IN THE HIGH COURT OF JUSTICE **Claim no. BL – 2020 – BHM – 000079**

BUSINESS & PROPERTY COURTS IN BIRMINGHAM

BUSINESS LIST (ChD)

HIS HONOUR JUDGE RAWLINGS, SITTING AS A HIGH COURT JUDGE

14 DECEMBER 2021

BETWEEN:

Mr LIAM BRIAN WORDLEY

Claimant/ Respondent

- and -

(1) LENDY LIMITED (in administration)

(2) SAVING STREAM SECURITY HOLDING LIMITED (in administration)

Defendants/ Applicants

(3) DAVID SHAMBROOK & GEOFFREY PAUL ROWLEY

(as Receivers appointed over the leasehold land on the north side of Paul Street (Title Number: MM49689))

Defendant

CLAIMANT'S SKELETON ARGUMENT

for application hearing on 14 December 2021

Time estimate: 1 day (plus 3 hours' pre-reading – see paragraph 7 below)

Andrew George, QC, Blackstone Chambers and Benjamin Wood, 4 New Square

andrewgeorge@[redacted].com; b.wood@[redacted].com

A. Introduction

1. This claim relates to a personal guarantee and security given by the Claimant ("**Mr Wordley**") over a property in Wolverhampton ("**the Property**" or "**the Car Park**"). The Car Park is adjacent to (and was intended for the use of) a residential development (the former Sunbeam factory: "**the Factory**") that is owned by QED Developments ("**QED**", in administration), of which Mr Wordley is the sole shareholder. The First Defendant ("**Lendy**") was a peer-to-peer lender (i.e., it brokered loan contracts between prospective

borrowers and prospective lenders and claimed to act as agent for, and be duly authorised by, those prospective lenders). Its security agent was the Second Defendant ("**SSSHL**"). They appointed the Third Defendants ("**the Receivers**") as receivers of the Car Park (which has recently been sold by the Receivers). The personal guarantee and the security were given in connection with loan facilities of up to c.£13 million for the development of the Factory.

2. The essence of Mr Wordley's claim against Lendy and SSSHL is that false representations were made by them and on their behalf regarding agreements they claimed to have reached with prospective lenders to provide the money that was due under the loan facilities (and specifically the "**Development Loan**") and/or that they breached the Development Loan agreement in their failure to procure timely payments of the various tranches of the Development Loan (which, says Mr Wordley, resulted in delays, cost increases and eventually QED's default under its agreements). As a result, says Mr Wordley, the personal guarantee and the security over the Car Park are unenforceable and he is entitled to damages for having been deprived of its control.

3. It is only in respect of certain parts of the first aspect of Mr Wordley's claim that Lendy and SSSHL's recent application for summary judgment/strike out is brought. Indeed, all of the issues identified by District Judge Rouine to take place in the "Phase 1" trial (currently listed to take place in November 2022) would still fall to be determined, even if the application were wholly successful [**B/13/114: Order of 28 Jul 21 at §2**]. The application, even if successful, appears to give rise to no substantial cost or time savings; to the contrary, it has precipitated this day-long hearing and puts the trial timetable in further jeopardy.

4. In short, it is Mr Wordley's submission that his claim – including specifically the issues identified by Lendy/SSSHL in their application – *does* enjoy (at least) real prospects of success. That is so both because Lendy/SSSHL's asserted interpretation of the contractual documents is commercially absurd and incorrect (and its commercial absurdity means that it is less likely to be correct) and because this is a case where the greater investigation of the surrounding factual matrix at trial (following disclosure, etc.), is both justified and necessary. Furthermore, Lendy/SSSHL's application, at least in relation to the Representation, lies within a developing area of law, making it all the less suitable for summary determination.

5. Furthermore, and to address a pleading point raised by Lendy/SSSHL, and to make a further amendment that has been identified as desirable during the preparation for this hearing, Mr Wordley seeks permission for certain re-amendments to his Particulars of Claim (if they are not agreed by consent).

6. Lendy/SSSHL's solicitors (Shoosmiths) have prepared a hearing bundle (in hard copy and electronic formats), to the tabs and pages of which references herein are made. It is anticipated that they may also prepare a composite authorities bundle, but in case this does not happen an electronic bundle of the Claimant's authorities has been prepared, and the tabs and pages of that are cross-referenced below as [**Auth#/xpage#**].

