Neutral Citation Number: [2020] EWHC 240 (Comm)

Case No: CL-2019-000705

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice
Rolls Building
London, EC4 1NL
Date: 31/01/2020

**Before** :

**THE HONOURABLE MR JUSTICE BRYAN**

**Between :**

| | |
|---|---|
| **DORY ACQUISITIONS DESIGNATED ACTIVITY COMPANY** | **Claimant** |
| **- and -** | |
| **IOANNIS (JOHN) FRANGOS** | **Defendant** |

**MR M BLOCH QC** (instructed by Boies Schiller Flexner LLP) appeared on behalf of the Claimant.

The Defendant was unrepresented and did not appear.

Hearing date: 31 January 2020

# Approved Judgment

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THE HONOURABLE MR JUSTICE BRYAN

## A. Introduction.

### A.1. The Applications.

1. There are before me today three applications ("the Applications") brought by the Claimant ("Dory Acquisitions") against the Defendant (Ioannis John Frangos ("The Guarantor")).

2. The Applications seek:

> (1) An order that proceedings have been validly served on the guarantor pursuant to CPR rules 1.2, 3.1(m) and 3.10, in circumstances where the claim form served on the Guarantor's English solicitors on 14 November 2019 did not have a court seal or a claim number on its face.
>
> (2) Permission for Dory Acquisitions to apply for summary judgment against the Guarantor pursuant to CPR rules 24.4, such permission being required as the Application for summary judgment is made at a time when the Guarantor has neither acknowledged service or filed a defence.
>
> (3) Summary judgment in respect of Dory Acquisitions' claim for amounts said to be due and unpaid pursuant to a personal guarantee and indemnity ("the Guarantee") given by the Guarantor to Piraeus Bank SA ("the Bank") in connection with a loan agreement in circumstances where the Bank's rights and obligations under the Loan Agreement and the Guarantee were transferred to Dory Acquisitions on 29 July 2019.

3. Dory Acquisitions' claim is in an amount of US$154,135,746.40, the sum of US$154,095,471.50 purportedly due under the Guarantee plus contractual interest alternatively statutory interest pursuant to section 35(a) of the Senior Courts Act 1981 plus expenses of US$40,274.88 purportedly due under the Guarantee, and costs.

4. As addressed in due course below, following purported service of the claim form and Response Pack, the Guarantor, through its solicitors Waterson Hicks, submitted that the Guarantor had not been validly served and also indicated that the Guarantor would challenge the jurisdiction of this court.

5. If service was either valid or is deemed to be valid today, the time for acknowledgement of service and provision of a defence has now passed. However, Dory Acquisitions seeks summary judgment on the merits today rather than a default judgment, so as to maximise its prospects of a successful enforcement of any judgment it may obtain.

6. The Guarantor has not appeared before the court today, notwithstanding having been

given, I am satisfied, proper notice of today's hearing.

## A.2. The Background Facts

7. The background to the case and to the Applications is set out in the witness statement of Mr Gregory Feldman served in support of the Applications on 11 December 2019 and in the Particulars of Claim to which I have had regard.

### The Loan

8. On 16 June 2016 the Bank entered into a loan agreement ("the Loan Agreement") with several corporate entities ("Borrowers"). Pursuant to this agreement the Bank made available to the Borrowers a secured fixed-term loan of US$176,709,126.23.

9. This was split into two tranches: Tranche A, amounting to $50 million, and Tranche B, amounting to US$126,709,126.23. The loan was drawn down by the Borrowers on the same day ("the Drawdown Date"). It was due to be repaid in agreed instalments by 17 June 2024.

10. The Loan Agreement contained terms to the effect that:

(1) Tranche A (pursuant to Clause 6.01) was to be repaid by the Borrowers:

(a) in 32 quarterly instalments:

(i) the first 12 instalments were in the amount of US$300,000 each. The subsequent 20 were in the amount of US$875,000.

(ii) the first instalment became due and payable on a Banking Day falling three months after the Drawdown Date.

(iii) all subsequent instalments became due at consecutive three-monthly intervals thereafter.

The final instalment was payable on the Final Maturity Date.

(b) Further, a balloon payment of 28,900,000 also became due and payable on the final maturity date (the Tranche A Balloon Payment).

(2) Tranche B (pursuant to the Clause 6.01) was to be repaid by three balloon payments:

(a) US$3 million became due and payable on a Banking Day falling three years from the Drawdown Date.

(b) US$5 million became due and payable on the sixth anniversary of the Drawdown Date.

And (c) US$118,709,126.53 became due and payable on the Final Maturity Date.

(3) The buyers were permitted to defer (with the consent of the Bank) paying instalments of Tranche A as long as they fell within the third anniversary of the Loan Agreement (a "Deferred Instalment"). These instalments were to be added into the Tranche A Balloon Payment. This was pursuant to Clause 6.02.

(4) Clause 7 set out provisions on payment of interest:

(a) by Clause 7.01 interest on the loan was payable in respect of each Interest Period at the applicable interest rate, such interest being payable in arrears on each Interest Payment Date (being the last day of an interest period) and on the Final Maturity Date.

(b) by Clause 7.02 the Borrowers (subject to the Bank's approval and consent) could select the length of the next Interest Period (1, 3 or 6 months) and relevant LIBOR.

(c) by Clause 7.03 the Interest Rate applicable to each Interest Period would be the aggregate of the Margin and LIBOR for each Interest Period.

Interest on the loan was payable on arrears on each interest payment date (the last day of an interest period) at the applicable interest rate and also payable on the final maturity date.

(5) An "Event of Default" was defined as follows:

"any principal or interest on the Loan or any part thereof or any other amount due from the Borrowers [...] under this Agreement or any amount due from the Borrowers [...] is not paid on the due date for payment thereof."

This is pursuant to Clause 10.01(a).

(6) If an Event of Default occurred, then the Bank could, by notice to the Borrowers:

(a) terminate the Bank's obligation to make and continue to make the facility available and reduce that facility to zero.

(b) accelerate the Loan and declare that the Loan and all interest accrued and all other sums payable under the Loan Agreement and security documents have become due and payable.

This is pursuant to Clauses 10.01(a) and 10.02.

(7) Each borrower indemnified the Bank on demand in respect of charges and expenses including legal fees incurred by the Bank in the exercise of enforcement of its rights under the security agreement. Further, the Borrowers also indemnified the Bank against any loss or expense which it may sustain as a consequence of *inter alia* any default in the repayment of the loan. That is pursuant to Clauses 15.02 and 15.03.

(8) The loan was governed by English law with English courts having exclusive jurisdiction to determine any disputes arising. This is pursuant to Clauses 20.01 and 22.02.

