Neutral Citation Number: [2021] EWHC 1864 (Ch)

Case No:PT-2020-MAN-000195

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Date: 5th July 2021

Before :

HHJ Halliwell sitting as a Judge of the High Court

- -

Between :

KARUNIA HOLDINGS LIMITED	**Claimant**
- and -	
CREATIVITYETC LIMITED	**Defendant**

- -
- -

Anthony Jones (instructed by **Fieldfisher LLP**) for the **Claimant**
Mr James Pickering QC (instructed by **Ralli Solicitors LLP**) for the **Defendant**

Hearing date: 27th May 2021

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The deemed date and time for hand down is 5th July 2021 at 2.30 pm.

HHJ Halliwell:

(1) *Introduction*

1. The Claimant ("Karunia") and the Defendant ("Creativityetc") are each entitled to charges ("the Charges") over properties at 73-87 Hillgate, Stockport, Manchester SK1 3AW ("the Properties"). Title to the Properties is registered at HM Land Registry and notice of the Charges has been registered together with a deed of priority dated 22nd January 2015. By its Claim ("the Claim") in these proceedings, Karunia seeks a declaration that the deed is void and an order removing all registered entries in respect of it. Creativityetc has filed a Defence and Counterclaim in which it takes issue with the entire factual and legal basis of the Claim.

2. This is my judgment on Creativityetc's application for summary judgment on the Claim, issued on the basis Karunia has no real prospect of success. Since the Claim is based on forgery, I must resolve whether Karunia has any real prospect of establishing the deed was forged and, if so, overcoming secondary issues based on the law of contract, deeds and estoppel. In the alternative, Creativityetc seeks security for costs. If I give summary judgment on the Claim, Creativityetc is content for the Counterclaim to be dismissed.

3. I shall also give judgment on a cross application, issued by Karunia following the circulation of a draft copy of Paragraphs [1] – [2] and [4] – [43] of this judgment. This is for the admission of new evidence. In giving judgment, I shall identify the principles governing such an application before determining whether the new evidence should be admitted.

(2) Background

4. Karunia is a limited company registered in Cyprus. At all material times, Mr David Rose was beneficial owner of its shares. Ms Eva Agathagelou ("Ms Agathagelou") and Mr Stelios Sawidis held office as directors but Mr Rose has filed evidence in parallel proceedings (Claim no. E30MA138) for the redemption of Creativityetc's security contending that they did so as "nominee directors…effectively acting on [his] behalf".

5. On 7th May 2014, the Properties were charged to Karunia and, on 25th June 2014, Karunia was registered as charge-holder. On 14th January 2015, Mr Rose and Mr David Waxman were registered as proprietors.

6. At about this time Creativityetc confirmed it was willing to advance £240,000 to Karunia and an associated company, Dreadnought Limited ("Dreadnought"), subject to a personal guarantee from Messrs Rose and Waxman supported by a first charge over the Properties. It did so in a facility letter dated 16th January 2015 ("the Facility Letter") confirming that "the advance will be made when the formalities have been dealt with and the Security for the Loan completed…" and that "upon completion…the charge in favour of Karunia…will rank lower in priority to our charge over [the Properties]. To that end a Deed of Priority in our favour will be required". By a Credit Agreement ("the Credit Agreement") of even date, which incorporated – by reference – the provisions of the Facility Letter, it was provided that Karunia would provide Creativityetc with "a first legal charge" over the Properties. The Facility Letter and the Credit Agreement appear to have been counter signed on Karunia's behalf; they each bear Karunia's stamp together with Ms Agathagelou's signature. The Credit Agreement was signed as a deed and attested by Karunia's solicitor, Mr Eli Hunter Zrihan ("Mr Zrihan") of Michael Hunter & Partners, Tel-Aviv, Israel. Mr Zrihan also endorsed the Credit Agreement with a certificate that he had independently advised Karunia and the same had been "properly executed…as a result of full and informed consent".

7. By an email timed at 13:29 on 22nd January 2015 ("the 22nd January 2015 Email"), Mr Zrihan forwarded to Abbey Solicitors, on behalf of Creativityetc, a series of "original executed and witnessed loan documents", including the Facility Letter and the Credit Agreement together with *inter alia* a first legal mortgage ("the Mortgage"), deed of priority ("the Original Deed of Priority") and solicitors' undertakings ("the Solicitors' Undertakings").

