Neutral Citation Number [2020] EWHC 1115 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No: BL-2018-002267**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

MR ANDREW HOCHHAUSER QC

(Sitting as a Deputy Judge of the High Court)

7, Rolls Building,
Fetter Lane, London
Date: 11 May 2020

B E T W E E N:

(1) EUROPEAN FILM BONDS A/S
(2) ALLIANZ GLOBAL CORPORATE & SPECIALTY SE
(3) ERGO VERSICHERUNG AG
(4) KRAVAG-LOGISTIC VERSICHERUNGS-AG
(5) BASLER SACHVERSICHERUNGS AG
(6) AXA VERSICHERUNG AG
(7) BAYERISCHER VERSICHERUNGSVERBAND VERSICHERUNGSAKTIENGESELLSCHAFT
(8) SV SPARKASSEN-VERSICHERUNG GEBÄUDEVERSICHERUNG AG

Claimants

and

(1) LOTUS HOLDINGS LLC
(2) LOTUS MEDIA LLC
(3) LARKHARK FILMS LIMITED
(4) LIP SYNC PRODUCTIONS LLP

Defendants

EDMUND CULLEN QC, instructed by Clintons, for the Claimants

LAURA JOHN and ALEXANDRA WHELAN, instructed by Wiggin LLP and Quinn Emanuel Urquhart and Sullivan LLP, for the First, Second and Third Defendants

Hearing dates 2 and 3 December 2019

I direct that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this Judgement and that copies of this version as handed down may be treated as authentic.

ANDREW HOCHHAUSER QC

APPROVED JUDGMENT

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be at 2pm on 11/5/2020.

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Introduction

1. This is a Part 8 claim which seeks declaratory relief in relation to the determination of an issue as to whether a film entitled "Starbright" (the "**Film**") is conclusively presumed to have been completed and delivered for the purposes of a Completion Guarantee Agreement dated 25 April 2016 (the "**CGA**"). That issue (the "**Substantive Issue**") arises against the background that, if the Claimants are successful on it, then the Second to Eighth Claimants will avoid the risk of being liable to make payments to the Third and Fourth Defendants under clause 2.1(c) of the CGA. It does not necessarily follow, however, that, if the Claimants are not successful on their application, that the Second to Eighth Claimants will be liable under clause 2.1(c) of the CGA.

2. The factual background is substantially agreed and the issue to be decided is a narrow one, turning essentially on when certain materials (the "**Lotus Delivery Materials**") were "*returned*" by the First and Second and Third Defendants to the Claimants within the meaning of paragraphs 5.2 and 9 of Schedule 2 to the CGA.

3. The First to Third Defendants allege that the Claimants and their agent, Burmester, Duncker & Joly GmbH & Co. KG, trading as DFG Deutsche Filmversicherungs Gemeinschaft ("**DFG**"), having taken over the obligations to effect completion and delivery of the Film, have failed to do so. The Claimants deny this. The dispute is a subject of an arbitration in Los Angeles, California. Those arbitration proceedings are presently stayed.

4. By two application notices, one dated 21 November 2018 from the Third Defendant, the other dated 29 November 2018 from the First and Second Defendants, a stay of these proceedings was sought under Section 9 of the Arbitration Act 1996 and/or the Court's inherent jurisdiction, on the basis that these proceedings fall within the scope of arbitration agreements between the parties (the "**Stay Applications**"). Those applications were heard by Deputy Master Henderson, together with a further application from the Third Defendant dated 4 April 2019, seeking a stay of this claim, including the Stay Applications, pending the decision of the California Superior Court in proceedings issued by the Claimants by way of a "Complaint" filed on 19 March 2019. In a judgment handed down on 31 July 2019 (the "**Stay Judgment**"), the Deputy Master dismissed them on the basis that the Substantive Issue is not within the scope of the CGA arbitration agreement. It therefore followed that s.9(1) Arbitration Act 1996

had no application and the Deputy Master declined to stay these proceedings under that section, the Court's inherent jurisdiction or his case management powers.

5. There has been no appeal from his consequential Order dated 17 September 2019. The Stay Applications and the Stay Judgment are relevant to one of the defences raised by the First to Third Defendants. I will address that in due course. If the Claimants are right about deemed acceptance, there is no longer any issue to be arbitrated and the First to Third Defendants have agreed that the pending arbitration proceedings will be dismissed.

The Evidence

6. The evidence before me consisted of the following:

   (1) The first witness statement of Stephen Joelson dated 19 October 2018 ("Joelson 1");

   (2) The fifth witness statement of Alan Owens dated 29 October 2019 ("Owens 5");

   (3) The first witness statement of Khaled Khatoun dated 29 October 2019 ("Khatoun 1");

   (4) The fourth witness statement of Stephen Joelson dated 12 November 2019 ("Joelson 4");

   (5) The first witness statement of Steve Harrow dated 12 November 2019 ("Harrow 1");

   (6) The exhibits to those witness statements include the following agreements:

      (i) The Short Form Sales Agency Agreement dated 22 December 2015 (the "**SAA**");

      (ii) The CGA; and

      (iii) The Sales Agent Interparty Agreement dated 25 April 2016 (the "**Interparty Agreement**"),

      (iv) The Producer's Completion Agreement dated 25 April 2016 (the "**PCA**").

   I will refer to the salient parts of those agreements in due course. There were also communications between the parties relating to the delivery of the Film and

correspondence as to whether or not there had been compliance with the delivery procedure set out under Schedule 2 to the CGA and Exhibit 1 to the Interparty Agreement. I will refer to these when setting out the factual background.

7. At the hearing the Claimants were represented by Mr Edmund Cullen QC and the First to Third Defendants were represented by Ms Laura John and Ms Alexandra Whelan. I am grateful to them for their helpful written and oral submissions.

The Parties

8. The First Claimant ("**EFB**") is a company involved in the provision of completion guarantees in relation to film and TV projects. The remaining Claimants (the "**Underwriters**") are insurance companies which underwrite those guarantees. The Claimants are all parties to the CGA either originally or by virtue of a Deed of Amendment dated 31 January 2017, whereby the composition of the underwriting group was amended. They are represented by DFG, which entered into the CGA (and the Deed of Amendment thereto) expressly as their agent. The Underwriters are referred in the CGA as the "**Guarantor**". This is in contrast to the Interparty Agreement, where simply DFG, together with EFB, are referred to as the "**Guarantor**". The Underwriters were not parties to the Interparty Agreement.

9. The First and Second Defendants (together "**Lotus**") are sales agents who are responsible for marketing and selling films to distributors around the globe. They were also parties to the CGA but, significantly, clause 1.15 provided that this was "*solely for the purpose of agreeing to the provisions of Schedule 2 and 3 … and it shall have no other right or benefit pursuant to this Agreement or any obligation hereunder*."

10. The Third Defendant ("**Larkhark**") is an investment company which is managed by one of the companies within the Ingenious Group, which among other things, promotes tax-driven film investment schemes. Larkhark was the financial producer and the main financier of the Film. It was a beneficiary under the CGA.

11. The Fourth Defendant ("**Lip Sync**") is the other beneficiary under the CGA. It has not acknowledged service of the proceedings and has taken no part in them. On 21 November 2019, solicitors for Lip Sync wrote to the parties and to the Court saying that "*in accordance with the Overriding Objective, in order to expedite matters and to*

save cost, our client has not taken a formal position in the litigation and does not intend to do so as its involvement is neither required nor necessary".

The legal issues to be determined

12. This case falls to be determined on the correct contractual interpretation of the CGA, taken together with the Interparty Agreement.

13. The Claimants submit it is clear from the undisputed evidence that the Lotus Delivery Materials were not returned to EFB within the time specified in paragraph 5.2 of Schedule 2 to the CGA and that, as a consequence, there has been a deemed acceptance of the Film. They seek a declaration to that effect.

14. The Defendants contend there has been no presumed "*completion and delivery*" of the Film for the following three reasons:

    (1) Lotus complied with the time period specified in paragraph 5.2 of Schedule 2 to the CGA for the return of the Lotus Delivery Materials and, as such, there was no presumed "*completion and delivery*" of the Film. This submission turns on the correct construction of the word "*return*" under Schedule 2 to the CGA. Lotus contends that those materials were "*returned*" when they were sent to (the "consignment" interpretation), rather than when they were received by EFB (the "delivery" interpretation). On that basis Lotus complied with the timetable laid down in Schedule 2.

    (2) Further, and/or in the alternative, the CGA must be construed in light of the Interparty Agreement, such that where there is conflict between the two, the provisions of the Interparty Agreement take precedence. On this basis:

        (i) Lotus complied with the requirement in respect of the return of materials under paragraph 5.2 of Schedule 2 to the CGA, as properly construed in the light of the Interparty Agreement; and/or

        (ii) Any failure to comply with an applicable time period did not result in a presumed "*completion and delivery*" of the Film under the CGA, as properly construed in the light of the Interparty Agreement.

(3) Further, and/or in the further alternative, paragraph 9 of the CGA is unenforceable as a penalty, such that any breach of the timeframe did not result in a presumed "*completion and delivery*".

The Factual Background

15. I have taken the summary of the relevant factual background from the Stay Judgment and the parties' skeleton arguments. It is set out in detail in the witness statements and exhibits thereto.

16. The CGA and the Interparty Agreement are two of several agreements which were entered into in relation to the funding and making of the Film. The contractual framework for the Film's production was broadly as follows.

17. By a Commissioning and Distribution Agreement dated 17 July 2015 ("**CDA**"), Starbright, Srl ("**Starbright srl**") (an Italian company, that was the vehicle of the individual creators, Francesco Lucente, Olimpia Lucente and Enrico Fadani) commissioned Larkhark as "Producer" to produce, complete and deliver the Film in return for payment of a Purchase Price of approximately €18.9 million.

18. On the same day, under a Production Services Agreement ("**PSA**"), Larkhark engaged an American entity, Starbright Corporation ("**Starbright Corp**"), to provide the production services necessary to enable Larkhark to produce, complete and deliver the Film in accordance with the CDA. Starbright Corp was a wholly owned subsidiary of Larkhark and, at the outset, two of its four directors were representatives of Ingenious Group. Since March 2018, all Starbright Corp's directors have been representatives of Ingenious Group. Under the PSA, Larkhark agreed to make available the "*Budget Contribution*", being a sum of approximately €17.7 million. Larkhark took a producer fee of approximately €1.2 million, being the difference between the Purchase Price (€18.9 million) and the "*Budget Contribution*" (€17.7 million).

19. On 22 December 2015, Starbright srl entered into the SAA with the First Defendant, Lotus Holdings LLC, whereby it agreed to become the worldwide distributor for the Film. Clause 8 of the SAA provided: "*Long Form Sales Agency Agreement and Delivery Schedule: All other terms shall be as set forth in Company's [the First Defendant's] standard long form Sales Agency Agreement and standard theatrical delivery schedule, incorporated by reference herein, subject to: (i) any changes*

necessary to conform such documentation to the terms and conditions of this Agreement; (ii) any additional changes made by good faith negotiations and mutual agreement; and (iii) any requirements of the Completion Guarantor …" I was not taken to any provisions of the First Defendant's standard long form Sales Agency Agreement and the standard theatrical delivery schedule referred in clause 8 of the SAA was not exhibited.

20. On 25 April 2016, three agreements were entered into, namely the Interparty Agreement, the CGA and the PCA. I shall consider each in turn.

The Interparty Agreement

21. This agreement was entered into by Starbright srl, Larkhark, Starbright Corp, Ingenious Broadcasting LLP, Lotus, Lip Sync, EFB and DFG. It is common ground that the Interparty Agreement is referred to at clause 1.5 of the CGA as "*the SAA Side Letter*", perhaps misleadingly, given its length. It contains no express provision that DFG was entering into it as agent for any of the Underwriters, although the effect of clause 9.2 of the CGA, to which the Underwriters were parties by the agency of DFG, provided that the provisions of the CGA were subject to the provisions of the Interparty Agreement.

22. Clause 15.1 provides: "*Notwithstanding anything to the contrary contained in the [SAA] or any other Relevant Agreement, the Parties hereby agree with each other that if the Sales Agent disputes whether Completion and Delivery* ***under the [SAA]*** *has taken place, the dispute shall be resolved in accordance with the procedure set out in Exhibit 1 to this Agreement…*". [emphasis added]

23. Exhibit 1 to the Interparty Agreement sets down a Dispute Resolution Procedure in respect of certain materials. Those materials are referred to in the Interparty Agreement as the "**Sales Agent Bonded Delivery Materials**", defined in Schedule 1 and attached at Exhibit 2. They are the same materials as those identified in the CGA at Schedule 3 of that agreement, where there are defined as the "**Lotus Delivery Materials**." I shall refer to them hereafter as the **"Lotus Delivery Materials**", in relation to both agreements.

24. The procedure under the Interparty Agreement provides for various notices and objections to be provided between certain parties, and for the Lotus Delivery Materials to be sent back and forth. That procedure is summarised at paragraphs 27-33 of

Owens 5. I shall not set it out in full here. Suffice it to say, it is a similar, but not identical, procedure to the procedure contained in Schedule 2 of the CGA, to which I shall later refer.

25. Clause 23.6.2 provides that, "*except as otherwise stated in this Clause 15*", its provisions take precedence over the CGA in the event of conflict. The provisions in clause 15 stating otherwise, do not impact on the Substantive Issue.

The CGA

26. EFB and DFG (expressly in its capacity as agent for the Underwriters) entered into the CGA with, among others, Larkhark, Starbright srl, Starbright Corp, Lotus and Lip Sync. This contains a guarantee provided by the Insurers in respect of the Film.

27. The central obligations of the CGA (subject to the various exclusions and conditions set out in the CGA) are contained in clause 2.1, whereby the guarantee is provided for the benefit of the "Beneficiaries", which are defined to include Larkhark, Lip Sync and, despite the provisions of clause 1.15 referred to in paragraph 9 above, Lotus. The inclusion of Lotus within that definition must be an error because clause 2.1(c) of the CGA makes clear that the Payment Sum (as defined in clause 2.1(c)) is payable only to Larkhark and Lip Sync.

28. In particular, clause 2.1(c) provides that "*if the Guarantor* [i.e. the Underwriters] *fails to effect Sales Agent Delivery or discontinues production of the Film the Guarantor shall reimburse to Lip Sync the Lip Sync Funding* [(i.e. £575,000) as set out in sub-clause 1.1A], *to the Producer* [Larkhark] *the WIP Price (as defined in the [CDA])*" plus certain costs and less certain receipts. In broad terms, the "*WIP Price*" is the difference between (i) the total amount of the Budget Contribution advanced by Larkhark under the PSA (i.e. some €17.7 million) and (ii) any part of the Purchase Price Advance received by Larkhark under the CDA. The aggregate sum payable under this provision is defined as the "**Payment Sum**".

29. "*Sales Agent Delivery*" is defined in clause 1.12, where it is a component of "*completion and delivery of the Film*". By sub-clause (a), it required "*tender of delivery to Sales Agent* [i.e. Lotus] *by 31 December 2017 subject to an extension to those dates equal to the duration of any delays caused by the occurrence of Events of Force Majeure and/or Events of Essential Element Force Majeure (up to ninety 90 days) (the*

*"**Delivery Date**") of the materials specified in the delivery schedule attached hereto as Schedule 3 and marked with an asterisk ("**Sales Agent Delivery Materials**") and thereafter such action, such notices and such remedies as the Guarantor is required to take, provide and/or effect in accordance with the delivery procedure attached hereto as Schedule 2 (such delivery being defined herein as "**Sales Agent Delivery**")*". In addition, sub-clause (c) sets out various other specifications for the Film.

30. Thus, in broad terms (and subject to the exclusions and conditions of the CGA), the Underwriters undertook to pay the Payment Sum if "*Sales Agent Delivery*" was not effected. "*Sales Agent Delivery*" entailed:

    (i) tender of delivery of the Sales Agent Delivery Materials by the Delivery Date; and

    (ii) such action, notices and remedies as the Underwriters might be required to take, provide and/or effect in accordance with the delivery procedure in Schedule 2.

    The definition of "*Sales Agent Delivery Materials*" in clause 1.12 of the CGA appears synonymous with "Lotus Delivery Materials". Both seem to refer to "*the materials specified in the delivery schedule attached hereto as Schedule 3 and marked with an asterisk*", although the definition of "*Lotus Delivery Materials"* in paragraph 1.1 of Schedule 2 to the CGA refers incorrectly to Part 1 of Schedule 4 to the CGA (which is concerned with Presale Distributors), rather than Schedule 3. It is unclear to me why these different definitions have been used in different parts of the CGA. I shall refer simply to "Lotus Delivery Materials". This procedure is at the heart of the issue to be determined in this action. It provides for various notices and objections to be provided between certain parties, and for the Lotus Delivery Materials to be sent back and forth as part of this process. In particular, paragraph 5.2 of Schedule 2 to the CGA imposed a requirement to "return" the Lotus Delivery Materials within three days and paragraph 9 of Schedule 2 to the CGA imposed certain consequences for a failure to comply with that time period.

31. By clause 3.1 of the CGA, in consideration for the obligations undertaken by the Guarantor, EFB, on behalf of the Guarantor, is paid a guarantee fee in the amount of USD 575,000.

The PCA

32. EFB, DFG (for itself and as agent for the Underwriters), Larkhark, Starbright srl and Starbright Corp entered into the PCA under which Larkhark, Starbright Srl and Starbright Corp each undertook various obligations and provided various warranties about the production of the Film. By clause 8.1, the Guarantor was given the right, in the event of a "*Completion Bond Event*", to "*take over and complete the production of the Film*".

Events thereafter

33. The Film went into production. For reasons which are not material to the determination of the Substantive Issue, there were problems with the production which led to its going into 'takeover' under clause 8 of the PCA.

34. The Delivery Date under clause 1.12(a) of the CGA was extended to 31 May 2018.

35. On 30 May 2018, EFB delivered to Lotus in Los Angeles the Lotus Delivery Materials and sent Lotus (and others) by email a "Delivery Notice" (as defined in paragraph 1.1 of Schedule 2 to the CGA).

36. This had the effect that the Delivery Procedure under Schedule 2 to the CGA was triggered. There is a helpful annex attached to the Claimants' skeleton which I append to this judgment, which summarises the required dates and the various steps taken under the Delivery Procedure (and under the similar procedure at Exhibit 1 to the Interparty Agreement (which is there defined as the "SA IPA")). I do not propose to set out all the details here, but in outline:

    (1) The procedure consists of two 'rounds'. First, after receipt of the Delivery Notice, Lotus had to give either an Acceptance Notice (as defined in paragraph 1.1.1 of Schedule 2 to the CGA), in which case the Film was accepted and completion and delivery of the Film was effected, or an Objection Notice (as defined in paragraph 1.1.2 of Schedule 2 to the CGA), specifying the ways in which the delivered materials were said to be defective.

(2) In the event of an Objection Notice, EFB[1] could then request additional information in relation to it and/or request return of the delivered materials, such return to be "*at the requesting party's expense in order to allow … EFB … to cure the defects in such Lotus Delivery Materials*" (paragraph 1.1.2 of Schedule 2 to the CGA).

(3) After Lotus had complied with these requests, EFB could either redeliver the materials (with defects cured as necessary) with a Cure Notice or serve an Arbitration Notice. This latter course would, in effect, constitute a challenge to the justification for the original Objection Notice.

(4) In the former event (redelivery of materials with defects cured as necessary), the second 'round' commenced: Lotus could again either give an Acceptance Notice or it could give an Additional Objection Notice. In the latter event, EFB would have a further entitlement to request additional information in relation to the Additional Objection Notice and/or to request return of the re-delivered materials "physically delivered" to Lotus.

