Neutral Citation Number: [2021] EWHC 1047 (Ch)

Case No: CR-2019-BHM-371

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 28/04/2021

Before :

HHJ DAVID COOKE

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In the Matter of Arboretum Devon (RLH) Ltd
And in the Matter of the Insolvency Act 1986

Between :

Terence Guy Jackson (1) **James Hawkesworth (2)** **As administrators of Arboretum Devon (RLH) Ltd**	**Applicants**
- and -	
Phillip Rodney Sykes, Mark John Wilson, Damian Webb, Christine Mary Laverty, Helen Julia Dale and Patrick O'Sullivan (as administrators of Saving Stream Security Holding Ltd) (1) **Shoby Investments Ltd (2)**	**Respondents**

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Stefan Ramel (instructed by **Harrison Clark Rickerbys Solicitors**) for the **Applicants**
Matthew Weaver (instructed by **Shoosmiths LLP**) for the **First Respondents and for Saving Stream Security Holding Ltd**
Ali Tabari (instructed by **Freeths LLP**) for the **Second Respondents.**

Hearing date: 22 March 2021

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Approved Judgment

Covid 19 Protocol: This judgment is deemed to be handed down at 10.30 am on 28 April 2019 by release of electronic copies to the parties and to BAILII.

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HHJ David Cooke:

Introduction

1. This matter relates to a dispute between two parties who are, or claim to be, secured creditors of Arboretum Devon (RLH) Ltd ("Arboretum") as to the priority of their claims to a fund of some £902,500 ("the Fund") held by Mr Jackson and Mr Hawkesworth ("the Arboretum administrators") following the sale by them of Arboretum's business and assets. The two creditors are Saving Stream Security Holding Ltd ("SSSHL") and Shoby Investments Ltd ("Shoby").

2. There are in fact three applications before me. For simplicity I have named the parties above in their roles in relation to the first application, which was made by the Arboretum administrators on 19 August 2020 seeking an order that in the absence of any application by SSSHL or Shoby they be authorised to distribute the Fund to SSSHL. In response to that two further applications were issued:

   i) On 22 September 2020 by the first respondents named, in their capacity as administrators of SSSHL and on behalf of SSSHL itself, seeking an order that the Fund be paid to SSSHL, and

   ii) On 14 October 2020 by Shoby, seeking an order that it has locus to challenge the validity and/or enforceability of loans made by Lendy Ltd ("Lendy") to Arboretum, and/or the security held by SSSHL which purports to secure those loans.

3. By order of DJ Rouine on 23 November 2020 all three applications were listed before me for a full day's hearing to determine a preliminary issue that had been agreed between the parties in these terms:

> "Does clause 2.9 of the Intercreditor Deed dated 19 March 2018 prevent [Shoby] from issuing a claim to challenge the entitlement of [SSSHL] to [the Fund] pursuant to the security given by [Arboretum] to [SSSHL]".

4. This in fact proved to be an excessively narrow limitation and the argument before me extended to a number of issues that were outside, or arguably outside, the preliminary issue as so defined, some of which I consider that I can and should determine in order to serve the overriding objective and at least reduce the scope of any further litigation between these parties.

5. Mr Ramel appeared for the Arboretum administrators, who take a neutral stance on the preliminary issue but have other matters of concern that will need to be addressed depending on the outcome. Mr Weaver appeared for SSSHL and its administrators, and Mr Tabari for Shoby.

Factual background

6. In order to understand the issues I summarise the background to the dispute as follows. Arboretum wished to borrow to fund the purchase of a site in Devon and its development into holiday chalets. Lendy operated a peer-to-peer lending platform under the trading name "Saving Stream" by which it coordinated funds from various

investors and made loans on their behalf to commercial borrowers. On 5 September 2016 it entered into two loan agreements with Arboretum as Borrower, referred to as a Land Loan and a Development Loan. They were in similar form and it is for the most part sufficient to refer to the terms of the Land Loan document, which provided:

i) Lendy, defined as "the Agent", entered into it "as agent for the Lenders", defined as "the persons who have agreed with the Agent from time to time to provide all or part of the Loan to the Borrower and whose names and addresses are maintained by the Agent". The Lenders are not named or further identified in the loan agreement, nor are any details given about any arrangements between them and Lendy, such as the amounts they have agreed to lend through the Lendy platform for these loans.