8. The Mortgage was signed as a deed by Ms Agathagelou, as director, and Hive Management Services Ltd ("Hive"), as company secretary. Their signatures were un-dated but, again, attested and certified by Mr Zrihan. It again bore Karunia's stamp.

9. On its face, the Original Deed of Priority was also signed as a deed by Ms Agathagelou, as director, and Hive, as company secretary. It again bore Karunia's stamp. Ms Agathegelou's signature was in manuscript and Hive's was typed. Unlike the Mortgage, Mr Zrihan's attestation clause and certificate were not incorporated. Karunia expressly

agreed that Creativityetc's security would rank ahead in priority postponing its own security to the Mortgage.

10. The Solicitors' Undertakings were contained in a letter dated 22nd January 2015 from Mr Zrihan, on behalf of Michael Hunter & Partners to Abbey Solicitors on behalf of Creativityetc. They were in the following form.

> "We the solicitors acting for the Borrowers Karunia Holdings Ltd and Dreadnought Ltd confirm that we hold the properly executed originals of the documents attached to this email ('the Loan Documents'). We irrevocably undertake to send these to you today by safe courier and/ or DHL and to hold to your order, certified copies of each document in the event that the original documents are lost or delayed during delivery.
>
> We irrevocably confirm that our clients agree to be immediately bound by the terms of the Loan Documents irrespective of the physical delivery to you of the originals…..
>
> This undertaking will take immediate effect but only once your client Creativityetc Ltd has authorised you to disburse the funds in accordance with their Facility Letter dated 16 January 2015 (being one of the Loan Documents attached) and that you have initialled the transfers detailed in it, including one to this firm for not less than £103,000."

11. Following the 22nd January 2015 Email, Creativityetc authorised the release of the sum of £240,000. It did so later that day.

12. Mr Zrihan then posted or purported to post the original "Loan Documents" to Abbey Solicitors. However, for reasons that are obscure, the Original Deed of Priority appears to have been amended before it was posted so as to alter the date assigned to the Facility Letter in the Definitions Section. This involved substituting 20th for 16th January 2015. There is no evidence another facility letter was issued on 20th January 2015, certainly not a facility letter in revised terms. The new date is thus likely to have been introduced in error and it is plain that the parties intended to refer to the Facility Letter. It was not suggested that it could have been intended to refer to anything else. Moreover, it was incorporated in a reference which had no material bearing on the operative provisions of the deed itself. However, the alteration was endorsed with the initials of Ms Agathagelou

and, upon receipt, Mr Stephen Henesy initialled the alteration and signed the amended Deed ("the Amended Deed of Priority") in his capacity as director of Creativityetc. Once that was done, the Amended Deed of Priority was to be construed in the light of the surrounding circumstances and the reference to 20th January 2015 construed as a reference to 16th January 2015. It did not give rise to any material change in relation to the rights and obligations of the parties.

13. Copies of the Mortgage and the Amended Deed of Priority were then sent to HM Land Registry and, on 4th February 2015, notice of the same was registered on the Charges Register for the Properties.

14. As part of the loan arrangements, Karunia had agreed to grant Creativityetc a debenture over its assets. It did so but the debenture was not initially registered in Cyprus. Mr Stephen Henesy has filed a witness statement confirming that, at a meeting in Cyprus, in August 2015 his uncle, Mr Nick Henesy, was invited to sign another copy of the Deed of Priority ("the Third Version") in connection with the registration formalities in Cyprus. He apparently did so in Mr Stephen Henesy's name with his authority. The debenture was subsequently registered. It is unclear how and, if so, to what extent the Third Version was utilised in connection with the registration formalities.

15. On 5th May 2017, Creativityetc formally demanded repayment. On 5th July 2017, it commenced legal proceedings against Karunia and, on 4th September 2017, obtained judgment, in default, for £268,103.75. Judgment has not been set aside and this amount remains outstanding together with statutory interest.

16. Creativityetc also took steps to place Karunia in receivership and, on 12th May 2017, Mr Ioannis Moditis was appointed receiver. There is an issue about the lawfulness of his appointment. In any event, his appointment has been terminated or is in the process of being terminated.

(3) The Claim

17. By these proceedings - issued on 21st December 2020 - Karunia seeks "a declaration that a Deed of Priority dated 22nd January 2015…made between [Karunia] and [Creativityetc] affecting [the Properties] is void by reason of fraud" and "an order that the Land Register be rectified by removing all entries relating to the Deed".