B. Suggested reading

7. If time permits, the Court is asked to read the following documents, in addition to the parties' written submissions:

   7.1. Case Summary [**D/29/223-225**];

   7.2. Agreed Chronology [**D/30/227-229**];

   7.3. Draft Re-amended Particulars of Claim dated 6 December 2021 [**E/40/309-331**];

   7.4. Defence dated 23 January 2021 [**A/3/32-54**];

   7.5. Reply dated 22 March 2021 [**A/4/57-65**];

   7.6. Lendy/SSSHL's Further Information dated 22 July 2021 [**A/5/67-70**];

   7.7. Application notice dated 22 October 2021 [**D/31/231-234**];

   7.8. Witness statement of Aaron Harlow, in support of the application, dated 22 October 2021 [**D/32/237-244**];

   7.9. Witness statements of Mr Wordley [**D/34/253-261**] and of Nigel Brook [**D/33/245-251**], both dated 6 December 2021 and made in response to the application;

   7.10. Witness statement of Ben Lloyd dated 8 October 2018 [**D/35/263-265**] made in connection with the QED administration proceedings but also relied upon in response to the application by the Claimant; and

   7.11. Further witness statement of Mr Harlow, ostensibly in reply, dated 8 December 2021 [**D/36/267-271**]. (It is not accepted either that this statement contains any relevant evidence or that the facts asserted by Mr Harlow – presumably upon instructions – are true.)

C. Factual and procedural background

8. Until very recently (when it was sold by the Third Defendant receivers), Mr Wordley owned a car park next to the Sunbeam Factory residential development in Wolverhampton ("**the Development Land**"). The Development was (until it was also sold by QED's administrators) owned by QED, which is in administration. QED is and was Mr Wordley's company.

9. Between about September 2015 and July 2016, various loan agreements were entered into between QED and Lendy (a now defunct peer-to-peer lender). SSSHL is and was Lendy's (and its underlying lenders') security agent. In July 2016, QED and Lendy agreed to seek to consolidate the initial loans into a loan for £6.6 million ("**the Land Loan**") and to enter into a further loan for up to £6.1 million ("**the Development Loan**"). That Development Loan was to be provided in a series of tranches, payable on specific dates or on the reaching of certain milestones. As a peer-to-peer lender, and as clearly set out in the contractual documentation, Lendy did not provide, or assume any obligation to provide, lending itself. Rather, Lendy brokered loan contracts between prospective lenders and prospective borrowers. Lendy entered into those loan contracts, including the Land Loan and the Development Loan, as agent for those lenders. It did not disclose the lenders' identity to borrowers, including QED. Rather, it made clear statements, recorded in all the relevant contractual documentation, that *"the Lenders have agreed to provide the Borrower with a loan as set out in this agreement"* and *"*[Lendy] *is entering into this agreement as the agent of the Lenders"* [**D/23/151**, for example].

10. It now appears to be common ground that these representations were entirely false. Beyond possibly an initial payment in respect of the Development Loan, no lender had agreed to provide any part[1] of any further tranche of the Development Loan. No lender had even been asked to do so. As Lendy/SSSHL have very recently acknowledged, at least in respect of the Development Loan, Lendy/SSSHL only had *"lenders who had committed funds sufficient for each draw down under the Development Loan by the date of each draw down*" [**A/5/68: Pt18R §3**].

[1] In Lendy's terminology, a "part" means a proportion of the overall loan (e.g., a commitment to fund a 10% part of £6m to be payable in 3 equal tranches over 12 months is a commitment to fund £200,000 of each £2m tranche). The word "tranche" refers to the total amount payable on each occasion funding is provided (in the foregoing example there are three £2m tranches).

11. The Development Loan was effectively a sham – Lendy assumed no obligation to pay; and there were in fact no lenders who had *"agreed to provide the Borrower with a loan as set out in this agreement"*. No-one at all had either agreed, or assumed any legal obligation, to provide the, or the balance of the, Development Loan.

12. It is however the extraordinary contention of Lendy and SSSHL within this application not only that QED had no legal remedy in respect of this deception (whether in misrepresentation or by reason of contractual interpretation) but that there is no real prospect of such a remedy being established at trial such that no trial in this regard should be permitted by this Court.

13. It is Mr Wordley's case that he (and his company, QED) were induced by these representations and relied upon them in deciding whether to accept the loan offers and/or to provide security [**E/40/318-320: APoC §§45-55**]. It is not suggested that the issues of inducement and reliance are susceptible to summary judgment – this application purely relates to whether the Representations were made and/or the contractual significance of the matters set out above.

