deburo's case, and excluding the amounts outstanding under the BBL Loans and the Interest Sharing Deed, the Loan to Value was 135 per cent at the date of the Second Guarantee Demand. On any basis, the LTV Condition was therefore satisfied.

67. In fact, Cs submit that the true LTV was significantly higher—241 per cent—at the time of the Second Guarantee Demand because the amount due under and in connection with the Facility was considerably higher than that admitted by Deburo. Cs submit that some €106m was outstanding under the Facility and €5.9m under the Interest Sharing Deed and the amounts outstanding under the BBL Loans (some €51m) also need to be included in the *'Loan'* amount for the purposes of applying the LTV Condition.

68. Accordingly, Cs submitted that, at the time of the Second Guarantee Demand, there was no question but that the LTV condition was satisfied. Accordingly, Cs submitted that the guarantee was clearly triggered at this stage.

69. Cs further submitted that, in accordance with the analysis in Moschi v Lep Air Services [1973] AC 331, 344G-345E, Clause 2.1(A) contains two distinct promises by Deburo, being, under (1), a *'see to it'* guarantee, pursuant to which the guarantor promises that it will ensure performance by the guaranteed party, the breach of which promise sounds in damages and, under (2), an obligation to pay any sums due under or in connection with the Facility as a principal obligor, which sounds in debt. This obligation is expressed to arise *"on demand"*, although a demand may not in fact be necessary for liability to arise. Cs argued that the effect of a stipulation that the surety must pay *"as if it was the principal obligor"* is to obviate the need for demand (see M.S. Fashions Ltd v Bank of Credit and Commerce International S.A. [1993] Ch. 425 at 436D–F), though they accepted that this ultimately turns on the construction of the relevant clause.

70. They argued that, in relation to the claim under the *'see to it'* limb of the Guarantee, since this is a continuing breach that sounds in damages rather than debt, it may also be relevant to consider the Loan to Value at the time of trial in relation to the claim under this limb of the Guarantee.

71. As to this:

    71.1 The most recent loan account statement for the Facility shows that the amount outstanding under and in connection with the Facility stood at approximately €115 million as at 31 January 2024.

    71.2 As at 31 January 2024, the amount due under the BBL Loans was €55,790,887.

    71.3 The market value of the remaining properties in accordance with the July 2023 valuation reports (which remain the most recent valuations) is €59,900,000.

71.4 Accordingly, the Loan to Value as at 31 January 2024 was 286 per cent. On any view, the LTV Condition is therefore satisfied at the date of trial.

72. In response to Deburo's contention (set out below) that the LTV had to be satisfied at the time of the initial claim, and that the Second Guarantee Demand was therefore invalid, Cs' response was that a party which has commenced proceedings under a guarantee in reliance on a potentially invalid demand may cure that defect by issuing a fresh demand and amending its claim. In this connection, Cs relied on the decision in Maridive and Oil Services (SAE) v CNA Insurance CO (Europe) Ltd [2002] EWCA Civ 369, which was applied in United Trust Bank Limited v Dalmit Singh Dohil [2011] EWHC 3302 (QB) at [77]–[84]. They referred me to the judgment of Chadwick LJ in the Maridive case, at [54], where he said:

> "*...There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail. The court has a discretion whether or not to allow the amendment in such a case; a discretion which is to be exercised as justice requires. In the present case I have no doubt that, had the claimants sought to amend their particulars of claim (so as to rely on the demand of 13 March 2000) within the period from 12 April to 30 August 2000, they should have been permitted to do so. There was no reason why they should have been required to commence new proceedings.*"

73. Cs submitted that the parties are to be assumed to have had knowledge of the Maridive principle when negotiating the LTV Condition (pursuant to the principles summarised in Financial Conduct Authority v Arch Insurance (UK) Ltd [2020] EWHC 2448 (Comm) at [76]) and thus had they intended to produce a different result they can be expected to have clearly so specified. Their failure to do so is a clear indication that the proper construction of the LTV Condition is not as contended for by Deburo.