ii) The operative provision was clause 2 by which "The Lenders [agree] to lend to the Borrower the aggregate amount of the Loan…in the proportions that they have agreed with the Agent".

iii) Security was to be provided by way of security documents granted to SSSHL, defined as "the Security Trustee". Arboretum granted a debenture to SSSHL dated 5 September 2016 creating fixed and floating charges over all its assets and undertaking.

iv) There is reference to a Term Sheet, which is not before me but was clearly intended to list the security documents to be provided and set out matters such as the amount of the loan and the specified repayment date.

7. The Land Loan was to be drawn in one tranche, but the Development Loan provided for multiple drawdown requests as required from time to time to fund the costs of construction of the chalet site. The exact total amount lent is not apparent from the documents available at the hearing and is not likely to affect the outcome, but it appears from the Statement of Affairs that by the time Arboretum went into administration in May 2019 it accepted that it had received advances of about £6.8m in principal amount under these two loans, on which interest of about £1m had accrued.

8. Separately but also on 5 September 2016 Shoby agreed to lend Arboretum some £4.23m. Arboretum also granted security to Shoby by way of a debenture dated 5 September 2016.

9. About 18 months later on 19 March 2018 Arboretum granted further security to each of SSSHL and Shoby by way of legal charges over the property it had by then acquired, and Lendy, Shoby and Arboretum entered into the Intercreditor Deed that is in issue before me. It provided, in general terms, that the security in favour of SSSHL would rank in priority to that held by Shoby up to an amount of £7.845m, plus interest.

10. The Arboretum administrators were appointed in May 2019 and in December 2019 sold the business realising a sum in respect of the land sold, net of costs, of £902,500 which is the Fund now in issue. It is accepted that on the face of it and subject to the challenges Shoby seeks to make this fund is caught by the fixed charges in favour of SSSHL and Shoby and so by virtue of the priority given by the Intercreditor Deed would be entirely payable to SSSHL.

11. The purchaser was a company called Cumberland Ltd. No connection between it and Shoby has been acknowledged, but it appears likely that there must be some such connection because Cumberland negotiated provisions in the sale agreement that allowed it an opportunity to explore whether Arboretum might successfully challenge the validity or enforceability of SSSHL's security and a period in which it could exercise an option to have any claim that Arboretum might make in that respect assigned to it. It is difficult to see how the successful pursuit of such a claim could benefit Cumberland, though it would clearly be of benefit to Shoby. At all events, although it apparently obtained a favourable opinion of counsel, Cumberland did not take up the option to have any claim assigned to it and that option has now lapsed.

Terms of the Intercreditor Deed and Shoby's intended challenge

12. Clause 2.9 of the Intercreditor Deed provides that:

> "**No challenge to security**
>
> Neither Lender shall challenge or question:
>
> 2.9.1 the validity or enforceability of any Security constituted by a Security Document;
>
> 2.9.2 the nature of any Security constituted by a Security Document; or
>
> 2.9.3 without prejudice to the generality of the foregoing, whether any Security constituted by a Security Document is fixed or floating."

13. There were in fact three "Lenders" defined, ie Lendy, SSSHL and Shoby, but although the use of "neither Lender" would indicate two parties, it is not suggested this clause does not apply to all three of them. "Security" is widely defined as including any mortgage charge or other security interest and "Security Document" as including "each of the Senior Security Documents". Those in turn include Shoby's debenture and legal charge, which are among documents listed in a schedule, and "… any other document… which secures any of the Senior Debt".