14. The Representations were made to Mr Wordley by Lendy in its documents and also by its Mr Darling, during the course of a meeting at the end of May 2016. The documentary representations are the subject of the present application. The Oral Representation will be proceeding to trial regardless of the outcome of the present application.

15. When it came to the development itself, Lendy/SSSHL had appointed a surveyor ("**the IMS**") to certify the valuations for the purposes of drawing down tranches of the loans. It is Mr Wordley's case that Lendy/SSSHL were in breach of their obligations in failing to facilitate the drawing down of the tranches and/or delayed the IMS's certifications. The delays for each valuation are set out in Appendix 1 to the Amended Particulars of Claim [**A/3/29-30**]. This aspect of the claim will be proceeding to trial regardless of the outcome of the present application.

16. It is common ground that the development encountered difficulties and has not performed as expected. It is Mr Wordley's position that this was caused by the issues with Lendy/SSSHL as described above. SSSHL placed QED into administration in November 2018 and it subsequently appointed the Receivers over the Car Park.

17. With a sale of the Car Park threatened, Mr Wordley sought an interim injunction in autumn 2020. That application was refused by HHJ Richard Williams on 27 October 2020 [**B/7/75-76**]. It was asserted on behalf of the respondents in connection with the injunction application that (a) a sale had been agreed and contracts drafted, such that "*the sale… could go ahead within 2-4 weeks*" and (b) the price for the Car Park was agreed at £200,000. According to Mr Harlow, the Receivers completed the sale of the Car Park only on 6 August 2021 [**D/32/240: Harlow 1 §15**]. Mr Wordley understands that the Car Park was sold for £400,000, and that completion of the Car Park and Factory sales were simultaneous on 6 August 2021.

18. The present claim was issued on 8 October 2020 [**A/1/1: Claim Form**]. Mr Wordley seeks declaratory relief regarding the enforceability of the security against him and/or the rescission of those documents, together with damages/compensation. For their part, the Defendants say that there has been no wrongdoing and that Mr Wordley remains guarantor for QED's indebtedness, which they put at something over £28 million.

D. <u>The relevant contractual provisions</u>

19. There are two key contractual documents which were effectively entered into in materially identical form in respect of each of the relevant loans which form the subject-matter of this application, save for certain terms specific to the Development Loan which was to be provided, as set out above, in tranches. As Mr Wordley explains, these had been provided to him on numerous occasions prior to the relevant contract [**D/34/255: Wordley 4 §§15-16**].

20. The first document is the Standard Terms. These are effectively an umbrella agreement between the borrower (here QED) and Lendy/SSSHL (here acting as principal, not agent) which explain the introductory and broking services which Lendy will perform in order to procure binding loan agreements between borrowers (here QED) and lenders (for whom Lendy will act as agent having been duly authorised by the lenders to enter into the relevant contractual documentation). Key terms are as follows:

    20.1. Preamble – "…*Each agreement between each lender and borrower comprises our standard loan conditions and term sheet (as may be amended from time to time in accordance with these terms and conditions) (together the "Loan Contract"). There will be more than one lender for each loan. The Loan Contract is a separate agreement between you and the lender and is*

governed by separate terms and conditions. If there is a conflict between these terms and conditions and the Loan Contract, the Loan Contract will prevail…" [**C/28/210**]

20.2. Clause 1.2 – "[Lendy][2] *is authorised by the lenders to enter into the Loan Contract as agent for the lenders.*" [**210**]

20.3. Clause 3.5 – *"*[Lendy] *will perform introductory functions on behalf of borrowers and lenders in order to bring together prospective borrowers and lenders, to provide a stream-lined process for entering into loans (including the development of standard loan conditions) and to facilitate the payment and collection of sums due under or in connection with these loans (including certain limited actions upon a borrower's default as set out in these terms and conditions).*" [**212**]

20.4. Clause 3.7 – "*Once you have accepted the loan request offer, you automatically enter into a separate and legally enforceable Loan Contract with each of the lenders for each relevant loan part. The identity of the lenders will not be disclosed to you and may change during the term of the Loan Contract. The Loan Contract will be generated automatically to include the term sheet, which sets out the specific details of the loan, and our standard loan conditions. The first time you borrow you will be required to accept the loan conditions for all your on-going borrowing. You will be deemed to accept the loan conditions by signing these Terms. The money is then posted from each of the relevant [Lendy] lender accounts by us to your [Lendy] borrower account where it can be transferred to your bank or building society account. Once you have accepted a loan it cannot be cancelled for any reason…*" [**212**]