11. From September 2018 onwards the Borrowers did not pay certain of the principal and interest instalments by the time that they fell due under the Loan Agreement. In this regard:

(1) In relation to Tranche A, three payments of the principal became due on 17 September 2018, 17 December 2018, 18 March 2019 and 17 June 2019 respectively. Principal payments were each for US$300,000, totalling US$1.2 million. A total of US$2,160,684.09 in interest payments also became due in respect of this period. The Borrowers did not pay these sums.

(2) In relation to Tranche B, the first balloon payment became due on 18 June 2019 in the sum of US$3 million. Interest payments were due under Tranche B on 17 December 2018, 18 March 2019 and 17 June 2019, in the sum of US$2,830,705.10. The Borrowers did not pay these sums.

**The Guarantee**

12. On 16 June 2016, the Guarantor entered into a personal guarantee and indemnity to the Bank in respect of the Borrowers' obligation under the Loan Agreement. The Guarantor unconditionally guaranteed as primary obligor the Borrowers' timely repayment of the loan (see Clause 2.01).

13. The Guarantee provided that any person to whom the Loan Agreement was assigned was entitled to the benefit of the Guarantee (see Clause 7.02)

14. The Guarantee was expressed to be governed by Greek law pursuant to Clause 8.01 and provided that the Guarantor irrevocably submitted for the Bank's benefit to the non-exclusive jurisdiction of the English courts to determine any disputes (see Clause 8.03).

15. The Guarantee also provided that the solicitors Waterson Hicks were the guarantors' process agent for English proceedings.

**The transfer of rights and obligations**

16. On 29 July 2019, Dory Acquisitions entered into an assignment agreement to acquire the Bank's rights, interest and obligations in the Loan Agreement and the security documents (one of which was the Guarantee).

17. On 30 July 2019, a letter was sent to the Borrowers and Guarantor, amongst others, notifying the assignment to them.

18. On 23 September 2019, the Guarantor sent a letter to Dory Acquisitions stating in reference to "my guarantee dated 16 June 2016 [...] granted by myself as a personal guarantor in favour of the Original Lender [Piraeus Bank SA] and transferred to the Existing Lender [Dory Acquisitions]" that: "The Guarantee shall remain in full force and effect notwithstanding the sale of the vessels and change of management."

**The notice of acceleration and demand under the Guarantee.**

19. On 6 September 2019, Dory Acquisitions sent a demand and notice of acceleration to the Borrowers, with the Guarantor in copy. On 24 September 2019 the amount demanded was reduced by US$37 million.

20. On 16 October 2019, Dory demanded payment of the following amounts from the Guarantor, which it is said were due under the terms of the Guarantee.

(1) US$153,138,088.53 as unpaid principal and interest as of 16 October 2019.

(2) Further interest accruing (currently at the rate of 8.10213 per cent per annum) from 16 October 2019 up to and including the date of payment.

And (3) US$40,274.88 as unpaid expenses.

**The issue of legal proceedings and subsequent events.**

21. On 29 October 2019, Dory Acquisitions served a letter before action on the Guarantor in compliance with the Pre-action Protocol. The Guarantor did not respond to this letter.

22. On 14 November 2019 Dory Acquisitions' solicitor Boies Schiller Flexner sent a letter to the Guarantor's solicitor Waterson Hicks by hand and by email, stating, amongst other matters:

> "1. We act on behalf of Dory Acquisitions Designated Activity Company.
>
> "2. We enclose the following documents **by way of service** in relation to the proceedings:
>
> "(a) Claim Form.

> "(b) Particulars of Claim.
>
> "(c) Response Pack, comprising forms N9, N9(CC), N9A and N9B.
>
> "And (d) Initial Disclosure List of Documents at Schedule 1."

23. The copy of that letter, which is before the court, has endorsed upon it "Received by hand on behalf of Waterson Hicks" with a signature and a name, with a time and date of 14 November 2019 at 16.40 hours.

24. The claim form that is referred to does not, under the heading "Claim number and issue date", have a claim number or issue date completed. Nor does it bear a seal. But it is signed with a statement of truth. Equally, the Particulars of Claim do not have a claim number attached to them, but accompanying those documents was a document entitled "E-filing submission confirmation", which, amongst other matters, states: "Court: Commercial Court (QBD). Filing types: Filing Claim Form (Part 7)."

25. From this it would be apparent that a claim form had been CE-filed and issued that day. I should say the time. The date is 14 November and the time 04.19 pm. So in other words, shortly before the letter accompanying the claim form was handed to the Guarantor's solicitors.

26. I interpose at this point that Waterson Hicks, being solicitors and no doubt familiar with CE filing in the Commercial Court, could at that point, had they wished to do so, have logged on to the CE file system, and had confirmed by using "Dory" as a search term, that indeed a claim form had been issued. And if they had looked at that they would also have been able to see that it was in identical terms to that which had been served, and they would also have been able to identify the claim reference number.

27. As they are not present today, it is not known whether that in fact was what they did. But it is a reasonable inference. I am satisfied that that is what a solicitor would do in the position of Waterson Hicks.

28. Thereafter on 29 November 2019, Waterson Hicks wrote to the Claimant's solicitors saying as follows:

> "We refer to your letter dated 14 November 2019 and the various documents attached."

29. So at the very least they are thereby acknowledging that they did indeed receive that letter on 14 November 2019, and various documents attached, which included the claim form albeit not sealed.

30. They also took up an offer that was referred to in that letter on 14 November 2019 in

relation to documentation, and sought documentation including a copy of the banking licence of Dory Acquisitions, and a copy of various of the documents identified in the initial disclosure.

31. Thereafter, on 2 December 2019, the Claimant's solicitors responded referring to that letter and inferring from that letter that Waterson Hicks were instructed to act on behalf of the Guarantor in the proceedings, and asked them to respond by return if that was not the case, and saying, amongst other matters:

> "We understand from the court that your client has failed to file an Acknowledgement of Service or a defence although the deadline for doing so expired on 29 November 2019."

32. The heading to that letter included the claim reference CL-2019-000705, which is indeed the reference of this action.

33. The letter ended saying:

> "All our client's rights and remedies are reserved, including to apply for default judgment."

34. That letter was responded to by Waterson Hicks by a letter on 3 December 2019, which provided, amongst other matters:

> "We thank you for your letter dated 2 December 2019. We are currently seeking instructions from Mr Frangos."