74. Cs' case was that the proper interpretation of the LTV Condition is that it simply defines the point at which Deburo assumes liability under the Guarantee, namely when the *'Loan to Value'* exceeds 60 per cent. The LTV Condition could equally have been expressed as, and bears a synonymous meaning with: *"Deburo shall not be liable under the Guarantee unless the Loan to Value exceeds 60 per cent"*. This construction accords both with the natural and ordinary meaning of the words used and commercial common sense. Cs made the following points in this regard.

74.1 First, Deburo's construction requires the words *"make a claim"* to be read as referring only to the step of initiating legal proceedings in court. But the natural and ordinary meaning of the word *'claim'* is far broader and also encompasses making a formal *"demand or request"* for payment (as per the OED definition[3]). To take but one example, it is common parlance to refer to *"making a claim"* under an insurance policy, which refers to the process of submitting a request for payment in accordance with the terms of the policy. In the context of an obligation which is expressed to be triggered by demand, a *'claim'* is *'made'* on

[3] The OED defines 'claim' to include: *"[with object] formally request or demand; say that one owns or has earned (something)"*.

the instrument in question by making a demand for satisfaction. By making the Second Guarantee Demand, Cs made a further *"claim"* against Deburo and the LTV Condition will have been satisfied at the date of that claim if (as it did) the Loan to Value then exceeded 60 per cent.

74.2 Second, and relatedly, the words *"make a claim"* can also naturally encompass a new claim brought within existing proceedings by amendment rather than merely the initial step of issuing a claim form. When Cs amended their Particulars of Claim to rely on a new head of claim arising from the Second Guarantee Demand, they made a further *"claim"* against Deburo under the Guarantee. Had the drafter of the Guarantee intended to produce the result contended for by Deburo (i.e. that any amendments to the claim after issue are irrelevant), they would have needed to be considerably more specific and to have expressed the LTV Condition in terms such as: *"*[RS Lux II] *shall only be entitled to issue proceedings against Deburo to enforce this guarantee... at any time that the Loan to Value exceeds 60 per cent"*.

74.3 Third, Deburo's construction of the LTV Condition would not prevent Cs from making a demand for payment or taking other steps to enforce the Guarantee short of bringing proceedings under the guarantee itself, even if the Loan to Value was below 60 per cent. For example, on Deburo's construction the LTV Condition would not prevent Cs making a statutory demand for payment under the Guarantee and then commencing winding up proceedings in reliance on the failure to satisfy that demand, since neither step would entail Cs issuing proceedings to enforce the Guarantee. This cannot have been intended by the drafter of the Guarantee and the result would be contrary to the obvious purpose of the LTV Condition, which, as set out above, is to prevent Deburo from bearing liability under the Guarantee when the Loan to Value does not exceed 60 per cent.

74.4 Fourth, Deburo's construction does not give effect to the words *"at any time"*. Such words suggest that the LTV Condition is not to be assessed on a one-off basis when proceedings are issued, but at any time that the Guarantee is sought to be enforced.

74.5 Fifth, the result contended for by Deburo serves no logical or commercial purpose. Its only effect would be to require Cs to issue a separate set of proceedings against Deburo, on which Cs could almost immediately seek and obtain summary judgment, since Deburo has no other defence. That would only serve to increase costs and delay. There is no commercial rationale for such an outcome and it is therefore highly unlikely to have been intended by the parties when drafting the LTV Condition.

Deburo's submissions.

75. Deburo accepted that Cs have, since the commencement of the proceedings, obtained and disclosed Valuations that meet the criteria within the Facility Agreement. However, it was Deburo's case that the wording of the Loan to Value condition makes clear that the entitlement to '*make a claim*' is contingent on the condition being met (which, Deburo says, can only happen if there are contract-compliant Valuations) at the time. In other words, without a full set of Valuations, Cs were not able to bring this claim.

The fact that they were not entitled to bring this claim when they did must, in Deburo's submission, lead to the dismissal of the claim.

