Neutral Citation Number: [2021] EWHC 1902 (Ch)

Case No: BL 2020 000591

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 13 July 2021

Before :

HHJ JOHNS QC
Sitting as a Judge of the High Court

- -

Between :

(1) BORRO LIMITED
(2) BORRO LOAN LIMITED
(3) BORRO LOAN 2 LIMITED
(4) BORRO LOAN 4 LIMITED
(5) BORRO L1 INC
(6) BL3 INC

Claimants

- and -

PAUL AITKEN

Defendant

- -

MR ANDREW SCOTT and MR TOM COATES (instructed by **Mishcon de Reya LLP**) for the **Claimants**

MR DANIEL SHAPIRO QC and MR CARLO TACZALSKI (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing dates: 22-23 June 2021

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JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 13 July 2021.

HHJ JOHNS QC:

1. I heard three applications and the case management conference in these proceedings over a day and a half on 22-23 June 2021. Overall, the claim is by companies in the Borro group of companies against their former director and chief executive officer, Mr Paul Aitken, and arises out of alleged breaches of his duties as director. This is my judgment on the applications and on two case management issues concerning expert evidence.

2. I start with some brief background.

Background

3. The Borro group was in the business of providing loans secured against luxury assets including fine art as well as (from 2015) real property. There were underwriting processes designed to ensure that the security was appropriately valued and the loan to value ratio did not exceed an acceptable level.

4. The Defendant, Mr Aitken, was CEO of the companies from 2008 to June 2017. The core of the claim is that he failed to implement or adhere to the underwriting policies. Complaint is made of several loans in particular. The first is referred to as the Faryab loan, being a loan made on 17 June 2011 in the sum of £1.05m to Frank Faryab secured on a painting said by Mr Faryab to be by the artist JMW Turner.

5. Two of the loans which are the subject of the proceedings were secured on sculptural artworks: A loan of 181,000 US dollars made on 6 December 2013 for which the security was a bronze casting of an Edgar Degas sculpture. And a

loan of 3,412,500 US dollars made on 28 April 2015 secured on an architectural model known as the Tatlin Tower.

6. The Claimants allege that the Defendant acted in breach of his duties as a director in respect of the loans complained of, including those duties imposed by sections 172 and 174 of the Companies Act 2006. There is also a complaint that the Defendant was at fault in permitting the Claimants to breach their regulatory obligations. The value of the claim is estimated at £12m of which more than £11m represents losses on the loans having regard to the limited recovery so far made, and anticipated, on those loans.

7. The substance of the claims is denied, as to both breach and loss. But there is a further obstacle to the claim, namely a settlement agreement entered into between the Defendant and Borro Group Holdings Ltd for the Borro group companies dated 21 June 2017 ("the Settlement Agreement"). Such agreement includes at clause 11 a waiver of claims against the Defendant in terms which I will need to examine closely later in this judgment.

8. The claim as currently pleaded is for loss flowing from breaches of the Defendant's duties as director; the Claimants making the case that such claims are not caught by the waiver as such was, on the true construction of the Settlement Agreement, conditional on a warranty by the Defendant that he was not aware of the grounds for any claims against him and that the Defendant was in breach of that warranty.

9. The Defendant not having accepted that interpretation of the Settlement Agreement and contending instead that the claim is barred by the agreed waiver, the Claimants apply by an application notice dated 11 December 2020 to amend

the Particulars of Claim so as, among other things, to advance a claim for breach of warranty by the Defendant in the alternative.

10. The Defendant does not oppose an amendment to make a case for breach of warranty against him, save in respect of the Faryab loan. But, on the basis of his construction of the Settlement Agreement, he applies by notice dated 15 January 2021 for reverse summary judgment on, or strike out of, the Claimants' primary claim. By that application he also seeks to strike out words in the Particulars of Claim which, he says, make it unclear whether dishonesty is being alleged against him as part of the Claimants' case under s.172 of the 2006 Act.

Hearing

11. By virtue of directions made by the Chancery Masters, both these applications come before me together with the case management conference. And one other application. That is the application by the Defendant for security for his costs of the proceedings.

12. These three applications and the CMC were heard remotely using Microsoft Teams. I had the excellent help of Mr Andrew Scott, leading Mr Tom Coates, for the Claimants, and of Mr Daniel Shapiro QC, appearing with Mr Carlo Taczalski, for the Defendant. I am very grateful to them for their assistance.