20.5. Clause 3.9 – *"Each borrower agrees that all notices and communications to be given to a lender will be sent to [Lendy] (acting as agent on behalf of the lenders) and that this is sufficient to identify the lenders for the purposes of the Loan Contracts.*" [**213**]

20.6. Clause 4.3 – "[Certain fees charged to the Borrower] *cover our role in providing services in relation to the introduction between you and the lenders.*" [**214**]

21. As envisaged by the Standard Terms, there was then a further key contractual document ("**the Loan Contract**") which, once Lendy had identified the relevant lenders and secured

[2] Confusingly, Lendy (i.e., the First Defendant) used, and is sometimes referred to, by its trading name of "Saving Stream". It is important to note that these are references to the First Defendant rather than the Second Defendant (which has a similar name – "Saving Stream Security Holding Limited" – but is a separate legal entity).

their agreement to enter into the relevant loan agreement, was entered into between the borrower (here QED) and those lenders (for whom Lendy acted as agent). Thus, the Development Loan, which was to be provided in a series of tranches payable when certain dates and/or milestones had been reached provided:

21.1. Recital A – "*The Lenders have agreed to provide the Borrower with a loan as set out in this agreement.*" [**C/25/169**]

21.2. Recital C – "*The Agent is entering into this agreement as the agent of the Lenders.*" [**169**]

21.3. Clause 1.1 (definition of "Lenders") – "*the persons who have agreed with the Agent from time to time to provide all or part of the Loan to the Borrower and whose names and addresses are maintained by the Agent.*"[**173**]

21.4. Clause 2 – "*The Lenders agree to lend to the Borrower the aggregate amount of the Loan on the terms of the Loan Agreement and in the proportions that they have agreed with the Agent.*" [**176**]

21.5. Clause 4.1 – "*The Borrower may draw down a tranche of the Loan by delivering to the Agent a duly completed Drawdown Request.*" [**176**]

21.6. Clause 4.2 – "*The Loan may be drawn down in more than one tranche but the Borrower may not request more than one tranche in any month. The Lenders will not be obliged to make any part of the Loan available at any time until the conditions in clause 5 have been satisfied…*" [**176**]

E. The Applicants' three issues

22. The applicants have raised three issues that they say are suitable for summary determination:

    22.1. Does Mr Wordley have a real prospect of establishing that it was a condition of each loan (whether a condition precedent or a contractual condition) that there were, at the point of completion of the Loan Agreement, lenders who had, as per Recital A and clause 2 of the Loan Agreement, agreed and authorised Lendy to agree as agent on their behalf, to lend to QED the aggregate amount of the loan on the terms of the Loan Agreement ("the First Issue")?

    22.2. Does Mr Wordley have a real prospect of establishing that the obligations owed by QED under the Land Loan and the Development Loan (and secondarily by Mr Wordley himself under the Personal Guarantee) were owed only to those lenders who had, at the point of completion of the Loan Agreement, agreed and authorised Lendy to agree as agent on their behalf, to lend to QED a part of the aggregate amount of the loan on the terms of the Loan Agreement ("the Second Issue")? This is effectively an alternative case in circumstances where there were some lenders who had so agreed in respect of their part of the loan but not sufficient lenders to cover the entirety of the promised Development Loan.

    22.3. Does Mr Wordley have a real prospect of establishing that Lendy represented by the repeated provision of its standard contractual documents, in connection with each loan, that there were, at the point of completion of the Loan Agreement, lenders who had agreed and authorised Lendy to agree as agent on their behalf, to lend to QED the aggregate amount of the loan on the terms of the Loan Agreement ("the Third Issue")?

F. Summary judgment and strike out – General principles

23. Lendy and SSSHL have brought their application for summary judgment and in the alternative for strike out (the latter on the stated basis that the relevant paragraphs disclose no reasonable grounds for bringing the claim).

24. The significant difference between the two applications is that a strike out is concerned with pleadings and no evidence is needed on the application: *Ministry of Defence v. AB* [2010] EWCA Civ 1317 at [71] [**Auth4/x114**]:

> *…In our view, this power is intended to be exercised on examination of the pleading itself, not after examination of the evidence supporting it. It is open to the court to raise the issue of strike out under this rule of its own motion. It should not be necessary and is not appropriate for evidence to be served in support of or opposition to an application to strike out under this rule.*

25. By contrast, a summary judgment application *is* concerned with the evidence and with what can or cannot be shown to be incontrovertible fact at the summary judgment stage. In reality, the summary judgment application is likely to be the core of the oral hearing.