18. The basis for the Claim is set out as follows in Paragraph 5 of the Particulars of Claim.

> "…the Deed [of Priority] was obtained and registered by way of fraud and is accordingly a false instrument.
>
> *Particulars of Fraud*
>
> (1) The Deed was not executed by officers of [Karunia] on its behalf; they neither signed nor initialled the Deed.
>
> (2) The Deed is therefore a forgery.
>
> (3) The Deed was subsequently registered at the Land Registry by the Defendant with the effect that the Defendant's security ranked ahead of that of the Claimant.
>
> (4) But for the registration of the Deed, the Claimant's security would have ranked ahead of that of the Defendant.

19. There are, of course, at least three versions of the Deed, namely the Original Deed of Priority (Para 6 above), the Amended Deed of Priority (Para 11 above) and the Third Version (Para 13 above). However, they are each derived from the Original Deed of Priority and the putative fraud or forgery must logically have been committed when the Original Deed was executed by Ms Agathagelou and/or Hive.

(4) The Defence

20. Creativityetc contends that, since the fraud or forgery must have been committed whilst the Original Deed of Priority was in the possession of Karunia or its agents and appears inconsistent with the Solicitors' Undertakings, it is for Karunia to identify the fraud or forgery, stating how and by whom it might have been committed, and provide at least some evidential basis for its case. Although it appears the original is unavailable and has not been referred to a handwriting expert, Creativityetc submits that it is not enough for Karunia to state, baldly, that the Deed of Priority has not been executed by its officers. In the absence of explanatory evidence, it is submitted Karunia has no real prospect of establishing the factual foundations for its case. If not, Creativityetc submits that, following the advance of the loan monies, Karunia is estopped from challenging the Original Deed of Priority or, indeed, the Amended Deed of Priority in the absence of a

successful challenge to the other loan documents, in particular the Facility Letter and the Credit Agreement.

(5) The test for summary judgment

21. The Court may give summary judgment against a claimant on the whole or part of a claim, under *CPR 24.2*, if satisfied that it has no real prospect of succeeding on the claim and there is no other compelling reason why the case should be disposed of at trial.

22. In *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)* at *[15],* Lewison J (as he then was) provided guidance on the principles for determining whether a party to proceedings has reasonable prospects of success. This guidance has been approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301* at 24. It is as follows.

    i. The court must consider whether the respondent has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 1 All E.R. 91*;

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

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

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

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

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

vii. On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*.

23. Summary judgment should not be given if there is some other compelling reason why the case should be disposed of at trial. This can include cases in which summary judgment will not dispose of all the issues for determination, for example where there will remain in existence an overlapping counterclaim, or where there will remain circumstances which warrant further examination. However, in the present case, Mr Pickering QC for

Creativityetc accepts that, if I dismiss the Claim, this will dispose of the need for it to obtain the relief sought by way of Counterclaim. In this event, he invites me to dismiss the Counterclaim.

(6) Formalities of execution

24. Subject to the issue of forgery, there is no material question about compliance with the statutory formalities for execution. Since Karunia was incorporated in Cyprus, these formalities were and are governed by *Regulation 4* of the *Overseas Companies (Execution of Documents and Registration of Charges) Regulations* 2009 (SI 2009 No. 1917). It was entitled to enter into written contracts under its common seal or by any person acting under its authority in accordance with the laws of Cyprus. Documents were to be executed by affixing its common seal or in any manner permitted by the laws of Cyprus. However, documents signed by a person acting under the authority of the company in accordance with the laws of Cyprus and expressed (in whatever form of words) to be executed by the company had the same effect in relation to the company as it would have in relation to a company incorporated in England and Wales. Documents executed as a deed for the purpose of *Section 1(2)(b)* of the *Law of Property (Miscellaneous Provisions) Act 1989* would be treated as validly executed if duly executed by the company and delivered as a deed. For the purposes of *Section 1(1)(b),* it was presumed to be delivered on execution unless a contrary intention was proved.

25. The Facility Letter was counter-signed by Ms Agathagelou and it bore Karunia's stamp. The Credit Agreement and the Mortgage were signed as a deed and delivered by Karunia acting by its authorised officers, Ms Agathagelou and Hive, as director and company secretary. The signatures on both documents were endorsed with Karunia's stamp. No doubt, Karunia's stamp can be treated as its common seal for the purposes of these Regulations; it is not suggested otherwise.

26. The Original Deed of Priority was signed as a deed, in manuscript, in the name of Ms Agathagelou. It was also signed as a deed in the name of Hive and endorsed with Hive's stamp.

