Plaintiff's application for Summary Judgment in respect of its claim against the Defendant and a reverse claim for such in respect of the Defendant's counterclaim under Rule 19 of the Royal Court Civil Rules 2007; or in the alternative that the Defendant's defences and/or counterclaim be struck out under Rule 52 of the Royal Court Civil Rules 2007.

[2021]GRC060

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

BETWEEN:

BUTTERFIELD BANK (GUERNSEY) LIMITED

Plaintiff

- and-

Q GSY LIMITED

Defendant

Hearing date: 23 July 2021

Judgment handed down: 14 December 2021

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Plaintiff: Advocate Elaine Gray
The Defendant was represented by its director, Mr Quinten Hubbard

Cases & legislation referred to:

The Royal Court Civil Rules 2007
The Civil Procedure Rules 1998 (The White Book)
Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical CO 100 Ltd [2007] FSR 63
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013-14] GLR 445
ITG Limited & Bayeux Limited v Rawlinson & Hunter Trustees SA and Vimelator GCA Appeal number 511 1 August 2017
Tranquility Holdings v Invista Real Estate Investment Management (CI) Limited, Judgment 38/2015
Saville AD4 Ltd and Saville AD7 Ltd v Marlborough Trust, Marlborough Nominees Limited, Marlborough Secretaries Limited and SPL Guernsey ICC Limited Judgment 3/2016

Introduction

1. This is the Plaintiff's application for summary judgment on its claim against the Defendant and reverse summary judgment in relation to the Defendant's counterclaim under Rule 19 of the Royal Court Civil Rules 2007 (the "RCCR") or in the alternative that the defences and/or counterclaim of the Defendant be struck out under Rule 52 of the RCCR (the "Applications").

Background

2. The Cause was first tabled on the 20 November 2020. A week's adjournment was granted for the Defendant to obtain legal advice, and on the 27 November 2020 leave was given for the Plaintiff to file an amended Cause (the Defendant having no objection) to reflect a mistake in the calculation of interest. At that time, the Defendant indicated the matter was to be defended and the matter was placed *inscrite*. The Defendant tabled its defences and a counterclaim which are treated as being tabled on 25 December 2020. A *replique* and defence to the counterclaim was filed on the 5 February 2021 and a *duplique* filed by the Defendant on the 19 March 2021.

3. In support of the Applications, the Plaintiff filed an affidavit of Andrew Wilson Graham, Chief Risk Officer with the Plaintiff dated 11 May 2021. A further brief affidavit of Emma Jane Gallienne dated 27 July 2021 was filed in order to satisfy the rules on summary judgment, confirming that the Plaintiff believes that on the evidence, the Defendant has no prospect of successfully defending the claim or being successful on its counterclaim and that the Plaintiff knows of no compelling reason why the claims or issues should be disposed of at trial. The Defendant filed an unsworn undated affidavit of Mr Hubbard (no issue being taken that it was not sworn). Both parties filed written skeleton arguments and augmented these orally at a hearing on the 23 July 2021.

4. The Plaintiff's claim is for the payment of sums loaned to Mr Quinten Hubbard and Mrs Jo Hubbard (the "Borrowers") which were guaranteed by the Defendant and secured against a property Mentone L'Abbaye, Vale, Guernsey ("the Property") owned by the Defendant. The Plaintiff also seeks a Preliminary Vesting Order.

5. The Defendant is owned by a discretionary family trust of which the Borrowers were the principal beneficiaries. Mr Hubbard is also the Director of the Defendant and has at all times during these proceedings appeared on behalf of the Defendant.

6. The Property was subject to a mortgage with Lloyds Bank, but the Borrowers re-financed this borrowing with the Plaintiff. The Property was, in part, a development project and the borrowing was additionally linked to the progress of the building work being undertaken by the Borrowers on the Property. In the first agreement dated 30 November 2016 (the "First Agreement"), between the Plaintiff, the Borrowers and the Defendant, the Plaintiff lent the Borrowers the sum of £1,500,000 plus interest and charges and the Defendant agreed to guarantee the loan. The Defendant executed a guarantee dated 30 November 2016 (the "First Guarantee") and this was secured against the Property by a Bond dated 15 December 2016. Assignments were taken over two life assurance policies relating to the lives of the Borrowers for the same amount.