35. And then continued asking questions about certain documentation, including that the request for a copy of the banking licence of Dory Acquisitions was made, because it was said that the Claimant appears to be a company incorporated in Ireland and, in consequence, subject to Irish legislation, and it was suggested that it appeared that the Claimant was required to hold a banking licence in order to take over the position of Piraeus Bank, and:

> "unless your client holds a banking licence it would be unlawful for your client to attempt to enforce the loan agreement or the security documents."

36. The letter ended saying:

> "We look forward to hearing from you."

37. I interpose at this point, therefore, that at this stage Waterson Hicks were foreshadowing a possible defence on behalf of the Guarantor.

38. Thereafter, further correspondence followed on 6 December 2019, where the Claimant's solicitor referred to that letter of 3 December 2019 and addressed the

question of the banking licence. They also reiterated that they looked forward to the Guarantor's prompt payment of the overdue debt, and again reserved all their client's rights and remedies.

39. Thereafter, on 10 December 2019, Waterson Hicks sent a further letter, again referring to certain of the documentation, and referred to the website of the Central Bank of Ireland, which publishes up-to-date lists of authorised institutions, as does the website of the European Central Bank. And it was said that it seemed that the Claimant did not appear on any of those lists. The letter ended as follows:

> "We invite your client to withdraw **its claim** on terms that it will pay our client's reasonable costs to be assessed if not agreed."

40. I interpose, therefore, that at this stage Waterson Hicks were treating a claim as if it had been validly made and were inviting, on behalf of the Guarantor, that that claim be withdrawn, and that the Claimant pay "our client's", that is Mr Frangos, the Guarantor's, reasonable costs.

41. That prompted a response on 12 December 2019, or whether it prompted it or not it certainly referred to that letter and engaged with the assertion that the Claimant was not properly authorised. And it was said that the Defendant, the Guarantor, continued to fail to engage with what was being said on behalf of the Claimant, including by not particularising which of the narrow circumstances if any or how the criterion and definition of banking business prescribed in the Irish Central Bank Act of 1971 applied to the Claimant.

42. It was said:

> "Given your client's continued failure to pay a bona fide debt and the hopelessness [as it was put] of the only argument that had been raised in respect of that debt, our client must now take further steps to seek to recover the amount due."

43. [5] then provided:

> "Accordingly, we enclose by way of service our client's application pursuant to CPR 24 for summary judgment (the Summary Judgment Application) as filed at court today, comprising (a) an application notice and draft order, (b) the First Witness Statement of Gregory Feldman dated 11 December 2019, (c) Exhibit GF1, and (d) a covering letter to the court, in relation to listing."

44. They also set out the timetable that would follow pursuant to section F5.3 of the Commercial Court Guide. They proposed a time estimate of half a day for that summary judgment application.

45. On 19 December 2019, an email was sent from the Claimant's solicitors to the

Guarantor's solicitors referring to the application for summary judgment, referring to the proposed time estimate of half a day and notifying them that counsel's clerk was attending Commercial Court listing the following day to list a hearing of the Application:

> "If you would like your counsel's availability to be considered please arrange for their clerk to attend the Listing Office at that time."

46. No counsel's clerk on behalf of the Defendant did attend and the application was fixed for a date of today's date.

47. Then, on 30 December 2019, there was a further email from the Claimant's solicitors to the Defendant's solicitor, which, amongst other matters, having referred to the Application, stated:

> "We had notified you your client's evidence in answer to the application was due by 27 December 2019. We had also invited you to attend the listing appointment to jointly list a hearing of the Application. However, your client did not file any evidence in answer and you did not attend the listing appointment. In this regard, please note the application has now been listed to be heard on Friday, 31 January 2020 with a time estimate of half a day.

48. Then, at [4], it was said:

> "Given your client's non-participation we infer that your client does not intend to respond to the application or appear at the hearing. If that is not the case, please let us know as soon as possible so that we can keep costs and the parties' use of valuable court time to a minimum."

49. Then, on 21 January 2020, which I interpose is approximately two months since the original service of the claim form and Waterson Hicks first engaging in correspondence with the Claimant's solicitors, Waterson Hicks wrote a letter to the Claimant's solicitors in which, amongst other matters, they thanked them for the letter of 12 December 2019, stating they had now an opportunity to consider the correspondence and the documents, and stating:

> "We should make clear at the outset that Mr Frangos [that is the Guarantor] disputes the jurisdiction of the English court, and our comments below are made subject to that general reservation. So, to inform you and the English court of Mr Frangos' position without any intention of making any submission to the jurisdiction of the English court."

50. There is then reference to [30] of Mr Feldman's witness statement dated 11 December 2019, in which it was asserted that proceedings were served by the delivery of papers to Waterson Hicks's offices on 14 November 2019. It is said:

> "With respect, that assertion is plainly wrong. On 14 November 2019 someone from your firm made a 'by hand' delivery of papers to our office just after 16.30 pm. The papers then delivered to our office had not been issued by the Court. The claim form did not bear any court seal and did not bear any court action number. For the purpose of service 'claim form' means the form issued by the Court and bearing the Court seal and action number. We refer you to the notes at CPR 6.2.3 and CPR 6.2.2 of the White Book and the case mentioned therein of *Hills Contractors & Construction Limited v Struth* [2013] EWHC 1693 (TCC). These defects…in service were not minor technicalities.
>
> Similarly, the Particulars of Claim did not bear any action number (see CPR Practice Direction 7A at 7APD.4). In fact, you have never sent us a Claim form bearing a court seal or action number, and we became aware of the above-mentioned action number by chance as you included it in the headings of your letter dated 2 December and subsequent documents."

51. It was then asserted:

> "Once it is appreciated that the steps taken on 14 November and subsequently were not good service, it is apparent that the time for filing an Acknowledgement of Service has not yet started to run and the time for a challenge to jurisdiction has not expired. It follows that it is not appropriate for the Court to give permission for a summary judgment application. The application should be dismissed. The rationale behind CPR 24.4 is that a defendant should not be required to respond on the merits to a summary judgment application until any challenge to jurisdiction has been determined, or the time for bringing a challenge to jurisdiction has passed without any challenge having been brought (see, for example, *Trafigura Beheer BV v Renbrandt* [2017] EWHC 3100 (Comm) and the other cases mentioned in that judgment)."

52. The letter ended by saying:

> "The documents that you have delivered to our office [refer to] a variety of other matters. We do not propose to address them at this time. You should anticipate that if proceedings are served, Mr Frangos will challenge jurisdiction and will then set out the grounds upon which jurisdiction is challenged."

53. Just stopping there for a moment, it will be seen that the first time, therefore, that any point is taken about the validity of service of the claim form is on 21 January 2020, some two months since the claim form was served.

54. In the meantime, as I have noted, Waterson Hicks corresponded with the Claimant's solicitor on the basis that there was a claim afoot, not least because of its letter of 10 December 2019 in which the Claimant was invited to "withdraw" its claim.