26. There should be little disagreement over the law as it applies to summary judgment applications, summarised by Lewison J in *Easyair Ltd v. Opal Telecom Ltd* [2009] EWHC 339 at [15]:

> *1. The court must consider whether the* [respondent to the summary judgment application] *has a "realistic" as opposed to a "fanciful" prospect of success.*
> *2. A "realistic"* [statement of case] *is one that carries some degree of conviction. This means a [case] that is more than merely arguable.*
> *3. In reaching its conclusion the court must not conduct a "mini-trial".*
> *4. This does not mean that the court must take at face value and without analysis everything that [the respondent] says. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.*
> *5. 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.*
> *6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts at trial than is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, 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.*
> *7. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral*

evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

27. In the context of Lendy/SSSHL's application, there are three key points.

28. First, paragraph (5) of the *Easyair* summary refers to the need for the court to take into account the evidence that will be available at trial, and not merely the evidence available at the summary judgment stage. What documents can be retrieved from Lendy/SSSHL's records (including particularly those shedding light on the existence of lenders and their contractual arrangements) and what, exactly Mr Darling (or any other witnesses called to deal with the lending process) will say both in chief and in cross-examination are good examples of such evidence.

29. The need to take into account evidence that can reasonably be expected to become available at trial is made clear in 24PD.1.3(2). Consequently, a summary judgment hearing has a forward-looking element to it. It includes:

    29.1. consequences of the lack of extrinsic evidence from Lendy/SSSHL, whether from a witness or from documents: Lendy/SSSHL has remained completely – and deliberately – silent and this application has been brought when (and perhaps because) they imminently face the obligation of extended disclosure. There are 3 consequences for their summary judgment application:

        29.1.1. the court is being asked to assume that Lendy/SSSHL's witness evidence at trial would have no bearing on the issues of construction, but there is no material on which to base such an assumption;

        29.1.2. the court is also being asked to assume that documents which might normally be expected to be relevant to consideration of the factual matrix, and which ought in due course to be disclosed, have no such bearing, and yet there is no basis for such a conclusion (and, if anything, the timing of the application points the other way);

        29.1.3. the reasonable inference is that Lendy/SSSHL know they have more to gain by being silent than by giving the court such clear, unvarnished version of events as they are able.

    29.2. disclosure, which will have to be given by Lendy and SSSHL: even if no extended disclosure order were made, the Disclosure Pilot expressly preserves the duty to

disclose adverse documents, regardless of what order is made [**51UPD.3.(2)**]. At present, Mr Wordley does not know what documents the applicants have in their possession (and, somewhat troublingly, it is far from clear that the administrators themselves know what documents they have). Instead, of accepting their disclosure obligations, the applicants have instead chosen the detour of this application;

29.3. whilst the applicants have (with no small measure of reluctance) gone some way to acknowledging that Mr Wordley was indeed right to suspect and to allege that Lendy had falsely stated that, at the point of completion, it had identified lenders who had agreed and authorised Lendy to agree as agent on their behalf, to lend to QED the aggregate amount of the loan on the terms of the Loan Agreement that still leaves Mr Wordley (and the Court) in the dark about what the true situation was, and this could well bear upon the issues of construction. Thus, it is not clear whether individual lenders had committed to fund the whole development, but there were not enough of them, whether there were enough lenders to fund the first tranche but they had made no commitments to fund further tranches, or some other scenario (or combination of scenarios). In legal terms, entirely different considerations may apply to a "fictitious or non-existent lender" as opposed to a lender who has authorised Lendy to make certain agreements (i.e., part of the first tranche of a Development Loan) but has provided (contrary to Lendy's representations and the relevant contractual terms) no authority to make an agreement in respect of the balance of the Development Loan[3]. The Court is therefore in the unsatisfactory position of being asked to determine these issues without even knowing how the contracts were operated in practice.

30. Second, the amount of additional evidence likely to be available at trial has a knock-on effect. Principle (6) of *Easyair* encapsulates this point.

31. Finally, to succeed Lendy/SSSHL must establish both limbs of the summary judgment test: they must demonstrate both that Mr Wordley has no real prospect of success on (the impugned aspects of) his claim and that there is no other compelling reason for a trial.

[3] See, generally, *Bowstead & Reynolds on Agency* (22ed.) at 9-016 [**Auth16/x622**], 9-018 [**x623**] and 9-085 [**x650**], and further at paragraph 78 below.