27. If there were any doubt about compliance with the statutory formalities, Mr Zrihan has confirmed proper execution in the Undertakings Letter.

28. The distinct issue taken by Karunia is whether Ms Agathagelou's signature on the Original Deed of Priority is a forgery.

(7) Forgery

29. Karunia's case is narrowly based on the contention that "the Deed" is a forgery because it was not executed by officers of Karunia on its behalf and no such officers signed or initialled the Deed. Although no distinction is drawn in the Particulars of Claim between the Original Deed of Priority and the Amended Deed of Priority, it is no doubt intended to refer to the Amended Deed of Priority since, unlike the Original Deed of Priority, this is the initialled document delivered, for registration to HM Land Registry. It is also at least implicit that the critical issue is with Ms Agathagelou's signature.

30. On Karunia's behalf, Mr Anthony Jones submitted that caution should be exercised on any application for summary judgment in relation to a case based on fraud or forgery. This is particularly so in the present case where the original document is not available for the examination of a handwriting expert. He submitted that there is all the more reason for caution where there are or have been at least three versions of the document.

31. Mr Jones was correct in urging the need for caution but with two obvious qualifications. Firstly, the allegation of forgery is inconsistent with the Solicitors' Undertakings. By his letter dated 22nd January 2015, Mr Zrihan confirmed that Michael Hunter & Partners held *properly executed originals* of the attached documents. It was at least implicit that the originals were not forgeries. Secondly, the Original Deed of Priority was delivered and took effect when the 22nd January 2015 Email was sent and the loan monies released. It is true that the Original Deed of Priority was amended before it was posted to Creativityetc's solicitors. However, Karunia was already bound by the provisions of the Original Deed itself by the time it was sent and received. Moreover, whilst the minor amendment was later initialled on behalf of Creativityetc itself, it was plainly not material in the sense envisaged in *Pigot's Case (1614) 11 Co. Rep. 26b, 27a*, so as to invalidate the Deed itself. It can be seen from the judgment of Potter LJ in *Raiffeisen Zentralbank AG v Crossseas Shipping Ltd [2000] 1WLR 1135* at *1148 [27]* and *[28]* that materiality is to be assessed by asking whether the amendment is "potentially prejudicial" to the "legal rights or obligations" of the "would-be avoider" under the instrument. In the present case,

substituting a date that was plainly incorrect for the date of the Facility Letter in the Definitions Section of the Original Deed of Priority was not to the potential prejudice of the legal rights or obligations of either party to the Original Deed of Priority. The Amended Deed of Priority was signed as a deed by Mr Stephen Henesy and sent to HM Land Registry but, again, does not in itself present Karunia with grounds for challenge. Nor does it make a difference that Mr Nick Henesy later signed the Third Version in Cyprus.

32. Consistently with the guidance of Lewison J in *Easyair (supra),* I have reached the conclusion that, when assessed in its overall context, Karunia does not have any real prospect of successfully establishing its case based on forgery with the degree of conviction necessary to satisfy the test in *CPR 24.2(a).*

33. The overall context is significant. Several loan documents were signed and emailed, on 22nd January 2015, to Creativityetc's solicitors, including the Facility Letter, the Credit Agreement and the Mortgage. It is alleged that only one of these documents was forged. The forged document is the Original Deed of Priority. It is true that the original has not been produced or admitted for expert examination. However, where there is nothing in the overall context to suggest otherwise, it is incumbent on the respondent to an application under *CPR 24.2*, to provide at least some explanatory evidence to suggest it might have been forged. In the present case, it is not obvious from the available copies of the Original Deed of Priority or, indeed, the Amended Deed of Priority, that it might have been forged. Moreover, the point was not taken until recently. In his submissions for Creativityetc, Mr Pickering drew my attention to the Amended Particulars of Claim filed by Messrs Rose, Waxman and Palador Property Investments Limited in related proceedings against Creativityetc (PT-2020-MAN-000161) asserting, without any suggestion of forgery, that a deed of priority – presumably the Original Deed of Priority or the Amended Deed of Priority – has been signed by Karunia but not Creativityetc. It appears Mr Rose signed a statement of truth in support of this statement of case as recently as November 2020.

