Neutral Citation Number: [2024] EWHC 2787 (Ch)

Case No: CH-2023-000216

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
ON APPEAL FROM CHIEF ICC JUDGE BRIGGS IN BR-2022-000505
AND BR-2022-000507

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 5 November 2024

Before:

MR JUSTICE THOMPSELL

- -

Between

(1) WAYNE MURFET
(2) PAMELA MURFET

Appellants

And

(1) PROPERTY LENDING LLP
(2) SKYRED INTERNATIONAL S.A.R.L.

Respondents

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Mr Sajid Suleman (instructed by **Pinder Reaux Solicitors**) for the **Appellants**
Mr Samuel Parsons (instructed by **Howard Kennedy LLP**) for the **Respondents**

Hearing dates: 25 October and 5 November 2024

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Approved Judgment

This judgment was handed down in open court on 5 November 2024 and by circulation to the parties or their representatives, by e-mail and by release to the National Archives

Mr Justice Thompsell:

1. INTRODUCTION

1. This appeal arises as the culmination of a long series of hearings, but it is not necessary to recite the full history, merely that this is an appeal of the order of Chief ICC Judge Briggs ("**Judge Briggs**") dated 3 October 2023 ("**the Briggs Order**") pursuant to an *ex tempore* judgment (the "**Judgment**") given by him on the same date.

2. Judge Briggs was considering an application to set aside certain statutory demands. The statutory demands relied on personal guarantees given to the Respondents by the Appellants. The personal guarantees guaranteed the obligations of a property development company, XH Bury Ltd (the "**Borrower**") under two separate loans that were advanced respectively by the Respondents (which I shall also refer to as the "**Lenders**" and each as a "**Lender**"). The First Appellant is the sole shareholder and director of the Borrower and the second Appellant is his mother. The loans were made under two Facility Agreements each dated 8 April 2021 (the "**Facility Agreements**") and each comprising a facility letter (the "**Facility Letter**") and standard Terms and Conditions. Both lenders engaged the same firm of solicitors and both Facility Agreements are in substantially the same form at least as regards the matters to be considered in this case.

3. I will refer to the Appellants in their capacity as guarantors of the Borrower's liabilities under the Facility Agreement as the "**Guarantors**".

4. In the course of the Judgment, Judge Briggs made a number of findings against the Appellants and by the Briggs Order he dismissed the Appellants' application.

5. The Appellants appealed the Briggs Order in its entirety, originally citing eight separate grounds of appeal. The Appellants were originally denied permission to appeal by an order made on paper by Adam Johnson J on 16 January 2024. However, subsequently after the same judge heard oral argument on the matter, he gave permission through his order of 9 February 2024 (the "**Johnson Order**") to appeal on Grounds 2, 3, 4 and 11 (the "**Remaining Grounds**"). He refused permission to appeal on all other grounds. Grounds 2, 3 and 4 were all concerned with the question of the proper meaning and effect of Clause 7.2 of the Facility Letter (defined below), and Ground 11, which related to the application of the Unfair Contract Terms Act 1977 ("**UCTA**").

6. The Appellants have called into question the reasoning of Adam Johnson J in dismissing Ground 6. Ground 6 was based on an argument that Judge Briggs erred in holding that the Respondents had valid reasons for calling in the loan and effectively terminating the lending agreement as the court had insufficient evidence to reach such a conclusion: the question of whether the development was progress or delayed was a factual issue which could only be determined after trial and the Judge had ignored some evidence and given undue weight to other evidence.

7. The Appellants argue that Adam Johnson J was illogical in allowing an appeal based on this ground as his reasons for doing so appeared to be based, or at least partly based, on a consideration that the point did not matter since Judge Briggs had found that under the Facility Agreement the Lender did not need to be able to show a reason for terminating the loan. The Appellants argue that this did not make sense as a reason to

dismiss an appeal on this ground since Adam Johnson J had allowed other grounds of appeal to go forward which put in question Judge Briggs' finding that the Lender did not need to be able to show the reason for terminating the loan.