(5) Once these requests had been complied with, EFB could either again redeliver the materials (with defects cured as necessary) with an Additional Cure Notice or serve an Arbitration Notice. This latter course would, in effect, constitute a challenge to the justification for the Additional Objection Notice.

(6) In the former event (second redelivery of materials with defects cured as necessary), Lotus could then either give an Acceptance Notice or it could give an Arbitration Notice.

37. Each of these steps was subject to a time limit. As a general proposition, the second 'round' was intended to be more compressed than the first 'round' for both Lotus and EFB. Thus:

(1) On Lotus's side, in 'round' one, Lotus had 30 days from its receipt of the Delivery Notice in which to give an Objection Notice or an Acceptance Notice (paragraph 1.1 of Schedule 2 to the CGA). In 'round' two, Lotus had 15 Business Days from its receipt of the Cure Notice in which to give an Additional Objection

[1] The Delivery Procedure permits steps to be taken by EFB or the Guarantor. For convenience, this outline will refer only to EFB.

Notice or an Acceptance Notice (paragraph 5 of Schedule 2 to the CGA). ("*Business Days*" were defined in clause 2.2 of the CGA as being "*any day other than a Saturday, Sunday or a day on which banks in Germany or England are required to be closed*".)

(2) As for EFB, in 'round' one, if it received an Objection Notice, EFB had to redeliver the cured materials and give a Cure Notice within 30 days of the later of *"(i) receiving the Objection Notice or the Response, as applicable, or (ii) the return of any Lotus Delivery Materials …*" (paragraph 3.1 of Schedule 2 to the CGA). In 'round' two, if EFB received an Additional Objection Notice, the time for redelivery of the cured materials and the giving of an Additional Cure Notice was no later than within 15 Business Days of the later of "*(i) receiving the Additional Objection Notice or the Second Response, as applicable, or (ii) the return of any Lotus Delivery Materials…*" (paragraph 6.1 of Schedule 2 to the CGA).

38. A tight timetable was maintained in Schedule 2 to the CGA from the giving of the original Delivery Notice through to the end of any arbitral process. For example, paragraph 11 of Schedule 2 to the CGA provides that any arbitration was to be "*expedited*"; two arbitrators were to be appointed within five Business Days of any Arbitration Notice, with a third to be appointed three Business Days later; the arbitration was to commence within seven Business Days thereafter; the arbitrator was to issue an award not later than one day after the conclusion of the arbitration.

39. Schedule 2 to the CGA also spelt out the consequences of any failure to complete a step within the specified time:

(1) In the event of a failure by Lotus to respond with either an Acceptance Notice or an Objection Notice within the time periods specified, it would be deemed to have given an Acceptance Notice (see paragraphs 2 and 9 of Schedule 2 to the CGA). It would no longer be possible for any objection to be made, an Acceptance Notice shall be conclusively presumed to have been given and "*completion and delivery of the Film shall be conclusively presumed to have been effected*".

(2) In the event of a failure by EFB to deliver either a Cure Notice or Arbitration Notice with the time periods specified, an Arbitration Notice would be deemed to have been given (paragraphs 4 and 7 of Schedule 2 to the CGA). The provisions permitting the cure of defects would therefore come to an end. EFB would thus be deprived of the opportunity to cure any of the defects alleged and be compelled to arbitrate on the basis of the Film as it was.

40. Following EFB's delivery of the Lotus Delivery Materials and giving of the Delivery Notice on 30 May 2018, the subsequent steps of the Delivery Procedure were followed. In particular, pursuant to paragraph 1.1 of Schedule 2 to the CGA:

(1) Lotus's response was required within "*30 days from and after its receipt of … the Delivery Notice*" (i.e. by 29 June 2018). On 27 June 2018[2], Lotus gave an Objection Notice stating: "*This notice constitutes an Objection Notice for the purposes of Schedule 2 of the [CGA]*". There was no reference to the Exhibit 1 to the Interparty Agreement. The Objection Notice made various complaints, which included complaints that the Lotus Delivery Materials were not in accordance with the Approved Picture Specification, defined in paragraph 1.1.2 of Schedule 2 to the CGA and attached a quality control report alleging objections that the delivered materials were not if technical quality suitable for the making of commercially acceptable release prints.

(2) Any request for additional information was required "*within 3 Business Days … after receiving [the] Objection Notice*" (i.e. by 2 July 2018). On 2 July 2018, EFB made such a request for additional information.

(3) Lotus had "*3 Business Days after its receipt of [the] request*" in which to respond in good faith thereto (i.e. by 5 July 2018). On 5 July 2018[3], Lotus responded, stating "*This is a response, prepared in good faith … for the purposes of Schedule 2 "Delivery Procedure*" *clause 1.1.2 of the [CGA] and Exhibit 1 "Dispute Resolution Procedure" clause 1a ii to the [Interparty Agreement] … All of [Lotus's] rights in each and any jurisdiction are reserved*."

[2] It was sent at 10.59pm BST (11.59pm Copenhagen time) on 26 June 2018. It was therefore deemed received on 27 June 2018: see paragraph 10 of Schedule 2 to the CGA. This is common ground.
[3] The letter is dated 4 July 2018 but was emailed on 5 July 2018.

(4) Any request for return of the Lotus Delivery Materials had to be made "*within 3 Business Days after receiving the Objection Notice or a Response, as applicable*" [emphasis added]. On 10 July 2018, EFB requested return of the Lotus Delivery Materials to "*EFB c/o Paul Dray at Lip Sync Productions LLP, 195 Wardour Street, London W1F 8ZG*."

(5) Lotus were required to return the Lotus Delivery Materials to EFB "*within 5 Business Days after the Sales Agent's receipt of … EFB's … written request*" (i.e. by 17 July 2018). On 16 July 2018, the Lotus Delivery Materials were delivered to EFB (c/o Lip Sync as requested). They had been collected by FedEx from Lotus at 3.45pm (LA time) on 13 July 2018 (a Friday) and had arrived at Stansted Airport the following day. Since it appears that Lotus had not elected for weekend delivery, they were not delivered until Monday 16 July 2018.

41. Pursuant to paragraph 3.1 of Schedule 2 to the CGA, the cured Lotus Delivery Materials had to be delivered to Lotus, and a Cure Notice had to be given, "*no later than 30 days after the later of (i) receiving the Objection Notice or the Response as applicable, or (ii) the return of any Lotus Delivery Materials as appropriate which … EFB … has requested in order to cure any claimed defects*" (i.e. by 15 August 2018, "*30 days after … the return of [the] Lotus Delivery Materials … which … EFB …. ha[d] requested*"). On 14 August 2018 the Lotus Delivery Materials were delivered to Lotus by EFB. They were collected by a courier, Team Air, at 6.00pm (London time) on 13 August 2018 and delivered to Los Angeles the following day at 5.55pm (LA time). The Cure Notice was given on 15 August 2018[4].

42. That led to 'round' two. Lotus had "*15 Business Days from and after receipt of [the Cure Notice] and the relevant Lotus Delivery Materials*" in which to give an Additional Objection Notice or an Acceptance Notice: paragraph 5 of Schedule 2 to the CGA (i.e. by 6 September 2018).

(1) On 17 August 2018, Lotus wrote confirming that, under paragraph 5 of Schedule 2 to the CGA, and in the light of the intervening August bank holiday in England on 27 August 2018, the date required for a response was 6 September 2018. On 5

[4] It is dated 14 August 2018 but was emailed on 15 August 2018.

September 2018[5], Lotus gave an Additional Objection Notice (again including a quality control report). On that occasion reference was made only to "*clause 5.2 of Schedule 2 of the [CGA]*". No reference was made to Exhibit 1 of the Interparty Agreement.

(2) Any second request for additional information was required *"within 3 Business Days … after receiving [the] Additional Objection Notice*": paragraph 5.2 of Schedule 2 to the CGA (i.e. by 10 September 2018). On 10 September 2018, EFB made a request for additional information.

(3) Lotus had "*3 Business Days after its receipt of [the] request*" in which to respond: paragraph 5.2 of Schedule 2 to the CGA (i.e. by 13 September 2018). On 13 September 2018, Lotus responded[6]. The letter stated: "*This is a response, prepared in good faith … for the purposes of Schedule 2 "Delivery Procedure" clause 5.2 of the [CGA] and Exhibit 1 "Dispute Resolution Procedure" clause 1c ii to the [Interparty Agreement] … All of [Lotus's] rights in each and any jurisdiction are reserved*".

(4) Any request for the return of the Lotus Delivery Materials "*physically delivered*"[7] to Lotus had to be made "*within 5 Business Days after receiving the Additional Objection Notice*": paragraph 5.2 of Schedule 2 to the CGA (i.e. by 12 September 2018). In contrast to 'round' one, the time for the request for the return of materials was fixed by reference to the date of receipt of the Additional Objection Notice alone. EFB could <u>not</u> wait until after the receipt of the second response to the request for additional information. On 12 September 2018, EFB requested the return of the Lotus Delivery Materials. Once again, the request specified that the return should be made to "*EFB c/o Paul Dray at Lip Sync Productions LLP, 195 Wardour Street, London W1F 8ZG*." Given the 8 hour time difference between the UK and Los Angeles, the request would have to be received early in the morning by Lotus.

(5) Lotus were required to return the Lotus Delivery Materials to EFB "*within 3 days after the Sales Agent's receipt of … EFB's … written request*": paragraph 5 of

[5] The letter is dated 4 September but was emailed on 5 September 2018.
[6] The letter is dated 12 September 2018 but was emailed on 13 September 2018.
[7] Those words do not appear in paragraph 1.1.2 in relation to "round one".

Schedule 2 to the CGA (i.e. by 15 September 2018). It is common ground that the Lotus Delivery Materials were not delivered to EFB by that date. Part of the Lotus Delivery Materials were delivered on 17 September 2018 and part were delivered on 18 September 2018.

(6) The circumstances in which this arose appear to be as follows. As set out above, the request for return was made on 12 September 2018. It was made at 5.10pm (London time) (i.e. 9.10am LA time). There is no indication of what happened in response to that request until the day after it had been received, when Lotus's laboratory, Digital Cinema United ("**DCU**") sent an email on 13 September 2018 at 11.06am LA time) to Lotus entitled "Starbright redelivery – NEED ANSWER ASAP" in which they said they were working on redelivery, but needed to know if Lotus wanted the materials copied and cloned before being returned. DCU stressed the "*need to know ASAP*". Lotus's response was to say that they would check with Ingenious. Lotus made an urgent request of Nadine Luque at Ingenious. For some reason, she did not respond until the following day, apologising for not getting back to Lotus the previous night (14 September 2018 at 10.33am LA time).

(7) As a result, it was not until the evening of 14 September 2018 that Lotus (or DCU on its behalf) arranged for the Lotus Delivery Materials to be collected by FedEx. This collection took place at 5.46pm (LA time) on 14 September 2018. For some reason, it was arranged in two packages. Lotus/DCU did not select the fastest service offered by FedEx and they did not select weekend delivery. As a result, one of the packages was not delivered until 11.24am (London time) on 17 September 2018. The other package was subject to some further delay and was not delivered until 9.06am (London time) on 18 September 2018. Thus, if receipt was required, the return of the Lotus Delivery Materials was not within the time period specified in paragraph 5.2 of Schedule 2 to the CGA.

43. On 24 September 2018 EFB gave notice to Lotus that completion and delivery of the Film had been conclusively presumed to have been effected and Lotus conclusively presumed to have issued an Acceptance Notice in accordance with paragraph 9 of Schedule 2 of the CGA. That states:

> *"If (i) the Sales Agent fails to give any of the notices described in paragraphs 5.1, 5.2, 8.1 or 8.2 above or (ii) the Sales Agent* ***fails to return*** *to EFB… the Lotus Delivery Materials within the time period specified in paragraph 5.2 above, then completion and delivery of the Film shall be conclusively presumed to have been effected and the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice. EFB … shall thereupon give notice to the Beneficiaries that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice but failure to give such notice by EFB … to the Beneficiaries shall not affect the fact that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice."*[emphasis added]

44. By a letter dated 28 September 2018[8], Lotus disputed that there had been deemed acceptance. It contended that its obligation "to return" the Lotus Delivery Materials was met when those materials were placed in the FedEx's International Priority Delivery service on Friday 14 September 2018. It said that "return" in the sense used in paragraph 5.2 meant "send", and that EFB were confusing "return" with "receipt". Also, at that time, one of the grounds of that dispute was that, properly interpreted the reference to "*3 days*" in paragraph 5.2 of Schedule 2 meant "*3 Business Days*". But in any event, if "return" meant "receipt", three Business Days would have meant a deadline of 17 September 2018 and the second package was not delivered until 18 September 2018, which was too late. That interpretation was not relied upon by the First to Third Defendants before me. The other points raised in that letter will be considered below.

45. In the light of Lotus's position, out of an abundance of caution and without prejudice to its position that there had been deemed acceptance, EFB proceeded to redeliver the Lotus Delivery Materials. The cured Lotus Delivery Materials had to be delivered to Lotus, and an Additional Cure Notice had to be given, "*no later than fifteen (15) Business Days after the later of (i) receiving the Additional Objection Notice or the Second Response as applicable, or (ii) return of the Lotus Delivery Materials as appropriate requested by EFB*": paragraph 6.1 of Schedule 2 to the CGA, (i.e. by 10 October 2018). On 5 October 2018 the Lotus Delivery Materials were delivered to

[8] This was emailed at 3.02am on 29 September 2018.

Lotus. They were collected by a courier, Team Air, at 2.28pm (London time) on 4 October 2018 and delivered in Los Angeles the following day at 5.25pm (LA time). The Additional Cure Notice was deemed to have been given on 8 October 2018[9].

46. If, contrary to the Claimants' case, there had not already been deemed acceptance, pursuant to paragraph 8 of the Schedule 2 to the CGA, Lotus then had "*15 Business Days from and after its receipt of [the Additional Cure Notice]*" in which to give an Acceptance Notice or an Arbitration Notice (i.e. by 29 October 2018). On 19 October 2018, Lotus gave an Arbitration Notice[10]. It was stated to be given "*for the purposes of clause 8.2 of Schedule 2 of the [CGA] and clause 1.e of Exhibit 1 of the [Interparty Agreement]*." On the same date, both Lotus and Larkhark gave notice of arbitration before the Independent Film & Television Alliance. (the "**IFTA**").

47. On the same day, this action was commenced by the Claimants, seeking declaratory relief to the effect that, by reason of the failure to return the Lotus Delivery Materials within the time specified under paragraph 5.2 of the Schedule to the CGA, completion and delivery of the Film is conclusively presumed to have been effected and Lotus is conclusively presumed to have given an Acceptance Notice.

48. As stated in paragraph 4 above, there was an unsuccessful attempt by the First to Third Defendants to stay these proceedings, pending the conclusion of the pending arbitration. Since then as evidenced by Order No 7 dated 30 October 2019 in the IFTA arbitration, the parties have agreed that (i) the issue of deemed acceptance should be determined in these proceedings and (ii) if it is determined in favour of the Claimants, that arbitration will be dismissed.

The Claimants' claim

49. The Claimants' claim is simple. They submit that it is clear that the Lotus Delivery Materials were not returned to EFB within the time specified under paragraph 5.2 of Schedule 2 to the CGA and that, as a consequence, there has been deemed acceptance of the Film. They seek a declaration to that effect.

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[9] It was emailed at 3.59am (LA time) on 6 October 2018 (a Saturday) and is therefore deemed given on 8 October 2018 by virtue of paragraph 10 of Schedule 2 to the CGA.

[10] Although dated 18 October 2018, it was not sent (or deemed given) until 19 October 2018 (Copenhagen time).

50. As indicated at paragraph 14 above, three Defences are raised by the First to Third Defendants, I shall consider each in turn.

The First Defence: the proper interpretation of the word "return" in paragraph 5 of Schedule 2 to the CGA

51. There was no dispute as to the relevant principles of contractual construction. The Supreme Court has set out the key principles in a series of cases, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36l; [2015] AC 1619 at [15], and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

52. Those principles can be summarised as follows:

(1) The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause, but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

(2) Interpretation is a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications, given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause.

(3) The court must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest. This exercise involves checking each suggested interpretation against the provisions of the contract and investigating its commercial consequences. Similarly, the court must not lose

sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

(4) Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements.

(5) Account should be taken of the fact that negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.

53. The material part of paragraph 5.2 of Schedule to the CGA is as follows:

> *"If [ ] gives an Additional Objection Notice and in such notice the Sales Agent contends that some or all of the Lotus Delivery Materials are not suitable for the making of commercially acceptable release prints or broadcast materials, to the extent that the Lotus Delivery Materials which the Sales Agent contends are not of technical quality suitable for the making of commercially acceptable release prints or broadcast material (as appropriate) have been physically delivered to the Sales Agent within three (3) days after the Sales Agent's receipt of … EFB's … written request (which request … EFB … shall make (if at all) within five (5) Business Days after receiving the Additional Objection Notice), the Sales Agent* ***shall return*** *those Lotus Delivery Materials requested by … EFB at the Guarantor's expense, in order to allow EFB… to cure the defects in "such Lotus Delivery Materials as appropriate." [emphasis added]*

As Ms John correctly submitted, the provision is not easy to read, not least because it does not separate out the steps required in chronological order.

The First to Third Defendants' submissions on the proper interpretation of "return"

54. The proper construction of paragraph 5.2 of Schedule 2 to the CGA is that the requirement to "return" the Materials within three days meant that the Materials had to be sent by Lotus to EFB within three days (the consignment interpretation) and not received by EFB within three days (the delivery interpretation). On that basis, Lotus had to send the Lotus Delivery Materials by Saturday 15 September 2018, rather than EFB having physically to receive them by that date.

55. Such a construction reflects the ordinary meaning of the word "return". When "return" is used in the context of returning an object, it means the process of sending something back to somewhere or someone. It does not connote physical receipt. The Claimants have used the expression "to be returned", in support of their delivery interpretation, but the word is "return" in the active, rather than the passive, voice. Their reliance by analogy with CPR r 29.6 is not apt. It is being used there in a different context.

56. Further the consignment interpretation is consistent with the language used throughout the delivery procedure under Schedule 2 of the CGA. It is about the act of sending unless specifically stated otherwise. Ms John pointed to the following by way of illustration:

    (1) Paragraph 5.2 itself imposes (as other steps in the procedure) requirements that the Lotus Delivery Materials be "*delivered*" and "*physically delivered*" to the Sales Agent;

    (2) Paragraph 6.1 requires EFB to "*deliver*" to the Sales Agent any Lotus Delivery Materials that were specified in the Additional Objection Notice as not having been "*delivered*";

    (3) There are also multiple references to the requirement that certain notices be "*received*", see e.g. paragraph 5.2;

    (4) Lest it be said that the use of the word "*return*" was an anomaly, there are also frequent references to the requirement that the Lotus Delivery Materials be returned – see e.g. paragraphs 2, 3.1, and 5.2 of Schedule 2 to the CGA;

(5) Notably the delivery procedure itself does not use the word "*send*", although it does, at paragraph 1 refer in a general sense to notices "*to be sent*" and, at paragraph 10, specify the way in which notices are to be "*sent*".

57. The selection of the word "*return*" was not accidental. It was used rather than "*receipt*" or "*deliver*" or "*physically deliver*" (terms which appear frequently elsewhere). If the parties had intended to require that EFB actually receive the Lotus Delivery Materials within three days, or that the Materials be delivered to EFB within three days, they could, and would, have said so. Instead the parties stipulated for "*return*" – the sending back of the Lotus Delivery Materials.