34. In these circumstances, it was and is incumbent on Karunia to provide at least some reason for the forgery together with explanatory evidence as to how and why this might have been done and by whom. It is implicit in Karunia's case that the document was forged whilst in the possession of Karunia itself or its solicitors, Michael Hunter & Partners

notwithstanding that, in the Undertakings Letter, Mr Zrihan confirmed he held *properly executed originals* of the attached documents, including the Original Deed of Priority. However, no explanation has been provided as to why, how and when it might have been forged and by whom. No witness statement – explanatory, confirmatory or otherwise - has been provided by Ms Agathagelou, Mr Zrihan or indeed anyone on behalf of the company secretary.

35. In my judgment, Karunia does not have any real prospect of establishing that the Original Deed of Priority or the Amended Deed of Priority was forged.

(8) Secondary issues

36. On the hypothesis Karunia was able to establish a forgery, Mr Pickering submitted that it is estopped from challenging the Original Deed of Priority or the Amended Deed of Priority on the basis that the Facility Letter contained an assurance that, upon completion, the Mortgage would rank in priority before the charge to Karunia. He relied, in particular, on the provision, under the heading "Security", that "the charge in favour of Karunia…will rank lower in priority to our charge over Stockport. To that end a Deed of Priority in our favour duly signed by Karunia Holdings Ltd will be required".

37. Mr Pickering relies on the judgments of the Court of Appeal in *Nationwide Anglia Building Society v Ahmed and Balakrishnan (1995) 70 P&CR 381* in which a vendor of business premises agreed to take a second charge to secure the unpaid balance of the purchase price. Having done so, the vendor sought to claim that his lien for the unpaid purchase price took effect as an overriding interest binding upon the first mortgagee under the provisions of the *Land Registration Act 1975*. The Court of Appeal concluded that the vendor's rights did not furnish it with an overriding interest binding on the first mortgagee. However, had it been otherwise, Aldous LJ stated that, by entering into an agreement with the purchaser to give the first mortgagee priority, the vendor had encouraged the first mortgagee to lend funds on that basis and was estopped from taking a contrary position.

38. Creativityetc is, if anything, in a stronger position than the first mortgagee in the *Ahmed* case (supra) since, by signing the Facility Letter, Karunia entered directly into contractual commitments with Creativityetc itself to give the Mortgage priority and sign a deed of

priority in Creativityetc's favour. Karunia was thus under a contractual obligation to execute the Original Deed of Priority and remains under such an obligation if it has omitted to do so. On the hypothesis Karunia has not executed the Deed of Priority, it could no doubt be required to do so through a decree of specific performance.

39. Moreover, it is a historically established principle that where one party to a deed omits to execute the same but accepts a benefit thereby assured, it will generally be required to observe the conditions to which the benefit was subject, see for example *Halsbury's Laws of England (5th edn) Vol 32 (2019) Para 264, McDonald v John Twiname [1953] 2QB 305.* In the present case, the Original Deed of Priority was part of a series of transactions under which Creativityetc advanced funds on condition the Mortgage was accorded priority. Following release of the loan monies, I can see no reason why Karunia should not be subject to the conditions of the Deed of Priority.

40. I am thus satisfied that, if the Original Deed of Priority and thus the Amended Deed of Priority were forged, nothing substantial will be achieved through Karunia's claim for declaratory relief or, indeed, its claim for an order altering the entries at HM Land Registry in respect of the registered title. This is on the basis that, if the Amended Deed of Priority is void, Karunia is liable to observe the conditions of the loan and has no real prospect of defeating Creativityetc's contractual arguments under the Facility Letter or its case based on estoppel.

(9) "Other compelling reason"

41. Having determined that Karunia has no real prospect of succeeding on the claim, it remains necessary to consider whether there is no other compelling reason why the case or issue should be disposed of at trial under *CPR 24.2(b).* This might include circumstances which require wider examination than the legal parameters of the statements of case.

42. In the present case, Mr Jones identified, as issues, the initialled amendments to the Original Deed of Priority and Mr Nick Henesy's execution of the Third Version. However, for the reasons I have given, the initialled amendments were not potentially prejudicial to the rights and obligations of the parties and did not invalidate the Deed. The Amended Deed of Priority was signed as a deed by Mr Stephen Henesy, sent to HM Land Registry and registered in the Charges Register. It is true that Mr Nick Henesy subsequently signed

the Third Version in connection with the registration formalities in Cyprus. However, no convincing argument was advanced that this could somehow have invalidated the earlier deeds. It is conceivable Creativityetc's account raises pertinent questions about the circumstances in which Mr Nick Henesy came to sign the Third Version. However, in my judgment, speculation about these matters does not amount to a compelling reason for the case to proceed to trial. If, in the absence of condition precedent, a party to a deed is generally entitled to sue without first executing the deed (see, for example, *Halsbury's Laws of England (5th edn) Vol 32 (2019) Para 266),* it is generally idle to examine the circumstances in which it might subsequently chose to do so.