8. During the hearing, I said I would return to this point if I found in favour of the Appellants in relation to the Remaining Grounds, or any of them. In view of my findings below, this will not be necessary.

9. The Remaining Grounds may be summarised as follows:

   i) **Ground 2** was that Judge Briggs did not consider the principle of *contra proferentem.*

   ii) **Ground 3** was that Judge Briggs erred in holding that the Lender could demand full repayment at any time without any reason: this matter was a trial issue which could not be determined in the insolvency courts; it would depend on the intention of the parties, and so would require witness evidence; and as the Borrower was not a party to the insolvency proceedings, it was not possible for the court to reach any conclusion about the intentions of the Borrower.

   iii) **Ground 4** was that Judge Briggs was incorrect in holding that Clause 7.2 of the Facility Letter was a termination clause.

   iv) **Ground 11** was that Judge Briggs fell to consider the applicability of s.3 UCTA.

10. These Grounds were amplified in the skeleton argument provided by the Appellants and are discussed further below.

11. The overall case of the Respondents in response to these grounds is simple. In summary it is that Clause 7.2 of the Facility Letter, which stated amounts advanced under the Facility Letter to be "repayable on demand" was plain on its face in allowing the Borrower to recall the debt at any point. There was no ambiguity in this that would require any recourse to the factual matrix surrounding the Facility Letter, or which would allow the operation of the *contra proferentem* rule. S.3 of UCTA does not apply as the Facility Letter itself was not "standard terms of business" and in any case is only ever engaged in relation to exemption clauses and Clause 7.3 is not an exemption clause. Again, these points are developed further below.

2. RELEVANT LEGAL TESTS

12. The grounds on which the Court may set aside a statutory demand are set out in rule 10.5(5) of the Insolvency (England and Wales) Rules 2016. It has not been made plain as to which ground was being relied upon by the Applicants but it may be presumed that this is subparagraph (b):

> "The debt is disputed on grounds which appear to the court to be substantial."

13. It may also be that the Claimants would add ground (d):

> "The court is satisfied on other grounds that the demand ought to be set aside."

14. There was little disagreement between the parties as to the legal test to set aside a Statutory Demand. To set aside a Statutory Demand the debtor must show "a genuine triable issue" (see for example, In *Crossley-Cooke v Europanel (UK) Ltd* [2010] EWHC 124 (Ch), at [16]). The test has been authoritatively stated by Roth J in *Collier v P&MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643.

> "As being akin to that applicable to the test applied under CPR 24 for a reverse summary judgment, namely that there is "no real prospect of successfully defending the claim".

15. Roth J proceeded to state at [20]:

> "If the correct test was that of the balance of probability, it may be that on this appeal the Court would not interfere, but that is not the correct test. It is not appropriate on an application to set aside a statutory demand to conduct anything approaching a mini-trial."

16. In applying the test of "no real prospect of defending the claim" it is helpful to consider the summary of the legal principles summarised by Lewison J (as he then was) in *Easyair Limited (trading as Openair) v. Opal Telecom Limited* [2009] EWHC 339 (Ch) [at 15] which may be further summarised as follows:

    i) The Court must consider whether the respondent to the application has a "*realistic*" as opposed to a "*fanciful*" prospect of success i.e. one that carries some degree of conviction - a claim that is more than merely arguable.

    ii) The Court must not conduct a "*mini-trial*". This does not mean that the Court must take at face value and without analysis everything that a respondent to the application says in his statements before the Court.

    iii) The Court must take into account not only the evidence actually placed before it upon the application, but also the evidence that can be reasonably expected to be available at trial.

    iv) Although a case may turn out at trial not to be 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.

    v) On the other hand, it is not uncommon for an application under CPR 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. 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.