7. The second agreement between the same parties dated 21 April 2017 was for a further £350,000 (interest and charges) (the "Second Agreement") loaned by the Plaintiff to the Borrowers with the Defendant agreeing to guarantee the loan. This was supported by a guarantee by the Defendant in favour of the Plaintiff, dated 25 April 2017 (the "Second Guarantee") and a further Bond, registered as the first charge against the Property on 5 May 2017. The full amount under both agreements was drawn down by the Borrowers.

8. In January 2018, the two amounts were consolidated into a loan agreement for £1,850,000 (plus interest and charges) dated 29 January 2018. The terms of which were agreed by the Borrowers and the Defendant.

9. In 2019 due to the worsening financial situation of the Borrowers, there were discussions between the Borrowers and the Plaintiff about steps that could be taken. On 18 December 2019, an amended and re-stated loan agreement was entered into by the Plaintiff, the Borrowers, and the Defendant (the "2019 Loan Agreement"). An amended, re-stated security confirmation agreement dated 18 December 2019 (the "ARSCA") was also entered into between the Borrowers, the Plaintiffs, and the Defendant (together the "2019 Agreements").

10. On the 1 October 2020, Carey Olsen on behalf of the Plaintiff, demanded repayment of the loan from the Borrowers, identifying various breaches of the 2019 Agreements. The Borrowers failed to meet that demand and in accordance with the guarantee documentation, on 6 November 2020, Carey Olsen wrote to the Defendant, notifying it that the Borrowers had failed to make payment in accordance with the demand letter and that the Plaintiff was seeking to claim payment from the Defendant.

11. The arguments by the Defendant are, in summary, based on invalid documentation, conditions precedent which have not been fulfilled and breaches of the terms of the 2019 Agreements. In relation to the counterclaim, the Defendant claims damages of £1,925,000 (plus interest and costs) which it alleges are due to the actions and inactions of the Plaintiff in relation to the construction work at the Property including in relation to the value of the Property and the certification of works undertaken at the Property. Further that attempts by the Defendant to mitigate its loss have been thwarted by the Plaintiff. In response to the counterclaim, the Plaintiff asserts that it has no liability towards the Defendant. At no time did it undertake or assume any role in the construction process other than maintaining the facility to the Borrowers and the Defendant and specifically, it assumed no responsibility in relation to the Borrowers and/or the Defendant by virtue or pursuant to its engagement with the surveyor.

12. In relation to the defences, the Plaintiff pleads that the Borrowers have received the full benefit of the 2019 Agreements. Further, it denies that the 2019 Agreements are not valid. The 2019 Agreements were agreements to continue the existing lending which had been paid over in full to the Borrowers on amended terms. They are valid and executed legal agreements to which the Defendant as a contracting party is bound. In any event, even if they were not valid and not executed, which is denied, the Plaintiff would still be able to rely on the previous agreements, wherein the Defendant confirmed its agreement to and guarantee of, the Borrowers' obligation and which were separately guaranteed by the Defendant and secured by Bonds against the Property. The reliance on the conditions precedent is without foundation as is reliance on the alleged breaches.

The Law

13. The legal tests in this matter were not at issue. Both parties also accepted that this court can draw guidance in relation to both summary judgment and strike out from the equivalent rules in the Civil Procedure Rules and the approach of the English Courts as well as the Guernsey cases on these applications.