58. Ms John submitted that the construction contended for by the First to Third Defendants gives effect to the practical and commercial reality and what must have been the parties' objective intention at the time of contracting. The exercise entailed a number of steps which would be difficult to perform in three days if "*return*" meant physical receipt rather than consignment. Upon receiving a notice from EFB:

(1) Lotus had to instruct DCU, the laboratory in Los Angeles where Lotus had the Lotus Delivery Materials reviewed, to deliver them to EFB c/o Lip Sync.

(2) DCU had to retrieve the Lotus Delivery Materials and then send them. DCU is closed on Saturdays, Sundays, and holidays – on such days, it is not possible to retrieve any Materials from the laboratory.

(3) The Lotus Delivery Materials therefore had to be transferred/posted internationally (Los Angeles-London) and as part of that process pass through customs.

(4) Thereafter, the Lotus Delivery Materials would be delivered to Lip Sync in London. Lip Sync is closed on Saturdays, Sundays, and Bank Holidays – on such days, it is not possible to deliver any Materials to Lip Sync.

All of these matters would have been known to (or assumed by) a reasonable person in the position of the parties at the time of entering into the CGA. Depending on which day of the week the notice was given it may be nigh impossible physically to deliver the Lotus Delivery Materials to EFB c/o Lip Synch. On the "consignment" interpretation, on the other hand, the First to Third Defendants had three days to

arrange the steps outlined in (1) and (2) above, which was a short but reasonable time. The steps in (3) and (4) were outside their control.

59. In relation to the timing of the Cure Period or the Additional Cure Period, there are problems presented whichever interpretation applies. If the delivery interpretation applied, Lotus would not be aware when it was actually received and it was important for Lotus to know when that had happened, in relation to the remainder of the timetable. Ms John accepted, however, that the consignment interpretation meant that EFB's time to cure any defects would be eroded while the Lotus Delivery Materials were in transit and, also, EFB would not know if and when time had begun to run. This construction may have these effects, but this is not surprising or so unreasonable that the same could "*not have been intended*" for the following reasons:

    (1) EFB did not, in fact, require physical return of the Lotus Delivery Materials in order to start work on curing the defects because as is the practice in the industry (which all parties can be taken to have known at the time of contracting), it retained the master copies and it had the Additional Objection Notice and Second Response (which informed it of Lotus's objections). This was set out in detail at paragraph 56 of Owens 5;

    (2) Although it is accepted that under the CGA, EFB needed physically to receive the Lotus Delivery Materials, the responsive evidence of Mr Harrow at paragraphs 7 and 11 of Harrow 1 made clear that it is important because it enables the post production house (a) to double-check that the materials which the sales agent claimed had not been delivered had in fact not been delivered and (b) to determine whether the claimed defect was not a problem in compiling, but a problem with the master element itself. It was not his evidence that the return of the Lotus Delivery Materials was necessary to enable the post-production house to cure the defects. The key point is not that return of the Lotus Delivery Materials was unnecessary, but rather that EFB did not need to wait until it had received them in order to commence its work as to any curing of defects and, as such, any delay was not prejudicial to them.

    (3) Further, and in any event, the consequence for EFB of a failure to respond to an Additional Objection Notice within the specified time period was only that they be deemed to deliver an Arbitration Notice pursuant to paragraph 7 of Schedule 2

to the CGA. In other words, if there were a delay outside Lotus and EFB's control (e.g. due to a hold up in customs as was the case in this particular instance) and if this delay had the effect that EFB was unable to cure any defects within its permitted time period, neither it nor the Guarantor would suffer any substantive loss of rights or change in its position as a result.

(4) By contrast, the consequences if Lotus missed the deadline were severe. Three days was an extremely short period and permitted no room for contingencies. A minor delay in returning the Lotus Delivery Materials (even one wholly outside Lotus's control) could deprive the Guarantee of any value. It must have been the parties' objective intention that it would be reasonable or practicable for Lotus to comply with the time period imposed and, moreover, that delays occurring wholly outside of their control, after they had sent the Lotus Delivery Materials, would not result in such a harsh, uncommercial outcome.

(5) Although there is a dispute on the facts, as to whether the delay was outside Lotus's control, or whether it was because Lotus failed to send the Lotus Delivery Materials quickly enough (and Ms John accepted that there were different postal options available, some quicker than others), that is irrelevant to the question of contractual construction. Subsequent conduct is inadmissible as a tool of construction.

An implied term as to a reasonable mode of delivery

60. Despite the fact that there was no prescribed method of delivery of the Lotus Delivery Materials to EFB, Ms John submitted that it was obvious, given the short timetable imposed, that the mode of delivery had to be consistent with and cognisant of that timetable. In oral argument, Ms John therefore submitted that there should be an implied term to this effect. There were various formulations advanced by her, that delivery should be "by a reasonable method consistent with and cognisant of the timetable", "very short", "reasonably short", and in this regard she pointed to and relied upon the provision contained in clause 10.9(c) of the CGA, which deems a notice sent by first class post to be given 5 days after being put in the post, as indicative of a reasonable period. If Lotus used an unreasonable method of delivery, which substantially eroded EFB's ability to cure, that would amount to a breach of such an implied term. She indicated that such an approach would be consistent with and

counter-balanced by the fact that in certain scenaria on the delivery interpretation, the Sales Agent might return the Lotus Delivery Materials on a weekend to nominated premises where there was no access available, and a term could be implied permitting delivery on the next working day.

An implied term to notify

61. In oral argument Ms John also suggested that a possible solution would be to imply a further term of mutual notification into paragraph 5.2. This was on the ground of necessity or that it was so obvious that it did not have to be expressed. It "cut both ways" in that Lotus would have to notify EFB of despatch in the event that the consignment interpretation applied, and EFB would have to notify Lotus of receipt in the event of that the delivery notification applied. This would remove any disadvantage of a party being unaware that an important step in the process had occurred.

The exclusion clause argument

62. Finally, Ms John submitted that taken together, paragraphs 5.2 and 9 of Schedule 2 to the CGA are, in effect an exclusion clause. This is because they purport to restrict or exclude the liability of the Guarantor which would otherwise attach to its breaches of contract (such as the liability to be sued in respect of the guarantee, i.e. here in the arbitration) in circumstances where one party (Lotus) is in breach of certain technical requirements under the delivery procedure. She relies upon the second category of exclusion clause in the three categories identified in [15-003] of Chitty on Contract (33rd ed), namely "*clauses which purport to exclude or restrict the liability which would otherwise attach to a breach of contract, such as the liability to be sued for breach or to be liable in damages, or which take away from the other party the right to treat as repudiated or rescind the agreement*". See e.g. *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 CLC 573 where the Court of Appeal considered an exclusion clause that imposed a time-bar on claims made by the injured party for breach of contract.

63. In such circumstances, the court should apply the principles of contractual construction applicable to exclusion clauses, which includes, as a final measure, the "*contra proferentem*" principle, namely that in cases of ambiguity such clauses be construed against the party seeking to rely on the exemption, on the basis that "*parties do not*

normally give up valuable rights without making it clear that they intend to do so" [per Briggs LJ (as he then was) in *Nobahar-Cookson v Hut Group Ltd* [2016] at [18]]. Therefore, insofar as there is any remaining ambiguity as to the meaning of "return" under paragraph 5.2 or as to the consequences of a breach of paragraph 5.2 under paragraph 9, that ambiguity ought to be construed against the Claimants, such that a narrow construction be given to the exclusion granted to the Guarantor.

64. On the basis of the consignment interpretation contended for above, there has been no breach of the timetable within paragraph 5.2 on the part of Lotus and paragraph 9 is not engaged.

The Claimants' submissions on the proper interpretation of "return" in paragraph 5 of Schedule 2 to the CGA

65. The consignment interpretation is contrary to the natural and ordinary meaning of the words used. The key phrase is obviously "*return to EFB*". The consignment interpretation requires one to accept that the Lotus Delivery Materials had been "*returned to EFB*" when they were put into the hands of the representatives of FedEx. On any view, they had not at that point been returned to EFB. They were not returned to EFB until delivery was made (or tendered) to EFB (or to the place where EFB had directed delivery). "*Return*" denotes a giving back. As a matter of ordinary language, a thing is not returned until it has reached the place/person to which it was meant to be returned. For an illustration of this ordinary usage, the Court need only look to the CPR r29.6, which provides:

> *"(1) The court will send the parties a pre-trial check list (listing questionnaire) for completion and* ***return by*** *the date specified in directions given under rule 29.2(3) unless it considers that the claim can proceed to trial without the need for a pre-trial check list.*
>
> *(2) Each party must file the completed pre-trial check list by the date specified by the court.*
>
> *(3) If no party files the completed pre-trial check list by the date specified, the court will order that unless a completed pre-trial check list is filed within 7 days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court."*
>
> [emphasis added]

There the word "*return*" is being used in its ordinary sense. It is being used in the active voice. The required date of "*return*" is equated with the date a party must file – i.e. the date on which the relevant document is delivered. It is not the date on which the document is, for example, put in the post, as is permitted by paragraph 5.2 of CPR PD 5A. The use of "return" in the active voice in paragraph 5.2 of Schedule 2 to the CGA does not assist the construction advanced by the First to Third Defendants.

66. The tight timetable contained in Schedule 2 to the CGA, from the giving of the original Delivery Notice through to the end of any arbitral process is indicative that the parties plainly intended that speed should be of the essence. The provisions in relation to the timing of the Delivery Procedure reflect the importance that the parties placed upon the Delivery Procedure being completed promptly and in accordance with the strict timetable. Each step was tightly regulated from the giving of the original Delivery Notice through to the end of any arbitral process. A procedure such as the Delivery Procedure needs to have deadlines and to make provision for what happens in the event that deadlines are not met.

67. In the context of the CGA, "*return*" is being used to denote a fixed point in time, not a process. This must be so because the date of return has important consequences for the subsequent timetable in the Delivery Procedure. Mr Cullen relied upon the following:

    (1) The date of return is of vital importance in the scheme of the Delivery Procedure. In both 'round' one and 'round' two (and there is no rational basis for suggesting that "*return*" might mean something different in 'round' one as compared with 'round' two), when a request for return of the Lotus Delivery Materials is made, the date of that return will operate as the beginning of the Cure Period or the Additional Cure Period. This is because the Cure Period is defined as being "*no later than 30 days after the later of (i) receiving the Objection Notice or the Response as applicable, or (ii)* ***the return*** *of any Lotus Delivery Materials as appropriate which … EFB … has requested in order to cure any claimed defects*". [emphasis added] The Additional Cure Period is defined similarly as being "*no later than 15 Business Days after the later of (i) receiving the Additional Objection Notice or the Second Response as applicable, or (ii)* ***the return*** *of any Lotus Delivery Materials as appropriate requested by EFB*". [emphasis added]

(2) There are a number of points to note about this: first, the first limb of each of these is clearly tied to the date of *receipt*, not the date of sending. Thus, the operative 'trigger' will be when the Objection Notice/Response/Additional Objection Notice/Second Response is received, not when it is sent. While these notices may be given by email so that sending/receipt are more or less simultaneous, this is not the case where, e.g., an email is sent out of office hours. Paragraph 10 of Schedule 2 to the CGA makes express provision to deem receipt of such emails to be on the next Business Day. In those circumstances, for the purpose of the determining the commencement date of the Cure Period or the Additional Cure Period, it will be the date of receipt, not the date of sending that will be relevant. That being so, the proposition that there would be some different approach in the case of the second limb – i.e., return of the Lotus Delivery Materials – is surprising. The natural expectation would be that it also would be fixed by reference to receipt/delivery.

(3) Secondly, given its vital role in determining the commencement (and thus the ending) of the Cure Period/Additional Cure Period, the date of return must be capable of being ascertained with certainty and, more specifically, EFB must know with certainty when the Cure Period/Additional Cure Period expires. However, under the consignment interpretation, as is accepted by the First to Third Defendants, EFB will not have any means of determining the date on which the Lotus Delivery Materials were returned. It will be something solely within the knowledge of Lotus (or whoever it is that Lotus has delegated the act of consignment to).

(4) Thirdly, as is obvious, the effect of the consignment interpretation is that the period available to EFB to cure any alleged defects is effectively reduced (or possibly extinguished) by the time that is taken between consignment and delivery. This is a very peculiar outcome, given that the express purpose of EFB being given the entitlement to ask for return of the Lotus Delivery Materials is so as to enable it "*to cure the defects in [the] Lotus Delivery Materials*". If the purpose can only be achieved upon delivery of the materials, that is a clear indication that "*return*" entails delivery. To put the point another way, one would not expect a Cure Period and EFB's time to cure the materials to commence on a date before EFB is in possession of the materials to be cured. It cannot have been

the intention of the parties that the ambit of the Cure Period available to EFB would have been at the discretion of the First to Third Defendants. It would be most surprising that EFB should have *less* time to cure defects than Lotus had to identify those defects, particularly since EFB would have to allow time at the end of the Cure Period/Additional Cure Period to enable delivery to be made before the expiry of the 30 or 15 Business Day period, given the need to deliver the Lotus Delivery Materials to Lotus before it can give a Cure Notice or Additional Cure Notice.

(5) As to the point made by Mr Owens on behalf of the First to Third Defendants that EFB did not need to wait until it had received them, in order to commence its work as to any curing of defects and, as such, any delay was not prejudicial to them, this is mere assertion and is not accepted by the Claimants, as Mr Harrow makes clear at paragraph 7 of Harrow 1.

68. Moreover, all of these points must be seen in the light of the fact that the CGA does not prescribe *any* method of return of the Lotus Delivery Materials. The parties left it open as to how the Lotus Delivery Materials might be returned. That has important consequences. In particular:

(1) The consignment interpretation depends on the proposition that the materials would be consigned to a delivery service such as FedEx. Nothing in the CGA suggests that the parties had any particular mode of delivery in contemplation. The return of the materials might, for example, have been effected by a representative of Lotus taking one of the numerous daily direct flights from Los Angeles to London and hand-delivering them. In such circumstances, it is reasonable to ask when the materials would have been "*returned*". Would it have been when the representative left home or some later point? The answer is obvious: it would have been when he/she delivered them. Thus, the consignment interpretation assumes an act of consignment which might never take place.

(2) Furthermore, even where there is a consignment, the effect of the consignment interpretation is that the length of the Cure Period or the Additional Cure Period will be contingent upon the mode of consignment which Lotus happens to select. As Mr Joelson describes at paragraph 17.4 of Joelson 4, there are various levels of service which couriers and postal services offer. Some are much faster than

others. On the consignment interpretation, Lotus could choose whichever it wanted. The slower the service, the less time EFB would have to cure any defects. That cannot have been the parties' intention.

(3) Although the CGA does not prescribe any method of return of the Lotus Delivery Materials, clause 10.9 is significant in this context. It provides that:

> *"All notices or other communications to be given or made under this Agreement shall be made by letter or email and shall be deemed to be duly given or made when:*
>
> *(a) delivered to (in the case of a letter delivered personally)*
>
> *(b) received by (in the case of a notice or other communication sent by email)*[11]*;*
>
> *(c) 5 days after being put in the post first-class postage pre-paid (in the case of post) addressed to the relevant party…"*

What this demonstrates is that the parties contemplated that any notice or other communication would be treated as given or made at the point of delivery/receipt, with a deemed delivery date in the case of first-class postage, not at the point of consignment/sending.

(4) The same point is evident from the clear pattern throughout the Delivery Procedure which consistently and repeatedly gives the date of receipt as the relevant trigger. So, when, for example, Lotus is to "*notify*" EFB that completion and delivery has not been effected, that notification takes effect when it is received by EFB, whereupon by paragraph 1.1.2, "*within 3 Business Days … after receiving such Objection Notice*" EFB can request additional information. Similarly, under the same paragraph, if such a request is made by EFB, that request is treated as made when it is received, the Sales Agent having three Business Days "*after its receipt of that request to respond in good faith thereto*".

(5) This pattern is constant throughout, whatever verb or phrase is used to describe the relevant act (i.e., whether it is to "*notify*", "*request*", "*give*" or "*respond*"). In each case, it is clear that the notification, request, giving or response takes place

[11] As stated in paragraph 67(2) above, paragraph 10 of Schedule 2 to the CGA made specific express provision as to when emails were deemed to be received: either when sent or, if sent outside office hours, then on the following Business Day.

upon receipt by the other party (a point made even clearer by the deemed receipt provision in paragraph 10 of Schedule 2 to the CGA).

(6) Moreover, in some contexts, the Delivery Procedure refers specifically to "*delivery*". In particular, EFB must "*deliver*" the Lotus Delivery Materials to Lotus before the end of the Cure Period and the Additional Cure Period: paragraphs 3.1 and 6.1 of Schedule CGA Schedule 2. It is plain on the wording of those paragraphs that EFB cannot give a Cure Notice or an Additional Cure Notice until it has delivered or re-delivered the Lotus Delivery Materials that had been requested by EFB. If it fails to "deliver" a Cure Notice or Additional Cure Notice before the end of the Cure Period or the Additional Cure Period, it will be deemed to have given an Arbitration Notice: see paragraphs 4 and 7 of Schedule 2 to the CGA. That clearly means what it says: the materials or the Cure Notice or the Additional Cure Notice must actually be delivered to Lotus by the relevant date, not merely put in transit by that date. Against that background, the argument that, in the sole instance of "*return*", the consignment interpretation should be applied is unsustainable.

69. In relation to the reason advanced by the First to Third Defendants in support of the consignment interpretation, namely the alleged difficulty in effecting a transatlantic return of the Lotus Delivery Materials in the space of three days, Mr Cullen made the following submissions:

(1) Whilst the timetable is tight, that was the bargain the parties made (having regard to the evident importance attached to the expeditious completion of the Delivery Procedure).

(2) He relied upon Mr Joelson's evidence to show that it is simple to get a package from Los Angeles to London within three days. As referred to at paragraph 68(2) above, Joelson 4 para 17.4 gives examples by reference to Lotus's chosen courier, FedEx, which detail the various services which it offers, which would have enabled timely delivery. Further, in order to ensure delivery within three days, Lotus could have delivered materials personally. If one looks at the contemporaneous documentary evidence, there is nothing to indicate that Lotus were relying upon the "consignment" interpretation, until their letter of 28 September 2018. In his email of 13 September 2018 to Ingenious, Mr Guiraud on

behalf of Lotus stated: "*I need an urgent answer as we are on a tight timeline to send back the material to EFB"*. Whilst subsequent conduct is not an aid to contractual construction, it is evidence of a common assumption and therefore material to an estoppel by convention, which is considered below.

(3) In relation to Mr Owens's suggestion that delivery from DCU or to Lip Sync on a weekend would not have been possible, there is no reason why the parties would have been contemplating delivery from DCU or to Lip Sync when they entered into the CGA. In any event, Mr Cullen relied upon paragraph 14 of Harrow 1 to demonstrate that delivery on a weekend would have been possible. Moreover, whenever delivery was going to be necessary (whether on a weekend or on any other day), then EFB would no doubt have been required to ensure that delivery was possible. Plainly it would be sufficient for Lotus to tender delivery. EFB could hardly complain about late delivery if there was no-one present to accept delivery (whether on a weekend or on any other day).