17. As to point (iii) in this summary, that principle can be taken too far – a number of cases have warned against what Mr Parsons referred to as "pure Micawberism". As an example, I would cite the judgment of Cockerill J in *King v Steifel* [2021] EWHC 1045 (Comm) at [21] and [22] and, in particular, at [23] where she said that:

> "when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

3. GROUND 3

18. I will deal first with Ground 3 as this reflects the core of the Applicants' argument. Stated in full, Ground 3 is as follows:

> "The Learned Judge erred in holding that the Respondent could demand full repayment at any time without any reason.
>
> a. The question of whether parties intend such an interpretation was a trial issue which could not be determined in the insolvency courts – the Court seeking to establish intention would have properly required an analysis of the witness evidence, which, on the papers, was disputed – as such, this dispute and the need for the Court to have explored this in live witness evidence should have been sufficient alone, to warrant a bona fide dispute being established, sufficient to set aside the Demands
>
> b. As the Borrower was not a party to the insolvency proceedings, it was not possible for the court to reach any conclusion about the intentions of the Borrower.
>
> c. Evidence from the Borrower would be required and tested at trial before any determination on this issue.
>
> d. The evidence before the court met the threshold for holding that there was a substantial dispute as to the meaning of Clause 7.2."

19. There are essentially two aspects to Ground 3: arguments based on the interpretation of Clause 7.2 and arguments relating to implied terms.

The interpretation of Clause 7.2

20. I set out below Clause 7 of the Facility Letter in its entirety:

> "7.1 Subject to Clause 7.2 below, the Facility will expire and the Borrower must repay or discharge the liabilities irrevocably and in full by no later than: (a) the date of completion of the sale of

> the whole or substantially the whole of the Property; and (b) the Termination Date.
>
> 7.2 Notwithstanding the above or any other provision of this Agreement, the Liabilities (including without limitation all capitalised interest under Condition 6.2) are repayable on demand.
>
> 7.3 [Following the repayment of any senior debt,] [T]he Borrower must pay the Net Proceeds of Sale to the account notified to you by us, to be applied in reduction of the Liabilities."

21. The words in square brackets denote differences between the Facility Letters produced by each of the two Lenders.

22. The Respondents argue that Clause 7.2, is clear on its face. It states in terms that it operates notwithstanding the previous subclause or any other provision of the Agreement. If there was any remaining doubt about the precedence between Clauses 7.1 and 7.2, this is dispelled by the wording in Clause 7.1 which makes it expressly "Subject to Clause 7.2 below".

23. The Appellants have sought to argue that Clause 7.2 cannot be looked at by itself. They argue that the clause must be considered in the light of the entirety of the agreement and the surrounding facts (what lawyers like to call the "factual matrix"). They cite *Chitty on Contracts* (35th Ed. (2023) at 16-053, where it is argued (on the basis of the principles summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune")* [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep. 654) that the interpretation of contracts contains the following components:

> "(i) the objective nature of the assessment; (ii) the "factual matrix" or "available background"; (iii) the meaning of the language used by the parties; (iv) the need to have regard to the contract as a whole; (v) the significance of the nature, formality and quality of the drafting of the contract; (vi) what is to be done when there are two possible meanings of the disputed clause; (vii) the unitary and iterative nature of the process; and (viii) striking the balance between the various, potentially conflicting, principles."

24. *Chitty* goes on to consider these components in details. First, as regards the objective nature of the assessment, we have Lord Hoffman's dictum in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at *[912] ("**West Bromwich**").*

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

25. As regards the "factual matrix" or "available background", the courts will, in principle, look at all the circumstances surrounding the making of the contract and available to the parties which would assist in determining how the language of the document would have been understood by a reasonable person in their position. The Appellants stress the importance and width of the factual matrix in this case and pray in aid Lord Hoffmann's judgment in *West Bromwich* when he said (at pp912-913)):

> "Subject to the requirement that it should have been reasonably available to the parties … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

26. However as further noted in *Chitty*, Lord Hoffman later observed (in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [39]) in response to criticisms which had been levelled against the expansive nature of the "factual matrix"

> "I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background … I was certainly not encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage.