32. The Court of Appeal has warned of the dangers of deciding part of a case on summary judgment and trying to decide overlapping or related issues at trial: *Partco Group v. Wragg* [2002] EWCA Civ 594 at [27] [**Auth1/x29**] and *Iliffe v. Feltham Construction* [2015] EWCA Civ 715 at [68] and [72] [**Auth8/x359**].

33. The Court in the present case is being asked to assume that it can decide the case in favour of Lendy/SSSHL without even knowing – or examining – the full factual matrix that is a necessary element of the exercise of contractual interpretation and on the basis that the law on representations is settled against Mr Wordley. This is manifestly the wrong approach.

34. One further unsatisfactory aspect of the Applicants' approach is that they implicitly concede that Mr Wordley's case under the Financial Conduct Authority's COBS (and specifically COBS 4.2.1 R) has (at least) reasonable prospects of success. As pleaded at paragraphs 21-22 of the Particulars of Claim [**E/40/314**], Lendy was obliged to ensure that its communications were fair, clear and not misleading (and this obligation is admitted in the Defence [**A/3/34: §11**]); the Representation (and the Oral Representation) were communications to which COBS 4.2.1 R applied [**E/40/320: POC §55**]; and it is alleged that there was a breach of COBS 4.2.1 R by Lendy's failing to ensure that the Representation and the Oral Representation were fair, clear and not misleading [**E/40/323: POC §78**].

35. The trial Judge will therefore be required to evaluate whether the Representation and the Oral Representation were fair, clear and not misleading. Plainly, in undertaking that exercise, the Court will need to reflect upon what the relevant words and phrases mean. Were the applicants to succeed on their application, the trial Judge – armed with all the evidence and the detail that will only emerge at a trial – is (presumably) to be prevented from making his or her own findings on the matters of construction but nevertheless to decide whether, by comparing that meaning with the words used, to decide whether there has been a breach of COBS. The risk of contradictory findings is high and the trial Judge's balancing act would be difficult.

G. Mr Wordley's re-amendments to the Particulars of Claim

36. Mr Wordley has tendered changes to his Particulars of Claim, consisting of a new paragraph 46A and amendments to paragraphs 47 and 49. They are shown on a single page in Mr Wordley's exhibit LBW4 [**E/40/308**]. The Receivers have consented to these amendments, but Lendy/SSSHL appear from correspondence to accept that the amendments "stand or fall" with the issues raised by the summary judgment application.

37. The Court is invited to adopt the usual approach of deciding Lendy/SSSHL's application on the basis of the Re-Amended Particulars of Claim (hence the cross-references herein to the Particulars of Claim are to the pages of those Re-Amended Particulars of Claim).

H. Contractual interpretation – General principles

38. In a judgment of the Supreme Court in April this year (*Burnett or Grant v. International Insurance Co of Hanover* [2021] 1 WLR 2465 [**Auth12/x449**]), Lord Hamblen JSC (with whom the other members of the Court agreed) was able (at para. [29], 2471B-C [**x455**]) to summarise the law (which was not contentious) in a single paragraph:

> *The parties were agreed that the policy, like any other contract, is to be interpreted in accordance with the principles discussed and set out by Lord Hodge JSC in Wood v. Capita Insurance Services Ltd [2017] AC 1173, paras 10-13. The policy is to be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. This involves a consideration of the words used in their documentary, factual and commercial context. This approach applies equally to exclusion clauses. The doctrine of interpretation contra proferentem is only relevant in a case of genuine ambiguity or real doubt as to the meaning of the words used – see Impact Funding Solutions Ltd v. Barrington Support Services [2017] AC 73, paras 6-7 per Lord Hodge JSC.*

39. That summary drew upon *Wood v. Capita Insurance Services Limited* [2017] AC 1173 [**Auth11/x435**], which itself contained an analysis of the judgments in *Arnold v. Britton* [2015] AC 1619 [**Auth9/x361**]. In *Arnold v. Brittan*, Lord Neuberger PSC gave the following guidance (the last of his Lordship's seven points being specific to the facts of the case) [**x369**]:

> *15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean…" And it does so by focusing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) any other relevant provisions… (iii) the overall purpose of the clause… (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*

16. For present purposes, I think it is important to emphasise seven factors.
17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances… should not be involved to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision…
18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning… However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
19. The third point… is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…
20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties agreed, not what the court thinks that they should have agreed…
21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties…
22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention….