14. It is then necessary to bear in mind a chain of linked definitions:

    i) "Senior Debt" is defined as "all Liabilities which are or may become payable or owing by the Borrower to the Beneficiaries… under the Senior Debt Documents";

    ii) "Beneficiaries" includes Lendy and the investors for which it acted as agent;

    iii) "Liabilities" means "all present and future monies, obligations or liabilities, whether actual or contingent… as principal or surety and/or in any other way"

    iv) "Senior Debt Document" includes

        a) "the loan agreement entered into on or around 5 September 2016 and the term sheet… between [Arboretum] and [Lendy]". Although this is in the singular, it was not suggested that it did not cover both the Land Loan agreement and the Development Loan agreement.

b) The Senior Security Documents, and

c) The Intercreditor Deed itself.

15. There are additional definitions and terms of the security documents that I will need to refer to later.

16. In order to explain the nature of the challenge that Shoby wishes to bring, and why he submits it is not prevented by clause 2.9, Mr Tabari referred me to the draft Particulars of Claim that Shoby has served with its evidence. These state:

i) By paras 1 and 2 that Shoby seeks "declaratory relief in respect of the value of the competing securities held by itself and SSSHL" and denies any "challenge to the validity or enforceability or nature of the legal charge and debenture granted in favour of SSSHL…".

ii) By para 15 that in its loan agreements

a) Lendy acted only as agent for the defined "Lenders", not as principal;

b) The loans were "predicated on the express basis that a defined number of identifiable lenders would at all times be in contracts of lending with [Arboretum] in a total aggregate sum no less than…" the maximum stated loan amounts. It is not said where such a basis is expressed and I was not referred to any document doing so;

c) "Lendy was representing that it had secured the express agreement of a defined group of Lenders…" to advance those aggregate amounts;

d) Lendy was warranting the existence of that "defined group of Lenders"; and

e) Lendy would only release any Lender wishing to withdraw if another Lender replaced him with a commitment for a similar amount.

iii) By para 16 that Lendy had not in fact secured agreement of a defined group of Lenders to advance the full amount of the loans. In support of that Shoby relies on inference from delays in providing funds in response to drawdown requests, and statements in the Arboretum administrators' proposal document, and its intention to seek information on disclosure.

iv) By para 17 that "from the date of the Lendy loans onwards it could not have been that case that the Lenders were advancing the full sum of [the loans] or that the group of Lenders advancing the full sums even existed and accordingly the representation and warranties set out above were incorrect and the basis of the Lendy loan agreements failed."

v) By para 19 that "as a consequence [Arboretum] is only liable to Lendy for repayment of the entirety of the sums paid over to it from 5 September 2016 onwards on the grounds of either (i) a restitutionary claim or (ii) an implied loan as between Lendy and [Arboretum]. Given the failure of basis described above [Arboretum] bears no liability pursuant to the terms of the Lendy loan agreements."

17. Mr Tabari accepts that Arboretum is under an obligation of some sort to repay the amounts advanced to it by Lendy (or its investors) but submits that if that obligation does not arise under the written loan agreements but instead on one or other of the two bases set out in the draft Particulars of Claim, the obligation is not secured by the SSSHL security documents. That is not, he submits, a challenge to the "validity or enforceability" of those securities; he accepts that they are valid securities but in the circumstances there are no obligations that they secure. That is what he characterises as the "value" of the securities.

18. There are I think a number of very obvious difficulties that such a claim would face. Insofar as it alleges a breach of warranty or misrepresentation, that would not be sufficient to make the loan contracts void ab initio, and Mr Tabari accepts that (a) Shoby has no standing to take any action on behalf of Arboretum to avoid those contracts if they are presently only voidable and (b) neither Arboretum nor its administrators have sought to do so. He submits that Shoby does not have to show that the contracts are void, only that nothing was lent under them. Pressed as to what the alleged "failure of basis" means in law, he struggled to articulate it.

19. Insofar as it is said that on the facts (yet to be established) Lendy did not have investors available to provide the full amount of the loans contracted for, it is nevertheless inescapable that it must have had at least some such investors, because £6.8m of funds was provided. The allegation seems to be made in relation to both loans, but it is not clear from the documents before me whether there was any shortfall in the amount of the Land Loan advanced for purchase of the property or only in the Development Loan to fund later costs. If there was a shortfall on either, it is hard to see why anything the investors did advance does not constitute a loan on the terms of the written agreement made for the purpose. There may be other consequences if a shortage of investors was proved, such as a claim for breach of warranty of authority against Lendy. It may be the case that on the construction of the loan agreements Lendy has committed such investors as it had to provide the whole amount of the loans contracted for, notwithstanding any limitations on the extent of its authority as between it and those investors. If Lendy had some investors for whom it could act as agent, but not enough to provide the whole loan, it may be that Lendy made itself liable for the balance on the basis that it acted as purported agent for a non-existent principal.