43. I can see no other compelling reason why the case should be disposed of at trial.

(10) Karunia's subsequent application for an order permitting it to rely on new evidence

44. The hearing of Creativityetc's application for summary judgment took place on 17th May 2021. At the end of the hearing, I reserved judgment. On 25th June 2021, I emailed a draft judgment to counsel on a confidential basis in advance of the date listed for it to be handed down, inviting them to submit a list of typing corrections and other obvious errors. The draft judgment was essentially as set out in [1] –[2] and [4] - [43] above. By emails timed at 13:02 and 13:06 on 29th June 2021, Mr Pickering and Mr Jones responded with corrections. At this stage, judgment was due to be handed down at 10am on 30th June 2021 and Fieldfisher were on the record as Karunia's solicitors.

45. However, later on 29th June 2021, RHF Solicitors, filed an Application Notice on behalf of Karunia seeking "an order to introduce new evidence post trial on the basis of material non-disclosure". The Application Notice contained the following statement.

> "The new evidence has come to the Claimant's attention post hearing of the Defendant's application for summary judgement heard on 27th May 2021. The evidence was discovered following the delivery up of solicitors' files in relation to a claim brought by the Claimant against Abbey Solicitors who had originally acted in relation to the transaction which forms the subject matter of the dispute presently before the Court. The new evidence discovered is fundamental to the

Claimant's case and ought to have been in the Defendant's possession and control and should have been brought to the Court's attention".

46. The Application Notice was supported by a witness statement from Mr Rose stating that he was seeking to adduce e-mail communications and letters between Mr Nick Henesy and Mr Zrihan and himself and Mr Zrihan together with a copy of the Original Deed of Priority and the Facility Letter. He stated that the documentation shows Creativityetc "asked for execution of all of the original loan documents in August 2015 whereas the Defendant's pleaded case states that all of the documentation was executed in January 2015". Later, in the witness statement, he confirmed his "…belief that [Creativityetc] has failed to disclose several original wet ink loan documents purported to have been received in January 2015". He also stated that Ms Agathagelou "has been unwell for some time due to contracting Covid 19" but, following perusal of the Amended Deed of Priority, he understands "she said that…she has never seen this document nor has she ever been provided with a copy of this nor is it held on record of the offices of [Karunia]". Documentation was exhibited to Mr Rose's witness statement and a draft order was appended with provision for "judgment [to] be deferred in order to afford [the judge] the opportunity to consider the additional evidence".

47. Karunia thus invited me to admit the new evidence and re-open the draft judgment. Under a consent order dated 11th May 2021, the deadline for delivery of its evidence expired well before the hearing on 27th May 2021. It filed a witness statement in compliance with the deadline but did not seek to file further evidence before or, indeed, at the hearing of the application for summary judgment. Karunia's application for permission to introduce new evidence was thus issued out of time. It was also at odds with the principle of finality under which, on analogy with a full trial, the respondent to an application for summary judgment can generally be expected to present its full case in opposition to the application at the hearing itself, supported by the evidence on which it is based.

48. However, I have jurisdiction to extend time, give relief from sanction, admit new evidence and, under the *Barrell* principle, re-open judgment at any time before the court order has been perfected. The Court's judgment to re-open a judgment in this way has been authoritatively confirmed by the Supreme Court in *re L and another (Children) (Preliminary*

Finding: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634. For these purposes, the discovery of new facts following judgment is capable of amounting to a good reason for doing so, see *re Blenheim Leisure (Restaurants) Ltd (No 3) The Times 9 November 1999* (implicitly endorsed by the Supreme Court in *re L and another (supra)* at *[27]*), *Charlesworth v Relay Roads Ltd [2000] 1 WLR 230* and *Vringo Infrastructure Inc v ZTE (UK) Ltd [2015] RPC 23*.

49. In these circumstances, once my attention was drawn to the Application Notice, I postponed the date for judgment to be handed down and, by an email on 29th June 2021, invited counsel to respond with their observations. In response, Mr Pickering and Mr Jones each provided me with their written submissions.