14. An application for summary judgment under Part IV of the RCCR must meet the two-stage test in rule 19(2):

> "*The grounds of the application for summary judgment shall be that –*
> *(a) the plaintiff has no real prospect of succeeding on the claim or issue, …*
> *and there is no other compelling reason why the claim or issue should be disposed of at a trial.*"

15. The summary given by Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch) (at para. 15)*, is a readily accessible summary of the

considerations involved when deciding applications for summary judgment frequently used by this court:

> "*i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> *vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that it is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

16. The rules in relation to strike out are set out in Rule 52 of the RCCR relevant to this application are:

> *"The Court may strike out a pleading if it appears to the Court-*
>
> *(a) that the pleading discloses no reasonable grounds for bringing or defending an action,*
>
> *(b) that the pleading is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings."*

17. In *Tranquility Holdings v Invista Real Estate Investment Management (CI Limited)* judgment 38/2015 the then Bailiff, Sir Richard Collas, set out the following guiding principles:

    a) *Claims which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA).*
    b) *The principal test is whether the party's case is "bound to fail", which creates a high threshold before a pleading, or a part thereof, will be struck out. Simply because a case might be weak is not sufficient to justify striking out.*
    c) *A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown January 19, 2000, unrep, CA).*
    d) *Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011]EWHC 1781 (QB)).*
    e) *The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (see In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
    f) *The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4:*

        > *"Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."*

    g) *It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, The Times, January 26, 2000,CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL).*

Discussion

18. The submissions of the Plaintiff start with a reminder that the court must not lose sight of the over-riding objective under rule 1 of the RCCR and that this is an addition to the court's duty to manage cases under rule 50 including the duty to consider whether a case which should be disposed of summarily.

19. The Plaintiff's submissions are in effect that the case is a simple one, the documentation speaks for itself and there is no reason why the Plaintiff should not be able obtain judgment on the claim without the necessity of going to trial. This is a case, the Plaintiff submits, where the Defendant's case both in defence and counterclaim is "bound to fail". The Plaintiff has lent the Borrowers money, the Defendant agreed to act as guarantor and in default of the Borrowers repaying the sum, the Plaintiff is entitled to payment of the sums set out in the amended cause. The Plaintiff

denies that that it ever agreed to undertake any role in the construction process nor assumed any responsibility to the Borrowers nor the Defendant other than to provide the facility to the Borrowers and the Defendant is unable to show any evidence that it did nor that there is any basis in law for the Defendant's assertions of the Plaintiff's duties in that respect.

20. The Plaintiff's application to strike out the Defendant's pleadings is on the basis of rule 52(2)(a) and/or (b). These are pleadings which in the White Book come within the description at paragraph 3.4.1 (with respect to the identical paragraphs under the Civil Procedure Rules 1998) which allow the court to strike out pleadings which are "*unreasonably vague incoherent vexatious scurrilous or obviously ill-founded and other cases which do not amount to a legally recognised claim or defence*". Either sub-rule is appropriate to this application because a pleading that discloses no reasonable grounds can be struck out under (a) or (b) and there is no direct dividing line between the two grounds.

21. Whilst striking out a claim is a high threshold nevertheless this is a case where that threshold is met as the Defendant's case is an unwinnable one i.e. "*where continuance of the proceedings is without possible benefit to the respondent and would waste resources on both sides*" (see the reference to *Harris v Bolt Burdon [2000] L.T.L., February 2, 2000,* CA in *Tranquility Holdings v Invista Real Estate Investment Management (CI Limited) (ibid*).

22. The Plaintiff submits that there is no real distinction between strike out on the basis sought by the Plaintiff or on obtaining summary judgment in this case. By reference to paragraph 24.2.5 of the White Book on summary judgment applications, this is a case where the Plaintiff has satisfied the burden in establishing that there are grounds to be believe that the Defendant is unable to show some "*real prospect of success*" and there is no other compelling reason why this matter should proceed to trial. Although it is not a high burden the Defendant is not able to show some real prospect of success. The court is not required to accept without analysis everything said by the Defendant and should not. Likewise, the counterclaim is unsustainable and summary judgment should be given. The Plaintiff has adduced credible evidence in support of its application as set out in the affidavit of Mr Graham but the Defendant's case does not carry any or a sufficient degree of conviction nor any other reason why it should proceed to trial as required in the authorities.