20. However, Mr Tabari submits, the merits of Shoby's proposed claims are not within the defined preliminary issue and so are not before me, and accordingly I should make no determination of them but assume for present purposes that the claims might succeed. The question then is, on that assumption, are they the sort of claims that are barred by clause 2.9?

Construction of SSSHL's security

21. Shoby's proposed claim raises the question whether those claims that it asserts are the only ones available to the Lenders are, on the proper construction of the SSSHL security documents, secured by those documents. I was addressed by both counsel on that question of construction, although arguably at least determining that question (as distinct from the construction of the Intercreditor Deed) goes beyond the preliminary issue as defined. Given that I did hear argument on it I propose to make such a determination, since to avoid doing so would merely leave the matter open and potentially having to be argued again at further cost to the parties if the matter goes further.

22. By clause 3 of the SSSHL debenture various charges are created "as a continuing security for the payment and discharge of the Secured Liabilities". There is also a direct covenant in clause 2 to "pay…and discharge the Secured Liabilities when they become due". The debenture provides that:

    i) "Secured Liabilities" means "all present and future monies obligations and liabilities of the Borrower to the Beneficiaries whether actual or contingent and whether owed jointly or severally, as principal or surety or in any other capacity together with all interest (including without limitation default interest) accruing in respect of those monies obligations or liabilities pursuant to any Finance Document."

    ii) "Finance Documents" means "the Loan Agreement the Security Documents and all other agreements entered into between [Lendy] (directly or as agent) or [SSSHL]…and [Arboretum]."

    iii) "Loan" means the principal amount outstanding under the Loan Agreement and "Loan Agreement" means "the loan agreement entered into on or around the date of this debenture between [Arboretum] and [Lendy] as agent for the Lenders." Again, it was not suggested this was not apt to refer to both the loan agreements made with Lendy on 5 September 2016.

    iv) "Lenders" means "the persons who have agreed with [Lendy] to provide all or part of the Loan…"

23. It is not necessary to set out extensively in this judgment the law on interpretation of written contractual documents, which is now well known having been discussed frequently at the most senior judicial levels. Mr Tabari summarised it thus in his skeleton:

> "a. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The test is objective;
>
> b. The admissible background includes material which a reasonable person would have regarded as relevant and which would have affected the way in which they would have understood the language of the document, and which would have reasonably been available to the parties;
>
> c. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent; and
>
> d. The rule that words should be given their natural and ordinary meaning reflects the common-sense proposition that one does not easily accept that people have made linguistic mistakes, particularly in formal documents. "

He referred for these propositions to *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 (HL), *BCCI v*

Ali [2002] 1 AC 251 (HL) and *Rainy Sky SA v Kookmin Bank* [2012] 1 All ER 1137 (UKSC) and drew my attention to the more recent authorities emphasising that the starting point for consideration is the ordinary and normal meaning of the words used in the document; see *Arnold v Britton* [2015] UKSC 36.

24. Mr Tabari's submissions began with the interpretation of SSSHL's debenture. He submits that it secures "Secured Liabilities" as defined, which must be liabilities arising "pursuant to a Finance Document". If whatever obligations are owed to the Lenders arise by way of restitutionary obligation or pursuant to an implied contract of loan, rather than the loan documented in the Loan agreements, those obligations do not arise pursuant to a Finance Document and so are not Secured Liabilities as defined.