70. As to the contention by the First to Third Defendants that the parties cannot have intended that a small delay caused by something outside Lotus's control (such as a delay at customs) would have the effect of relieving the Guarantor of liability, in the instance case, there was no basis for thinking that Lotus missed the deadline because of some event outside its control. Because Lotus were acting on the instructions of Larkhark and Larkhark was dilatory in providing those instructions, no attempt was made to begin making arrangements for the return of the Lotus Delivery Materials until the evening before the deadline for their return. The evidence of Mr Joelson at paragraph 46.1 of Joelson 1 (which is not contradicted by Mr Owens), shows it would have been obvious to Lotus that return of the materials would be requested. The Lotus Delivery Materials were easy to put into a box and to transport. During 'round' one, Lotus had delayed consigning the materials until Friday 13 July 2018 (apparently so that it could make copies for Ingenious) but had still managed to ensure that they were delivered by the required date (i.e. by 16 July 2018). It is evident from the email exchange between 11 and 12 July 2018 between Jeremie Guirand of Lotus and Dusan Sulla of DCU that Lotus was then proceeding on the basis that the materials needed to be delivered, not merely consigned, by 16 July 2018.

71. The First to Third Defendants' interpretation overlooks the balance of the Delivery Procedure. As noted above, there are numerous stages, each of which is contingent upon one or other party ensuring the receipt by the other of a notice or of materials. Thus, most importantly, EFB is required to deliver the cured Lotus Delivery Materials and a Cure Notice or an Additional Cure Notice before the end of the Cure Period or the Additional Cure Period. If it fails to do so within the prescribed time period, it will be deemed to have served an Arbitration Notice under paragraph 7 of Schedule 2 to the CGA. It will then have to go into that arbitration on the basis of the uncured materials. If it had performed cures to the late-delivered materials, it may be assumed therefore that any arbitration based on the uncured materials might conclude that completion and delivery had not been effected and the Guarantor would be liable to pay the Payment Sum. A deemed Arbitration Notice therefore may be effectively conclusive as to its liability.

72. Thus, EFB runs the risk of ensuring delivery of the Lotus Delivery Materials by the required deadline (including the risk of events of the kind alleged by Mr Owens, namely, delays in transit/customs). On the consignment interpretation, it also runs those risks in relation to the return of the Lotus Delivery Materials (despite this being within the control of Lotus (or its chosen representative)). In fact, the natural assumption would be that Lotus would bear those "risks" when it comes to return of the materials.

The Implied Terms contended for by the First to Third Defendants

73. Mr Cullen submitted that having to resort to implied terms to make sense of the consignment interpretation was an act of desperation, which was necessary to make sense of the construction advanced.

The Implied Term to notify

74. The Claimants' justification for this on the basis that "it cuts both ways" was factually incorrect. Mr Cullen submitted that there is no need for such an implication for the delivery interpretation. The party required to make the return by delivering the materials will evidently know when it has made the delivery. Either it will have delivered personally (so it will have direct personal knowledge) or it will have engaged an agent (such as FedEx) to make the delivery in which case it will be able to track the progress of the delivery online using the tracking number and print out the tracking

report (e.g., FedEx's report) showing in real time when delivery was effected. Examples of such reports from FedEx or from the Claimants' courier were in evidence.

The Implied Term to use a reasonable method of consignment

75. Once again, it was suggested by Ms John that this was counter-balanced by an alleged problem in relation to the delivery interpretation, namely the inability successfully to deliver over the weekend or a Bank Holiday because of lack of access to the designated premises. There is no equivalence. If Lotus or their agent were physically unable to deliver within the three days stipulated, because the premises were closed, EFB could hardly rely upon a failure of performance which it has rendered impossible.

76. By contrast, if the consignment interpretation were adopted, the absence of any prescribed mode of delivery would indeed be a "failing" in the CGA (as asserted on behalf of the First to Third Defendants). Again, the fact that an implied term would be needed in order to make the consignment interpretation conform with business common sense is fatal to their argument. This is all the more so in circumstances where the First to Third Defendants were unable clearly to formulate the term to be implied.

The exclusion clause argument

77. In relation to the assertion by the First to Third Defendants that paragraphs 2 and 9 of Schedule 2 to the CGA (in relation to "rounds" 1 and 2 respectively) amounted to an exclusion clause, this raises two issues: (a) who is the "proferens"? and (b) does it amount to an exemption clause? Here the CGA was a contract negotiated between parties of equal bargaining power, and in such circumstances, EFB is not to be regarded as the "proferens". In any event, properly construed, these paragraphs do not amount to an exemption clause, but part of an integral part of the delivery procedure, creating a "deemed Acceptance Notice". Paragraph 1.12 of the CGA contains the agreement of the parties as to what "Completion and Delivery of the Film" shall mean, and the Payment Sum is payable upon satisfaction of certain conditions precedent. If an Acceptance Notice is given (deemed or otherwise), there is no liability to pay the Payment Sum. A guarantee is based on risk, if the envisaged risk does not occur, there is no liability to pay.

78. If, which is denied, paragraphs 2 and 9 of Schedule 2 to the CGA do amount to an exclusion clause, because they 'exclude liability to make payment' as Briggs LJ stated

in Nobahar-Cookson v Hut Group Ltd at [19]: "*Commercial parties are entitled to allocate between them the risks of something going wrong in the contractual relationship in any way they choose … The court must still use all its tools of linguistic, purposive and common-sense analysis to discern what the clause really means*". Performing that exercise results in the delivery interpretation being the proper construction of the word "return" in paragraphs 5.2 and 9 of Schedule 2 to the CGA. Clause 9 provides that upon Lotus's failure to return the Lotus Delivery Materials, "*EFB shall **thereupon** give notice to the Beneficiaries that completion and delivery of the Film shall be conclusively presumed to have been effected and that the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice*." [emphasis added]. The use of the word "thereupon" must entail EFB being aware of the failure to return, which knowledge must be based on receipt, rather than consignment, within three days.

79. Insofar as it was suggested that the effect of the clause was to prevent Larkhark from suing for any breach, what breach is there to sue on? The relevant obligation under clause 2.1(c) of the CGA is to pay the Payment Sum. The condition for payment of the Payment Sum is "*if the Guarantor fails to effect Sales Agent Delivery*". If the Sales Agent is conclusively presumed to have issued an Acceptance Notice, then Sales Agent Delivery is effected, and no payment is due.

Discussion and conclusion on the proper interpretation of "return" in paragraph 5 of Schedule 2 to the CGA

80. Having carefully considered the parties' detailed submissions, in my judgment the correct construction of the word "return" in paragraph 5 of Schedule 2 to the CGA is that advanced by the Claimants. The obligation on Lotus was to deliver the Lotus Delivery Materials to EFB, rather than commence the process by sending those materials to EFB.

81. I reach that conclusion for the following reasons:

    (1) In my view the starting point is that the normal use of the word "return" means arriving at the destination to which it was intended to return.

    (2) The Delivery Process contained in Schedule 2 of the CGA contained a tight timetable, with deadlines becoming increasingly shorter as the process

progressed. In my view that is indicative that the parties regarded time as being of the essence.

(3) As Ms John pointed out, paragraph 5.2 is not an easy paragraph to read. It is, however, plain that the date of "return" has important consequences for the subsequent timetable in relation to both 'round' one and 'round' two, because it operates as the trigger for the commencement of the Cure Period or the Additional Cure Period to enable EFB to remedy any defects. In my view, this must be tied to the date of receipt of the Lotus Delivery Materials and not the date of sending them. This interpretation is reinforced by the definition of the Additional Cure Period in paragraph 6.1, which states it is "*no later than 15 Business Days after the later of (i)* ***receiving*** *the Additional Objection Notice or the Second Response as applicable, or (ii)* ***the return*** *of any Lotus Delivery Materials as appropriate requested by EFB*" [emphasis added]. The first limb of that definition is clearly based upon receipt. It would be odd if the second limb (and time runs from the later of two events) is subject to a different approach, namely the date of sending, rather than receipt. So whilst I acknowledge that different words are used here, and indeed in relation to other steps in paragraph 5.2, as described in paragraph 56 above, which are strongly relied upon by Ms John, in my view that does not lead to the conclusion that the consignment interpretation is the correct one.

(4) The delivery interpretation is reinforced by two other factors. First, it is clearly important that EFB should know when the Additional Cure Period begins, so as to put in place a timetable of works to enable it to meet the deadline within paragraph 6.1 for the redelivery of the cured materials and the giving of an Additional Cure Notice. As Ms John accepted on the consignment interpretation, EFB will not know when the Additional Cure Period commences. It will be a matter known only to Lotus or to whom it has delegated the act of consignment and that will reduce the time available to EFB to remedy any defects. EFB will not know the amount of that reduction. I was not persuaded by her argument that this problem should be remedied by reference to an implied term, on the grounds of necessity or because it was obvious, obliging the Sales Agent to notify to EFB of the date on which consignment commenced. Such term would be needed in order to support the consignment interpretation. What is odd is that on the facts

here, Lotus gave no such notification to EFB, and therefore, would appear to be in breach of this necessary, obvious, implied term. She also suggested that by parity of reasoning, there would need to be a similar term implied, in order for the delivery interpretation to work, because otherwise the Sales Agent will not know when the Lotus Delivery Materials have reached their destination. I do not accept that. As Mr Cullen submitted, correctly in my view, the party required to make the return by delivering the materials will evidently know when it has made the delivery. Either it will have delivered them personally (so it will have direct personal knowledge) or it will have engaged an agent (such as FedEx) to make the delivery in which case it will be able to track the progress of the delivery online using the tracking number and print out the tracking report (e.g., FedEx's report) showing in real time when delivery was effected. There is therefore no need for any such implied term in relation to the delivery interpretation.

(5) The second factor is that there is no prescribed method of delivery by which to return the Lotus Delivery Materials, which means that it was open to Lotus to choose one which could substantially erode the Additional Cure Period available to EFB. I do not regard that as something which the parties intended, particularly given the tight timetable which was imposed under the agreement. Under Schedule 2, in 'round' 2, each side was given 15 Business Days to take their respective step, Lotus to give an Additional Objection Notice, EFB to give an Additional Cure Notice (from the return of the Lotus Delivery Materials). There is a symmetry in that, and it would be odd if it was in practice open to Lotus to reduce the Additional Cure Period, the effect of which would be to give the objector more time than the party charged with remedying the problem.

(6) Ms John sought to deal with this problem in two ways, neither of which I found convincing. First, she submitted that it was not necessary for the Lotus Delivery Materials to be in the possession of EFB for work to commence remedial works. There was a dispute about this, but it seems to me that the wording of paragraph 5.2 of Schedule 2 to the CGA, properly construed, envisages that the Lotus Delivery Materials required to be remedied will be physically available to EFB throughout the Additional Cure Period.

(7) Secondly, she contended for a further implied term, on the grounds that it was obvious, which would have the effect of reducing, but not eliminating, the erosion of both the Cure Period and the Additional Cure Period. The term was to the effect that the mode of delivery had to be consistent with and cognisant of the agreed timetable. She formulated the implied term in a number of different ways, as described at paragraph 60 above. The fact that there was no one clear formulation was unhelpful, as was the need for it in the first place to support the consignment interpretation. Importantly, it does not prevent the inevitable result that on her interpretation, that within the 15 Business Days of the Additional Cure Period, EFB would still lose the amount of time needed for the "reasonable" mode of delivery chosen by Lotus. She justified the existence of such an implied term as a counter-balance to a problem which would arise with the practical application of the delivery interpretation, namely an inability for a Sales Agent successfully to deliver the Lotus Delivery Materials over the weekend or a Bank Holiday because of lack of access to the premises designated by EFB, whereupon there would have to be an implied term permitting delivery on the next working day. There is a dispute as to whether in practice there would have been such a problem, but that seems to me to be irrelevant. Assuming that there was a lack of access, it does not seem to me that any term needs to be implied in such circumstances. The obligation of the Sales Agent would be to tender delivery, and if that were made impossible, as Mr Cullen correctly submits, EFB could hardly rely upon a failure of performance, which it has rendered impossible.

(8) It seems to me that there are difficulties in characterising paragraphs 2 and 9 of Schedule 2 to the CGA as an exclusion clause and praying in aid the "contra proferentem" argument to support the consignment interpretation. In my view, those clauses do not exclude a party's right to sue for a breach of contract, but instead provide that a step in the procedural process will be deemed to have been taken, namely the giving of an Acceptance Notice, thus removing any obligation on the Guarantor to pay the Payment Sum. There is no exclusion of liability for breach of contract because no breach of contract by EFB will have occurred. If I am wrong in that analysis, and properly construed, those paragraphs do amount to an exclusion clause, given that the CGA was the product of detailed negotiations between sophisticated businessmen, legally advised, it seems to me wrong to

describe EFB as the "proferens" in relation to these paragraphs, any more than the Sales Agent is to be regarded as the "proferens" in relation to the deeming provisions relating to the giving of an Arbitration Notice contained in paragraphs 4 and 7 of Schedule 2 to the CGA[12]. All of the deeming provisions, voluntarily agreed between the parties as part of an expeditious delivery process, seem to me to reflect the statement made by Briggs LJ in the *Nobahar-Cookson* case at [18], recited at paragraph 78 above, namely: "*Commercial parties are entitled to allocate between them the risks of something going wrong in the contractual relationship in any way they choose..*" In both clause 2 and 9, the wording provides that "*if the Sales Agent fails to return to EFB ... the Lotus Delivery Materials ... the Sales Agent shall be conclusively presumed to have issued an Acceptance Notice. EFB shall* ***thereupon*** *give notice to the Beneficiaries that completion and delivery shall be conclusively presumed to have been effected ...*" [emphasis added]. In my judgment, Mr Cullen is correct to emphasise the importance of the word "thereupon" therein. It must entail EFB being aware of the failure to return, which knowledge must be based on receipt, rather than consignment, within the three days referred to in paragraph 5.2 of Schedule 2 to the CGA. It is that "*linguistic, purposive and common-sense analysis*" which Briggs LJ stated in the *Nobahar-Cookson* case is required, which results in the delivery interpretation being the correct one.

(9) I do not accept that there is such a difference in the gravity of outcome in the deeming provisions in clauses 2 and 9 on the one hand and 4 and 7 on the other, where the parties miss their respective deadlines. If Lotus failed to deliver the Lotus Delivery Materials on time, the end result would be that the Beneficiaries would indeed lose the right to call upon the guarantee, but if EFB failed to deliver an Additional Cure Notice within the required time period, it would be deemed to have served an Arbitration Notice, and the arbitration would be based on the uncured Lotus Delivery Materials. If there were substance in the complaints contained in the Additional Objection Notice, which EFB would not have had the chance to remedy, it is likely that EFB would lose the Arbitration and the

[12] There appears to be an error in the title to paragraph 7 of Schedule 2 to the CGA, which states "Failure to Respond – Additional Objection Notice Deemed Given". It should read "Arbitration Notice Deemed Given", as appears in paragraph 4.

Beneficiaries would obtain the benefit of the Guarantee. Although the latter process will take longer, it would have serious consequences for EFB, provided a justifiable Additional Objection Notice has been served.

The Second Defence: the CGA must be construed in light of the Interparty Agreement, such that where there is conflict between the two, the provisions of the Interparty Agreement take precedence. On this basis Lotus has complied with the requirement in respect of the return of materials under paragraph 5.2 of Schedule 2 to the CGA

The First to Third Defendants' submissions in relation to the Second Defence

82. Clause 9.2 of the CGA provides that "*if there is a conflict between this Agreement and any provisions of the [Interparty Agreement] or a Presale NOA, the provisions of the [Interparty Agreement] or applicable Presale NOA shall prevail*". The Disputes Resolution Procedure contained in Exhibit 1 to the Interparty Agreement is included within the expression "*the provisions of the [Interparty Agreement]"*. The contention to the contrary by the Claimants makes no sense. The effect of clause 9.2 of the CGA is reflected in clause 23.6 of the Interparty Agreement, which states: "… *if there is any conflict between this Agreement and any other agreement to which any of the Parties is a party, the provisions of this Agreement shall prevail as between the Parties hereto …"* The Interparty Agreement and the CGA conflict in two important respects. These are set out by Mr Owens in paragraph 37 of Owens 5 and in summary are as follows.

83. First, as to the delivery procedures:

    (1) Under the CGA, EFB has five Business Days from receipt of Additional Objection Notice or Response to request return of the Lotus Delivery Materials: paragraph 5.2 of Schedule 2 to the CGA. Lotus then has three days from receipt of a request for the return of the Materials to return said materials to EFB: paragraph 5.2 of Schedule 2 to the CGA.

    (2) In contrast, the Interparty Agreement contemplates that there may be requests for and return of the Lotus Delivery Materials, and the period for responding to the Objection Notice or Additional Objection Notice runs from the later of EFB's receipt of the relevant Notice or Lotus's return of the Lotus Delivery Materials, if requested by EFB: paragraphs 1(a)(ii) and 1(d)(i) of Exhibit 1, but it does not prescribe any time limit for the request or return.

(3) The basic conflict here is whether there are three days to return the Lotus Delivery Material in response to a request from EFB, or no time limit in which to return those materials in response to a request from EFB.

84. Secondly, as to the consequences of a failure to comply with the time period set down:

(1) The CGA provides that if Lotus fails to give any of the notices in paragraphs 5.1, 5.2, 8.1, or 8.2 of Schedule 2 or Lotus fails to return the Lotus Delivery Materials within the time period specified in paragraph 5.2, then "completion and delivery" of the Film shall be conclusively presumed to have been effected and Lotus shall be conclusively presumed to have issued an Acceptance Notice: paragraph 9 of Schedule 2 to the CGA.

(2) The Interparty Agreement contains no analogous provision and, accordingly, does not provide for any presumed "completion and delivery" of the Film in the event of a failure to meet a specified time period (or in any other circumstances).

(3) The basic conflict here is between a severe sanction for breach or no sanction for breach.

85. The Claimants seek to argue that there is no conflict in either instance set out above. They appear to do so on the basis that because the Interparty Agreement does not provide an express alternative – i.e. it does not provide a **different** time period (it just provides no time period) and it does not specify that there will be no deemed "completion and delivery" for any failure to comply with time periods (or for any other reason). It therefore does not conflict with the Completion Guarantee. This is a submission of no substance.

86. In order to see why the Interparty Agreement and the CGA conflict in the two important respects set out above, it is important to recognise the similarities between the two delivery procedures:

(1) Both procedures concern "completion and delivery" of the Film. The definition of "completion and delivery" is the same under the Interparty Agreement and the CGA.[13]

(2) Both procedures apply to the same materials.

(3) Both procedures set down a regime pursuant to which EFB provides the Lotus Delivery Materials to Lotus, Lotus accepts or objects to those materials, EFB can request further information in which case Lotus responds to that request, Lotus delivers or returns any defective Lotus Delivery Materials, and EFB has a period in which to cure the claimed defects (and so on).

Some of the similarities and differences between the delivery procedures were summarised at [101] of the Stay Judgment.

87. It is clear that this difference between the two delivery procedures is in fact a conflict.

(1) Schedule 2 to the CGA imposes a time period for return of the Materials if requested by EFB; Exhibit 1 to the Interparty Agreement does not. This is a conflict. The failure to specify a time period is not simply a gap that may be filled in by the requirement under Schedule 2 to the CGA. That would mean changing the requirement imposed by Exhibit 1 to the Interparty Agreement to match that within Schedule 2 to the CGA. And that puts matters quite the wrong way round because both the Interparty Agreement and the CGA provide that the Interparty Agreement is to take priority in cases of conflict: clause 15.1 of the Interparty Agreement and clause 9.2 of the CGA.