13. I shall deal with the three applications in the following order before turning to decide the expert issues arising at the CMC: (1) Summary judgment/strike out, (2) Amendment, (3) Security for costs.

Summary judgment/strike out

14. I consider first, on this application, whether to give reverse summary judgment on or strike out the Claimants' existing claim.

15. Clause 11 of the Settlement Agreement (which refers to the Defendant as the Employee and Borro Group Holdings Ltd as the Company) is central to the application for summary judgment. It is in two parts as follows:

"11 Warranties and Waiver of claims against Employee

11.1 The Employee warrants that save as disclosed in writing to the Chairman at the date of this Agreement he is not aware of any ground on which the Company or any Group Company would have any ground to bring a claim against him for any breach of any express or implied term of his employment contract with the Company or any Group Company nor in relation to any act or omission of the Employee in his capacity as a director or officer of any Company or Group Company.

11.2 In reliance on the warranty set out at clause 11.1 the Company agrees to waive, to the extent permitted by law, its rights and those of any Group Company to, and it shall procure that any employee on the Board or management team does not, bring any claims which they are or may be entitled to bring against the Employee arising out of or in connection with the Employee's employment or his appointment as a director or officer of any Company or Group Company."

16. Both sides addressed this aspect of the application under CPR Part 24, rather than focussing on CPR 3.4. For the principles to be applied on an application

for summary judgment, both sides rightly adopted the classic summary of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para. 15.

"*15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;

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

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

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

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

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 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."

17. The parties differed on the application of those principles to this case. Mr Shapiro submitted that the Claimants' case on construction was hopeless. Alternatively, if it was arguable, the question of construction was a nettle to be grasped now. That would narrow the issues, reduce costs and promote settlement. Mr Scott's submission was that the Claimants' case on construction had a real prospect of success and that the question of construction should, in all the circumstances of this case, be one of the questions at trial.

18. I have decided that the application for summary judgment should be dismissed. My reasons are these.

19. I do not consider the Claimants' argument on construction hopeless. In my judgment it has real prospects of success.

20. The Settlement Agreement falls to be construed in accordance with the principles established by a now well-known trio of Supreme Court decisions*:* *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50*, Arnold v Britton* [2015] UKSC 36, and *Wood v Capita* [2017] UKSC 24. A convenient summary is that of Lord Neuberger at para.15 of *Arnold* (a case concerning leases):

"*15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC*

1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…".

21. Mr Shapiro rightly emphasised that clause 11 did not use the words "condition precedent" or "condition". But that is not the end of the matter. As was said by Flaux J in *Astrazeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574 (Comm), "*Whilst it is clear that, for performance of a provision in a contract to be a condition precedent to the performance of another provision, it is not necessary for the relevant provision to use the express words 'condition precedent' or something similar, nonetheless the court has to consider whether on the proper construction of the contract that is the effect of the provisions*."

22. Mr Shapiro's arguments against the Claimants' construction included that the heading of the clause suggested it contained two separate, free-standing elements, that clear language and a clear structure of conditionality could and should have been used if conditionality was intended, that "in reliance on" is not language of conditionality (it may be there to help a misrepresentation claim), and that there was no real ambiguity so that commercial common sense had no real role to play. He also submitted that alternative formulations by the Claimants as to the nature of the suggested condition precedent reflected a lack of clarity fatal to construing clause 11 in the way contended for by the

Claimants. Those alternative formulations (taken from the proposed amendments) were as follows:

"71A.1 The waiver of claims in Clause 11.2 was conditional on the truth of the matters warranted by Mr Aitken under Clause 11.1.

71A.2 In the event that such matters were not true, the condition would not be satisfied and the waiver would not apply; alternatively, would not apply to the extent that those matters were not true."

23. But the following can be said in favour of the Claimants' construction of clause 11 of the Settlement Agreement.

24. First, the two parts of clause 11 are linked by position and language. As to position, they appear together. As to language, they are linked by the opening words of clause 11.2, "In reliance on the warranty set out at clause 11.1 …". It is easy to see the significance of one provision for the other in that the matters warranted are important for the waiver which follows. The position and language underlines that connection. A close connection between terms can lead to a conclusion that the first term is intended to operate as a condition precedent to the obligation in the second. Flaux J referred in *Astrazeneca* to one obligation being the quid pro quo of the other in that only performance of the first obligation earns entitlement to the second.