23. The Defendant's submissions are that this is not a case where the Court should dispose of the matter summarily. The defence and the counterclaim both demonstrate a realistic as opposed to fanciful prospect of success. Mr Hubbard on behalf of the Defendant says that is a dispute on the facts and further evidence will be needed. The documentation is ambiguous and should be interpreted against the Plaintiff. There is a clear dispute whether either of the 2019 Loan Agreements are valid and only a trial will determine whether it is. He says there was no drawdown under the 2019 Loan Agreements. There are multiple breaches of the contractual documentation on the part of the Plaintiff. In line with case guidance set out in *Easyair Limited (t/a Openair) v Opal Telecom Limited (ibid)* the Court should hesitate about making a final decision without a trial where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case. (*Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical CO 100 Ltd [2007] FSR 6*3). If the 2019 Loan Agreements are not valid the Defendant argues it will be able to rely on its *droit de discussion* which it says has not been waived in the Second Guarantee and therefore it will require the Plaintiff to proceed against the Borrowers first so these proceedings should be stayed.

24. The Defendant relies on the observations of Lewison J in *Easyair Limited (t/a Openair) v Opal Telecom Limited* (*ibid*) that the court must not conduct a mini-trial and this is a case where a trial is clearly needed. The application made by the Plaintiff has been made prior to any disclosure. There are documents in the Plaintiff's possession which it submits are relevant to the Defendant's case and are needed for the proper conduct of this litigation. Further there will

need to be witness evidence not only from the Borrowers but from third parties in relation to the counterclaim and expert evidence.

25. The Defendant is right that the court must not conduct a "*mini trial*" although that does not mean that I must take at face value and without analysis everything that is said by the Defendant in statements before the court.

26. In *Saville AD4 Ltd and Saville AD7 Ltd v Marlborough Trust, Marlborough Nominees Limited, Marlborough Secretaries Limited and SPL Guernsey ICC Limited* judgment 3/2016, the Deputy Bailiff as he was then, at paragraph 12, usefully set out the guidance found in *Three Rivers D.C. v Bank of England (No. 3) [2003] 2 AC 1* about the different tests found in summary judgment and strike out and quoting from the speech of Lord Hope of Craighead at para. 91:

> *"The difference between a test which asks the question "is the claim bound to fail?" and one which asks, "does the claim have a real prospect of success?" is not easy to determine. In Swain v Hillman at p 4 Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In Monsanto plc v Tilly, The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924 of 1999; Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In Taylor v Midland Bank Trust Co Ltd he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred."*

At para. 95 His Lordship added:

> *"…it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."*

27. I also add to these the paragraph identified by the Court of Appeal in *ITG Limited & Bayeux Limited v Rawlinson & Hunter Trustees SA and Vimelator* Guernsey Court of Appeal number 511 where McNeil JA referred to paragraph 158 from the *Three Rivers DC v Bank of England* (No 3) as it is of assistance in identifying what my role is.

> *"The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under*

RSC O.14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters."

28. The Defendant says that there is a clear dispute as to whether the 2019 Agreements are valid because the conditions precedent have not been fulfilled and therefore the 2019 Agreements were never executed. The 2019 Loan Agreement and ARSCA were clearly executed as the signed copies are attached to the affidavit of Mr Graham however as the Defendant is a litigant in person it is appropriate for me to consider whether if the conditions precedent were not fulfilled does this mean that the Loan Agreement or the ARSCA were never operative rather than not executed or valid. The difficulty that the Defendant has with this argument is that all the conditions that are required are for the benefit of the Plaintiff and quite clearly the Plaintiff did not discontinue the availability of the borrowing of which the Borrowers had already had the benefit. Further the 2019 Agreements make clear that the conditions precedent may be waived at any time by the Plaintiff and relevantly in the ARSCA, the Plaintiff can agree that the Agreement should take effect notwithstanding the ongoing obligations on the Borrowers to fulfil the conditions precedent. The conditions precedent must be construed against the facts of this case. The Borrowers had already received the benefit of the lending. The Defendant's argument that its case is supported by there being no drawdown on the 2019 Agreements is without substance. The Defendant argues that the 2019 Agreements are not operative because, for example, the recording of the lending in the Plaintiff's records is by the wrong title with the wrong payment dates and interest rates. However, I do not consider this is evidence that the 2019 Agreements are not in place. It is evident that the 2019 Agreements were not intended to provide additional lending but to update the terms of the lending and security. The parties clearly relied on the 2019 Agreements by the way they conducted themselves. The Defendant also defends the claim on the basis of numerous breaches that it has identified of the 2019 Agreements, for example, the failure of payment of the arrangement fee, the amount and timing of interest calculation, the breach of the LTV clause, and the failure by the Borrowers to obtain independent legal advice. I have not set out in this judgment all of the alleged breaches although I have considered all of the submissions by the Defendant and the evidence that it has provided very carefully. However to the extent that these alleged breaches are breaches at all, these are not fundamental breaches of the 2019 Agreements and in any event on the most part are due to the default of the Borrowers and for the benefit of the Plaintiff not entitling the Borrowers or the Defendant to rely on them to avoid their respective obligations to the Plaintiff in circumstances where these agreements are restatements and amendment of terms in relation to borrowing that the Borrowers have already received and the Defendant has guaranteed and secured by means of Bonds against the Property. Further, the Plaintiff has conceded its miscalculation of interest and amended its cause accordingly (to the Defendant's benefit).