(2) Similarly, as to the effect of any failure to comply with obligations under the delivery procedure, paragraph 9 to Schedule 2 of the CGA provides that a failure to comply with certain obligations results in a deemed "completion and delivery"; Exhibit 1 to the Interparty Agreement does not. Again, that is a conflict. The Claimants effectively assert that in order for a conflict to arise the Interparty Agreement would need to positively assert that there can be no presumed "completion and delivery". That cannot be correct: it would be a triumph of form

[13] Schedule 1 of the Interparty Agreement defines "Completion and Delivery of the Film" by reference to the CGA. Clause 1.12 of the CGA defines "completion and delivery of the Film" to include the delivery of the Lotus Delivery Materials pursuant to Schedule 2.

over substance. The effect of the Interparty Agreement is plainly that there can be no presumed "completion and delivery" for a failure to comply with the delivery procedure in respect of the Lotus Delivery Materials.

The consequences of a conflict

88. As the Interparty Agreement takes precedence, this means that the delivery procedure under the CGA must be construed in light of its provisions. This has two consequences:

    (1) Given that there is a conflict between the time period required for the return of the Lotus Delivery Materials, the Interparty Agreement prevails such that there is no specified time period for the return.

    (2) Further and/or in the alternative, given that there is a conflict between the consequences of a failure to comply with certain requirements, including in respect of the return of the Lotus Delivery Materials, the Interparty Agreement prevails such that any failure to comply does not result in a presumed "completion and delivery".

No breach and/or no deemed "completion and delivery"

89. Accordingly, based on the correct construction of the CGA:

    (1) Lotus did not breach paragraph 5.2 of Schedule 2, as modified by the Interparty Agreement, because there was no time limit for the return of the Materials.

    (2) Further and/or alternatively, if Lotus was in breach of paragraph 5.2 of Schedule 2 to the CGA, that failure did not result in a presumed "completion and delivery" under the CGA, as modified by the Interparty Agreement, because the provisions of paragraph 9 are disapplied.

The effect of the Stay Judgment

90. At paragraph 15 of Joelson 4, Mr Joelson appears to suggest that the above findings on contractual construction are not open to this Court in light of the findings made by Deputy Master Henderson in the Stay Judgment. To the extent that this is being suggested, it is incorrect.

91. Larkhark and Lotus did rely on the conflict provisions under the Interparty Agreement and CGA in their applications to the Court for a stay and made submissions that these

agreements conflicted in important respects. However, those submissions were made to support the argument that the arbitration agreements under the Interparty Agreement and CGA conflicted and, as a consequence, the arbitration agreement under the Interparty Agreement took precedence.

92. Deputy Master Henderson's findings related to those two (severable) arbitration agreements. At [88], [96] and [145-146] of the Stay Judgment, he accepted that the Interparty Agreement and CGA provided for the former to take precedence in cases of conflict: Judgment at [88], [96] and [145]-[146]. However, he found at [213]-[220], that there was no conflict between the two arbitration agreements and, accordingly, the arbitration agreement under the Interparty Agreement did not take precedence over that under the CGA. He stated at [220]:

> *"In my judgment there was no conflict between the two arbitration agreements. They were made between different sets of parties and covered different disputes. The arbitration agreement in the CGA was an agreement between its parties as to the arbitration of disputes between them as to completion and delivery of the Film under the provisions of the CGA, possibly as those provisions might be modified by the provisions of the [Interparty Agreement]. The arbitration agreement in clause 15 of and Exhibit 1 to the [Interparty Agreement] was an agreement between its parties (not being all the parties to the CGA arbitration agreement) that if the Lotus Entities disputed whether Completion and Delivery had taken place under the SAA, that dispute should be resolved by the procedure set out in Exhibit 1, which included the arbitration agreement."*

93. His reasoning in that paragraph specifically related to the scope of the arbitration agreements, which, he found, were between different parties and concerned disputes under different contracts (albeit about the same subject matter). In fact, at [220] the Deputy Master expressly left open the possibility that the provisions of the Completion Guarantee relating to completion and delivery might be '*modified*' by those under the Interparty Agreement.

94. In reaching the conclusion, at [216], he considered the issue of who were the parties to the arbitration agreement under Exhibit 1 to the Interparty Agreement and states as follows:

> *"216. On their face the opening words of Exhibit 1 narrow down the parties to the arbitration agreement in the SA IPA to the Sales Agent (i.e. the Lotus*

> *Entities), the Commissioning Distributor (i.e. Starbright Srl) and the Guarantor (i.e. DFG). However, the terms of that apparent narrowing down are inconsistent with the opening words of paragraph (f) of Exhibit 1 which provide that in the event that "any party" (and it is unclear whether that refers to all the parties to the [Interparty Agreement] or only the parties mentioned in the opening paragraph of Exhibit 1) elects or is deemed to have elected to submit a dispute concerning completion and delivery to binding arbitration then the Guarantor (i.e. DFG), Producer (i.e. Larkhark) and Sales Agent (i.e. the Lotus Entities) should thereafter initiate an arbitration proceeding. For present purposes nothing turns on this inconsistency and I do not pursue it.*

95. Whilst it is accepted that the Stay Judgment contains a finding as to the relationship between the arbitration agreements under the CGA and the Interparty Agreement and that those dispute resolution procedures in the latter are irrelevant to these proceedings, the issue before the Court is quite different: it is whether the relevant parts of the delivery procedures under the Interparty Agreement and the CGA conflict. The Stay Judgment contains no finding on that matter; to the contrary, it left that open.

No barrier to the reliance of rights under the Interparty Agreement

96. The Claimants appear to suggest that the First to Third Defendants are unable to rely on any rights under the Interparty Agreement because it would somehow be unconscionable to do so and/or they are estopped from doing so in circumstances where Lotus failed to assert its rights under the Interparty Agreement during the delivery procedure.[14]

97. That factual assertion is incorrect for the reasons set out by Mr Owens in paragraphs 44 to 49 of Owens 5 (and at Appendix A thereto). In short, Lotus did assert its rights under the Interparty Agreement and it expressly made it clear that it was not waiving any of its rights.

98. As Ms John accepted, in response to paragraph 63 of the Claimants' skeleton, the principles applicable to an estoppel by convention were set out by the Court of Appeal in *Tinkler v HMRC* [2019] EWCA Civ 1392 as follows:

> *"54. The parties were agreed that the principles governing estoppel by convention arising out of non-contractual dealings are conveniently*

[14] See paragraph 67 of Joelson 1 and paragraph 18.1 of Joelson 4.

summarised in the judgment of Briggs J in HMRC v Benchdollar Limited and Ors [2009] EWHC 1310 (Ch), [2010] 1 All ER 174 at [52]. This summary was approved by the Court of Appeal in Blindley Heath Investments Ltd & Anor v Bass [2015] EWCA Civ 1023, [2017] Ch 389 at [91], subject to one qualification explained at [92]. If that qualification is made to the first paragraph of the summary, the amended summary is as follows:

(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.

(2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

(3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(5) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

99. In the present case the correspondence and notices from Lotus present a mixed picture (see paragraphs 44-49 of Owens 5), although Ms John accepted that no Objection Notice had ever been served under the Interparty Agreement. There was, therefore, no common assumption. That being the case, none of the other elements were satisfied.

100. In any event this argument goes nowhere for the purpose of these proceedings. The question before the Court is the proper contractual construction of the parties' obligations under Schedule 2 to the CGA. It cannot be said that Larkhark and Lotus are precluded from arguing, and the Court is precluded from finding, that the proper construction of the delivery procedure under Schedule 2 to the CGA was modified by the provisions of the Interparty Agreement. Parties frequently construe their own contracts incorrectly, that is no barrier to the Court making a finding as to what the correct construction is and whether there was a breach of the provision as correctly

construed. Although this point was raised in paragraph 67 of Joelson 1, the Deputy Master did not address the matter in the Stay Judgment. He appears to have proceeded on the basis that the First to Third Defendants were entitled to rely upon their rights under the Interparty Agreement, not least because at [213]-[217] he considered whether the dispute fell within the scope of the arbitration agreement under the Interparty Agreement and whether that agreement took precedence over the arbitration agreement under the CGA. This would have been unnecessary if the First to Third Defendants were unable to rely on any rights arising under the Interparty Agreement.

Parties to the Interparty Agreement

101. In paragraph 55 of their skeleton argument, the First to Third Defendants accepted that the Underwriters are not party to the Interparty Agreement and stated "…*in relying on the Interparty Agreement, the First to Third Defendants do not submit the contrary. Rather they rely on the fact that the Underwriters were bound by the terms of the CGA, which they agreed could be modified by the Interparty Agreement in cases of conflict*." That reflected the evidence of Mr Owens at paragraph 68 of Owens 1. In oral argument, however, Ms John also relied upon clause 9.5 of the CGA. That provides: "*The Agent* [i.e. DFG] *represents and warrants to the Beneficiaries that it has been appointed as the agent of each of the Underwriters to enter into the Transaction Agreements and to bind the Underwriters to the terms of the Transaction Agreements (as executed)…*" Under clause 9.4 of the CGA, "*Transaction Agreements*" include the Interparty Agreement, and the provisions of Exhibit 1. It was unclear whether she was thereby contending that in fact the Underwriters were, as a result, parties to the Interparty Agreement. That was not the earlier stance taken on behalf of the First to Third Defendants at the hearing of the Stay Applications. In any event, she submitted that if the terms of the CGA were modified by the Interparty Agreement (for the reasons earlier set out above), there can be no suggestion that the Underwriters were not bound by those terms <u>as modified</u>.

The Claimants' submissions in relation to the Second Defence

102. The First to Third Defendants' second argument that the delivery procedures in the Interparty Agreement and the CGA conflict, and that the latter prevails is groundless and is in any event not open to the First to Third Defendants since (i) it was advanced

on the Stay Applications and rejected in the Stay Judgment and (ii) they are estopped from relying on it.

103. The First to Third Defendants' proposition rests on the fact that clause 9.2 of the CGA provides that "*if there is a conflict between this Agreement and any provisions of the [Interparty Agreement] or a Presale NOA, the provisions of the [Interparty Agreement] or applicable Presale NOA shall prevail*". Clause 9.1 of the CGA provides that "*For the avoidance of doubt, the Parties hereby agree that this Agreement shall include … the Schedules all of which shall be fully enforceable in accordance with their terms*." Thus, the reference to "*this Agreement*" includes Schedule 2 of the CGA.

104. There is a similar provision at clause 23.6 of the Interparty Agreement: "… *if there is any conflict between this Agreement and any other agreement to which any of the Parties is a party, the provisions of this Agreement shall prevail as between the Parties hereto….."* It is unclear what (if anything) this could add to the First to Third Defendants' argument but this provision is irrelevant since (i) the Underwriters were not parties to the Interparty Agreement and (ii) the term "*Agreement*" as used in the Interparty Agreement refers to "*this Interparty Agreement and the Schedules"* – it does not extend to the contents of Exhibit 1 to the Interparty Agreement. Therefore, it is appropriate to focus only on clause 9.2 of the CGA (but the submissions below are applicable equally to clause 23.6 of the Interparty Agreement).

105. Insofar as the First to Third Defendants now contend that by reason of clause 9.5 of the CGA, the Underwriters were parties to the Interparty Agreement:

    (1) That is a volte-face from their earlier position stated in their skeleton argument for this hearing and Mr Owens's evidence referred to at paragraph 98 above.

    (2) It is further contrary to their case as argued on the Stay Applications – see paragraph 82 of the First to Third Defendants' skeleton argument for Deputy Master Henderson, which stated: "*It is accepted that the Insurers are not a party to [Interparty Agreement]*". As can be seen from paragraph 83 of that skeleton argument, it was the basis on which the First to Third Defendants sought to persuade the Court to grant a stay under its inherent jurisdiction.

    (3) It is contrary to the findings at [215] and [222] of the Stay Judgment. These were fundamental to the conclusion in that it was one of the stated reasons in the

judgment why the First to Third Defendants were not entitled to a stay of the claim under Section 9 of the Arbitration Act 1996 against the Underwriters on the basis of the arbitration agreement in the Interparty Agreement. It is a binding finding.

(4) Thus, the First to Third Defendants have made repeated admissions in writing that the Underwriters were not parties to the Interparty Agreement. They require permission to withdraw such admissions: CPR r 14.1(5).

(5) It is far too late to make an application for such permission in circumstances where:

(a) The admission is reflected in a binding decision of the Court.

(b) In the Stay Applications, the First to Third Defendants relied on their admission in order to try to persuade the Court to exercise its inherent jurisdiction to grant a stay.

(c) If it had been considered an important or contentious point, it might have been possible, e.g., to investigate the reasons why the Underwriters were not made parties to the Interparty Agreement. The Claimants have been deprived of any such opportunity.

(6) In any event, the alleged significance of clause 9.5 of the CGA is not as claimed by the First to Third Defendants. In the CGA, the Underwriters are named as parties and it is expressly provided for that DFG was entering into it as agent for and on behalf of the Underwriters and DFG expressly signed the CGA for and on behalf of the Underwriters.

(7) By contrast, under the Interparty Agreement, there is no reference to the Underwriters and DFG did not purport to be acting and did not sign the Interparty Agreement on behalf of the Underwriters. This cannot be an accident.

(8) This difference must be because the parties did not intend that the Underwriters would be bound.

(9) The sole thing which the First to Third Defendants now point to is clause 9.5 of the CGA, which is a boilerplate clause which confirms that DFG has the necessary authority to enter into the Transaction Documents on behalf of the

Underwriters (as there defined). It cannot, however, operate to make the Underwriters parties to an agreement if it is plain on the face of that agreement that they were not parties.

(10) To the extent that clause 9.5 of the CGA might be used to suggest that the Underwriters are parties to the Interparty Agreement, it conflicts with the terms of the Interparty Agreement and the latter prevails by virtue of clause 9.2 of the CGA.

There is no conflict

106. Even assuming in the First to Third Defendants' favour that Exhibit 1 to the Interparty Agreement was capable of giving rise to a "*conflict"* for the purposes of clause 9.2 of the CGA, the hopelessness of the argument can be seen in the simple fact that there is no conflict in the relevant provisions.

107. Exhibit 1 to the Interparty Agreement sets out a "Dispute Resolution Procedure" which has some broad similarities to the Delivery Procedure under Schedule 2 to the CGA. It also has a number of differences. It is sufficient to note that Exhibit 1 to the Interparty Agreement does not have any prescribed time for the return of the delivered materials; nor does it have any provision equivalent to paragraphs 2 and 9 of Schedule 2 to the CGA, whereby a failure to comply with a timetable requirement gives rise to a deemed acceptance. Indeed, the Interparty Agreement scarcely deals with the return of the materials at all. It gives no express entitlement to request the return of materials, still less does it stipulate a date by which such request must be made or complied with. The only references to the return of materials are in relation to the timing of the Cure Notice and Additional Cure Notice, each of which is required a specified number of days after the latter of receipt of the Objection Notice (or Additional Objection Notice), the Response (or Second Response) (if applicable) and "*return of the defective materials if so required by Guarantor*": see paragraphs 1.b.i and 1.d.i. of Exhibit 1 of the Interparty Agreement.

108. For that simple reason alone, there is no "*conflict*". Schedule 2 of the CGA makes express provision for certain matters in relation to which the Interparty Agreement says nothing. The suggestion that this means that there is a "*conflict*" such that the Interparty Agreement's silence must be the prevailing provision is absurd. The Interparty

Agreement does not provide that the Guarantor should have to pay the Payment Sum in the event that completion and delivery is not effected. Does that mean that it is in conflict with the CGA such that the absence of any such requirement in the Interparty Agreement should prevail over the express provision of the CGA?

109. Schedule 2 to the CGA and Exhibit 1 to the Interparty Agreement may make different provisions, but that does not mean that they are in conflict. They will only be in conflict if circumstances arise where a party cannot perform under contract A without being in breach of its obligation under contract B. In those circumstances, if contract B takes precedence, then the obligation under contract A may be modified or discharged accordingly. That is simply not the position in relation to the relevant provisions under Schedule 2 to the CGA.

110. Aside from this basic point, the First to Third Defendants' reliance on Exhibit 1 to the Interparty Agreement must fail for a number of other reasons, as follows.

The effect of the Stay Judgment

111. The proposition that Exhibit 1 to the Interparty Agreement took precedence over Schedule 2 to the CGA was a key plank of the Stay Applications. That application was for a stay on the basis that "*the proceedings fall within the scope of arbitration agreements*" [plural]. As explained in the evidence in support, contained in Owens 1 and the First to Third Defendants' skeleton argument, their contention was that the dispute fell within Exhibit 1 of the Interparty Agreement and this took precedence over Schedule 2 to the CGA. Thus, the issue put squarely before the Court on the Stay Applications was whether the dispute fell within Exhibit 1 to the Interparty Agreement and whether it took precedence over the CGA.

112. An applicant for a stay under Section 9 of the Arbitration Act 1996 must prove that (i) it and the claimant in the action are parties to an agreement to arbitrate; and (ii) the dispute in the litigation is a matter which falls within the scope of the arbitration clause. If the applicant is able to discharge that burden, then a stay must be granted. On an application under Section 9 of the Arbitration Act 1996, the Court has a range of options. Under CPR r 62.8(3), *"where a question arises* [under a Section 9 application] *as to whether (a) an arbitration agreement has been concluded; or (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an*

agreement, the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision".

113. In *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 665 (Ch); [2007] 2 All E.R. 1075, Lightman J said at paragraph [16]:

> *"Guidelines were laid down by HHJ Humphrey Lloyd QC in Birse v St David at first instance (1999) BLR 19 and (though the decision of the judge was reversed) his statement of the guidelines was approved on appeal by the Court of Appeal [2000] 1 Lloyds Rep 57 and again by the Court of Appeal in the later case of Al Naimi v Islamic Press Agency [2000] 1 Ll.LR 522 ("Al Naimi"). These guidelines are to the effect that on an application for a stay such as the present where the conclusion of the arbitration agreement is in issue, there are four options open to the court: (1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay; (2) to give directions for the trial by the court of the issue; (3) to stay the proceedings on the basis that the arbitrator will decide the issue and (4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay. The Court of Appeal adopted the second of these options. The guidelines and the decision of the Court of Appeal establish that on an application under Section 9(1) of the 1996 Act the court can try and (subject to one qualification) should decide the issue whether the arbitration agreement was concluded. The minor qualification in respect of which the guidelines are not in accord with the construction which I have adopted is in respect of the third of the guidelines. Where there is an issue which the court cannot resolve on the available evidence on the application as to whether the arbitration agreement was concluded, the court indeed can stay the proceedings so that the arbitrators can decide the issue, but only by exercising its inherent jurisdiction and not by exercising any jurisdiction under Section 9".*

114. Lightman J's approach was approved by the Supreme Court in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 [2013] 1 W.L.R. 1889, where Lord Mance said:

> *"52. ... Section 9 runs contrary to JSC's general case, since it represents a situation in which the court, rather than the arbitral tribunal, rules in the first instance on arbitral jurisdiction,* ***and does so bindingly****. The Court of Appeal in Fiona Trust and Holding Corp v Privalov [2007] Bus LR 684 , para 36 and Lightman J in Albon (trading as NA Carriage Co) v Naza*

> *Motor Trading Sdn Bhd (No 3) [2007] 2 All ER 1075 , paras 14–20 correctly so held.*
>
> *53. However, JSC relies on Section 9, as supplementing its case on the general scheme of the 1996 Act and on the particular implications of sections such as Sections 30, 32, 67 and 72, in another respect. Given that* ***the court under Section 9 determines the existence or otherwise of arbitral jurisdiction conclusively*** *and at the outset, JSC points out that this is expressly provided by the Act." [emphasis added]*

115. Thus, in a case where the Court opts to decide the issue, that decision, although made at an interim stage in the proceedings, is binding and conclusive.