50. Mr Pickering submitted that the Application was too late and should not be entertained in the absence of an application for relief from sanction. In doing so, he observed that the new evidence was in the possession of Mr Rose in advance of the deadline for filing evidence on 7th May 2021. Mr Pickering also submitted that the new evidence was irrelevant since it did not show the original loan documents were not executed in January 2015. Relying on *Robinson v Fernsby [2003] EWCA Civ 1820*, he submitted that there were no exceptional circumstances to warrant an order altering the judgment. Moreover, considerable court resources had already been expended on the claim and prejudice would be caused to his client and other court users if Karunia was permitted to rely on the new evidence at this stage.

51. In his written submissions, Mr Jones relied on the observation of Norris J in *Swift Advances plc v Ahmed [2015] EWHC 3265* at *[26]* that, whilst, "the principle that there must be finality in litigation must of course weigh heavily" fresh evidence could be admitted where "it would be an affront to common sense and to any sense of justice to exclude" it (citing dicta of Lord Wilberforce in *Mulholland v Mitchell [1971] AC 666 (HL)* at *679-680*). He submitted that Mr Rose's evidence about Ms Agathagelou was significant on the basis she had confirmed that she did not sign the Original Deed of Priority but did sign an undated version of the document which she had kept on file. He also submitted that it could be seen from the documentation that Mr Zrihan "was no more in reality than a postbox who did as was bid" and that the security documentation could be seen to have been finalised in August rather than January 2015.

52. In *re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] UKSC 8, [2013] 1 WLR 634*, the Supreme Court confirmed that the *Barrell* principle is not confined to "exceptional circumstances" and, following the *CPR*, the outcome of any application to re-open a judgment will be guided by the Overriding Objective. In endorsing the dissenting view of Clarke LJ in *Stewart v Engel [2000] 1 WLR 2268*, the Supreme Court specifically referred to the Overriding Objective of dealing with the case *justly*. However, they can be taken to have envisaged, more generally, that the courts would apply *CPR 1.1(1)* in full so as to include dealing with cases *at proportionate cost* and import each of the considerations in *CPR 1.1(2).*

53. The threefold test in *Ladd v Marshall [1954] 1 WLR 1489* for the reception of fresh evidence on appeal is at least an important cross reference, namely whether (1) it could have been obtained with reasonable diligence, (2) if given, it would probably have an important influence on the outcome; and (3) it is apparently credible, though not necessarily incontrovertible.

54. In *Charlesworth v Relay Roads Ltd (supra)*, Neuberger J stated that, on an application to admit new evidence after judgment has been handed down but before the order has been drawn up, such factors should be "in the forefront of the mind of the court" albeit not to be applied "on the strict basis that each of these conditions always has to be fully satisfied before fresh evidence can be admitted before judgment". Later in his judgment, he stated that "it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd v Marshall*". This observation was taken up by Birss J (as he was) in *Vringo Infrastructure Inc v ZTE [2015] EWHC 214 (Pat)* at *[29*] when stating that "the point which Neuberger J in *Charlesworth* was seeking to express was that in a case like the one before him, with an application to raise a new point, call new evidence and have a new trial, that if the applicant does not meet the *Ladd v Marshall* test, it is hard to see how, in most cases, it would be permitted. I respectfully agree with that sentiment although I think it is right to say that to characterise any element of the test by using the word 'exceptional' is not now correct in the light of *in re L*". No doubt, Birss J's observation about the use of the word 'exceptional' applies also to the observation in Clarke LJ's dissenting judgment in *Stewart v Engel (supra),* Clarke LJ that "after a full trial, the application of the overriding

objective would be unlikely to lead to the conclusion that the losing party should be permitted to reopen the matter save in an exceptional case where the requirements of *Ladd v Marshall [1954] 1 WLR 1489* were not met. However it will all depend on the circumstances".

55. In *Swift Advances v Ahmed (supra)*, Norris J did not apply the *Ladd v Marshall* test when admitting a transfer deed following the trial of an application to set aside two deeds of trust as transactions at an undervalue under the provisions of *Section 423* of the *Insolvency Act 1986*. However, there was an overwhelmingly strong case for him to do so because the transfer deed was being admitted in evidence by the applicant to clarify an ambiguity arising from the respondents' oral evidence. Once it was admitted, it simplified the issues before the Court and entirely dispensed with the need for the applicant to seek an order setting aside one of the deeds.

56. In determining whether to permit Karunia to admit further evidence and re-open the draft judgment, I must thus apply the Overriding Objective. As a cross reference, I shall also take into consideration the *Ladd v Marshall* test mindful that it is not an essential requirement for each part of the test to be fully satisfied before fresh evidence can be admitted. I am also satisfied that I should apply the three-fold test in *Denton v TH White Ltd [2014] EWCA Civ 906*.