29. I do not consider that the Defendant has a realistic prospect of success on the basis of the 2019 Agreements not being valid.

30. In any event even if the Defendant had been able to successfully resist the Plaintiff's applications on the 2019 Agreements, this would not assist the Defendant. The effect would mean that the previous agreements would have continued with the obligations on the Defendant contained therein and would not have the effect of undermining and invalidating the Guarantee. Clause 2 (1) of First and Second Guarantees contains the following:

…., the [Defendant] agree to guarantee to pay [the Plaintiff] on demand all sums of money whether actual or contingent which now are or shall at any time be due, owing or incurred to [the Plaintiff] anywhere on any account whatsoever from [the Borrowers] whether solely or jointly with any other person or persons firm or company including the amount of any note, bill guarantees or other securities held now or hereafter by [the Plaintiff] on which

the [Borrower] may be liable and all interest commissions and other banking charges and all costs and expenses, legal or otherwise, incurred by [the Plaintiff] in connection therewith whether accruing before or after the date of demand and not debited to the [Borrowers] account.

31. At clause 4 under the heading Extent of Guarantee, the First and Second Guarantees state: "*This guarantee shall extend to cover any monies which shall for the time being constitute the balance due from* [the Borrowers] *to* [the Plaintiff].*"*

32. Further, under clause 9(2) of the First and Second Guarantees states: *"the liability of [the Defendant] under this guarantee which liability shall be as primary obliger and not merely a surety shall not be affected by reason of any security now or hereafter being held by the Plaintiff in respect of the indebtedness of the borrower being irregular defective, informal or void*."

33. The Plaintiff is also entitled to rely on the terms of its Bonds secured against the Property.

34. A further argument of the Defendant is that it did not relinquish its rights to the *Droit de Discussion* and therefore if the 2019 Agreements are invalid it would invoke them now requiring the Plaintiff to exhaust its options against the Borrowers before relying on the guarantee. As I have found that the 2019 Agreements are valid it is not strictly necessary for me to consider these arguments however, if I was wrong in relation to the 2019 Agreements I am clear that the Defendant would have no realistic opportunity of success of this argument. In the First Guarantee, the Defendant's *droit de discussion* is waived by the Defendant at clause 14. In the Second Guarantee the *droit de discussion* is also waived by the Defendant at clause 14. For completeness in the 2019 Loan Agreement at clause 18.7 this waiver is repeated. I have concluded that there is no prospect of the Defendant being able to go behind the documents, which point firmly against its contention that the *droit de discussion* was waived and consider that there is no possibility of the Defendant being successful in relation to this defence. Also, I do not consider that there is any basis for the claim that the Plaintiff has failed to mitigate its loss.

35. As a further defence in relation to the repayment of £350,000 of the borrowing and also as the basis of the counterclaim the Defendant alleges that the Plaintiff was negligent, in contractual breach of the Second Agreement and has caused the devaluation of the Property.