55. This produced a response the same day from the Claimant's solicitor, in which it was asserted that contrary to the assertions set out in Waterson Hicks's letter, the proceedings had been properly served. Further, a variety of points were made which were there set out, including that it was accepted that the papers were delivered by hand to Waterson Hicks's offices on 14 December 2019, and those papers were the Claim Form, the Particulars of Claim, a Response Pack, the initial disclosure list of documents and a copy of the electronic filing submission confirmation from the court CE filing system ("the Filing Confirmation").

56. As I have already noted, from that reference to the court CE filing system Waterson Hicks could have, if they saw fit, with a simple search, both confirmed that the claim form had indeed just been issued in the terms in which it had been served and also ascertained the claim number.

57. That letter of 21 January 2020 went on to make many of the points which have been made by Mr Bloch QC today on behalf of the Claimant in relation to that correspondence that I have gone through. The denouement of that letter is along the lines of that it is only on 21 January 2020, some 68 days after service of the proceedings and just over a week before the hearing of the summary judgment Application, that this point is taken in relation to service, which is said to be:

> "... a naked attempt to obfuscate the straightforward debt claim that our client has against your client and/or delay matters. Indeed, if you had any real belief in the point the appropriate course of action would have been to serve notice under CPR 7.7 requiring service of the claim form or to ask us or the court for a copy. However, you did not do so."

58. Various other points were made in that letter. There was a substantive response to that letter from Waterson Hicks on 24 January 2020 in which it was said, by reference back to the letter of 21 January 2020:

> "Mr Frangos [that is the Guarantor] disputes the jurisdiction of the English court, and our comments below are made subject to that general reservation, solely to inform you and the English court of Mr Frangos' position and without any intention of making any submissions as to the jurisdiction of the English court. Subject to that general reservation, we take the liberty of copying this letter to the court."

59. It was then said as follows:

> "In view of the content of your letter dated 21 January, we wish to draw attention to the fact that under the court's CE filing system it is not possible to file an Acknowledgement of Service without stating the applicable action number. The rules are clear and straightforward, there is no good reason why you should not comply with them. To date you have not complied with those rules."

60. That letter therefore stated that it was not possible to file an acknowledgement of service without stating the applicable action number. Of course, I have already noted that the Defendant, through Waterson Hicks, was alive or should have been alive from the very date of purported service that there had been a CE filing from which within a matter of minutes if not seconds it would have been possible for the Defendant to identify both the claim form in identical terms to that which was served, and the claim number, which would allow an acknowledgement of service to be provided.

61. Waterson Hicks, solicitors in London, would of course be aware of the contents of any Response Pack and the need to acknowledge service within the timescales identified.

62. On 27 January 2020, there was a response from the Claimant's solicitors in which it was asserted that they did not consider there was any defect in the service of the proceedings, including for the reasons that have previously been set out in the letter of 21 January. And it then continued:

> "However, and without any admission, please find enclosed by way of service our client's application of today's date seeking an Order that the Court, pursuant to its powers under CPR 3.10, remedy any error of procedure in the service of the proceedings."

63. It went on to make assertions as to what the likely order of the court would be on such an application.

64. For present purposes, it suffices to note, therefore, that the Defendant was aware of this further application to rely upon the provisions of CPR rule 3.10 and for that to be dealt with at the hearing on 31 January 2020. That is today's hearing date.

65. Notwithstanding that letter and the knowledge that the Guarantor undoubtedly had of today's Application, there has been no filing of Acknowledgement of Service. There has been no challenge to the jurisdiction. There has been no evidence put in on behalf of the Guarantor in relation to the Application for summary judgment or in relation to that Application in relation to the application of CPR rule 3.10. And as I have already noted, there has been no attendance today, either by the Guarantor nor by anyone acting on behalf of the Guarantor.

66. Pursuant to CPR rule 23.11(1) the court is entitled to proceed in a party's absence on an application hearing if it considers it is appropriate to do so. I am satisfied that proper notice of this hearing has been given to the Guarantor, and the inference I draw from the Guarantor's absence is that he has chosen not to attend today.

67. In such circumstances, I was satisfied that it was appropriate to proceed in the Guarantor's absence and hear the Applications which I have heard today.

68. In circumstances where this hearing is an inter partes hearing, there is no duty of full and frank disclosure as would exist on an ex parte application. Nevertheless, Dory Acquisitions and those acting for them have identified and addressed before me those points that it is anticipated would have been advanced by the Guarantor had he attended.

**B. Defective service**.

69. I first deal with Dory Acquisitions' Application pursuant to CPR rule 3.10. CPR 3.10 rule provides, as follows:

> "3.10:
>
> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction -
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

70. CPR Part 6 Part II sets out the rules on the service of claim forms. In order for service to be valid, an original claim form sealed by the court must be served (White Book commentary 6.2.3 relying upon *Hills Contractors & Construction Limited v Struth* [2013] EWHC 1693 (TCC).

71. It is clear (and accepted) that the attempted service on 14 November 2019 was not valid service in that the claim form served was unsealed and lacked a claim number. This was so notwithstanding the fact that it must have been apparent to the Guarantor's solicitors that the claim form had been issued, as was clear from the "E-filing submission confirmation" which was provided at the same time and which recorded the "filing-claim form part 7" together with payment of the appropriate court fee.

72. It would have taken a matter of minutes if not seconds for the Guarantor's solicitor to access the CE file and locate the very same claim form (sealed) and the associated claim reference number.

73. As quoted above, CPR rule 3.10 applies where there has been a qualifying "error of procedure" which includes a "failure to comply" with a rule or practice direction. It provides that where such an error occurs that procedural step will be treated as valid unless the court makes an order setting it aside, see CPR rule 3.10(a). Further, the court may make an order remedying the error, see CPR rule 3.10(b).

74. Guidance on the scope of this provision is to be found in *Phillips v Nussberger* (reported sub nom *Phillips and Another v Symes and Others* (No 3) [2008] 1 WLR

180).

75. This guidance was subsequently referred to by the High Court in, inter alia, *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm) and *Bank of Baroda and Others v Nawany Marine Shipping FZE and others* [2016] EWHC 309 (Comm).

76. The guidance of the House of Lords in *Phillips v Nussberger* and subsequent cases can be summarised as follows:

(1) The guidance in *Phillips v Nussberger* is authoritative obiter dicta.