40. With uncertainty over a perceived inconsistency between that approach and the earlier decision of the Supreme Court in *Rainy Sky v. Kookmin* [2011] 1 WLR 2900 [**Auth5/x167**], Lord Hodge JSC explained the unitary exercise of considering textualism and contextualism, in *Wood v. Capita Insurance Services* [2017] AC 1173 at [11]-[14] [**Auth11/x441**]:

11. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each…
13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they

have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…
14. On the approach to contract interpretation, the Rainy Sky and Arnold cases were saying the same thing.

I. Representations within contracts – Legal principles

41. At its heart, whether express or implicit, an actionable representation involves the communication of information: the making of a statement of fact.

42. Section 1 of the Misrepresentation Act 1967 makes clear that a term of a contract may have begun life as a (mis-)representation: "*Where a person has entered into a contract after a misrepresentation has been made to him, and (a)the misrepresentation has become a term of the contract…*" [**Auth13/x463**], and see *Chitty* at 9-004 [**Auth14/x467**].

43. In *Eurovideo Bildprogram GmbH v. Pulse Entertainment Ltd* [2002] EWCA Civ 1235 [**Auth2/x35**], the Court of Appeal dismissed an appeal from the first instance decision that "*not only was a there a breach of contract but that there had also been a misrepresentation of fact, to be found in the pre-contract exchange letters… and also in the terms of the draft contract proferred for signature*" (at [14] [**x38**]), observing (at [20] [**x39**]) that "*language found in negotiations or in a draft contract can, depending upon the particular wording involved, amount to a representation of fact*". The contract was for the licensing of videos in the German-speaking parts of Europe and the principal clause in question was headed "Representation and Warranties" and provided that "*Licensor has not entered into any agreement which conflicts with the rights granted herein to Licensee. Licensee has the exclusive first exploitation rights in the licensed territory*" (at [5] [**x36**]).

44. This was doubted by the Court of Appeal *Leofelis SA v. Lonsdale Sports Ltd* [2008] ETMR 63 [**Auth3/42**], where Lloyd LJ commented at [141] (p.1041 [**x81**]): "*In a case in which the point matters, it would be necessary to consider the details of the negotiations and the terms of any successive drafts, something that was not investigated in this case*". The appeal was decided on other grounds, but this obiter comment concerned a clause (2.2.1) which provided that an exclusive licence to use the Lonsdale brand on products in certain territories was taken subject to any

existing rights and licences in respect of the trade mark but recited that the licensors were not aware of any such licences or rights having been granted.

45. The same point was identified by Simon J (as he then was) in *Bikam OOD v. Adria Cable* [2012] EWHC 621 (Comm) at [39] [**Auth6/193**], where he held in the context of a summary judgment application that "*I am doubtful that a representation which only appears in a contract can fall within the terms of s.2(1) of the Misrepresentation Act 1967 in the light of the wording of the statute, however it is unnecessary to decide the point; and I proceed on the basis that the misrepresentation claims are properly arguable subject to the contractual issues*".

46. It is accepted that, by and large, a party who "*merely gives a contractual warranty does not necessarily represent that the fact warranted is true so as to give the other party an alternative claim for misrepresentation if the warranty is broken*": *Chitty* at 9-013 [**Auth14/x473**].

47. That comment reflects the analysis of Mann J in *Sycamore Bidco v. Breslin* [2012] EWHC 3443 (Ch) [**Auth7/x195**], when considering whether what were alleged to have been breaches of contractual warranties, given in relation to the accuracy of the accounts of a business being acquired, also founded a claim in misrepresentation. As the Judge noted (at [202] [**x257**]), the claimants in that case did not rely on anything other than the terms of the warranties in the SPA as amounting to representations. His Lordship concluded (at [203]) that the warranties did not have "*that dual quality*" as both warranties and representations and recognised (at [209] [**x260**]) that he was in disagreement with the views of Arnold J, going the other way, as expressed in *Invertec Ltd v. De Mol Holding BV* [2009] EWHC 2471 (Ch).

48. That disagreement was tackled head on by Andrew Baker QC (as he then was) in *Idemitsu Kosan Co Ltd v. Sumitomo Corp* [2016] 2 CLC 297 [**Auth10/x405**], in an application for summary judgment. The dispute concerned a share purchase agreement and whether warranties given by the seller were actionable as misrepresentations, including by reason of the fact that by providing an execution copy of the agreement for signature, the seller had made representations prior to and independently of the conclusion of the agreement.