36. The Second Agreement is addressed to the Borrowers although its acceptance is counter-signed by the Defendant by its director Mr Hubbard as well as the Borrowers. It is alleged by the Defendant that the valuations that the surveyor provided, rather than the architect's certificates which were required under the Second Agreement at clause 4.2, were provided in the face of negligent building works leading to a substantial devaluation of the property compared to the estimates provided for the value on completion and the Plaintiff "*erroneously released funds to continue to build*". Further, that "*if the* [Plaintiff] *had not released funds at the very beginning until architect's certificates had been received as required by the terms and conditions of the lending being adhered*" the loss would not have occurred.

37. The Defendant also pleads in aid of its claim a conversation between one of the Plaintiff's officers and the Borrowers wherein the Defendant asserts a promise was made on behalf of the Plaintiff to pursue a claim against the surveyor which should be treated as an admission of liability on the Plaintiff's part.

38. Mr Graham exhibits in his affidavit the Plaintiff's original valuation certificate dated 5 December 2016 which was, as set out at clause 1.4 of the valuation, to enable the Plaintiff "*to assess the suitability of the property*" being offered as security for lending for the first tranche of lending of £1,500,000. Mr Graham explains that the plan was that this would be followed after 6 months by a second loan. It is common ground that this was to fund the building work

undertaken by the Borrowers. This is referred to as "loan 2" in the Second Agreement. At clause 4.2 of the Second Agreement it states, "*Drawdown of Loan 2 is to be drawn in tranches on a 60:40 basis, subject to receiving architect certificates confirming that the works have been undertaken were of a satisfactory standard and are in line with the planning permissions and schedule of works.*" At clause 11.8 of the Second Agreement it states: "*An updated valuation in the form and substance satisfactory to the Plaintiff is made available in respect of the Property by valuers acceptable to the Plaintiff. Such valuation is to value the Property in its present condition and project the value on completion of the extension. The Plaintiff reserves the right to call for updated valuations on the Property on any annual basis at the expense of the borrowers*".

39. No architect's certificates were obtained. However, it is not in doubt, it was the Plaintiff who instructed the surveyor. The valuations and reports were accordingly addressed to the Plaintiff and for the benefit of the Plaintiff to ensure the Property's value as security for the borrowing. This was used by the Plaintiff as the trigger to release the tranches of loan 2 to the Borrowers. Amongst other evidence, this is confirmed in an email from the surveyor to the Plaintiff that Mr Hubbard had been in contact and indicating that the Plaintiff "*requires an opinion as to the uplift in the value since my last letter in May to enable funds to be released to* [Mr Hubbard]." and by the excerpt from the email provided by the Defendant in its submissions from the mortgage broker.

40. However, the Defendant fails in its defence and in its counterclaim to identify how the Plaintiff, which is a bank has, by including a requirement for architect's certificates and obtaining surveyor's reports, assumed duties in relation to the Defendant which would make the Plaintiff liable for the allegedly negligent work undertaken on the Property by third parties instructed by the Borrowers. The certificates were for the Plaintiff's benefit and the Defendant cannot rely on the decision of the Plaintiff to use a different form of reassurance in relation to the value of the security to argue that this is a breach of contract that it is entitled to rely on or rely on the alleged negligent report to create a duty of care or any other obligation making the Plaintiff liable in relation to the Property. Further, the Plaintiff's wish to ensure the value of its security (whether by architect's certificate or by surveyor's report) did not create a duty whether expressly or by implication to the Defendant or the Borrowers in relation to the construction process. There was no evidence before me that the Plaintiff expressly or impliedly had any time agreed or assumed a duty nor had any duty or role in the construction undertaken by or for the Borrowers on the Property nor did the relationship give rise to a duty of care whether to the Borrowers or to the Defendant in relation to the construction works or the consequences thereof whether as a consequence of the surveyor's valuations, which were provided by the surveyor to the Plaintiff or lack of architect's certificate, or otherwise. Further (although it would not create an obligation or duty that the Defendant could rely on if the Borrowers had refused to receive the money in the absence of the architect's certificate) it is also evident that at no time did the Borrowers question the absence of the Plaintiff obtaining an architect's certificate nor raise issue with, or refuse to receive the monies drawn down under Loan 2 as a consequence of the lack of certificate. It is worth noting that rather than raising this as an issue at the time, Mr Hubbard was encouraging the provision of the surveyor's interim reports by the surveyor to the Plaintiff to obtain further funds. The conversation with the officer about the Plaintiff possibly suing the surveyor does not assist the Defendant's claim and does not amount to any concession on liability. Applying the legal test to the counterclaim I am satisfied that the prospects of success for the Defendant is fanciful. Having come to that conclusion although the defence to the counterclaim includes *Exception des Formes*, I do not consider that this a case where delaying matters further for a response would be a worthwhile exercise. It would be delaying the inevitable in a case where I should "*grasp the nettle*". Neither the Defendant's case in its defence of the claim by the Plaintiff nor its counterclaim against the Plaintiff have a real prospect of succeeding.