(2) CPR rule 3.10 is a beneficial provision to be given a very wide effect. It can be used beneficially where a defect has no prejudicial effect to the other party and to prevent the triumph of style over substance. (See *Bank of Baroda* at [17].) CPR rule 3.10 can apply even where the defect constitutes a failure to serve sufficient claim forms on defendants or a failure to deliver the correct claim form to the correct defendants or even where a defendant received no claim form at all, only an acknowledgement of service form in the context of service of claim forms on multiple defendants (see the *Goldean Mariner* [1990] 2 Lloyd's Reports 215 discussed in *Phillips v Nussberger, Integral Petroleum* and *the Bank of Baroda*). This interpretation of CPR rule 3.10 applies to originating processes as much as it does to other procedural steps (see *Bank of Baroda* at [19]).

(3) In view of this broad guidance, the most important question in determining whether CPR rule 3.10 applies is whether there has been an error of procedure which might otherwise invalidate a procedural step. This would be more difficult where there has been, for example, a complete failure of service (*Bank of Baroda* at [17]).

(4) Another important factor to consider is whether the defendant has suffered any prejudice as a result of the procedural error. The court has in the past used its powers under CPR rule 3.10 to remedy service of an unsealed claim form without a claim number where the service of that claim did not deprive the defendant of any knowledge of the fact that the proceedings had been or were about to be started or the nature of the claim against it (see *Heron Bros Limited v Central Bedfordshire Council* [2015] EWHC 604 (TCC), at [16] and below).

(5) Whether the defect was the fault of the applicant is considered, but it is a subsidiary factor.

77. I will now consider each of these points in turn before applying them to the facts of this case.

**(1) Status of the guidance in Phillips v Nussberger.**

78. In *Phillips v Nussberger*, the service which had taken place in the English proceedings was personal service on Ms. Nussberger by the Swiss authorities of a package including the Particulars of Claim in English and German, a copy of the claim form in German but not the claim form in English because it had been removed from the package of documents by the Swiss authorities. Some documents were also not served on another defendant because of an error at the Swiss Post Office.

79. The House of Lords determined that service should be dispensed with under CPR rule 6.9. Lord Brown, with whom the other members of the Judicial Committee agreed, found that it was "at least arguable" that the court could make an order under CPR rule 3.10(b) in these circumstances for the reasons set out by Lord Brown at [29]-[34] to which I have had regard.

80. In *Integral Petroleum v SCU Finanz AG*, an error of procedure with respect to the service of Particulars of Claim was remedied pursuant to CPR rule 3.10, with the effect that the defendant was barred from challenging a default judgment against him pursuant to CPR rule 13.2, because as a consequence the time for the defendant to file its defence had expired by the time the default judgment had been entered (See Popplewell J's judgment at [42]).

81. Popplewell J was rightly of the view that the dicta in *Phillips v Nussberger* were authoritative guidance despite the fact that the remarks on CPR rule 3.10 fell outside the ratio of the decision (see in particular [22] and [24]).

**(2) Broad application of rule 3.10 including to originating process.**

82. Popplewell J at [28] to [30] made the following observations on the wide application of CPR rule 3.10 in *Phillips v Nussberger*:

> "28. Fifthly, Lord Brown approved two aspects of the decision of the Court of Appeal in *The Goldean Mariner* [1990] 2 Lloyd's Rep 215:
>
> (a) He approved the unanimous view of the Court of Appeal in that case that RSC order 2 Rule 1 was a beneficial provision to be given wide effect, and further observed that in this respect it was not materially different from CPR 3.10. It is clear from [32] that CPR 3.10 is to be given wide effect so as to be used beneficially to cure defects.
>
> (b) He approved the majority decision in *The Goldean Mariner* that the rule was engaged even where all that had been served was an acknowledgement of service and there had been no service of the writ. This suggests a very wide ambit to the rule, which is capable of curing a defect which consists of non-service of the very document by which originating process is initiated.
>
> 29. Sixthly, Lord Brown's observations at [31] that CPR 3.10 was engaged were addressed to the position not only of Mrs Nussberger, on whom there had been service by a permitted method of a package of documents which included

> the German translation of the claim form and particulars of claim in both languages, but also to the position of Nefer, the third defendant, on whom there had been no service at all. In this he went further than the majority in *The Goldean Mariner*, where there had at least been some service, of the acknowledgment of service form if not the writ. I have some difficulty in treating an "error of procedure" in CPR 3.10 as encompassing circumstances where there is no purported service of any document of any kind, particularly where CPR 3.10(a) automatically validates subsequent steps in the proceedings if CPR 3.10 is engaged. I would be inclined for my part to treat the remedy in such case as lying, if at all, with the discretionary power to dispense with service under CPR 6.9. Nevertheless, the reference by Lord Brown in [31] to CPR 3.10(b) applying to the third defendant, Nefer, is indicative of the view of the Judicial Committee that CPR 3.10 is a beneficial provision to be given very wide effect indeed."

83. Popplewell J found that there was a "significant distinction" between service of originating process and subsequent procedural steps and indicated that a narrower approach was justified where CPR rule 3.10 was to be applied to the service of such process because that is what establishes in personam jurisdiction over the defendant. However, he also accepted that, according to *Phillips v Nussberger,* even for service of originating processes, CPR rule 3.10 is to be given a wide effect (see [37]).

84. *Bank of Baroda and Others v Nawany Marine Shipping FZE and Others* [2016] EWHC 3089 (Comm) concerned the service of claims in relation to a loan agreement and a guarantee agreement. There was purported service of three separate claims. The claims were purportedly served on the defendant's process agents by a letter which appended one copy of the claim form and four original response packs. In fact, they should have served a separate copy of the claim form for each defendant in circumstances where there were at least three claims under separate documents.

85. It was found that CPR rule 3.10 did operate to cure the defect. Sara Cockerill QC, sitting as a Deputy High Court Judge (as she then was), summarised the position at [15] to [17], stating, amongst other matters, as follows:

> "15. This leaves only CPR 3.10 [...] In support of the Claimants' submissions I was referred to the judgment of His Honour Judge Graham Wood QC in *United Utilities Group PLC v Hart* (Liverpool County Court, unreported, 24 September 2015). That case concerned a question of whether purported defective service of a copy of the sealed version of the claim form can be cured by the court exercising discretion under any part of the CPR and where the defective service was held capable of being cured under CPR 3.10.
>
> 16. [...] [it] includes a very useful summary of the principles and recent authorities in the area, highlighting in particular Lord Brown's obiter dictum in *Phillips v Symes (No 3)* [2008] 1 WLR 180 at [31] ..."