116. In the Stay Judgment, the Court opted (without opposition) to decide the issue as to the scope of the arbitration clauses relied upon by the First to Third Defendants (the "**Scope Issue**"): see [20.2] and [25]. Much of the Stay Judgment is then concerned with the effect of any prior determination of the arbitrator as to his jurisdiction and with the question of whether the power to determine any issue as to scope rests exclusively with the arbitrator. The Court then made determinations in relation to the specific questions as to whether the dispute fell within the scope of Exhibit 1 to the Interparty Agreement and whether that took precedence over the CGA: see [213] to [222], and in particular [220] of the Stay Judgment (recited at paragraph 92 above).

117. The Court there reached a conclusive and binding determination that the dispute resolution procedure under Exhibit 1 to the Interparty Agreement and Schedule 2 to the CGA are not in conflict: they are intended to deal with two different situations and disputes. That determination is binding as a matter of *res judicata* and/or issue estoppel: see *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46 [2014] A.C. 160 at [17].

118. Quite apart from the estoppel, Mr Cullen submitted the reasoning of the Court is important and is unassailable and, when seen in the context of the other relevant provisions, shows clearly that the parties did not intend that the provisions of Exhibit 1 to the Interparty Agreement would ever "prevail over" Schedule 2 to the CGA. In particular:

    (1) Exhibit 1 to the Interparty Agreement only has any effect by virtue of clause 15.1 thereof. That is the only provision which refers to it. It is specific that it only applies *"… if the Sales Agent disputes whether Completion and Delivery* ***under***

the [SAA] *has taken place …"* [emphasis added]. The SAA does not apply to a dispute under the CGA. The only parties to the SAA are the *"Sales Agent"* (Lotus, specifically the First Defendant) and the "*Producer*", Starbright srl.

(2) In addition to this feature, there are a number of other important distinctions between the two procedures:

(a) As noted above, the Underwriters were not parties to the Interparty Agreement;

(b) Larkhark was not a party to arbitration agreement contained in Exhibit 1 to the Interparty Agreement;

(c) the Dispute Resolution Procedure under Exhibit 1 to the Interparty Agreement only related to disputes about completion and delivery of the "*Sales Agent Bonded Delivery Materials*" (i.e., the items marked as bonded at Exhibit 2 to the Interparty Agreement). It does not encompass any dispute in relation to the "*Approved Picture Specifications*" (as defined in paragraph 1.1.2 of Schedule 2 to the CGA), which include certain specific elements set out at clauses 1.10 and 1.12(c) of the CGA: e.g., the identity of the director and one of the lead actors and the Film being based on an identified screenplay;

(d) This limitation on Exhibit 1 to the Interparty Agreement no doubt reflected the fact that, by clause 14.1, the parties acknowledged that there were *"…no essential elements in the Film and [Starbright srl] and [Lotus] each undertake that no individuals are essential for the purpose of effecting delivery* ***under…the [SAA]..****…"* [emphasis added]. This is to be contrasted with Approved Picture Specifications in paragraph 1.1.2 of Schedule 2 to the CGA, which amount to essential elements, although not specifically described as such.

(3) Hence the Stay Judgment's conclusion that it is intended to apply to different parties and different disputes.

(4) That being so, there could never be a situation in which the provisions of Exhibit 1 could "*conflict*" with Schedule 2 to the CGA. The Delivery Procedure under Schedule 2 to the CGA will simply proceed in accordance with its terms

when it is invoked. There cannot be a "*conflict"* with anything in Exhibit 1 to the Interparty Agreement because that will not be applicable.

119. This conclusion should hardly be surprising, and it is consistent with the other features of the CGA and the Interparty Agreement. For example, as already indicated at paragraph 104 above, Exhibit 1 to the Interparty Agreement does not even fall within the meaning of "*the Agreement*". Thus, when clause 9.2 refers to "*the SAA Side Letter"* [i.e. the Interparty Agreement] there is no reason to interpret that as including a reference to Exhibit 1 to the Interparty Agreement. There is in fact every reason not to interpret it in such a way (just as clause 23.6.2 of the Interparty Agreement, when referring to "*this Agreement*" does not refer to Exhibit 1). That is so for the following reasons:

(1) The key definition of "*Sales Agent Delivery*" in clause 1.12(a) of the CGA is expressed by reference to "*such action, such notices and such remedies as the Guarantor is required to take, provide and/or effect in accordance with the delivery procedure attached hereto as Schedule 2"* [emphasis added].

(2) That Delivery Procedure constitutes a carefully tailored set of provisions with specific reference to the requirements of the CGA.

(3) The provisions of Exhibit 1 to the Interparty Agreement are quite different in numerous respects, including but not limited to, the following:

(a) Their scope: as described above, the Interparty Agreement is concerned solely with completion and delivery of the Sales Agent Bonded Delivery Materials and not with the Approved Picture Specifications;

(b) The timetable for the delivery/objection process;

(c) The provisions for deemed acceptance;

(d) The procedure for the appointment of the arbitrator;

(e) The rules to be applied in arbitration. Under the Interparty Agreement, it is the rules of IFTA in force at the time of the arbitration. Under the CGA, it is the IFTA rules in force as at the date of the agreement;

(f) The ability for defects to be cured after the arbitration award;

(g) The meaning of "*Business Days*".

(4) Despite these differences and despite the fact that the parties evidently went to great lengths to draw up and agree the provisions of Schedule 2 to the CGA, the position of the First to Third Defendants amounts to saying that they never actually intended those provisions to take effect because the provisions of Exhibit 1 should always "*prevail"*. That requires a degree of irrationality that could not be ascribed to contracting parties, when executing both agreements on the same date. This is all the more so when it is recognised that Lotus was only a party to the CGA for the purpose of agreeing the terms of Schedules 2 and 3: see clause 1.15 of the CGA. So, on Larkhark/Lotus's case, Lotus entered into an agreement for the specific purpose of agreeing the provisions of Schedule 2 and, at the same time, entered into another agreement which effectively tore those provisions up. That simply cannot be right.

(5) Although one might have thought it was too obvious to need stating, the parties agreed the terms of Schedule 2 to the CGA because they intended that those provisions (and not the provisions of Exhibit 1 to the Interparty Agreement) should apply to the Delivery Procedure under the CGA and to the effecting of completion and delivery of the Film under the CGA.

120. Thus, the provisions of Schedule 2 to the CGA cannot be in conflict with Exhibit 1 to the Interparty Agreement because they will always relate to separate procedures with different parties and different disputes.

121. As is apparent from paragraph 51 of their skeleton argument, the First to Third Defendants accept that there is a binding finding that the arbitration agreements are separate. However, they appear to argue that somehow the procedures under each may not be. That is impossible. The inevitable consequence of the finding that the arbitration agreements are separate is that the two procedures are separate. The procedures are part and parcel of the agreements to arbitrate (containing provisions relating to, e.g., the giving of arbitration notices, etc.). The arbitration clauses are in paragraph 1 of each of them and everything that follows in each of them flows (separately) from each arbitration clause. The fact remains that clause 15.1 of the Interparty Agreement expressly provides that the dispute procedure at Exhibit 1 to the Interparty Agreement

applies (and applies only) to a dispute about completion and delivery under the SAA Agreement and a dispute between only the First Defendant and Starbright srl.

122. In this context, the First to Third Defendants also relied upon paragraph 216 of the Stay Judgment and the provisions of Exhibit 1 to the Interparty Agreement. It was not clear what the point was but, for the sake of completeness:

    (1) Paragraph 1 of Exhibit 1 makes it clear that it applies only to a dispute between any of the Sales Agent, the Commissioning Distributor or the Guarantor. The Guarantor is mentioned here because, under the PCA, if the Film goes into 'takeover' the Guarantor steps into the Commissioning Distributor's (i.e. Starbright srl's) shoes in relation to the SAA: see clause 8.1 of the PCA. In that event "*said parties"* agreed to submit the dispute to arbitration: see para 1 line 3 of Exhibit 1.

    (2) That being so, the reference to "*any party*" in para 1.f (referred to by the Deputy Master in the Stay Judgment) seems plainly to be intended to be a reference to the "*said parties*". At all events, the point does not matter.

Estoppel by convention

123. As a further point, if and to the extent that it was otherwise possible for the First to Third Defendants to contend that the provisions of Exhibit 1 to the Interparty Agreement applied, Mr Cullen submitted that they are estopped by convention from so doing. He relied upon the law as stated by the Court of Appeal in *Tinkler v HMRC* at [54], recited at paragraph 98 above.

124. It is clear from the evidence that, from Lotus's original assertion that its Objection Notice was served under the CGA, the parties proceeded on the basis of the common and agreed assumption that the timetable and procedure of Schedule 2 to the CGA applied and not that of Exhibit 1 to the Interparty Agreement. This can be seen not only from the correspondence referred to above but also from the entirety of their compliance with the timetable of Schedule 2 to the CGA (until Lotus's failure to return the Lotus Delivery Materials on time in 'round' two). Moreover, this went beyond merely acting in accordance with the timetable. For example, Lotus has compelled payment for the cost of return of the materials, an entitlement which only arose under

Schedule 2 to the CGA: see Mr Joelson's evidence at paragraph 67 of Joelson 1 and Lotus's letter to EFB dated 13 July 2018.

125. Moreover, on the facts of this case, Lotus only ever invoked the Delivery Procedure under Schedule 2 to the CGA. In particular:

(1) Lotus's Objection Notice dated 26 June 2018 stated: "*This notice constitutes an Objection Notice for the purposes of Schedule 2 of the Completion Guarantee. You are hereby informed that Sales Agent Delivery has not been effectuated for the following reasons*". Sales Agent Delivery is not a defined term under the Interparty Agreement. It is a term used only in the CGA and defined by reference to the provisions of the Schedule 2 to the CGA. Again this emphasises the distinct nature of the CGA. The notice went on to identify purported defects, including alleged non-compliances with the Approved Picture Specifications, available only under the CGA. There was no reference to, still less an assertion of, any failure of delivery under, the SAA.

(2) Although Mr Owens is keen to point out at paragraphs 44.1 and 45 of Owens 5 that the Objection Notice referred to the Interparty Agreement and included a general reservation of rights, the plain fact is that it was not and did not purport to be an Objection Notice under the Interparty Agreement. No Objection Notice under the Interparty Agreement has ever been served. (Of course, the time for serving any such notice expired long ago (on 12 July 2018)). As a consequence, there has been deemed acceptance under Exhibit 1 to the Interparty Agreement: *"Those Sales Agent Bonded Delivery Materials, if any, that are not specified in the Objection Notice as requiring delivery correction or other modification in order to complete Completion and Delivery to Sales Agent [i.e., Lotus] shall be deemed to be either waived or accepted, as applicable, by Sales Agent [i.e., Lotus]"* paragraph 1.a.ii. of Exhibit 1 to the Interparty Agreement.

(3) Lotus's Additional Objection Notice dated 4 September 2018 was to the same effect: *"This is an Additional Objection Notice for the purposes of clause 5.2 of Schedule 2 "Delivery Procedure" of the Completion Guarantee dated 25 April 2016".* Once again, there was no reference to, still less an assertion of, any failure of delivery under, the SAA.

(4) Moreover, Lotus had even written to EFB in advance of the Additional Objection Notice, confirming that it would be required by 6 September 2018 (i.e. the date it would be due in accordance with the timetable under Schedule 2 to the CGA, and not the deadline under the SAA as identified in Exhibit 1 to the Interparty Agreement).

(5) In the circumstances, the fact that Lotus was pursuing objections solely under the CGA is not surprising: not only did it want to pursue objections in relation to the Approved Picture Specifications, which were not open to it in relation to the SAA but, by the time of delivery, the Film had gone into 'takeover' and Starbright srl had effectively dropped out of the picture. The real commercial interest was in Larkhark's pursuit of the Payment Sum under the CGA.

126. Thus, since only the Delivery Procedure under Schedule 2 of the CGA has ever been invoked, there can be no question of anything in the Interparty Agreement conflicting with it: the provisions of Exhibit 1 to the Interparty Agreement are simply inoperative.

127. For EFB, acting on the basis of this common assumption meant that it had to comply throughout with the timetable under Schedule 2 of the CGA in circumstances where the equivalents under Exhibit 1 to the Interparty Agreement either did not impose a time limit at all (e.g., for the making of a request for return of materials) or gave a considerably longer period for compliance. Thus, for example, the Cure Period under Exhibit 1 to the Interparty Agreement was 30 Business Days in contrast to the 30 days allowed under Schedule 2 to the CGA. In effect, by complying with Schedule 2 of the CGA, EFB had to return cured materials by 15 August 2018, rather than 28 August 2018 as would have been permitted under the Interparty Agreement. It is not difficult to predict the First to Third Defendants' reaction if EFB had failed to deliver the cured materials by 15 August 2018.

128. In the circumstances, Mr Cullen submitted that it is not now open to the First to Third Defendants to assert that in fact the timetable (or rather the absence of a timetable and the absence of a deemed consent provision) of Exhibit 1 to the Interparty Agreement should apply after all.

The Claimants' conclusion in relation to the Second Defence

129. The net result of the First to Third Defendants' position in relation to this aspect of the case is that they are suggesting that the parties intended that Schedule 2 to the CGA should be discarded in its entirety in favour of Exhibit 1 of the Interparty Agreement. This is despite the fact that Lotus was only joined to the CGA for the purpose of agreeing Schedule 2 and the related Schedule 3. Moreover in clause 9.1 of the CGA the parties expressly stated that "*the Parties hereby agree that this Agreement shall include the Recitals set forth in clause 1 and the Schedules all of which shall be fully enforceable in accordance with their terms".* According to the First to Third Defendants' case, the parties did not in fact intend this at all.

Discussion and conclusion on the Second Defence

130. I shall take the three aspects in turn.

What is the effect of the Stay Judgment? Does it prevent the First to Third Defendants from advancing this Defence?

131. In my judgment, it is important carefully to examine the Deputy Master's conclusion at [220], which is binding on the parties:

> *"In my judgment there was no conflict between the two arbitration agreements. They were made between different sets of parties and covered different disputes. The arbitration agreement in the CGA was an agreement between its parties as to the arbitration of disputes between them as to completion and delivery of the Film under the provisions of the CGA, possibly as those provisions might be modified by the provisions of the [Interparty Agreement]. The arbitration agreement in clause 15 of and Exhibit 1 to the [Interparty Agreement] was an agreement between its parties (not being all the parties to the CGA arbitration agreement) that if the Lotus Entities disputed whether Completion and Delivery had taken place under the SAA, that dispute should be resolved by the procedure set out in Exhibit 1, which included the arbitration agreement."*

132. He found that there was no conflict between the two arbitration agreements because they were made between different sets of parties and covered different disputes. He identified exactly what those different disputes were under each agreement. Those aspects are clearly binding as a matter of *res judicata* and/or issue estoppel; see *Virgin*

Atlantic Airways Limited v Zodiac Seats UK Limited [2013] UKSC 46 [2014] A.C. 160 at [17].

133. I would add that in [215] and [222] of the Stay Judgment, he expressly found, in accordance with the case then advanced by the First to Third Defendants that the Underwriters were not parties to the Interparty Agreement. That formed an important part of his judgment. It was on that basis that they sought to persuade the Court to grant a stay under its inherent jurisdiction. In my judgment, in the light of that finding, it is not open to those Defendants to argue the contrary position now. If I am wrong on that, under the provisions of CPR r14.1(5), the First to Third Defendants would still need to seek permission from the Court to resile from their admission that the Underwriters are not parties to the Interparty Agreement. No application was made by the First to Third Defendants, but for the reasons advanced by Mr Cullen, in paragraph 104(5) above, had it been, I would not have granted it.

134. I can see considerable force in the submission made by Mr Cullen that the inevitable consequence of the finding that the arbitration agreements are separate is that the two procedures are also separate, and it is not possible to argue that somehow the procedures under each may not be. The arbitration clauses are in paragraph 1 of each of them and everything that follows in each of them flows (separately) from each arbitration clause The procedures are part and parcel of the agreements to arbitrate (containing provisions relating to, e.g., the giving of arbitration notices).

135. However, I note the passage at [220]: "*The arbitration agreement in the CGA was an agreement between its parties as to the arbitration of disputes between them as to completion and delivery of the Film under the provisions of the CGA**, possibly as those provisions might be modified by the provisions of the [Interparty Agreement].***"* [emphasis added]. As Ms John contends, correctly in my view, it seems to me that by those words, the Deputy Master was expressly leaving open the possibility for the First to Third Defendants to argue that the provisions in relation to completion and delivery in the CGA, including the provisions in Schedule 2, might be modified by the provisions of the Interparty Agreement.

136. That conclusion is fortified in my view, by the fact that in his judgment, at [3] he identified what he described as the "Substantive Issue", namely the issue before me, and nowhere in the Stay Judgment does he suggest that, in the light of his findings at

[220], the defences that could be advanced in relation to the Substantive Issue, would, as a result of his judgment, preclude any argument that the procedures contained in Schedule 2 to the CGA, have been modified by Exhibit 1 of the Interparty Agreement. Indeed, the words used in [220], emphasised above, indicate the contrary.

137. In those circumstances, I reject the argument that the Stay Judgment prevents the First to Third Defendants from advancing their second defence.

Are the First to Third Defendants estopped from advancing the second defence on the grounds of Estoppel by Convention?

138. The Deputy Master did not appear to regard the First to Third Defendants from being estopped from being able to argue that the arbitration provision in Exhibit 1 to the Interparty Agreement took precedence over that contained in Schedule 2 of the CGA, despite the points raised in paragraph 67 of Joelson 1, which was in evidence before him and which stated:

> *"I would also point out that the parties have throughout conducted themselves on the common and agreed basis that the provisions of Schedule 2 to the CGA were applicable and governed the procedure with which they engaged … For Lotus now to assert that somehow its provisions are inapplicable is (a) wrong and (b) unconscionable. I consider that Lotus is estopped from so doing."*

Although he did not expressly address the point in the Stay Judgment, if he regarded that as the position, it would have been unnecessary for him to embark on the detailed analysis he conducted at [213]-[220].

139. Does the fact that the Deputy Master was considering only the rival arbitration agreements in the CGA and the Interparty Agreement, rather than Substantive Issue before me, make a difference? Having found that it remains open to the First to Third Defendants to argue that the provisions in relation to completion and delivery, including the provisions in Schedule 2, might be modified by the provisions of the Interparty Agreement, I take the view I should approach the matter afresh.

140. It seems to me that the First to Third Defendants have adopted a somewhat inconsistent approach in their communications with EFB in relation to the steps taken and the agreements on which they relied in relation thereto. If one looks at the way Lotus proceeded, it clearly had in mind adhering to the provisions of Schedule 2 to the CGA,

but there were on occasion references additionally to relying upon the provisions of the Interparty Agreement and reserving rights thereunder:

(1) On 26 June 2018 it gave an Objection Notice for the purposes of Schedule 2 of the CGA, although the letter made reference to the Interparty Agreement and a general reservation of rights.

(2) On 5 July 2018, Lotus stated: "*This is a response, prepared in good faith … for the purposes of Schedule 2 "Delivery Procedure*" *clause 1.1.2 of the [CGA] and Exhibit 1 "Dispute Resolution Procedure" clause 1a ii to the [Interparty Agreement] … All of [Lotus's] rights in each and any jurisdiction are reserved*".

(3) On 17 August 2018, Lotus wrote confirming that, applying the provisions of paragraph 5 of Schedule 2 to the CGA and in the light of the intervening August bank holiday in England, the date required for a response was 6 September 2018. It made no reference to the Interparty Agreement.

(4) On 5 September 2018, Lotus gave an Additional Objection Notice, referring only to paragraph 5.2 of Schedule 2 to the CGA. No reference at all was made to Exhibit 1 of the Interparty Agreement.