25. Mr Weaver's submission was that the term Secured Liabilities is very widely defined; the opening words of the definition referring to "all present and future monies obligations and liabilities of the Borrower to the Beneficiaries whether actual or contingent and whether owed jointly or severally, as principal or surety or in any other capacity". He submitted that the qualification "pursuant to any Finance Document" applied only to the second part of the definition, commencing "together with all interest… in respect of those monies…". Accordingly, he said, the principal obligations secured extended beyond those governed by the Finance Documents and any limitation to liabilities arising "pursuant to" those documents applied only to questions of interest.

26. Further, Mr Weaver submitted, since the definition of "Finance Documents" extended not only to the specified written loan documents but to "all other agreements entered into between" Lendy and either SSSHL or Shoby, any implied agreement of loan such as Shoby seeks to establish would also be within the definition, notwithstanding it was not in written form. To that Mr Tabari counters that since the defined term refers to documents, the "other agreements" included must be intended to be agreements in writing.

27. On these specific aspects, in my judgment Mr Tabari's argument is to be preferred. In *Chartbrook v Persimmon* [2009] UKHL 38 Lord Hoffman said (see paras 16 and 17) that the words adopted as defined terms were not likely to be chosen at random and could properly be regarded as indicating the concept intended to be defined. The other Lords either agreed with his opinion or did not express any different view on this point. The defined term "Finance Documents" strongly suggests that the parties intended to refer to identifiable documents, so that the reference to "other agreements" would be taken as being to documents setting out or describing other agreements, and not to extend to agreements made purely orally or otherwise arising without writing.

28. Looking then at the definition of "Secured Liabilities", although the way in which the reference to Finance Documents is included at the end and could as a matter of syntax be taken to refer only to the part immediately preceding it (obligations relating to interest), it seems to me there would be little commercial sense in setting out to secure the principal amount of "all monies and obligations", whether or not relating to a Finance Document, but providing that security for obligations relating to interest is to be limited by the requirement that they, in contrast to principal, must arise "pursuant to" a Finance Document. In my judgment, the objective observer would conclude that

the clause could have been better drafted and the parties intended that reference to apply to the whole definition.

29. That is not however, it seems to me, the end of the question. Shoby's proposed case will only avail it if the claims it accepts the Lenders would have are not in respect of "monies obligations [or] liabilities … pursuant to any Finance Document". Inherent in Mr Tabari's submissions is the premise that claims "pursuant to" a Finance Document are limited to claims to enforce the terms of that document as a contract. But I do not consider that limitation would be justified. The language used is plainly intended to be wide; why should it be thought that the multiple types of Secured Liabilities referred to (monies obligations or liabilities) must all be contractual in nature?

30. While it is obviously the case that each Loan agreement, for instance, is intended to create a contract and give rise to contractual obligations, at a more general level it describes a transaction that the parties have agreed to enter into, by which substantial amounts of money are to be paid over, on behalf of the Lenders, to Arboretum. The monies that were in fact paid over were no doubt so paid with the intention on both sides of pursuing the transaction described in that document. If the fact of payment gives rise to obligations to repay (as Shoby's proposed pleading accepts it does) then those obligations, whatever their legal characterisation, are it seems to me properly considered as obligations arising "pursuant to" that transaction. It may thus equally be said that the obligations arise "pursuant to" the Finance Document, in that it was that document that provided for the transaction to be entered into, and which the parties to it considered they were following.

31. Would the objective observer have understood the parties to be limiting the agreement to create security to security for claims in contract? I do not think it could be seriously suggested that any reasonable observer would be likely to have thought so. Knowing that the Lenders were to advance money to Arboretum on the agreed basis that its repayment would be secured, it would be a nonsense to think that the parties intended that the security would be available if a claim for repayment was made on the basis of the law of contract and relying on an express written agreement, but not if a claim that was in substance for the same remedy was made on another legal basis, such as restitution or implied contract as Shoby suggests it should. To postulate such an intention on Arboretum's part suggests something approaching deviousness, which it would be most unlikely that Lendy or the Lenders it acted for would have agreed to.

32. As between the two potential meanings of the phrase "obligations … pursuant to any Finance Document", then, which might be expressed as:

    i) "obligations arising in the law of contract from the terms of any Finance Document" and

    ii) "obligations arising from the transactions provided for in any Finance Document"

    in my judgment the reasonable objective observer would conclude that the latter was intended.