> "17. Judge Graham Wood QC also highlighted the careful analysis of the significance of that dictum by Popplewell J in *Integral Petroleum SA v SCU Finanz AG* [2014] EWHC 702 (Comm). Together these cases indicate the following:
>
> i) Lord Brown's dictum can be taken as an indication of the view of the Judicial Committee that CPR 3.10 is a beneficial provision to be given very wide effect;
>
> ii) This enables it to be used beneficially where a defect has had no prejudicial effect on the other party and prevents the triumph of form over substance;"
>
> iii)..."

**(3) Has there been an error of procedure?**

86. The third of the principles set out by Sara Cockerill QC at [17] is as follows:

> "iii) the key in considering whether a defect can be cured under this provision is to analyse whether there is "an error of procedure" which might otherwise invalidate a step taken in the proceedings. Thus, the benefit of CPR 3.10 will be less easy to obtain where there has been no attempt at a procedural step (e.g. a complete failure of service) or the step taken is not permitted by or within the rules at all."

87. This was considered in relation to the facts of that case at [19]:

> "19. Further, while the error relates to originating process (which Popplewell J at [37] indicated should attract a more cautious approach) this is a case where a procedural step was taken defectively rather than omitted or performed directly contrary to a rule. So although on one analysis one might say that service on some of the Defendants was omitted in the absence of sufficient Claim Forms, the covering letter makes clear that service was being attempted to be effected against all the Defendants. Effectively some of the procedural boxes were ticked, but others were not. This therefore seems to me to be a case where the power under CPR rule 3.10 can and should be exercised. Given the fact that no limitation point arises, and the effect of the order will be to validate the steps taken before the Claim Form expired, I do not consider that the expiry of the Claim Form stands in the way of this order being made."

88. At [20] of her judgment she also continued as follows:

> "I also note that this result is consistent with the law as it existed before the CPR: in *The Goldean Mariner* [1990] 2 Lloyd's Rep. 215 (cited in passing by Popplewell J and also discussed by Lord Brown) four defendants received the

> wrong writs, while the fifth received no writ, only an acknowledgment of service form. These errors were all treated as capable of cure under RSC rule 2(1). It would be odd if the CPR, with its greater emphasis on substance, should produce a less favourable result to an erring Claimant than would have been obtained under the RSC."

89. I would only add at this point that I agree with the sentiments expressed by the learned judge in that case, which I consider are also apposite to the facts of this case, as I shall come on to address.

**(4) A question of whether the error had a "prejudicial effect".**

90. The learned judge in that case considered further whether CPR rule 3.10 could operate in the case before her. An important consideration was whether the defect in service had a prejudicial effect, taking into account whether the defendants were effectively informed that proceedings had been commenced:

> "18. Is this therefore a case where CPR 3.10 can operate? There is no suggestion that the defect in service has had a prejudicial effect. The Defendants were effectively informed by the defective attempt at service that proceedings had been commenced against them. Nor was it argued that there was any limitation issue. If I were to accede to the Defendants' application, even though the validity of the Claim Form has now expired there would be nothing preventing the Claimants from issuing another Claim Form and serving it properly. This would, therefore, be a triumph of form over substance."

91. Lord Brown in *Phillips v Nussberger* also noted that the documents served on the defendant in that case included the German translation of the claim form and the Particulars of Claim which set out the details of the appellant's case, so:

> "29. […] (iii) the second and third defendants accordingly suffered no prejudice from the omission of the English language claim form from the package of documents served but rather used the omission as the opportunity to seek to achieve first seisin in Switzerland."

92. Furthermore, the court has previously used its powers under rule 3.10 of the CPR to remedy service of an unsealed claim form without a claim number where the error had no prejudicial effect. In *Heron Bros Limited v Central Bedfordshire Council* [2015] EWHC 604 (TCC), Edwards-Stuart J at [33] to [34] found that such service was an irregularity that could be cured (in the context of service within seven days of issue under regulation 47F(1) of the Public Contracts Regulations 2006), particularly where the irregularity did not deprive the defendant "of any knowledge of the nature of the claim against it or of the fact that proceedings had been or were about to be started " (at [60]) (emphasis added).

**(5) Fault of the applicant.**

93. As one of the considerations, the court has on occasions considered whether the failure to properly effect the procedural step was the fault of the applicant or beyond their control. In *Heron Bros* at [59], the judge noted that the failure to serve the claim form in time had "two effective causes": the failure of the court office to return the documents promptly and the failures of the claimant's legal consultants. Those consultants took no steps to find out what happened to those documents (despite them being retained by the court) or go to the court in person.

**(6) Application of the applicable principles to the facts of this case.**

94. I am satisfied that this is an appropriate case for the application of CPR rule 3.10 so as to remedy the defects in service, and for five reasons:

95. First, the attempted service of the claim form was an error made in taking a procedural step. There was service of a defective claim form: this constituted an attempt at a procedural step, not a complete failure of service (see *Bank of Baroda* at [17(iii)]). Further, service of a claim form which was unsealed and without a claim number is an irregularity that can be cured (see *Heron Bros* at [33]).

96. Secondly, the Guarantor and Waterson Hicks have long been aware that Dory Acquisitions intended to start proceedings against him. In fact, both parties continued to litigate as if the proceedings **had** been validly issued, and this remained the position until over two months later on 21 January 2020.

97. In this regard:

(1) The Guarantor received a letter before action from Dory Acquisitions on 29 October 2019 setting out Dory Acquisitions' intention to issue proceedings.

(2) The Guarantor was aware that the claim form had been issued by the court:

(a) the Guarantor, through Waterson Hicks, received a copy of the electronic filing submission confirmation from the courts CE filing system delivered by hand in its offices on 14 November 2019. The reason that the claim form was not sealed was that it had been electronically filed at court and the court had not yet provided a sealed version to Dory Acquisitions.

(b) further, Dory Acquisitions' letter of 2 December 2019 to Waterson Hicks set out the claim number, which demonstrated clearly if the Guarantor and Waterson Hicks were not already aware of the fact, that the claim had been issued by the court. As I have already noted, the means were readily at hand at any point for Waterson Hicks to check that the claim form had indeed been issued and issued in identical terms, and to have ascertained the claim reference number.

(3) Waterson Hicks engaged in correspondence with the solicitors of Dory Acquisitions regarding the proceedings, including discussion of the disclosure of documents.

(4) On 10 December 2019 Waterson Hicks sent a letter to Dory Acquisitions which asked Dory Acquisitions to "withdraw its claims on terms that it will pay [the Guarantor's] reasonable costs" (emphasis added). This comment is predicated on the basis that there was an extant claim - i.e. on the basis that the claim form had been validly served.

98. Thirdly, the Guarantor has long been aware of the contents of the claim form and the allegations made against it:

(1) The letter before action dated 29 October 2019 set out details of the claims that Dory Acquisitions intended to bring against the Guarantor. Those claims were also repeated in correspondence.