25. Second, the language of clause 11.2, while not being traditional language of conditionality, does stand in something of a contrast to the language used by the parties in connection with the release of at least statutory claims by the

Defendant. That release or waiver is in clause 9.2, by which the Defendant agrees "irrevocably and unconditionally" to waive and forego such claims.

26. Third, the opening words "In reliance on the warranty set out at clause 11.1 …" are not readily explained as being intended instead to set up a claim in misrepresentation. That job is done by clause 12.2 by which the Defendant "acknowledges that the Company is entering into this Agreement in specific reliance on the warranties, representations and waivers contained in this Agreement". That the words are intended to connote conditionality would provide an explanation for them.

27. Fourth, the context provided by the Settlement Agreement is of full and final settlement of the Defendant's claims against the Claimants, rather than the Claimants' claims against the Defendant – see clause 12 of the Settlement Agreement reflecting recital (B), which reads: "This Agreement is in full and final settlement of all claims that the Employee may have against the Company and any Group Company". There is no corresponding recital referring to Borro group company claims against the Defendant.

28. Fifth, the context provided by the circumstances in which the Settlement Agreement was entered into is said by the Claimants to include concerns as to the Defendant's management of the business. Para.6.5 of the Reply is in these terms:

"Holdings agreed the terms of the Settlement Agreement in circumstances where it considered that the interests of the Borro Group were better served by placing Mr Aitken on such "Garden Leave" than allowing him to remain

involved in the business, including on account of the concerns that Holdings had regarding Mr Aitken's management of the business in the preceding years."

29. A context of concerns about conduct was regarded as relevant in *Collidge v Freeport plc* [2008] EWCA Civ 485. A warranty that the employee was not aware of any circumstances constituting a repudiatory breach of the contract of employment was, held the Court of Appeal, a condition precedent to the employer's obligations under a compromise agreement. The basis for that decision was the language of the agreement but also the wider context as explained by Tuckey LJ at para.11:

"*This construction of the agreement is put beyond doubt, I think, when one considers the context in which it was made. The board had wanted to suspend the claimant whilst it carried out its investigations into his conduct. If that had happened the investigation would have revealed ample grounds for summary dismissal. But the claimant denied misconduct and so the board agreed termination arrangements with him although the investigation would continue which were conditional upon his warranty that he had done nothing wrong. In that way Freeport protected itself if it was subsequently shown that the promise which the claimant had given was untrue.*"

30. Sixth, commercial common sense could be said to favour the Claimants' construction. The Defendant's interpretation involves saying it was intended that he be given a release of claims the grounds of which he was aware of but which he failed to disclose and instead warranted he was unaware of.

31. Seventh, the Claimants' construction can also be said to be in accord with what has been called a cautionary principle expressed in this way by Lord Bingham in *BCCI v Ali* [2001] UKHL 8 at para.10:

"*10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware*."

He continued at para.17:

" *... Some of the cases, I think, contain statements more dogmatic and unqualified than would now be acceptable, and in some of them questions of construction and relief were treated almost indistinguishably. But I think these authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this….*"

32. Given all those factors, there is a real prospect of clause 11 being construed so that the waiver in 11.2 is conditional on the warranty in 11.1.

33. Further, the question of construction is not, in my judgment, a nettle which should be grasped now. The points which have led me to that view are these.

34. First, deciding the question of construction now will not avoid a trial. Indeed, it will have little or no effect on the factual issues to be tried and therefore on disclosure, evidence and cross examination.

35. The underlying case on breach of duty by the Defendant will need to be tried whether the claim is framed in the present way or, as proposed by way of amendment in the alternative, as a claim for breach of the warranty in clause 11.1. Mr Shapiro suggested in argument that if the claim proceeded as one for breach of warranty, that would augment the trial by adding the issue of the Defendant's awareness of the grounds of the claim as at the date of the Settlement Agreement, being 21 June 2017. The Claimants would need, on that new formulation of the claim, to establish such knowledge in order to show breach of warranty. But this submission ignores, in my judgment, the need for the Claimants to establish breach of warranty even on the current formulation of their claim and therefore to establish the Defendant's awareness of the grounds of claim as at 21 June 2017 in any event. The Claimants' primary, and current, case is that they can bring the claim for breach of duty despite the waiver at clause 11.2 because clause 11.1 represents a condition precedent to such waiver which has not been fulfilled. The Claimants' currently pleaded case also, therefore, involves establishing breach of warranty and, accordingly, involves showing the Defendant had knowledge of the grounds of claim. That is clear from the existing para.72 of the Particulars of Claim:

"The Claimants will contend insofar as necessary that the claims herein pleaded were not waived by reason of clause 11.2 of the Settlement Agreement in circumstances where (i) Mr Aitken had knowledge of the grounds of the claims and (ii) Mr Aitken had not disclosed those grounds in writing to the Chairman as at the date of the Settlement Agreement…".

36. Another suggestion made for the Defendant was that the claim in respect of the Faryab loan would fall away, because of a limitation argument, if the Court was with the Defendant on the issue of interpretation of clause 11. But it will be apparent from my decision on the amendment application (for which see paras. 56 to 58 below) that that part of the claim does not fall away on the Claimants' alternative, breach of warranty, case.

37. In any event, there will need to be a full trial. Giving summary judgment on the construction question will not avoid that. And a decision on the question at this stage has at least the potential to delay the trial or disrupt preparations for it, given the possibility of an appeal on a summary decision.

38. Second, the question of construction may not matter at all. On the arguments before me, it is difficult to see how the result at trial will depend on the answer to the question of construction. As I have said, the Claimants will need to establish breach of duty and breach of warranty however the claim is pleaded. And the loss is said to be the same on either formulation of the claim. The proposed amendment pleads as damages for breach of warranty loss of the claims which could otherwise have been made, valued in the same sums as put forward in the primary claim. Mr Shapiro did not suggest a different measure of loss, and there is, of course, not yet any Amended Defence. There is little or no value in deciding now a question which may not matter; indeed, which it is hard to see affecting the outcome of the trial. If the Defendant avoids a finding of breach of duty or breach of warranty, he will succeed however the claim is put. If the Claimants succeed in establishing those breaches, they will succeed on either basis.

39. I would add that the limited effect on the issues means a decision on construction now would be likely to have only the most limited influence on the possibility of settlement. This is not a case where, while it would leave a trial still to be conducted, a summary decision on an issue would remove a major roadblock to settlement.

40. Third, insofar as the question of construction does matter, the trial judge will be in a better position to decide it. One of the relevant factors will be, as I have said, the commercial context of the Settlement Agreement. The trial judge will have a firm grasp of that context in the light of all the available material. It is true that this is not a case where particular material can be identified now which will be available at trial and be likely to affect the outcome. But it is a case where evidence may emerge which is relevant to the question of construction. Mr Shapiro agreed that was possible. This seems to me a further factor which favours leaving the question of construction to be decided at trial.

41. In reaching the conclusion that that is the right course in this case, I have been fortified by consideration of two Court of Appeal authorities, being *AC Ward v Catlin (Five) Ltd* [2009] EWCA Civ 98 and *Iliffe v Feltham Construction Ltd* [2015] EWCA Civ 715.

42. The Court of Appeal decision which approved Lewison J's summary in *Easyair*, namely *AC Ward v Catlin*, was itself concerned with questions of construction. The defendant insurer applied for reverse summary judgment on the basis that the claim by the insured claimant was bound to fail on the proper meaning and effect of two warranties in the policy. The Court of Appeal upheld the decision of the first instance judge not to decide the questions of construction summarily

and to refuse summary judgment. The reasoning of the Court of Appeal can be seen from paragraphs 34 and 35 of the judgment of Etherton LJ, with which the other members of the Court agreed:

"*34. The Claimant has a real prospect of successfully contending that its interpretation gives the Policy a more reasonable commercial meaning and one more likely to be that intended by the parties, by limiting the "protections provided for the safety of the insured property" to those in the Original Proposal, and any burglar alarm system within the BAMW to a burglar alarm stated in the Schedule and which was approved by the Defendants, and by limiting the Warranties, as the Judge was inclined to do, to defects within the knowledge or reasonably capable of being within the knowledge of the Claimant and its agents. So far as concerns the former contentions, the Claimant may derive some support from the "General Condition" that "the Proposal and/or the particulars in writing by which the Insured has applied to the Insurers for an Insurance in the terms stated in this Policy and which the Insured has agreed shall be the basis of this Contract shall be held to be incorporated herein."*