57. I am mindful that Karunia invites me to re-open judgment on an application under *CPR 24* only, not judgment following trial. Whilst, in my judgment, there is no material difference between the applicable principles for such cases, it is relevant that, to succeed in its Defence it was and is only necessary for Karunia to show that it has a real prospect of success and, if not, summary judgment should not be given if these is some compelling reason why the case should be disposed of at trial. I have borne this in mind in considering the overall merits of the application. I am also mindful, when applying the Overriding Objective, including the requirement for the case to be dealt with at proportionate cost, that there has not yet been a full trial of the proceedings only an application for summary judgment.

58. Nevertheless, I am satisfied that Karunia's application to introduce the new evidence at this stage of the proceedings should be dismissed and I should decline to re-open the conclusions in my draft judgment.

59. Although it is not necessary to apply the "exceptional circumstances" test, it is highly unusual for a party to seek to introduce new evidence at this stage and Karunia must thus show it has a good case for doing so. The draft judgment was circulated in advance of the date appointed for handing it down so typographical corrections could be made and judgment would be available in its final form for publication when handed down in accordance with the practice identified by May LJ at [95] in *Robinson v Fernsby (supra).* It was certainly not intended to provide the parties with an opportunity to re-assess their evidence. As May LJ observed, the practice is intended to promote efficiency and economy not to enable the parties to re-open the substance of the judgment.

60. In the present case, Karunia has provided no explanation for the timing of its application. It can thus be inferred the application was prompted by the circulation of the draft judgment itself and, having seen the draft judgment, Karunia is thus seeking to exploit the practice to obtain a tactical advantage.

61. In any event, the Overriding Objective requires the courts to deal with cases so as to save expense, to allot them an appropriate share of the court's resources and enforce compliance with rules and orders. The courts should also seek to ensure that such cases are dealt with expeditiously and fairly, and in a way proportionate to the amounts of money involved, the importance of the case, the complexity of the issues and the financial position of the parties. To allow Karunia's application would plainly lead to additional expense, delay and the consumption of court resources. It would also require relief from sanction and a retrospective extension of the time allowed for delivery of Karunia's evidence under my court order dated 11th May 2021.

62. Measured against these considerations, Karunia has not demonstrated a strong or persuasive rationale for admitting the new evidence in support of the claim. On the hypothesis such evidence is admitted, there would remain no convincing explanation for the alleged forgery. It would remain the case that Ms Agathagelou has not provided a witness statement. Although it is suggested Mr Zrihan "was no more in reality than a

postbox who did as was bid", Mr Zrihan was instructed as Karunia's solicitor and, on that basis, issued the Solicitors' Undertakings. Whilst there are now additional allegations about the execution of loan documents in August 2015, these post-date completion. The Particulars of Claim is based on allegations of forgery in respect of the Original Deed of Priority. This had been executed in its original form by the time it was emailed to Creativityetc's solicitors on 22nd January 2015. Moreover, for the reasons I have given in [36] – [40] above, it remains the case that, on the hypothesis the Original Deed of Priority and thus the Amended Deed of Priority could be shown to have been forged, nothing substantial will be established by Karunia's claim for declaratory relief.

63. If I apply the *Ladd v Marshall* test, the same outcome is achieved. Karunia maintains that the new evidence was discovered following the delivery of solicitors' files in relation to a claim against Abbey solicitors. However, it has failed to show that the new evidence could not have been obtained with reasonable diligence for use at the hearing on 27th May 2021. Moreover, for the reasons I have given, I am not satisfied that, if the new evidence were to be adduced, it would have an important influence on the outcome of Creativityetc's application for summary judgment. Nor, indeed, am I satisfied that, in the hypothetical event Karunia makes an application for relief from sanction in respect of its failure to file the new evidence within the time required, it would satisfy the three-stage test in *Denton v TH White (supra).* The breach was plainly serous and significant, no explanation has been given for the default and there is no convincing case for relief based on the overall circumstances of the case.

(11) Disposal

64. I shall thus dismiss Karunia's application to adduce new evidence and allow Creativityetc's application for summary judgment. In these circumstances, no case for substantive relief arises on Creativtivityetc's application for security for costs and Mr Pickering has accepted that the Counterclaim can be dismissed. I shall hear submissions from counsel on all further and consequential issues.