(2) Waterson Hicks was delivered a copy of the unsealed claim form and Particulars of Claim, a Response Pack and an initial disclosure list of documents to its offices on 14 November 2019.

99. Fourthly, the Guarantor did not suffer any prejudice as a result of the error of procedure:

(1) For the reasons set out above, the Guarantor (through his solicitors) was aware of the fact that Dory Acquisitions had issued proceedings and the nature of the allegations and causes of action against it.

(2) The only prejudice that the Guarantor appears to allege is that they would be unable to acknowledge service within 14 days of receiving the claim form, i.e. by 28 November 2019, on the basis that a claim number is required to file an acknowledgement of service (and Dory Acquisitions first provided this claim number after the deadline for acknowledgement of service had passed). However, this is a bad point in my view. The Guarantor had been served with the Response Pack. Waterson Hicks would have been well aware of the need to acknowledge service and would have been able to obtain the reference from the court CE filing system, within if not a matter of seconds certainly within a matter of minutes, by searching for either of the parties' names or they could of course have simply requested the claim number from Dory Acquisitions' solicitors. They did not take either action, instead allowing time for the acknowledgement of service to elapse. This cannot, in my view, have been other than a conscious decision.

(3) The manner in which the Guarantor has conducted its response to the Application also shows that it has not suffered any prejudice as a result of the defective service:

(a) the Guarantor initially took no point on service and indeed

corresponded as if the claim had been validly served, and only took the point two months later and only about a week before Dory Acquisitions' application was due to be heard.

(b) whilst the Guarantor subsequently stated in correspondence that service had not been validly effected, he took no step to acknowledge service. Once he knew the claim reference number, he did not contest the jurisdiction and he did not put in any evidence either in furtherance of a jurisdictional challenge nor in opposition to the Application for summary judgment.

(c) yet further, even when put on notice of the application to be made under CPR rule 3.10 the Guarantor neither put in evidence in opposition nor any skeleton argument nor attended today.

(4) In such circumstances I am satisfied that the Guarantor suffered no prejudice as a result of the claim form with which he was served not being sealed nor in not being provided with the claim reference number.

100. Finally, while it could be said that Dory Acquisitions was at fault in providing an unsealed claim form with no claim number, the Guarantor was, I am satisfied, perfectly well aware that he was being served with proceedings. The accompanying Response Pack contained what he needed to respond and Waterson Hicks could have verified within short order that proceedings had been issued in such terms and could, as I have identified, have obtained the claim number. I have little doubt that this is in fact what they in all probability would have done at that time when no point was taken on service. That was then followed, as I have identified, by a period of some two months, during which time the Guarantor in correspondence conducted himself throughout through his solicitors as if the claim was proceeding.

101. The suggestion that there has been no valid service in such circumstances is technical in the extreme and applying the applicable principles as identified in the authorities I have referred to I am satisfied that this is a case within CPR rule 3.10 where there has been an error of procedure in failing to serve a sealed copy of the claim form which does not invalidate the step of service and it is appropriate that the service that was effected is to be treated as valid service under CPR rule 3.10(b).

102. Accordingly, the Guarantor has failed to acknowledge service or contest jurisdiction in time and has also failed to serve a defence within time. I would only add that it has also failed to do any of these things even after it was aware of the Claimant's stance that time to do so had expired. I am again satisfied that this was tactical. If the Guarantor actually had any ground to contest jurisdiction (despite the terms of the Guarantee in which he submitted to the jurisdiction of the court) he could, of course, have still sought to challenge jurisdiction. See the principles identified by Gloster J (as she then was), in *Antec International Limited v Bio Safety USA* [2006] EWHC 47 (Comm)).

103. The Guarantor did not do so. Equally, had the Guarantor had any defence to the claim, notwithstanding the terms of the Guarantee, he could, and I am satisfied would, have put in evidence in opposition and appeared today to resist the Application, no doubt making clear that in making any submissions on the merits he was not submitting to the jurisdiction of the court. If, in truth, he had any jurisdictional basis of challenge, or any genuine defence to the claim, he would have done so.

## C. Permission to apply for summary judgment

104. Dory Acquisitions needs to seek permission to apply for summary judgment as the Application is made before the Guarantor has acknowledged service or filed a defence. I am satisfied that it is appropriate to give permission on the facts of the present case.

105. First and foremost, the Guarantor is already aware of these proceedings and of the claims made against him and has been for some considerable time for the reasons that I have already given and yet he has taken no step to acknowledge service, challenge jurisdiction or defend the case on the merits.

106. Secondly, and as I will address in the next section of my judgment, I am satisfied that this claim in fact does satisfy the criteria of CPR rule 24.2 for summary judgment and would also further the overriding objective to deal with the case justly and proportionately in terms of cost by disposing of this case by way of summary judgment rather than at trial. In such circumstances I consider that this is a case where it is appropriate to give permission to apply for summary judgment and I do so.

## D Application for summary judgment

107. In relation to summary judgment and reverse summary judgment, CPR rule 24.2 provides, amongst other matters, as follows:

> "The court may give summary judgment against a claimant or a defendant on the whole of a claim or on a particular issue if -
>
> "(a) it considers that
>
> "(i) the claimant has no real prospect of succeeding on the claim or issue ... and
>
> "(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

108. The relevant principles are well established and well known and are conveniently summarised by Simon J, as he then, was in *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm) at [15].

> "(1) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v Hillman* [2001] 2 All ER 91 , 92. A claim is 'fanciful' if it is entirely without substance, see Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [95].
>
> (2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472.
>
> (3) The court must avoid conducting a 'mini-trial' without disclosure and oral evidence: *Swain v Hillman* (above) at p.95. As Lord Hope observed in the Three Rivers case, the object of the rule is to deal with cases that are not fit for trial at all.
>
> (4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products v. Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.
>
> (5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17].
>
> (6) 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 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, [19] ....

(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the Easyair case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(9) The overall burden of proof remains on the claimant,

> …to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason

for a trial, see Henderson J in *Apovodedo v Collins* [2008] EWHC 775 (Ch), at [32].

(10) So far as Part 24,2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see *Miles v Bull* [1969] 1 QB 258 at 266A…."

109. In my view the Guarantor in the present case has no reasonable prospects of successfully defending this claim for four reasons.

110. First, the claim is for a debt that arises, I am satisfied, under the Guarantee.

(1) The Borrowers owed US$154,095,471.50 as unpaid principal and interest as at 13 November 2019.

(a) I am satisfied that the Borrowers failed to pay principal and interest due under the Loan Agreement from September 2018 onwards.