35. I agree with the Defendants that neither the Claimant nor the Judge has articulated clearly any evidence relevant to interpretation which is likely to exist and, although not available on the hearing of the Application, can be expected to be available at trial. Had this been the only ground for dismissing the Application, it would not, in my judgment, have been sufficient: ICI Chemicals & Polymers v TTE Training: [2007] EWCA Civ 725 at paragraph [14] (Moore-Bick LJ). Mr Stuart-Smith accepted, however, as I have said that it is apparent from paragraph [46] of the Judgment that the Judge's decision included the

arguability of the Claimant's submissions on interpretation. Furthermore, I bear in mind that the Warranties are standard terms of the Defendants' Multiline Commercial Combined Policy, which may affect many other policyholders, and that provisions in the Warranties such as "be in full and effective operation at all times" and "put into full and effective operation at all times" are said to have even wider currency in the insurance market. In those particular circumstances, combined with the arguability of the Claimant's points on interpretation, I can understand why the Judge considered it would also be appropriate to give the Claimant the opportunity to seek and adduce any relevant and admissible factual material available by the date of the trial."

43. I take it from that decision that where the claimant has a realistic argument on construction, the question of construction is not one always to be grasped at the summary stage. And that, at least in combination with other factors, the possibility of further material being available at trial is something which may be taken into account, despite no material likely to be available at trial and likely to affect the outcome so far being identified.

44. In *Iliffe v Feltham Construction*, the Court of Appeal allowed an appeal against an order for summary judgment. The principal judgment, given by Jackson LJ, included this:

"*73. A further significant feature is that summary judgment in this case achieves much less in terms of saving costs and court time than is normal. There is going to be a trial anyway at which extensive factual and expert evidence will be called in order to establish (a) what caused the fire, (b) who is responsible. The*

claimants will have to participate in the trial, because they need to prove the quantum of their damages.

74. I wish to emphasise that whilst, after some hesitation, I am differing from the judge in the circumstances of this case, I am certainly not discouraging robust case management or the use of summary judgment under CPR Part 24. In appropriate cases Part 24 provides a valuable mechanism to avoid holding a trial, with all the expenditure of time and costs which that entails. My conclusion is simply that, for a collection of reasons as stated above, this case falls short of satisfying the requirements of CPR 24.2."

45. The Court there considered it of importance, in deciding that summary judgment was not the right course, that there would need to be a trial anyway of the key issues involving the same parties so that there would be only a limited saving of time and costs.

46. Like Jackson LJ, I am all for robust case management. Justice is often better done by grasping nettles early. But there is no real value in grasping this nettle now. It is a question of construction which may not matter, perhaps is even unlikely to matter. Deciding it now will have little or no effect on the factual issues and therefore on disclosure, evidence and cross examination. And the judge at trial will have a fuller picture from which to reach a conclusion on the question.

47. I turn to the other aspect of this application, namely to strike some words out of the Particulars of Claim.

48. The Defendant objects to the way the Claimants have pleaded their case on breach of his duty under s.172 of the 2006 Act. I can take the pattern adopted by the Claimants in relation to each of the transactions complained of from the summary in para.6 of the existing Particulars of Claim:

"In authorising or permitting Borro Group to enter into the loans in question, Mr Aitken not only failed to exercise reasonable skill care and diligence, but also failed to have regard to material considerations (in particular, the requirements of the underwriting policies) and no intelligent and honest director could, in the circumstances, have believed that the loans were for the benefit of the company concerned."

49. The Defendant's complaint as advanced by Mr Shapiro on this aspect of the strike out application is that it should be made clear whether it is being alleged that the Defendant acted dishonestly and, to that end, the words "and honest" must be struck out to bring such clarity if dishonesty is not being alleged.

50. Lack of clarity might be a basis for strike out as being likely to disrupt the just disposal of the proceedings and so within CPR 3.4(2)(b).

51. But the Claimants' position seems to me clear. It is as set out in the Reply at para.48 as follows:

"*48.2 … the Claimants do not allege that Mr Aitken acted dishonestly; and nor do they need to allege that in order to establish that he breached his duty under s. 172 CA 2006.*

48.3. As further set out in the Particulars of Claim, the Claimants' case in this respect is in summary that: (i) Mr Aitken failed to consider whether his actions

were in the Claimants' best interests and the various matters to which he was required to have regard in that connection (as pleaded at paragraph 23 of the Particulars of Claim); and (ii) no intelligent and honest person in his position could, in the circumstances, have reasonably believed that such actions were in the Claimants' best interests."