33. I conclude then that even if Shoby's proposed challenge were to succeed and establish that the Lenders' entitlement to recover the sums they advanced arises by way of restitutionary obligation or implied rather than express contract, that would be a Secured Liability of Arboretum within the meaning of the SSSHL debenture. It might

of course be the case that the amount recoverable on those bases would not be exactly the same as it would have been under the written contractual terms (for instance in relation to interest) but given the amount outstanding for principal that will not affect the outcome of this case.

Construction of the Intercreditor Deed

34. Turning to the interpretation of the Intercreditor Deed, the question is what is the meaning of the relevant words of cl 2.9:

> "Neither Lender shall challenge or question… the validity or enforceability of any Security constituted by a Security Document…"

and particularly what is meant by "validity".

35. Mr Tabari's submission is that "validity" is limited to matters such as whether formalities of execution and registration had been complied with, whether the Security Documents refer accurately to any associated legal charges, whether one debt or security ranks above another and what assets the security attaches to. Of these however, questions of the accuracy of cross references and the extent of the assets covered are questions of the meaning of the security document rather than its validity, and ranking between securities is not a matter of validity of the respective security documents but the subject of the agreement recorded in the Intercreditor Deed itself. Mr Tabari's submission therefore comes down to compliance with formalities.

36. He goes on to submit that the issues Shoby seeks to raise are, as it asserts in its proposed pleading, issues as to the value of the security which, if the parties had intended to bar each other from questioning, they could have dealt with by adding additional words such as "the amount owing to either Lender under any Security…". However the challenge Shoby seeks to make is not merely a matter of quantifying the amount due to the Lenders under a relevant obligation, but of questioning (a) whether the obligation exists at all, or (b) if it does whether it is an obligation secured by the terms of the Security Document. It is not a question for instance of disputing the amount lent by the Lenders, or the calculation of interest due to them, but whether the obligation to repay what was lent is effectively secured or not.

37. Mr Weaver points out that initially in correspondence Shoby's solicitors described the nature of the challenge their client intended to bring as a "challenge [to] the validity of the loans and/or security" or to seek a declaration "whether the security of [SSSHL] is valid…". Shoby's application as issued seeks a declaration that it has standing to challenge the validity of security held by SSSHL. It was only when their attention was drawn to cl 2.9 of the Intercreditor Deed that they re-cast their contention into its present form and denied any attack on validity. It is nevertheless, he submits, a challenge to SSSHL's ability to rely on its security and thus a challenge to the validity of that security. It is hard, he submits, to see that an allegation that security cannot be enforced is not a challenge to its validity or nature. It is a fair point, it seems to me, that the term "validity" may have more than one meaning, depending on the context, and that Shoby itself appears to have considered that the challenge it intended to bring was one as to the validity of SSSHL's security.

38. I do not doubt that a security may in principle be a valid security, in the sense that all necessary formalities have been complied with and a security interest in property has

been created, and yet in the event secure nothing because no liabilities of the sort it is expressed to secure have arisen, but that is not the only possible meaning of the word "valid" or "validity" and it seems to me that that is too limited a concept for these parties to have been likely to have intended it in the context of an agreement between them for the ranking of their respective securities. The surrounding circumstances at the time of the Intercreditor Deed were that both of them had entered into loan agreements with the borrower, that in both their cases money had already been advanced ostensibly for the purposes of those loan agreements and they had both been given security, and the issue they were agreeing between them was the priority of their securities. There is no indication in the deed that any question is being raised or reserved about the nature or effectiveness of their respective transactions; indeed every indication that these matters are not in dispute. Mr Weaver points to recital A by which the parties record that "[Lendy] has agreed to provide, or has provided, the Senior Debt to the Borrower on behalf of the [Lenders] secured by way of the Senior Security".