(i) In this regard the Borrowers failed to make principal and interest payments due under Tranche A on 17 September 2018, 17 December 2018, 18 March 2019 and 17 June 2019. The payments which were then due amounted to $1.2 million in principal and US$2,160,684.09 in interest. This was, I am satisfied, clearly in breach of Clauses 6.01 and 7 of the Loan Agreement.

(ii) I am satisfied that the Borrowers failed to make the first Balloon Payment of Tranche B which was due on 18 June 2019 in the amount of US$3 million and failed to make interest payments due under Tranche B on 17 December 2018, 18 March 2019 and 17 June 2019 in the sum of US$2,830,705.10. This was clearly in breach of Clauses 6.01 and 7 of the Loan Agreement.

(b) I am satisfied that the Borrowers' breaches set out above each constituted an "Event in Default" under Clause 10.01(a) of the Loan Agreement. The Bank was therefore entitled to accelerate the loan with all amounts due under the Loan Agreement becoming immediately due and payable by the Borrowers.

(c) The Bank did exercise, I am satisfied, its rights under Clause 10.01(a) to accelerate the loan by sending a demand and notice of acceleration to the Borrowers on 6 September 2019.

(2) The Claimant claims that it is owed US$48,274 in expenses incurred to date pursuant to Clause 15.02 and 15.03 of the Loan Agreement. In relation to that, and whilst there is a right under Clauses 15.02 and 15.03 to claim expenses, I put to Mr Bloch that the material before this court did not descend to particularity as to what those expenses were, nor indeed did Mr Feldman

depose that those expenses were approved and were due and owing. In those circumstances I am not satisfied for the purpose of the Application today that a claim for summary judgment in respect of those expenses have been made out. However, given the possibility that it may be possible for the Claimant to prove those expenses and to prove why they are due under Clause 15.02 and 15.03 of the Loan Agreement, rather than dismissing that aspect of the summary judgment application I will simply adjourn it at this point.

(3) I am satisfied in relation to the principal sums claimed that pursuant to Clause 2.01 of the Guarantee the sums due from the Borrowers under the Loan Agreement as earlier set out became due and payable by the Guarantor as primary obligor and debtor.

(4) Furthermore I note, which I regard as significant, that the Guarantor has not disputed any of the matters I have identified above in the course of the correspondence in relation to the Application, and of course has not attended today to dispute any of those points which are advanced on behalf of the Claimant and which I am satisfied have been demonstrated by the Claimant to the requisite standard on the Application before me today.

111. Secondly, and importantly, the Guarantor has in fact stated in correspondence on 23 September 2019 that the Guarantee "remains in full force and effect", and in those circumstances it is difficult to understand how Dory Acquisitions' claim could fail in circumstances where the Borrowers are, I am satisfied, clearly in default of their payment obligations and a notice of demand has been sent by Dory Acquisitions pursuant to the Guarantee.

112. Thirdly, the Guarantor's argument that it is unlawful for Dory Acquisitions to attempt to enforce the Loan Agreement or the security documents pursuant to section 7 of the Irish Central Banking Act 1971 ("the Irish Banking Act") because it does not hold a banking licence is, I am satisfied, without substance.

(1) As a matter of Irish law I am satisfied that the narrow circumstances in which the Irish Banking Act requires a person to obtain a banking licence do not apply to Dory Acquisitions for the reasons which are set out in the witness statement of Gregory Feldman:

(a) I am satisfied the Irish Banking Act only requires a person to obtain a banking licence where they are:

(i) carry on "banking business" this includes -- receiving money on their own account from members of the public or granting credits on their own account. Dory Acquisitions on the evidence before me does not carry out either of those functions.

(ii) holding out or representing themselves as a banker or as carrying

on banking business. Pursuant to section 7.2 of the Irish Banking Act a corporate body is deemed to hold itself out as a banker if its name includes the word "bank" or variance thereof or if it holds itself out or represents itself as conducting or being willing to conduct banking business. I am satisfied that Dory Acquisitions meets neither criterion.

(iii) accepting deposits or other repayable funds from the public. Again, on the evidence before me Dory Acquisitions does not accept such monies.

(2) The argument is, I am satisfied, one which was vague and unparticularised. It was also made in correspondence rather than being carried through by way of any evidence or any skeleton argument or any submission at the hearing today. Certainly, it is not supported by any witness evidence such as might have been served in opposition to this Application.

113. Fourthly, although the Guarantor has stated in correspondence that they intended to challenge the jurisdiction of the English courts, no such challenge has in fact been made. Furthermore, and although such a challenge would be theoretically possible on the information and evidence before me, any such challenge would, I am satisfied, be hopeless in view of the clear express submission by the Guarantor to the non-exclusive jurisdiction of the English courts in Clause 8.03 of the Guarantee.

114. Accordingly, and applying the applicable principles, and for the reasons that I have identified, I grant summary judgment in favour of the Claimant against the Defendant in the figure of US$154,095,471.50 together with contractual interests to 31 January 2014, resulting in a total figure of US$156,802,126.78.

115. As I say, and for the reasons I have given, I adjourn the application for expenses which were contractually claimed under Clause 2.01 of the Guarantee by reference to sums claimable under the Loan Agreement and Clause 15.02 thereof.

116. Under the Guarantee the Claimant is entitled to costs on a contractual basis effectively on an indemnity basis. However, Mr Bloch again accepts, rightly in my view, that there is not before me the material which would allow me to justify to make a finding that such costs were recoverable in a particular figure. Realistically, therefore, and sensibly in my view, Mr Bloch therefore limits his claim before me today to costs on the standard basis as set out in the draft order that is before me.

117. I consider that the Claimant is the successful party and that costs should follow the event and that the Claimant is therefore entitled to have their costs of and occasioned by this Application.

118. In the context of a half day hearing, and having the benefit of a schedule of costs before me, I consider that it is appropriate to assess costs summarily so as to avoid

the additional cost and expense of a detailed assessment in circumstances where I am satisfied that there is no reason why there needs to be a detailed assessment of costs.

119. I will hear from counsel for the Claimant in relation to those costs and there will then be added to my judgment the appropriate figure for those costs as summarily assessed by me.

120. Accordingly, for the reasons that I have given, I declare that CPR rule 3.10 applies and I grant the relief that I have identified in relation to CPR rule 3.10 and I give permission that there be an application for summary judgment. For the further reasons that I have given I am also satisfied that this is an appropriate case for summary judgment on the basis that there is no real prospect of a successful defence and that there are no other compelling reasons why there should be a trial.

121. Once I have heard from counsel in relation to the summary assessment of costs, I will then finalise the Order with the assistance of counsel.