27. *Chitty* at 16-062 (referring here to *Contra Holdings Ltd v Bamford* [2023] EWCA Civ 374 at [31]) explains the use the courts make of the factual matrix as follows:

> "…it can be said that the function of the matrix of fact is to "elucidate the contract, and not contradict it". Thus it has been stated that it is not "permissible" to construct from the matrix of fact "a meaning that the words of the contract will not legitimately bear". However, the latter statement must be seen in context. Cases can be found in which the courts have given to words a meaning which, as a matter of their natural and ordinary meaning, they will not legitimately bear. But the courts will not lightly reach such a conclusion and reliance on the matrix of fact alone, without clear evidence both that something has gone wrong with the language and clear evidence of what it was that the parties intended to provide, will not generally suffice to persuade the court to depart from the meaning of the words which the parties have used.

28. *Chitty* considers (at 16-064) that:

> "The drift of modern authority is in the direction of putting greater emphasis on textual analysis and on the meaning of the words which have been used by the parties, particularly in the case where the contract has been drafted with the benefit of skilled professional advice."

and reconciles the authorities with a conclusion that:

> "The instrument must speak for itself, but the words used must, as stated by Lord Hoffmann, be understood to bear the meaning which they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

29. *Arnold v Britton and others* [2015] UKSC 36 provides a good example of the drift of modern authority. There the Supreme Court held at [17] that:

> "The reliance placed in some cases on commercial common sense and surrounding circumstances (e g in *Chartbrook* [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

30. It seems to me appropriate that I should take a similar approach in the current case.

31. The words of Clause 7.2 could not, in my view, be any clearer in stating that outstanding advances were to be repaid "on demand".

32. One of the Appellant's most important arguments is that Clause 7.2 also must be read together with paragraph 4.3 of Schedule 2.

33. Clause 4.3 sets out the criteria for the Respondents to refuse further funding. The Appellants argue that it cannot be the case that the Respondents could demand repayment under Clause 7.2. yet remain bound to provide further funding under paragraph 4.3. The only commercially workable interpretation, they argue, is that repayment may be demanded on the same basis as ongoing funding may be refused under paragraph 4.3. The fact that there were a set of objective provisions which applied before there could be any drawdown of further funds under the Facility Agreements, should be taken as evidence that of an unstated implication in the contract that the same provisions should be applied before a demand for repayment could be made under Clause 7.2.

34. I am unpersuaded by this argument. First, the problem is that the argument is simply incompatible with the plain language of Clause 7.2. Judge Briggs made his decision on this basis, and I see no basis for challenging this.

35. Secondly, the argument that the provisions of paragraph 4.3 can somehow be transposed into Clause 7.2 so as to create conditions precedent to the exercise of Clause 7.2 is unworkable. The provisions of paragraph 4.3 are not expressed to amount to events of default or repayment events. Most importantly, they do not deal in a way that could be transposed into Clause 7.2 with what would have been one of the most important circumstances that might cause the Lenders to wish to seek repayment. This

is the position where the project is not progressing satisfactorily. That point is dealt with in paragraph 4.3(a)(iv) in relation to further advances by insisting that these will not be made unless there has been a Project Monitoring Surveyor's Certificate, but that certificate is only required if there is a request for further funds. There is no deadline for one to be provided that could form a trigger to allow the calling in of amounts already advanced.

36. Whilst the provisions in Schedule 2 set out conditions for drawing down further funds, other than Clause 7.2 itself there is no provision at all for calling back funds already advanced ahead of a Termination Date in circumstances where this would be warranted. There is no provision elsewhere in the agreement to allow a termination or repayment for the usual events of default on a loan agreement such as breach or insolvency, or for failure of the Borrower to get on with the development. Of course none of this would be particularly necessary from the viewpoint of the Lenders if Clause 7.2 is given its natural meaning. The fact that the Facility Agreement does not include any workable events of default allowing advances to the called in is a strong argument as to what Clause 7.2 should be given its plain meaning.

37. There is therefore no lack of commercial sense in giving Clause 7.2 its natural meaning. It is easy to see the advantages from the side of the Lenders in allowing them to call back in the loans when they considered it commercially necessary, without getting bogged down in legal arguments as to whether they had a good reason for this and therefore why they may be taken to have preferred Clause 7.2 to a more traditional clause setting out events of default or repayment events.