41. Before deciding whether to deal with the pleadings summarily, I should consider whether it should be given an opportunity to amend its pleadings (see the reference to *In Soo-Kim v Youg [2011] EWHC 1781 (QB*) at paragraph 47 of *Tranquility Holdings v Invista Real Estate Investment Management (CI Limited) (ibid)*). However, given my conclusions above with regard to the defence and/or the counterclaim neither of these pleadings are ones where its defects might be cured by amendment.

42. I have come to the conclusion in this case that for the Plaintiff's claim against the Defendant the right route is to consider the summary judgment route and therefore I must consider the second limb of the test for summary judgment in rule 19 of the 2007 Rules. I have asked myself whether, I should nevertheless permit the defence to proceed to trial. I have considered the guidance set out in the White Book in this regard and I have come to the conclusion that there is no reason why I should permit the issues contained in the defence to go trial. Due to the considerable overlap between the court's powers under the two rules in cases such as this, if I had not decided to use the rule 19 power to achieve the summary disposal of issues, the Plaintiff would have been successful on its application to strike out under rule 52(2)(a).

43. I consider that the Defendant's counterclaim should be struck out in accordance with rule 52(2)(a) i.e. that the pleading discloses no reasonable grounds for bringing an action. For the avoidance of doubt, I consider the Plaintiff's application for summary judgment would have also been successful.

44. In making this decision I have been mindful of the words of Beloff JA in *Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013-14] GLR 445* at paragraph 18:

> *" The overriding objective, which is the foundation of the CPR as it is of the 2007 rules, requires that the Court should recognise that, in the interests not only of the parties, but of the administration of justice more generally, cases should not be permitted to proceed to trial with all the concurrent expenditure of costs and time if the outcome is inevitable."*

Conclusion

45. For the reasons I have given, the Plaintiff's application for summary judgment on its claim and its application to strike out of the counterclaim are successful. This means that the Plaintiff has obtained judgment in the amount £1,916, 665.92 (inclusive of interest as at 11 May 2021) plus interest accruing at the contractual rate until the date of this judgment and post judgment interest in accordance with the Judgments (Interest) (Bailiwick of Guernsey) Law 1985. I should be grateful if the Plaintiff would calculate this amount in order that the actual figure can be inserted in the act of court.

46. In relation to costs, these are pleaded on contractual and therefore indemnity basis pursuant to clause 13.17 of the 2019 Loan Agreement (clause 9 of the 2019 Loan Agreement also provides for this) and clause 6 of the ARSCA. Given that the Plaintiff has been entirely successful in its applications and applying the normal principle that a successful party is entitled to his costs, there does not appear to be a justification for costs not to be ordered for the benefit of the Plaintiff on this basis, however I will give the Defendant 7 days from the date of this judgment being handed down to make any representations as to why costs should not be so ordered. If the Defendant does make any representations, I will give the Plaintiff 14 days to respond and then either party can list the matter for interlocutory court for a brief hearing.

47. I also grant the Preliminary Vesting Order.