(5) After EFB made a request for further information, on 13 September 2018, Lotus responded stating: "*This is a response, prepared in good faith … for the purposes of Schedule 2 "Delivery Procedure*" *clause 1.1.2 of the [CGA] and Exhibit 1 "Dispute Resolution Procedure" clause 1a ii to the [Interparty Agreement] … All of [Lotus's] rights in each and any jurisdiction are reserved*."

(6) By a letter dated 28 September 2018 (and emailed on 29 September), when a dispute arose as to whether there had been presumed "completion and delivery", Lotus wrote stating: "*We assume "dispute procedure" is intended to refer to Exhibit 1 of the [Interparty Agreement] and which has precedence over the [Completion Guarantee] Delivery Procedure and any other Relevant Agreement. Exhibit 1 does not set out any timetable for return of the materials to the Guarantor nor any provision for the deemed acceptance of the Film, such that your letter of 24 September, and the notice contained in it, cannot be of any effect.*"

141. In my judgment, those occasional references to and reliance upon the Interparty Agreement are sufficient to prevent an estoppel by convention arising. The equivocal behaviour by Lotus is insufficient to give rise to the necessary common assumption. On several occasions, Lotus were reserving the right to rely upon the provisions of the Interparty Agreement. In those circumstances, applying the second principle in [54] of *Tinkler v HMRC*, given the referral to and the reservations of rights by Lotus in relation to the Interparty Agreement, I do not regard Lotus as to have "*assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it*."

142. Therefore, despite the points powerfully made by Mr Cullen, summarised at paragraphs 123-128 above, I believe that he fails properly to take account of the several references to and reliance upon the provisions of the Interparty Agreement to which I have referred. I therefore reject the Claimants' submission that the First to Third Defendants are estopped by convention from advancing the second defence.

Do the delivery procedures under the CGA and the Interparty Agreement conflict, such that the delivery procedure under the Interparty Agreement prevails?

143. I therefore turn to the second defence. Having carefully considered both parties' submissions, I have reached the firm conclusion that there is no merit whatsoever in this defence.

144. I reach that conclusion principally for the following reasons:

(1) I accept that:

(a) clause 9.2 clearly provides "*Clause 9.2 of the CGA provides that "if there is a conflict between this Agreement and any provisions of the [Interparty Agreement] or a Presale NOA, the provisions of the [Interparty Agreement] or applicable Presale NOA shall prevail*". I do not, however, see that the similar provisions of clause 23.6 of the Interparty Agreement, to which the Underwriters were not parties, take matters any further; and

(b) The Disputes Resolution Procedure contained in Exhibit 1 to the Interparty Agreement is included within the expression "*the provisions of the [Interparty Agreement]"* within clause 9.2 of the CGA. I do not accept

Mr Cullen's submissions that the provisions of Exhibit 1 are to be wholly ignored as part of the Interparty Agreement. In my view his reliance on the wording of clause 1.2.3 of the Interparty Agreement as referring to "*this Interparty Agreement and the Schedules..*", as thereby excluding Exhibit 1, ignores the fact that Exhibit 1 is incorporated by reference by clause 15.1. Certainly, the Deputy Master did not approach the matter in this way when considering the Stay Applications.

A conflict, however, must be established. I cannot see any such conflict here.

(2) The starting point is the binding finding contained in the Stay Judgment that the two arbitration agreements were made between different sets of parties and covered different disputes. Although I have found this is not *res judicata* in relation to the second defence raised by the First to Third Defendants, it is highly relevant when considering the arguments advanced.

(3) In relation to the CGA, the dispute was between its parties as to the completion and delivery of the Film, under the provisions of the CGA. Unlike the Interparty Agreement, it included disputes in relation to the "*Approved Picture Specifications*" (as defined in paragraph 1.1.2 of Schedule 2 to the CGA), which include certain specific elements set out at clauses 1.10 and 1.12(c) of the CGA, matters which Lotus included in their complaints in their Objection Notice.

(4) Exhibit 1 to the Interparty Agreement only has any effect by virtue of clause 15.1 thereof. That is the only provision which refers to it. It is specific that it only applies *"... if the Sales Agent disputes whether Completion and Delivery* ***under the [SAA]*** *has taken place ..."* [emphasis added]. The SAA does not apply to a dispute under the CGA. The only parties to the SAA are the *"Sales Agent"* (Lotus, specifically the First Defendant) and the "*Producer*", Starbright srl. Unlike the CGA, it is concerned solely with completion and delivery of the Sales Agent Bonded Delivery Materials and not with the Approved Picture Specifications.

(5) The procedures set out in each of Exhibit 1 to the Interparty Agreement and Schedule 2 of the CGA to which their respective arbitrations relate are similarly entirely separate from one another. In my judgment, given that they served entirely different purposes, one has no bearing on the other. They exist in tandem

and do not in any way conflict. It should be remembered that these carefully negotiated agreements were executed on the very same day. Paragraph 9.1 of the CGA expressly provided "*the Parties hereby agree that this Agreement shall include the Recitals set forth in clause 1 and the Schedules all of which shall be fully enforceable in accordance with their terms".* The idea that the parties intended that this very detailed timetable, dealing with a different dispute was something which the parties could simply ignore by reference instead to Exhibit 1 of the Interparty Agreement, dealing with an entirely different dispute under the SAA is, in my view, absurd.

(6) Exhibit 1 to the Interparty Agreement sets out a "Dispute Resolution Procedure" which has some broad similarities to the "Delivery Procedure" under Schedule 2 to the CGA. It also has a number of differences. These are outlined at paragraph 107 above. In my judgment, Mr Cullen is right in his submission that there could not be a situation in which the provisions of Schedule 2 to the CGA could conflict with Exhibit 1 to the Interparty Agreement. The Delivery Procedure under Schedule 2 to the CGA will simply proceed in accordance with its terms when it is invoked. There cannot be a "*conflict"* with anything in Exhibit 1 to the Interparty Agreement because that will not be applicable.

(7) Moreover Ms John does not point to any express conflict, but rather contends that where Schedule 2 of the CGA makes express provision for certain matters, such as specific time periods, where Exhibit 1 to the Interparty Agreement is silent as to any specific period of time, that constitutes "a conflict", such that the Interparty's silence prevails and has the effect that the prescribed time periods in Schedule 2 should be ignored. I do not accept that. As Mr Cullen points out, taking this submission to its extreme, the fact that the Interparty Agreement makes no mention of the obligation on the part of the Guarantor to pay the Payment Sum in the event that completion and delivery of the Film is not effected, would prevail over the express provision to the contrary in the CGA.

(8) In short, the parties agreed the terms of Schedule 2 to the CGA because they intended that those provisions (and not the provisions of Exhibit 1 to the Interparty Agreement, dealing with a different dispute altogether) should apply to

the Delivery Procedure under the CGA and to the effecting of completion and delivery of the Film under the CGA.

145. I therefore reject the second defence.

The Third Defence – Clause 9.2 of Schedule 2 to the CGA is a penalty

The Law on penalty clauses

146. The law on penalty clauses was reviewed by the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172. Both parties referred to and relied upon certain passages in the judgment. It set out the applicable principles as to whether a clause qualifies as a penalty, which can be summarised as follows.

147. The penalty doctrine applies:

(1) when there is a provision operating on a breach of contract: *Cavendish* at [12]-[13] per Lords Neuberger and Sumption;

(2) to agreed or fixed damages clauses.

148. It may apply to provisions that result in a party not receiving (or forfeiting an entitlement to) a payment: see *Cavendish* at [154]-[156] per Lord Mance and [226]-[228] per Lord Hodge, who at [228] stated: "*I therefore conclude that clauses that authorise the withholding of sums otherwise due to the contract breaker may fall within the scope of the rule against penalties"*. Lord Toulson agreed with Lords Mance and Hodge in those respects. Lord Clarke agreed in relation to [227] of Lord Hodge's judgment (but did not refer to [228] cited above). Lords Neuberger and Sumption (with whom Lord Carnwarth agreed) at [72] declined to decide the point, but stated at [73] "*We are prepared to assume, without deciding, that a contractual provision may in some circumstances be a penalty if it disentitles the contract-breaker from receiving a sum which would otherwise have been due to him."*

149. On the facts of the *Cavendish* case, the Supreme Court unanimously held that a clause ("**clause 5.1**") in a substantial commercial contract, which withheld payment of a seller's right to receive certain parts of the purchase price, in the event he was in breach of certain restrictive covenants, was a price adjustment clause and did not amount to a penalty. Lords Neuberger and Sumption (Lord Carnwarth agreeing) found at [73] that the penalty doctrine was not even engaged. Whether it was, depended on the right of

which the contract breaker was being deprived and the basis on which he is being deprived of it. They stated:

> *"It is not a proper function of the penalty rule to empower the courts to review the fairness of the parties' primary obligations, such as the consideration promised for a given standard of performance … There is no reason in principle why a contract should not provide for a party to earn his remuneration, or part of it, by performing his obligations. If as a result his remuneration is reduced upon his non-performance, there is no reason to regard that outcome as penal."*

After considering the authorities, Lord Mance found that there was no penal presumption and at [181] said:

> *"… the question still remains whether clause 5.1 can and should be condemned as penal, on the grounds that it is extravagant, exorbitant or unconscionable in its nature and impact. Not without initial hesitation, and despite the powerful points made by Mr Bloch I have come to the conclusion that, in this particular agreement made deliberately and advisedly between informed and sophisticated parties, the court should answer this question in the negative, and hold that clause 5.1 is enforceable.. Its effect was to revise the basic price calculation for the shares which had been agreed to be sold, and, so viewed in the context of a carefully negotiated agreement between informed and legally advised parties at arm's length, I do not consider it can or should be regarded as extravagant, exorbitant or unconscionable."*

At [270] Lord Hodge said that there was a strong argument that in substance also regarded clause 5.1 as a primary obligation, but *"even were it correct to analyse clause 5.1 as a secondary provision operating on breach of the seller's primary obligation, I am satisfied that it is not an unenforceable penalty clause …*" He then gave six reasons for his conclusion at [271]-[277]. Lord Clarke said at [291] that, like Lord Hodge he had an open mind as to whether clause 5.1 was capable of constituting a penalty, but nonetheless allowed the appeal on the basis that, even if the doctrine applied, it was not unenforceable. Lord Toulson agreed with Lord Mance at [181] and Lord Hodge at [270].

150. Mr Cullen also relied upon [31] per Lords Neuberger and Sumption as follows:

> *"31. In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine*

pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. In Legione v Hateley (1983) 152 CLR 406, 445, Mason and Deane JJ defined a penalty as follows:

"A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation …"

All definition is treacherous as applied to such a protean concept. This one can fairly be said to be too wide in the sense that it appears to be apt to cover many provisions which would not be penalties (for example most, if not all, forfeiture clauses). However, in so far as it refers to "punishment" and "an additional or different liability" as opposed to "in terrorem" and "genuine pre-estimate of loss", this definition seems to us to get closer to the concept of a penalty than any other definition we have seen. The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm."

151. The test for determining whether a contractual clause amounts to penalty is as follows:

(1) '*[W]hether 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*'.[15] per Lords Neuberger and Sumption at [32];

[15] Lords Carnwath and Clarke [291] agreed, Lord Mance agreed in substance [152]. Lords Hodge and Toulson expressed the test differently but did not differ in substance: at [255], [294].

(2) As summarised by Chitty on Contracts (33rd ed) at 26-190: "*[W]hether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of breach is not extravagant or unconscionable in comparison to that interest*".

The First to Third Defendants' submissions as to whether paragraph 9 of Schedule 2 to the CGA is a penalty

152. The penalty doctrine applies to paragraph 9 of Schedule 2 to the CGA because:

(1) The consequences set down by paragraph 9 – a presumed 'completion and delivery' – apply upon breach of contract, here a breach of the time limit imposed by paragraph 5.2 of Schedule 2 to the CGA.

(2) The consequences are a presumed "completion and delivery" which, in substance, means the withholding of any sum that would otherwise be due under the guarantee.

Paragraph 9 is a penalty

153. Paragraph 9 is aimed at ensuring the performance of, *inter alia*, the requirements imposed by paragraph 5.2 of Schedule 2 to the CGA. It is accepted that:

(1) EFB may have a legitimate interest in ensuring performance of paragraph 5.2 and for securing compensation for breach; and

(2) a delay and/or failure to return the Lotus Delivery Materials might result in some inconvenience and/or cost to EFB. It is clear, however, that any such inconvenience or cost would be minimal and limited to compensation for that cost. Not only are EFB able to commence work on curing any defects before they receive the Lotus Delivery Materials, they have the option of bringing the entire delivery process to an end by doing nothing (which results in the issuance of an Arbitration Notice under paragraph 7 of Schedule 2 to the Completion Guarantee).

154. In contrast, the potential consequences of a breach of paragraph 5.2 are, for Larkhark, Lip Sync, and Lotus, significant. They are the loss of the protection of the guarantee entirely and the withholding of any sum that would otherwise be owed by the Guarantors.

155. These consequences are out of all proportion to any legitimate interest the Claimants may have in ensuring performance and do not represent a genuine pre-estimate of the loss suffered by the Claimants as a result of any breach of paragraph 5.2 of Schedule 2 to the CGA. It would have been clear at the time of the contract that in all cases in which paragraph 9 is engaged, it has the effect of depriving Larkhark, Lip Sync, and Lotus of the benefit of the guarantee, for which USD 575,000 had been paid. Plainly that sum is in no way referable to EFB's (or the Guarantor's) interest in ensuring compliance with the timetabling requirement under paragraph 5.2 and in securing compensation for breach of that requirement. As above, any damages to which the Claimants might be entitled as a result of this breach are likely to be minimal.

156. It would also have been clear at the time of the contract that the sum liable to be withheld would fluctuate and that this fluctuation would have nothing to do with the breach in question (e.g. of paragraph 5.2 of Schedule 2 to the CGA). That is because the amount of the sum liable to be withheld would depend on Larkhark's (and Lip Sync's) entitlement under the Guarantee, which would in turn depend on whether EFB and the Guarantor had complied with myriad other obligations under the agreements between the parties (including various technical requirements for the Film). The fluctuating nature of the sum is, in and of itself, a strong indication that the sum is not a genuine pre-estimate of the loss suffered by the Claimants as a result of the breach of paragraph 5.2 of Schedule 2 to the CGA: see *Public Works Commissioner v Hills* [1906] AC 368, 376. In *Public Works*, the House of Lords considered a provision of a railway construction contract which provided that in the event of non-completion of the line within a specified time period, the defendant would be entitled to retain, as 'liquidated damages' for breach, certain percentages of moneys otherwise payable to the plaintiff and held as security under the contract and two other contracts. The House of Lords held that the sum in question was not a genuine pre-estimate of loss and therefore it was not liquidated damages. Lord Dunedin explained at 376:

> *"The determining factor is that the sum is not a definite sum, but is liable to great fluctuation in amount dependent on events not connected with the fulfilment of this contract."*

The decision was followed by the Privy Council in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 582E (in the context of provision providing for forfeiture of a deposit).

157. It would have been clear at the time of entering into the contract that paragraph 9 could have the effect of depriving Larkhark and Lip Sync of a potentially significant sum, far in excess of the premium paid. It would have been understood that the production of the Film was both expensive and uncertain. Indeed, that is reflected in the fact that the Guarantee was obtained and a significant sum was paid for it. Ms John accepted that specific sums are not relevant to the question of construction, because the question as to whether a clause is a penalty has to be assessed at the time the contract is made. The potential amount of the sum to be withheld, which would have been know when the agreement was made, however, is a clear indication that it is not a genuine pre-estimate of loss and, indeed, it is not in any way referable to EFB's (or the Guarantor's) interest in ensuring compliance with a timetabling requirement for return of the Lotus Delivery Materials and in securing compensation for breach of that requirement. In this regard, it was submitted that if the Claimants were simply entitled to damages for breach of paragraph 5.2 of Schedule 2 to the CGA, the sum to which they would be entitled would likely be minimal and certainly nothing comparable to the amount of the sum liable to be withheld.

158. Both the loss of the benefit of the guarantee and the specific sums which may be withheld as a result of a failure to comply with paragraph 5.2 of Schedule 2 to the CGA are wholly disproportionate to and/or unconscionable in comparison to any legitimate interest the Claimants may have in performance of that provision. That is particularly so given that the defects in the Film (in respect of which it is alleged that the Guarantor is liable) are not limited to the technical quality of the Lotus Delivery Materials, but also concern substantive failures to comply with the contractual specifications. For these reasons, paragraph 9 of Schedule 2 to the CGA is a penalty.

The identity of the parties

159. Finally, it is noted that the party with the relevant obligation (Lotus, which was required to return the Lotus Delivery Materials) and the party who will suffer some of the consequences if that obligation is breached are not the same party. Paragraph 9 of Schedule 2 to the CGA has the effect of depriving Larkhark, Lip Sync, and Lotus of the benefit of the Guarantee, but it is only Larkhark and Lip Sync that are entitled to payment of the Payment Sum under clause 2.1(c) of the Guarantee. However, it is

denied, if it be submitted, that this has the effect that paragraph 9 of Schedule 2 to the CGA cannot be a penalty.

160. First, Lotus does suffer the main consequence of breach of paragraph 5.2 of Schedule 2 to the CGA, namely loss of the benefit of the guarantee. This is not simply loss of a right to arbitrate, it is the loss to receive the Payment Sum.

161. Second, and in any event, the origins of, and justifications for, the penalty doctrine provide no reason for requiring that the breaching party and the party suffering the penalty be one and the same. The underlying justification for the penalty doctrine is that contract law does not allow an innocent party to impose punishment for breach and thus clauses which do impose a punishment – i.e. penal clauses – are void. As set out above, more recently, the focus has been on whether the provision goes beyond the legitimate interests of the innocent party in performance of the contract. However, this formulation also reflects the fact that the law does not usually permit contracting parties to punish for breach. Thus, in *Cavendish*, Lords Neuberger and Sumption observed that '*the real question when a contractual provision is challenged as a penalty is whether it is penal*' and in this sense references to '*punishment*' are apposite: at [31].

162. While the case law refers to punishment of the breaching party, in doing so the cases cannot be taken to limit the penalty doctrine to attempts to punish and/or deter the breaching party directly. This is clear from the most recent and authoritative statement on the doctrine of penalties in *Cavendish*:

    (1) *Cavendish* sets down the test for the court, namely whether the consequences imposed are out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. It is submitted that the fact that the consequences of the breach are imposed on a different (non-breaching) party under the contract cannot be sufficient to turn a provision that is disproportionate into one that is proportionate.

    (2) Similarly, both Lords Mance and Hodge emphasised that the court must consider whether the provision is exorbitant or unconscionable by reference to the innocent party's legitimate interest in performance: at [152] per Lord Mance and at [249] per Lord Hodge. Again, the fact that the consequences of the breach are

imposed on a different (non-breaching) party cannot be sufficient to turn a provision that is exorbitant or unconscionable into one which is not.

(3) The findings in ***Cavendish*** also make it clear that the court should focus on the substance of the clause not its form. Thus, while Lords Neuberger and Sumption held at [77] that clause 5.1, one of the impugned clauses was, in reality, a price adjustment clause and therefore not a penalty, they noted that price adjustment clauses are liable to abuse and left open the possibility that such clauses might, in certain cases, be a disguised punishment for breach. In a similar vein, Lord Hodge stated at [258] that where it is clear that the parties have circumvented the penalty rule (e.g. by deliberately drafting it in such a way so that the consequences do not appear to arise upon breach) and '*that the substance of the contractual arrangement is the imposition of punishment for breach of contract*', then the court may intervene using the concept of a disguised penalty. Consistent with this approach, it is open to the court to find that parties cannot simply avoid the penalty doctrine by visiting the consequences of breach on a different party from the contract breaker.