38. It is true that Clause 7.2 might operate to the disadvantage of the Borrowers, and to that extent the Borrower made a bad bargain, but, as has been noted by the courts on many occasions, it is not the job of the court to mend a bad bargain.

The definition of Liabilities

39. The Appellants have also sought to make an argument based on the definition of "Liabilities" in the Terms and Conditions which is used in Clause 7.2. Liabilities is defined in Schedule 2 as:

> "all sums due to all the Lender from any Obligor in connection with the Finance Documents on any account whatsoever, whether actual or contingent, present or future, alone or with any other person."

40. It is the Appellants' case that the liabilities of the Borrower do not arise unless and until the conditions for repayment in Clause 7.1. of the Facility Agreement are met, suggesting that this definition meant that the demand could apply only if amounts advanced were already due for payment. Under Clause 7.1 the discharge of the Liabilities was due only on the Termination Date (defined as a date 21 months after the first drawdown) or on the date of completion of the sale of the whole or substantially the whole of the property.

41. This argument is again simply unsupportable given the wide definition afforded to the term "Liabilities" which include all "*present or future*" liabilities. This makes it clear

that the term was not limited to amounts that were already (otherwise than through the demand) due for payment.

42. The Appellants argue that if disclosure is given, something might turn up that might put a different gloss on the Facility Agreement, but that is not enough. Whilst certainly it is acknowledged in cases such as *Easyair*, that the court must take into account the possibility of further evidence emerging, as I have mentioned, this cannot allow "pure Micawberism" - there must be something already before the court to suggest something specific. Here no such matter has been put forward.

43. I therefore agree with Judge Briggs in dismissing any argument based on interpretation of Clause 7.2.

Implied Terms

44. There remains, however, another argument relevant to Ground 3. This is that there must be an implied term that the very broad power that the Lender has taken under Clause 7.2 must be subject to implied terms that it must be used in a reasonable and proportionate manner.

45. Judge Briggs referred in the Judgment to *Property Alliance Group Limited v The Royal Bank of Scotland Plc* [2018] EWCA Civ 355 ("***PAG***") and *UBS AG v Rose Capital Ventures Limited* [2019] 2 BCLC 47 ("***Rose Capital***") to find that that there was no implied term that required reasons for demanding repayment.

46. This point was not as developed as it might have been in the Appellants' skeleton arguments but was developed further in oral argument.

47. In *Paragon Finance pic v Nash* (CA) [2002] 1 WLR ("***Paragon Finance***") the Court of Appeal was ready to find an implied term into a consumer mortgage contract that, in exercising its discretion to vary interest rates, the mortgage lender was bound to make its judgment "fairly, honestly and in good faith, and not arbitrarily, capriciously or unreasonably". I made a similar finding recently in *Breeze v TSB Bank PLC* [2024] EWHC 2427 (Ch) (although this was on the basis that the point had been conceded by both sides).

48. It is to be doubted, however, whether a similar implied term would apply in relation to a power to call in a loan. An almost identical issue was raised in *Rose Capital*. In that case the Defendant contended that UBS was not entitled to call a loan in early, on the basis that it was "unreasonable and/or irrational and/or arbitrary and/or capricious for it to do so." Chief Master Marsh in a finely reasoned reserved judgment rejected this contention and found that the mortgagee's duty of good faith was not the same as a duty of good faith existing in commercial contracts generally (and in relational contracts in particular) – it had developed along another path. As he noted at [34]:

> "As it was put by Hoffmann J in *Re Potters Oils Ltd (No 2)* [1986] BCLC 98 at 103, [1986] 1 WLR 201 at 206 a mortgagee 'is under no duty to refrain from exercising his rights merely because doing so may cause loss to the [mortgagor] or its unsecured creditors."