52. That case may or may not succeed. But it is clear what case is being made. And it is a case open to the Claimants to make given the discussion of the test under s.172 of the 2006 Act by John Randall QC (sitting as a Deputy High Court Judge) in *Re HLC Environmental Projects Ltd* [2014] BCC 337, particularly at para.92(b) and (c).

"*91. It is common ground that duties (I)(a) and (II)(a) are subjective ones, in the sense explained by Jonathan Parker J. (as he then was) in Re Regentcrest Plc v Cohen [2001] B.C.C. 494 at [120]: "The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell) para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he*

honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test."

92. However, this general principle of subjectivity is subject to three qualifications of potential relevance in this case:

(a) Where the duty extends to consideration of the interests of creditors, their interests must be considered as "paramount" when taken into account in the directors' exercise of discretion (per Mr Leslie Kosmin QC in the Colin Gwyer case (above) at [74]). Although I note the contrary view expressed by Owen J. in the Supreme Court of Western Australia that although "the directors must 'take into account' the interests of creditors [i]t does not necessarily follow from this that the interests of creditors are determinative" (Bell Group Ltd v Westpac Banking Corp [2008] WASC 239 at [4438]–[4439], applying the judgment of Mason J. in Walker v Wimborne [1976] HCA 7; (1976) 137 C.L.R. 1), so far as English law is concerned I respectfully agree with Mr Kosmin QC that his use of "paramount" was consistent with the judgment of Nourse L.J. in Brady v Brady (1987) 3 B.C.C. 535 (CA) at 552, where he observed that "where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone". I also note that this passage from Mr Kosmin QC's judgment was cited with apparent approval by Norris J. in Roberts (Liquidator of Onslow Ditchling Ltd) v Frohlich [2011] EWHC 257 (Ch); [2012] B.C.C. 407 at [85].

(b) As Miss Leahy submitted, the subjective test only applies where there is evidence of actual consideration of the best interests of the company. Where there is no such evidence, the proper test is objective, namely whether an

intelligent and honest man in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (Charterbridge Corp Ltd v Lloyds Bank Ltd [1970] Ch. 62 at 74E–F, (obiter), per Pennycuick J.; Extrasure Travel Insurances Ltd v Scattergood [2003] 1 B.C.L.C. 598 at [138] per Mr Jonathan Crow).

(c) Building on (b), I consider that it also follows that where a very material interest, such as that of a large creditor (in a company of doubtful solvency, where creditors' interests must be taken into account), is unreasonably (i.e. without objective justification) overlooked and not taken into account, the objective test must equally be applied. Failing to take into account a material factor is something which goes to the validity of the directors' decision-making process. This is not the court substituting its own judgment on the relevant facts (with the inevitable element of hindsight) for that of the directors made at the time; rather it is the court making an (objective) judgment taking into account all the relevant facts known or which ought to have been known at the time, the directors not having made such a judgment in the first place. I reject the respondent's contrary submission of law."

53. On the second and third qualifications to the test under s.172, being the foundation for the case made by the Claimants in these proceedings, "intelligent and honest" is a description of the notional director. The actual director, here the Defendant, is simply someone who, it is alleged, has not in fact considered the relevant interest or factor; someone who has not made a judgment at all.

54. It seems to me the Claimants have given sufficient clarity. The Defendant knows the case he must meet. To underline what case is being made and to help draw the attention of the trial judge to it, I suggested in argument that my order include a recital that dishonesty is not alleged against the Defendant. Mr Scott made clear he was content with such a recital reflecting the Reply and my order will therefore include one. But it follows from what I have said that I dismiss the application to strike out.

55. I consider next the application to amend.

Amendment

56. What is opposed is amendment to plead a case of breach of warranty in respect of the Faryab loan. The basis of the opposition is limitation. Mr Shapiro submitted that a breach of warranty claim in relation to the Faryab loan had no real prospect of success. His argument ran in this way. That, as at the date of the Settlement Agreement, a breach of duty claim against the Defendant arising out of the making of the Faryab loan would have been barred, very recently, by limitation; the Settlement Agreement being made on 21 June 2017, over 6 years after the making of the Faryab loan on 16 June 2011. Accordingly, it is not credible that the Claimants would have refused to waive the claim if the grounds for it had been disclosed by the Defendant, so that the Claimants will inevitably lose on causation on a breach of warranty claim.