163. The parties are entitled to, and have chosen to, arrange their contractual obligations in this way. All the contracting parties to the relevant suite of agreements were aware that Lotus was acting on behalf of other parties (including Larkhark and Lip Sync). It is also to be noted that Lotus is referred to as a Beneficiary on the opening page of the CGA. In such circumstances, it cannot be the case that a provision which would be a penalty if the parties had provided that the Payment Sum be made to (and thus withheld from) Lotus is incapable of being a penalty just because the parties happened to provide that the Payment Sum be made to (and thus withheld from) Larkhark and Lip Sync. Such an approach would enable parties to circumvent the penalty doctrine entirely simply by providing that a different legal entity be entitled to the payment (or required to make it) from the entity required to perform the obligation. In order to ensure that the purpose/public policy of the doctrine of penalty – i.e. to prevent 'punishment' – the substance of the contractual arrangements must be and are more important than the mere form.

164. Furthermore clause 15.1 of the CGA states "*Sales Agent is a party to this Agreement solely for the purpose of agreeing to the provisions of Schedules 2 and 3 (which it*

hereby agrees to) and it shall have no other right or benefit pursuant to this Agreement or *any obligation thereunder.*" [emphasis added]. Properly construed, the word "other" should appear before "obligation", because there are obligations imposed upon the Sales Agent under Schedule 2 of the CGA. Failure to carry out certain steps amounts to breaches of the Delivery Procedure, which forms part of the CGA, rather than non-compliance with options.

The Claimants' submissions as to whether paragraph 9 of Schedule 2 to the CGA is a penalty

165. Paragraph 9 of Schedule 2 to the CGA is not a penalty for the following reasons:

(1) The First to Third Defendants submit (by reference to the contents of paragraph 66 of Owens 5) as a result of "*deemed acceptance*", Larkhark and Lip Sync are "punished" by loss of the Payment Sum. That is wrong. The effect of "*deemed acceptance*" is that there will be no arbitration. What the outcome of that arbitration might have been is unknown. There is nothing extravagant or unconscionable about a party not being entitled to arbitrate a claim if a deadline is missed. It occurs in numerous environments.

(2) Furthermore, this effect is not a "*punishment"* visited on the supposed contract-breaker. The deadline was missed by Lotus, which has no rights or benefit under the CGA, save in relation to agreeing to the provisions of Schedule 2 and 3 thereto. There is no suggestion that Larkhark or Lip Sync has breached any obligation or that "*deemed acceptance*" is the result of any default on their part. If one looks at clause 1 of the Schedule 2 to the CGA the agreement in relation to the Delivery Procedure is between "*the Sales Agent and EFB and the Guarantor*". There is no reference to the Beneficiaries. Their role under Schedule 2 of the CGA is limited to a referral to arbitration on behalf of the Sales Agent pursuant to paragraph 11. The penalty doctrine simply does not have any application.

(3) In any event if one looks at [16] of *Cavendish,* there are examples of different types of penalty. This clause does not fall into those categories. Here the entitlement to a sum of money has not been fulfilled. It would first need an arbitration award.

(4) Even in relation to Lotus, it would be a mischaracterisation to describe what it has done (or failed to do) as a breach of obligation. Indeed clause 1.15 expressly states that Lotus *"shall have … no obligation hereunder"*. The structure of Schedule 2 to the CGA is that it provides Lotus with a series of options under which it can make objections to the Film as delivered or it can give its acceptance (deemed or actual). Lotus could have accepted the Film, even if it had been delivered late and/or did not meet some of the *"Approved Picture Specifications"* or technical quality requirements. Lotus's acceptance of the Film could have been express (by serving an Acceptance Notice) or deemed. It is not a matter of breach on the part of Lotus; it is a matter of election. This is not a penal provision, but an agreed part of a procedure for delivery with a tight timetable.

(5) The First to Third Defendants suggested that Lotus was acting as Larkhark's agent in the Delivery Procedure. This is simply not right. Lotus's SAA was with Starbright srl. There is nothing in the CGA or elsewhere to support the suggestion that Lotus was acting as Larkhark's agent. No evidence has been adduced to support such a proposition. It is inconsistent with clause 1.15 of the CGA. Furthermore, paragraph 11 of Schedule 2 to the CGA expressly contemplates that Larkhark might, in certain circumstances, act "*as agent for Lotus"*. That makes no sense if Lotus had been acting as Larkhark's agent all along.

(6) The submission by Ms John that clause 1.15 of the CGA should be read as though *"other*" applied also to the word "*obligation*" (as well as to the words "*right or benefit*") is wrong and there is no reason not to construe the words of clause 1.15 literally. This is so because it is a mischaracterisation of the provisions of Schedule 2 to regard them as imposing obligations on the Sales Agent. In particular:

(a) At various stages, there is a step to be taken by the Sales Agent. Thus, for example, at the beginning of 'round' 1, it can either serve an Objection Notice or an Acceptance Notice. Plainly it is not under an "*obligation*" to serve an Objection Notice – that is a *"right*". Nor is it under an *"obligation"* to serve an Acceptance Notice.

(b) It may be suggested that the Sales Agent is under an "*obligation*" to do one or other. But Schedule 2 is not expressed in such terms, it simply provides

that the Sales Agent "*shall have 30 days*" to do one or the other. If it does not do either, the CGA provides that it is deemed to have given an Acceptance Notice (under para 2).

(c) The same analysis is applicable at each stage. There is no reason to view the provisions as imposing "*obligations*" on the Sales Agent in circumstances where the CGA merely provides for a series of steps to be taken and for what should happen if they are not taken. That is why it is more properly viewed as essentially a matter of election: the Sales Agent has the right to object or to accept (express or deemed). "*Obligation*" does not come into this.

(7) Quite apart from these (conclusive) points, the CGA forms part of a series of agreements drawn up by sophisticated film industry experts with the benefit of legal advice: see paragraph 21.1 of Joelson 4. As stated in *Cavendish* at [35], *"in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach*": see also [152] per Lord Mance.

(8) Paragraph 9 of Schedule 2 to the CGA are clauses which are not remotely like any that are found in any of the cases on penalties. It is commonplace that contracts will have deadlines for, e.g., the service of notices and that missing those deadlines may have very serious adverse consequences. That does not make them penal. This is not a penal provision, but part of a carefully negotiated procedure for delivery with a tight timetable.

(9) These provisions must be seen in their context: they formed part of a Delivery Procedure that was intended to be swift and which might lead to an arbitration which was to be expedited. There had to be a timetable. The effect of missing a deadline needed to be spelt out. The sophisticated parties made their bargain as to what that should be. So far as Lotus is concerned, there would be deemed acceptance; so far as EFB was concerned, there would be a deemed arbitration notice, so that, as indicated at paragraph 71 above, it would be compelled to arbitrate on the basis of uncured materials. Those are the rules which the parties

chose to adopt. The penalty doctrine cannot be invoked so as to change those rules.

(10) Assuming that clause 9 of Schedule 2 to the CGA is properly construed as a clause which authorises the withholding of money from a contract breaker. The Supreme Court in *Cavendish* were far from unanimous as to whether the penalty doctrine would apply to such clauses. Reliance was placed by Mr Cullen on the differences of approach of the Lordships set out at paragraph 148 above. It is submitted that in those circumstances *Cavendish* should not be regarded as authority that clauses which seek to withhold payments should fall within the scope of the rule against penalties.

Discussion and conclusion on the third defence: Is clause 9 of Schedule 2 to the CGA unenforceable on the ground it is a penalty.

166. Having carefully considered the submissions made by the parties, I have reached the conclusion that clause 9 of Schedule 2 to the CGA is valid and is not an unenforceable penalty clause.

167. I reach that decision for the following reasons:

(1) There is a strong argument that applying the approach that the Supreme Court did in the *Cavendish* case, that the penalty doctrine is not engaged. Whilst I reject the submission of Mr Cullen that the effect of clause 9 of Schedule 2 to the CGA is simply the loss of a chance to arbitrate, and I accept Ms John's analysis that the practical effect of that clause, is that, given the conclusive presumption that Lotus had issued an Acceptance Notice, and the conclusive presumption that acceptance of completion and delivery of the Film had been effected, there was no entitlement on the part of Lip Sync or Larkhark to the Payment Sum, the matter does not end there.

(2) I accept Mr Cullen's submission that clause 9 must be seen in context: it formed part of a Delivery Procedure that was intended to be swift and which might lead to an arbitration which was to be expedited. There had to be a timetable. The effect of missing a deadline needed to be spelt out. The sophisticated parties, acting with the benefit of legal advice made their bargain as to what that should be. So far as Lotus is concerned, there would be deemed issuing of an Acceptance

Notice; so far as EFB was concerned, there would be a deemed arbitration notice, so that, as indicated at paragraph 71 above, it would be compelled to arbitrate on the basis of uncured materials. Those are the rules which the parties chose to adopt. The penalty doctrine cannot be invoked so as to change those rules.

(3) Just as Lords Neuberger and Sumption said in *Cavendish* at [31]: "*It is not a proper function of the penalty rule to empower the courts to review the fairness of the parties' primary obligations, such as the consideration promised for a given standard of performance … There is no reason in principle why a contract should not provide for a party to earn his remuneration, or part of it, by performing his obligations. If as a result his remuneration is reduced upon his non-performance, there is no reason to regard that outcome as penal*." The parties are entitled to, and have chosen to, arrange their contractual obligations in this way. As Ms John accepts, EFB had a legitimate interest in ensuring compliance with the Delivery Procedure, including paragraph 5.2. If there was a deemed Acceptance Notice by the application of the agreed provisions of the Delivery Procedure, the primary obligation on the part of the Underwriters to pay the Payment Sum under the CGA did not arise. That is not properly characterised as 'penal', but part of a carefully negotiated procedure for delivery with a tight timetable.

(4) There is the additional problem that Lotus, the entity who failed to comply with the procedure under clause 5.2, is not a beneficiary of the Payment Sum, despite being described as one of the Beneficiaries on the front page of the CGA. As stated at paragraph 27 above, the inclusion of Lotus within that definition must be an error because clause 2.1(c) of the CGA makes clear that the Payment Sum is payable only to Larkhark and Lip Sync. Clause 1.15 of the CGA makes it clear that Lotus is not subject to any obligations: it has only rights under Schedules 2 and 3 to the CGA. One of those rights was deciding which option to exercise under clauses 3 and 5 of Schedule 2 to the CGA. I reject Ms John's submission that clause 1.15 should be re-written so as to refer to "other obligations". I do not regard Lotus as Larkhark's agent in relation to the Delivery Procedure for the reasons advanced by Mr Cullen set out in paragraph 164(5) above.

(5) If I am wrong, and clause 9 of Schedule 2 to the CGA is subject to the penalty doctrine, in my view, it should not be set aside. As Lord Mance said in Cavendish

at [181], in relation to clause 5.1 in that case: "… *I have come to the conclusion that, in this particular agreement made deliberately and advisedly between informed and sophisticated parties, the court should answer this question in the negative, and hold that clause 5.1 is enforceable. Its effect was to revise the basic price calculation for the shares which had been agreed to be sold, and, so viewed in the context of a carefully negotiated agreement between informed and legally advised parties at arm's length, I do not consider it can or should be regarded as extravagant, exorbitant or unconscionable*."

I reach precisely the same conclusion in relation to paragraph 9 of Schedule 2 of the CGA. As Mr Cullen submitted, correctly in my view, the CGA formed part of a series of complex agreements, drawn up by sophisticated businessmen with experience of the film industry, and with the benefit of legal advice. It is commonplace that contracts such as these will have deadlines and those deadlines may have serious consequences. That does not make them penal and render them unenforceable.

Conclusion

168. Having rejected each of the three defences, I therefore find in favour of the Claimants and make the declaration sought in their Part 8 Claim Form. I decline to make the counter-declaration sought by the First to Third Defendants.

169. I will deal with all consequential matters on the basis of written submissions sent by email, which should be provided to me within 7 days of the handing down of the judgment in accordance with the COVID-19 Protocol. It would also be of assistance to me if Counsel try to agree a draft Order, and in the event of any particular disagreement, set out the respective versions sought.

170. I end by once again thanking Counsel for their assistance on this matter.

APPENDIX

SUMMARY OF THE DELIVERY PROCEDURE UNDER THE CGA AND THE DISPUTE RESOLUTION PROCEDURE UNDER THE SA IPA

	CGA				SA IPA				ACTUAL
	Trigger/time limit	**Action required**	**Relevant provision of Sch 2**	**Date required**	**Trigger/time limit**	**Action required**	**Relevant provision of exhibit 1**	**Date required**	**Date effected**
DELIVERY NOTICE	Delivery notice		1.1		Delivery notice		1 a		30/5/18
ROUND ONE									
OBJECTION/ ACCEPTANCE NOTICE	30 days from and after receipt of Delivery Notice	SA to "notify" P, B, EFB and G in writing that either acceptance notice or objection notice	1.1	29/6/18	30 Business Days from and after its receipt of a Delivery Notice	SA to "notify" G in writing that either acceptance notice or objection notice	1 a	12/7/18	27/6/18 (email sent 26/6/18 11.59pm Copenhagen time).
REQUEST FOR ADDITIONAL INFORMATION	"within 3 Business Days after receiving such Objection Notice"	G shall make any request for additional information	1.1.2	2/7/18	"within 5 Business Days after receiving such Objection Notice"	G shall make any request for additional information	1 a ii	4/7/18	2/7/18
RESPONSE	If G requests additional information: "3 Business Days after its receipt of such request"	SA shall respond	1.1.2	5/7/18	If G requests additional information: "5 Business Days after its receipt of such written request"	SA shall respond	1 a ii	10/7/18	5/7/18
REQUEST FOR RETURN OF MATERIALS	"within 3 Business Days after receiving the Objection Notice or a Response"	G shall make any written request for return of Delivery Materials	1.1.2	10/7/18					10/7/18
RETURN OF MATERIALS	If G requests return of Delivery Materials, "within 5 Business Days after SA's receipt of G's written request"	SA "shall return [the Delivery Materials requested] to G in order to allow G to cure the defects".	1.1.2	17/7/18					16/7/18 (On Ds case, 13/7/18)
REDELIVERY AND CURE NOTICE	EITHER: If SA gives an Objection Notice: "in no event later than 30 days after the later of (i) receiving the	G "shall deliver to the SA any Delivery Materials [not previously delivered], cure the defects...etc"	3.1	15/8/18 (On D's case 12/8/18)	If SA gives an Objection Notice: "in no event later than 30 Business Days after G's receipt of the	G "shall effect Completion and Delivery in accordance with specifications of the Objection Notice	1 b i	28/8/18 (On D's case 24/8/18)	14/8/18 (materials delivered) 15/8/18 (Cure Notice given)

	Objection Notice or the Response or (ii) the return of any Delivery Materials" ("the Cure Period")	and "shall give notice thereof ("a Cure Notice")"			Objection Notice or the Response and the return of the defective materials, if so required by G, whichever is later" ("the Cure Period")	and the Response...and give SA notice thereof ("a Cure Notice")"			
					If a Cure Notice is given: "within the Cure Period"	G shall effect Delivery to SA and give written notice thereof to SA	1 c	28/8/18 (On D's case 24/8/18)	14/8/18 (materials delivered) 15/8/18 (Cure Notice given)
OR G'S ARBITRATION NOTICE	OR: If SA gives an Objection Notice, "within 10 days after receiving the Objection Notice or the Response"	G "shall give" the SA an Arbitration Notice	3.2	15/7/18	If SA gives an Objection Notice, "within 5 Business Days after receiving the Objection Notice or the Response"	G "shall give" the SA an Arbitration Notice	1 b ii	12/7/18	N/A
ROUND TWO									
ADDITIONAL OBJECTION NOTICE OR ACCEPTANCE NOTICE	If Cure Notice is given, SA "shall have 15 Business Days from and after its receipt of such notice and the relevant Delivery Materials within which"	"to verify" cure and "to notify" G that either the film is accepted or completion and delivery has not been effected	5	6/9/18 NB confirmed in advance by D as the appropriate date	SA "shall have 15 Business Days from and after its receipt of a Cure Notice within which"	to "verify" cure and "to notify" G that either Completion and Delivery has been effected or that Completion and Delivery has not been effected	1 c	7/9/18	5/9/18
SECOND REQUEST FOR ADDITIONAL INFORMATION	"within 3 Business Days after receiving such Additional Objection Notice"	G shall make any request for additional information	5.2	10/9/18	If "within 5 Business Days after receiving such [Additional] Objection Notice"	G "requests" additional information	1 c ii	12/9/18	10/9/18
SECOND RESPONSE	If G requests additional information: "3 Business Days after its receipt of such request"	SA shall respond	5.2	13/9/18	If G requests additional information: "5 Business Days after its receipt of such written request"	SA shall respond	1 c ii	17/9/18	13/9/18
SECOND REQUEST FOR RETURN OF MATERIALS	"within 5 Business Days after receiving the Additional Objection Notice"	G shall make any written request for return of Delivery Materials	5.2	12/9/18					12/9/18
SECOND RETURN OF MATERIALS	If G requests return of Delivery Materials, "within 3 days after	SA "shall return [the Delivery Materials requested] to G in	5.2	15/9/18 (If Business Days, it would					18/9/18 (On D's case, 14/9/18)

	SA's receipt of G's written request"	order to allow G to cure the defects".		have been 17/9/18)					
REDELIVERY AND ADDITIONAL CURE NOTICE	If SA gives an Additional Objection Notice, "in no event later than 15 Business Days after the later of (i) receiving the Additional Objection Notice or the Second Response or (ii) the return of any Delivery Materials" ("the Additional Cure Period")	G "shall deliver to the SA any Delivery Materials [not previously delivered], cure the defects...etc" and "shall give notice thereof ("an Additional Cure Notice")"	6.1	10/10/18 (On D's case, 6/10/18)	If SA gives an Additional Objection Notice, "in no event later than 21 Business Days after receiving the Additional Objection Notice or the Second Response and the return of the defected [sic] materials, if so required by G, whichever later"	G "shall effect Completion and Delivery in accordance with specifications of the Additional Objection Notice and the Second Response...and give SA notice thereof ("a Cure Notice")"	1 d i	18/10/18 (On D's case 14/10/18)	5/10/18 (materials delivered) 8/10/18 (cure notice deemed given)
OR G'S ARBITRATION NOTICE	If SA gives an Objection Notice, "within 3 Business Days after receiving the Additional Objection Notice or the Second Response"	G "shall give" the SA an Arbitration Notice	6.2	18/9/18	If SA gives an Additional Objection Notice, "within 5 Business Days after receiving the Additional Objection Notice or the [Second] Response"	G "shall give" the SA an Arbitration Notice	1 d ii	20/9/18	N/A
ACCEPTANCE NOTICE OR SA'S ARBITRATION NOTICE	If Additional Cure Notice is given, SA "shall have 15 Business Days from and after its receipt of such notice within which"	"to verify" cure and "to notify" G that either completion and delivery has been effected or that it has not been effected (an Arbitration Notice)	8	29/10/18	If Additional Cure Notice is given, SA "shall have 10 Business Days from and after its receipt of such notice within which"	"to verify" cure and "to notify" G that either Completion and Delivery has been accepted and "to provide" an acceptance notice to G or "give G an Arbitration Notice".	1 e	22/10/18	19/10/18 (Amended 25/10/18)