49. After reviewing the law, Chief Master Marsh went after reviewing the law and in particular the circumstances relating to the Supreme Court decision in *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639, [2015] 1 WLR 1661 went on at [49] to detail a number of general principles including that:

> "(1) It is not every contractual power or discretion that will be subject to a Braganza limitation. The language of the contract will be an important factor.
>
> (2) The types of contractual decisions that are amenable to the implication of a Braganza term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest. In one sense all decisions made under a contract affect both parties, but it is clear that Baroness Hale had in mind the type of decision where one party is given a role in the on-going performance of the contract; such as where an assessment has to be made. This can be contrasted with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause.
>
> (3) The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account: per *Braganza* per Baroness Hale. Thus, it is more likely for a *Braganza* term to be implied in, say, a contract of employment than in other less 'relational' contracts such as mortgages.
>
> (4) The scope of the term to be implied will vary according to the circumstances and the terms of the contract."

50. I consider that Chief Master Marsh has correctly summed up the current state of the law, and accordingly I agree with the Respondents that their exercise of rights under Clause 7.2 was not subject to the sort of term implied in *Paragon Finance* not to use the power "fairly, honestly and in good faith, and not arbitrarily, capriciously or unreasonably".

51. That is not to say the use of this power was completely unconstrained: I think it is at least arguable that the parties intended the power to be exercised (as was the case *PAG)* in pursuit of legitimate commercial aims rather than to vex the borrower maliciously. As with *PAG* I consider that neither of the Lenders here could use their power for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them.

52. There was no evidence before Judge Briggs, and none before me, that provided any indication that the Lenders were calling in the loan otherwise than in pursuit of their legitimate commercial aims. The witness statement provided by Mr Philips makes it clear that the Lenders had formed a commercial view that the project was not progressing as they had expected and in calling in the loan were seeking to minimise their potential losses. That was a legitimate commercial interest.

53. Again, the Appellants argue that if this matter were sent for trial it is possible that further evidence would emerge that the Lenders were acting for an improper person, but this is simply too speculative for the court to take into account at this stage. I agree with the Respondents that it is pure Micawberism.

54. I therefore see nothing in raised in the arguments relating to Ground 3 that should cause me to overturn the careful findings made by Judge Briggs.

4. GROUND 2: *CONTRA PROFERENTEM*

55. As I have already noted in relation to Ground 3, part of the Appellants' case is that there is an ambiguity when one looks to the entirety of the Facility Agreement taking the Facility Letter together with the Terms and Conditions

56. The Appellants argue further that, given that there is such an ambiguity, and on the argument that the Facility Letter and the Terms & Conditions were the Lenders standard agreements, the *contra proferentem* rule applies in favour of the Borrowers and Judge Briggs erred in failing to take proper account of this in his judgment.

57. In my view this argument fails for a number of reasons.

58. First, it is clear from the transcript of the hearing before Judge Briggs that he was aware of the *contra proferentem* argument and nevertheless he did not find for the Appellants on this ground.

59. Secondly, as I have explained above I am with Judge Briggs in being unpersuaded by the argument that there was any ambiguity in Clause 7.2 that needed to be resolved by reference to any such rule. At most, one might be able to say that there was an ambiguity as to whether a demand made under Clause 7.2 caused of itself the termination of the Lender's liabilities under the Facility Agreement, or whether despite the demands being made the Facility Agreement would continue to have an effect in relation to any further obligation to continue lending.

60. However, that is not the real question that was before the court. The question was whether Clause 7.2 was ambiguous as to whether there was any qualification to the word "*repayable on demand*". In my view it was not. In reaching this view I take full account of the various precedents I was referred to as to the approach that the court is to take to interpretation of contracts.

61. Thirdly, there is a question whether the *contra proferentem* rule applied at all since the evidence put forward by the Appellants that the Facility Letters were on a standard form used by each of the Lenders is thin at best argument. In view of the point in the previous paragraph, I do not consider that I need to make any determination on this point for the purposes of dismissing the *contra proferentem* argument.

62. From the discussion above, it will be clear that I will not overturn the Briggs Judgment or Order on the basis of the *contra proferentem* argument.

5. GROUND 4: WAS CLAUSE 7.2 A TERMINATION CLAUSE?

63. Ground 4 was that Judge Briggs was incorrect in holding that Clause 7.2 of the Facility Letter was a termination clause.