57. But I am not prepared to find, on a summary basis, that the Claimants have no real prospect of success on causation in circumstances where, on the primary basis for their claim, they make a case under s.32 of the Limitation Act 1980; a case on limitation which there has been no application by the Defendant to strike

out. That case is set out with detailed particulars at para. 58 of the Reply. Given this dispute which has subsequently emerged under s.32, there is no knockout point on causation here. On the contrary, the dispute indicates that the Claimants may well have refused to waive a claim on the Faryab loan. That suggestion cannot be said to carry no conviction given that the claim is one which is in fact being pursued despite the limitation point.

58. Mr Shapiro also submitted that the Claimants' case on s.32 was inconsistent with their case on breach of duty, in particular their failure to allege dishonesty. But the test under s.32 is not a simple one – see for example the discussion in the recent case of *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339 – and the relationship between the two allegations in this case is one which must, in my judgment, be explored on real facts; that is, on the facts as found at trial.

59. I allow the amendment and turn to the application for security for costs.

Security for costs

60. By the time of the hearing there was no dispute that security for costs could and should be ordered and that the appropriate method of providing security was by way of a payment into court.

61. As to the sums to be ordered as security, the Defendant produced figures for each costs phase and asked the Court to order payment of a specified percentage of each such figure.

62. There were two areas of disagreement. The first was as to the appropriate percentage. The Defendant argued that security should be provided at the level

of 70 percent of his costs figures. The submission for the Claimants was that the appropriate percentage was 50 percent. The second point on which a decision is required is whether to fix now the figures for each phase or instead defer consideration of those figures to some later occasion once the amended statements of case have been filed and served.

63. I start with the appropriate percentage. The exercise of determining quantum is a broad-brush one as both sides accepted.

64. I have decided that that exercise results, in this case, in a percentage of 60 percent of the incurred and estimated costs.

65. That is within the band of percentages generally adopted for orders for security for costs, at least where assessment on the indemnity basis is not reasonably in prospect – see *Danilina v Chernukhin* [2018] EWHC 2503 (Comm) at para.17 and *Rowe v Ingenious Media Holdings plc* [2020] EWHC 235 (Ch) at para.101. Indeed, it is the percentage supported by the authority relied on by the Claimants, namely *Accident Exchange Ltd v McLean* [2018] EWHC 1533 (Comm). This is not a case where an order for indemnity costs is in view.

66. A comparison with the costs of the Claimants indicates to me it is appropriate to adopt a figure at the lower end of that band. The costs of the applications before me provides an illustration. Those were in the region of £331,000 for the Defendant; significantly higher than the £271,000 or so spent by the Claimants.

67. Mr Shapiro pointed to several factors as justifying the high level of costs being incurred and estimated on the Defendant's side including the number of versions of the draft Amended Particulars of Claim produced by the Claimants and

complaints about the conduct of the Claimants in connection with the application for security for costs and disclosure. But these were not such, in my judgment, as to justify the disparities between the incurred and estimated costs of the two sides or otherwise point to an order at the upper end of the range. His observation that the defence to the claim was being funded by insurers also provided no solid basis, to my mind, for an order at the top end of the range. These insurers are spending significantly more than the Claimants in the proceedings.

68. Mr Scott sought to justify an order at the level of 50 percent by a submission that the money used to provide security would otherwise be invested and that no cross-undertaking had been offered to protect the Claimants. He also pointed not only to the comparison between the level of costs on the two sides but to a detailed list of criticisms of the Defendant's costs figures set out in a 23-page annex to his skeleton argument.

69. But 50 percent would not strike the right balance between the interests of the Claimants and the Defendant. While it might exclude any risk of the Claimants losing out by providing too much security, it would bring a significant risk of the Defendant being significantly under-secured and unable to recover the balance of any costs ordered. An order for security at the level of 60 percent of the costs figures carries, in my judgment, only a limited risk of the Claimants suffering the limited prejudice of losing the costs of putting up an excess amount of security, and adequately reflects the Claimants' criticisms likely to be made on assessment.