39. Semantically, it might be said (Mr Tabari did not do so) that Senior Debt is not "provided" by a lender because that term is defined by reference to obligations of the debtor rather than advances made by the lender. Senior Debt as defined therefore arises as a result of money having been advanced. But what this recital is evidently referring to is the advances that have been made by Lendy, and the further advances agreed but yet to be made, and it can only sensibly be read as an acknowledgment that such advances have given rise or will give rise to Senior Debt, ie liabilities "under the Senior Debt Documents" and that such Senior Debt is "secured by the Senior Security".

40. A similar recital B is made in relation to Shoby's advances.

41. With this background, it seems to me, the phrase "validity … of any Security" is unlikely to be intended to refer only to matters of formal validity as a legal security interest, but more generally to include the effectiveness of the security as a security for the acknowledged secured obligations on both sides. The parties are seeking to avoid disputes between themselves by preventing such challenges and agreeing the monetary extent of the secured liabilities due to SSSHL that will rank in priority.

42. This is reinforced by consideration of other provisions of the Intercreditor Deed:

    i) By clause 2.3 the parties agreed that:

    > "Subject to clause 10…the Senior Debt ranks and shall rank in priority to the Junior Debt".
    >
    > This is stated separately from the agreed ranking of security, and so relates to the order of payment of the debts themselves. It would be inconsistent with the agreed stated ranking for Shoby to have retained an ability under clause 2.9 to argue that the Senior Debt it acknowledged to have arisen was in fact unsecured and so ranked for payment after its own secured Junior Debt.

    ii) By clause 7.2 it was agreed that:

> "The subordination in this deed, and the obligations of the Junior Lender under this deed, will not be affected by…
>
> 7.2.6 any invalidity, illegality, unenforceability… of any actual or purported obligation of, or Security held from, [Arboretum] …under any Debt Document or any other document or security."

It would be inconsistent with that provision for Shoby to have retained an ability to argue that the obligations that were on the face of it incurred (and so "purportedly incurred") under Lendy's loan agreements, such as the obligation to repay the sums advanced by the Lenders in apparent performance of those agreements, were in fact invalid or unenforceable because they were in some way not so incurred but had a different legal character such as to render them outside the scope of the Lenders' security.

iii) By clause 10 the parties agreed that:

> "The priority of the Lenders shall stand … so that all amounts from time to time received or recovered by a Lender in connection with the realisation or enforcement of any part of the Security…shall….be applied in the following order of priority… first in or towards discharge of the Senior Debt…"

It would be inconsistent with application in that order of priority for Shoby to have retained an entitlement to argue that realisations from sale of charged property should be applied in discharge of its Junior Debt in priority to the Senior Debt that it acknowledged to exist, on the basis that the security held by SSSHL was ineffective to secure that Senior Debt.

iv) By clause 12 it was provided that the Senior Debt could be refinanced at any time, without the prior consent of Shoby, and "the new debt" would rank with the same priority as SSSHL's Senior Debt, provided the new lender agreed to be bound by the terms of the Intercreditor Deed. Of course there has not been any such refinancing, but this clause shows that the parties did not attach importance to the exact nature of the obligations that were given priority, or even who was entitled to the benefit of them, and so makes it less likely that cl 2.9 was intended to preserve for Shoby an entitlement to dispute priority by reference to the legal characterisation of those prior ranking obligations.

43. It follows that, in my judgment, any challenge putting in question whether the Senior Security is effective to secure the obligations arising from the advances actually made by the Lenders, or those provided for by the loan agreements already entered into, is a challenge to the "validity" of that security within the meaning of clause 2.9.

44. I should say that would be so even if I had agreed with Mr Tabari on the issue of construction of SSSHL's debenture. If Shoby has agreed not to challenge the validity of the security as security for obligations it acknowledged to exist, it cannot matter what the nature of those obligations is, or the nature of the challenge that is raised.

45. This construction would not prevent Shoby disputing the quantum of the secured liabilities, for example by questioning what had been advanced or the calculation of

interest. But Shoby's proposed challenge is not a challenge on quantum, notwithstanding its attempt to describe it as such.

46. For these reasons, in my judgment, on the true construction of clause 2.9 of the Intercreditor Deed that clause does prevent Shoby from bringing the challenge it proposes.