64. This ground is not of itself a ground for impugning Judge Briggs decision. As I have stated, the essential question before Judge Briggs was whether or not Clause 7.2 meant what it said on its face, i.e. in allowing a demand to be made at any time for repayment. I have agreed with Judge Briggs that it did. That being the case, it is irrelevant to the matters before the court as to whether Clause 7.2 had any wider effect in terminating the Facility Agreement – that matter was not before the court. That being the case, I cannot allow an appeal on this ground.

6. GROUND 11: UCTA

65. The Appellants started to raise with Judge Briggs an argument based on the applicability of s.3 UCTA. This was developed further before me.

66. S.3 UCTA provides as follows:

> "3.— Liability arising in contract.
>
> (1) This section applies as between contracting parties where one of them deals [...] on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term—
>
> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (b) claim to be entitled—
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

67. The term "reasonableness" is explained in detail in s.11 of and Schedule 2 to UCTA.

68. The Appellants argue that s.3 UCTA applies because the Borrower was contracting on the Lenders' written standard terms of business and the effect of Clause 7.2 was to allow the Lenders to render a contractual performance substantially different from that which was reasonably expected: it allowed them to call in the loans without having to demonstrate any reason for doing so, whereas it was to be reasonably expected that the loans would not be called in until the end of the project, or if there was some demonstrable reason to do so. Thus, they argue, s3.(2)(b) UCTA is engaged.

69. The Respondents argue first that s3(2)(b) UCTA could not properly be engaged. The Respondents had already rendered the contractual performance required of them (by advancing the first part of the loan) and there was never any notice requiring them to

make any further advances. This does not seem a good point to me. S.3(2)(b) might be engaged if the Appellants were able to show that considering the agreement in a holistic manner that (absent Clause 7.2 itself) the Lenders were being expected to advance the loans and not to seek repayment, a clause allowing a different effect might be caught by s.3(2)(b).

70. However, even if this is theoretically possible, I do not see any real prospect that the Appellants would be able to use UCTA to invalidate this clause or the Respondents' use of it.

71. First, Clause 7.2 is not tucked away in the Terms and Conditions in a way that disguises its effect and leaves the reader with the impression that the loan will not be called in until the Termination Date. It is front and centre in defining the obligations of the parties. It does not modify the position of the parties as regards time for repayment. It is part of the central definition of what those obligations are. A case under s.3(2)(b) UCTA would therefore fail at the first hurdle.

72. Secondly, any court is going to be reluctant to invoke UCTA in a case between two commercial parties except where a term is clearly abusive. As I have noted above, in the absence of any right within the Facility Agreement, allowing termination for cause there was a clear need for some ability to call in the loan.

73. Thirdly, even if the Applicants could argue that Clause 7.2 could be regarded as the sort of exemption clause that S.3 UCTA is trying to control, I strongly doubt that the court would find that the clause was unreasonable. There has been no evidence that there was an imbalance of bargaining position between the parties. Of central importance is the fact that the Borrower knew or ought reasonably to have known of the existence and the extent of Clause 7.2. It was not buried away in the small print: it formed an important and very clear part of the main Facility Letter and (despite the protestations of the Appellants to the contrary) there was no ambiguity about its terms.

74. Fourthly, there is no evidence before the court that the Lenders were contracting on standard terms in relation to Clause 7.2.

75. As regards the second to third arguments above, it may fairly be objected that these are matters that should go to trial and will turn on evidence. However, the first argument: that Clause 7.2 is part of the core of the agreement not a term modifying the agreement is not one that requires evidence and is enough by itself for me to dismiss the argument based on Ground 11.

7. CONCLUSION

76. In conclusion, I do not consider any of the grounds of appeal have been substantiated as valid grounds for overturning the well-reasoned decision of Judge Briggs to grant the Briggs Order. On the matters raised, I find myself entirely in agreement with Judge Briggs, and certainly in no position to overturn his findings of fact. The appeal is therefore dismissed.

77. I will hear from the parties in relation to costs and any other consequential matters.