76. In this regard, they submitted that the expression '*entitled to make a claim*' must be given its natural meaning, i.e. the commencement of a court claim. The term should not be interpreted more loosely (compare, e.g., with *Shanghai Shipyard Co v Reignwood Investment Co Ltd* [2021] 1 WLR, at paragraphs 53 to 65, where it was made clear that '*dispute submitted to arbitration*' meant just that, rather than e.g. a dispute that may potentially be submitted to arbitration). Whilst Cs had sought to argue that "make a claim" has a broader meaning, Deburo's case, however, is and always has been that the LTV Condition had to be satisfied as at the date of the claim, as a minimum. The condition had to be satisfied *both* at the time of serving a demand *and* at the time of bringing a claim.

77. Turning to Cs' reliance on *Maridive and Oil Services (SAE) v CNA Insurance CO (Europe) Ltd* [2002] EWCA Civ 369, and *United Trust Bank Limited v Dalmit Singh Dohil* [2011] EWHC 3302 (QB) at [77]–[84], Deburo submitted that both of those cases dealt with demands not being served correctly. Whether and how a demand is served is completely within the control of the creditor. It is a purely procedural requirement and is not aimed at providing any substantive protection to the guarantor. The LTV Condition is different in nature. If the total indebtedness is less than 60% of the value of the Properties, the creditor cannot sue. The commercial aim of the provision is to prevent the creditor from going after the guarantor if there is enough security available against which the creditor can enforce. So long as the LTV Condition is not met, the guarantor is safe from any claim being brought against it. The protection afforded by the Loan to Value provision is therefore significant. It cannot be compared to the purely formal requirement that a demand be served in the correct form.

78. Given that there was no authority directly on point, Deburo contended that accepting Cs' interpretation would set a highly undesirable precedent. It would enable lenders to bring proceedings while expressly prevented by the terms of a guarantee from doing so, in the hope that the relevant requirement may be satisfied at some point during the proceedings. It would substantially reduce the protection available to a guarantor. On a practical level, it would mean that a guarantor would have to devote time and resources to defending a claim that has no merit when it is begun, to then ultimately lose in the litigation due to new circumstances that arose at some later point during the proceedings.

79. To summarise, it is therefore submitted that the failure to comply with the LTV Condition when the claim was issued cannot be cured after the beginning of proceedings, because of:

    79.1 The wording of the Guarantee, which expressly provides that the lender shall '*only be entitled to make a claim*' at a time when the LTV Condition is met; and

79.2 The nature of the LTV Condition, which is designed to protect the guarantor and which should not be interpreted in such a way that its protective force is substantially reduced.

Discussion and conclusions.

80. I have concluded that Cs are correct in relation to this issue. I have reached this conclusion for the following reasons:

80.1 The natural meaning of the words in the guarantee, both "may be claimed", and "make a claim" (which appear in different sub clauses) is in my view not limited to issuing proceedings in Court. I accept the submission that the word "claim" extends beyond the issuance of a claim form.

80.2 The protection that the Loan to Value condition provides the guarantor with is enhanced by this construction. Essentially, as Cs submit, the condition acts as a brake on liability, not as a brake on the manner in which that liability is enforced in Court. In this regard, I accept the submission that Deburo's contention proves too much, since it would mean that other means of enforcement (eg the filing of insolvency proceedings) might be argued to be outside the ambit of the provision, which I would regard as both undesirable and unlikely.

80.3 It would follow from this construction that if, at the time of the issuance of proceedings, the Loan to Value condition was not satisfied, the claim would have to be dismissed, since the provision is a condition precedent to liability.

80.4 Turning to the ability to amend in order to introduce a new cause of action, then in my view it would be undesirable to require a Claimant to issue new proceedings as opposed to introducing the new cause of action by way of amendment. I accept Cs' reliance on the Maridive principle. The fact that the cases involved defective service does not in my view detract from the principle involved, namely that the Court has the discretion to grant permission to amend to introduce a new cause of action. That is, essentially, what has happened in this case, if Deburo are correct in saying that the Loan to Value Condition was not satisfied at the time of the issuance of the initial claim form.

81. Accordingly, in relation to this second issue, I hold that the Second Guarantee Demand and the amendment based on that Demand constituted a valid claim for the purposes of the Loan to Value condition.

82. I would be grateful if Counsel could draw up an Order to give effect to this judgment.