Estoppel

47. A further issue that was raised at the hearing is SSSHL's argument that Shoby is in any event estopped by the terms of the Intercreditor Deed, and particularly by Recital A referred to above, from contending that the obligations owed to the Lenders are not obligations arising pursuant to the Lendy loan agreements that are secured by SSSHL's security. Mr Tabari pointed out that this is not a matter within the terms of the agreed preliminary issue, but, as Mr Weaver submits, it is not a new issue between the parties having been canvassed in correspondence between solicitors, and since I heard argument from both sides it seems to me better to make a determination of it rather than leave the parties to the expense and delay inherent in potentially revisiting it at a later stage.

48. The point is similar to, but not the same as, that considered as a matter of construction of cl 2.9. It would arise if I were wrong in the finding I have made on that issue, and also wrong on the question of construction of the SSSHL debenture.

49. I take the law briefly as Mr Tabari did not dispute the propositions Mr Weaver put forward, which I summarise as:

    i) The law now recognises "contractual estoppel" as a concept separate from other forms of estoppel such as estoppel by convention. It arises "when contracting parties have in their contract agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist. The effect of such 'contractual estoppel' is that it precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract" (Chitty on Contract, 33rd edn. para 4-116).

    ii) Thus it does not matter if the facts are actually different from what they were agreed to be in the contract, even if the parties knew that to be the case when the contract was made.

    iii) The estoppel does not require it to be shown that it would be unconscionable to resile from the agreed statement of fact, or that detrimental reliance has been placed on that statement.

    See in particular *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 at [56-7] and *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [142-4] [157-160] and [177].

50. As I have said above, Recital A of the Intercreditor Deed can only in my judgment sensibly be read as an acknowledgment that the advances that had by then been made by the Lenders had given rise to Senior Debt that was secured by the Senior Security. The definition of Senior Debt refers to "Liabilities … under the Senior Debt Documents". That amounts to a statement of facts agreed between the parties to that

deed, from which neither of them may depart, at least in the context of matters relating to the Intercreditor Deed.

51. If the obligations of Arboretum arising from the Lenders' advances are agreed to be obligations "under the Senior Debt Documents" it is in my judgment plainly impossible to argue that they are not obligations "pursuant to any Finance Document" for the purposes of the definition of Secured Liabilities in SSSHL's debenture, since there can be no material difference between "under" and "pursuant to", and all the Senior Debt Documents, as defined in the Intercreditor Deed (and in particular the Lendy loan agreements), are Finance Documents as defined in the debenture.

52. The claim that Shoby seeks to pursue is equally plainly one that arises in the context of the Intercreditor Deed, since Shoby seeks to deploy it to deny the liabilities it impugns the priority they would otherwise have under the terms of that Deed. Those claims necessarily involve assertions that the liabilities do not have the character that they have, by Recital A, been agreed to have, and accordingly the estoppel bites to prevent the claims being made.

Standing to seek a declaration

53. Finally, I should say that there was some discussion at the hearing about Shoby's standing to seek a declaration as to the nature of obligations arising as between Arboretum and the Lenders, given that it was not a party to the relevant contracts and that the declaration it seeks involves advancing a disputed case on the facts as between Arboretum and the Lenders, which Arboretum itself has not advanced and, at present at least so far as its administrators are concerned, which Arboretum has no intention of making. Mr Tabari referred me to *AXA SA v Genworth Financial International Holdings Inc* [2018] EWHC 2898 (Comm), and in particular to paras 31-34 of the judgment of Andrew Baker J in support of his proposition that it could nevertheless be open to Shoby to seek the declaration it does.

54. That issue was not however before me as part of the agreed preliminary issue, and in contrast to others that I have dealt with was not argued fully, so it is best that I express no view upon it. It may be that it is now unnecessary in any event as a result of the issues that I have decided.

55. I will list a date for this judgment to be handed down without a hearing, and invite the parties to agree the order resulting. If there are matters arising that cannot be agreed, or any application for permission to appeal, they should if possible be dealt with by short written submissions on each side, to be lodged at least one clear working day before the handing down, and I will determine them, again if possible, without a hearing.