70. I can deal with the second point, namely whether to fix now the figures for each phase, very briefly. Mr Scott's argument was that the shape of the case may change, in particular by reason of my decisions on the summary judgment and amendment applications, so as to reduce the scope of the proceedings by removing the issues relating to the Faryab loan. But that has not been the effect of my decisions. The shape of the case is known. To defer fixing the sums for later phases would only add to the costs of these proceedings. The right course is, for those reasons, to fix the figures now by applying the percentage of 60 percent to the Defendant's current estimates of his costs.

Experts

71. There are two questions for me to decide relating to expert evidence.

72. The first is in relation to valuation experts. It is common ground that there will need to be expert evidence as to the value of the property on which each of the loans was secured. The parties have agreed directions for evidence from a real property valuer on each side to deal with those loans secured on real property. The Claimants' proposal is that one other valuation expert on each side deal with all the other loans (albeit with permission to apply). That would involve such expert giving an opinion on each of the paintings used as security but also two sculptures. One loan was secured on a casting from a Degas mould; the mould being made from one of Degas' original sculptures. Another was secured on an architectural model known as the Tatlin Tower. I was told there are only three such models. The Defendant's proposal was that there be a paintings valuation expert and a sculpture valuation expert on each side. The latter would value the casting and the tower.

73. I accept the Defendant's proposal and so will direct expert valuation evidence from a paintings expert and a sculpture expert. My reasons are these.

74. One, that seems to me to strike the right balance between the general and the particular. The valuation of the sculptures looks set to be a difficult exercise and/or one with a very significant range of opinion. I would not expect a person also instructed on the basis of their expertise in valuing paintings to be able to give the Court the best help with that exercise. Indeed, an order directing one expert would run the risk of tempting an expert outside his or her area of expertise. In any event, the evidence overall would be likely to be too general. But to direct different experts for each of the two sculptures could well result in evidence reflecting an unnecessarily specific expertise. The Court does not need a treatise on the Tatlin Tower or on Degas castings. But it does need reliable valuation evidence from someone experienced in the market for sculptures.

75. Two, Mr Scott rightly reminded me of the duty to limit expert evidence to what was reasonably necessary and submitted that the Defendant's proposal involves a proliferation of experts resulting in additional costs. But the significant point, to my mind, is that the proposal does not really involve extra expert evidence, and so should have only a limited impact on costs. This is not like a case where a further layer of experts is proposed, dealing with the same subject matter. An example of such a case might be both surveyors and structural engineers dealing with the condition of a building. Here, if there is evidence from experts in sculpture valuation, that will mean the other art experts will not report on the value of the sculptures and will not be cross examined on those topics at trial.

The proposal is not one for extra expert evidence. It is concerned only with the identity of the experts.

76. The second question relating to expert evidence concerns the terms of the order directing evidence from forensic accounting experts. There is agreement that each side should have permission for evidence from a forensic accountant addressing the quantum of the Claimants' alleged loss. The Defendant proposes that the order for such evidence indicate that the expert should also "opine on the Borro Group's accounts and loan book during the period material to the claim, including the loan to value ratios of the loan book(s), and the steps taken which ultimately led to the administration of [Borro Group Holdings Ltd]".

77. This was not covered in Mr Shapiro's extensive skeleton but he did seek to justify the proposal, albeit as something of an afterthought, in his oral submissions.

78. I have decided not to add the proposed words to the order.

79. An order giving permission for expert evidence can specify the issues for the expert to address – see CPR 35.4(3). Generally, that is done to ensure focus on the issues in dispute which the Court will need expert assistance on. The words proposed to be inserted in the order here would not, it seems to me, do that job. They do not set out clearly defined issues. And they refer to matters which are not, at least not clearly, matters for an expert at all. It cannot, given those points, be said that the matters are ones on which expert evidence is reasonably required. Further, insofar as the experts need to address such matters in order for them to explain their opinion on loss, no doubt those matters will be dealt with in the report.

80. I ask counsel to agree an order reflecting my decisions. The order should include directing a one-hour disclosure guidance hearing before a Master if any issues arising out of the preparation of the disclosure review document remain to be resolved. Some such issues were raised in the skeleton arguments before me but I was not asked to decide them in the end, given that some had only recently emerged and that attempts were being made to resolve them by discussion.