49. The Deputy Judge concluded that Mann J's analysis was, in respect of warranties, to be preferred, focusing (at [14] [**x411**]) on the peculiar quality of a warranty:

When a seller, by the terms of the contract under which he sells, 'warrants' something about the subject matter being sold, he is making a contractual promise. Nothing less. But I also think (and all things

being equal) nothing more. That is so just as much for a warranty as to some then present or past matter of fact as it is for a warranty as to the future. By contracting on terms by which he warrants something, the seller is not purporting to impart information; he is not making a statement to his buyer. He is making a promise, to which he will be held as a matter of contract in the sense that any breach of the warranty will be actionable as a breach of contract, subject to any other relevant terms of the contract and to general principles of the law of contract, for example as to remedies. In argument in the present case, I posed the simple case of a seller contracting to sell grain from a warehouse, 'warranted at the date of contract free from' some identified impurity. It would I think be quite novel, and wrong, to suggest that this would amount to a statement of fact, made by the seller to the buyer, that the grain was then free from the impurity in question. In the absence of additional facts, I do not think there could be any question of claiming rescission for misrepresentation, or damages for misrepresentation under the 1967 Act, if in fact the grain contained the impurity (so that there was a breach of the warranty)…

50. However, the Deputy Judge acknowledged (at [16] [**x412**]) that his decision to reject the contention rested upon a conclusion that there had not been a statement of a matter of past or present fact.

51. Accordingly, where a provision of a contract is no more or less than a warranty, then a claim based upon that wording amounting to a misrepresentation is unlikely to succeed. By contrast, a contract may otherwise readily found a claim in misrepresentation, the central question being whether a party is making a statement to the counterparty.

52. In this case, none of the relevant contractual terms are said to be warranties. Further, some of the key representations relied on are not contractual terms but recitals – i.e., written statements which specifically purport to record a pre-existing representation of fact.

J. Submissions on the First Issue

53. Lendy/SSSHL's position is that there is no real prospect of a trial Judge concluding that, it was a condition of each loan that, at the point of completion, there were lenders who had agreed and authorised Lendy to agree as agent on their behalf, to lend to QED the aggregate amount of the loan on the terms of the Loan Agreement.

54. As a starting point, Mr Harlow's analysis of the statements of case (at paragraphs 19 to 24), is flawed and incomplete.

55. First, he wrongly treats the word "foregoing" in paragraph 47 of the Particulars of Claim [**E/40/319**] as capable only of referring to the previous paragraph 46. There is no basis

for such a restrictive reading and, even if there were, it is addressed by the proposed amendment to paragraph 47.

56. Second, Mr Harlow does not take account of the Reply to paragraph 27 of the Defence, which is addressed in paragraph 11 of the Reply [**A/4/59-60**], suggesting that it "*provided no further detail*". Mr Wordley identified the Development Loan agreement (and the express term in clause 2) and joined issue with the Defendants' reliance upon Recitals (B) and (C).

57. The proposed amendments to the Particulars of Claim put the matter beyond any doubt.

58. Turning to the question of construction, and the meaning of the words in their documentary, factual and commercial context, and adopting the relevant factors identified by Lord Neuberger in *Arnold v. Brittan* [**Auth9/x369**].

59. **Any other relevant provisions.** Mr Harlow relies (at paragraph 22 of his first witness statement [**D/32/241**]) upon three clauses of the Standard Terms.

60. The first point to note is that, where there is a conflict between the Standard Terms and the loan-specific agreements, the latter will prevail, as expressly stated in the preamble to the Standard Terms [**C/28/210**].

61. Mr Harlow first relies upon clause 4.3. However, he wrongly identified this as being clause 4.3 of the Standard Terms, rather than what is in fact clause 4.3 of the Development Loan agreement [**C/25/177**]. To the extent that Mr Harlow acknowledges the primacy of the Development Loan agreement in the event of conflict and the fact that the two documents must be read together, this is accepted.

62. However, his reliance on the clause is otherwise misplaced. That there were conditions imposed on QED before it was entitled to receive the drawdowns of various tranches neither negates nor contradicts the condition/condition precedent for which Mr Wordley contends. To the contrary, the very fact that the "*Lenders will not be obliged to make any part of the Loan available unless… the Borrower is complying with the Loan Agreement in all respects*" clearly implies that, if the Borrower *is* complying, then the Lenders <u>are obliged</u> to make the relevant part of the Loan available.

63. Second, Mr Harlow relies upon clause 9.1 [**C/28/216**], but this takes matters nowhere. That clause provides that "*Membership of* [Lendy] *does not in any way constitute an obligation on us to procure funding for borrowers or constitute a warranty by us that funding will be available*". But it is not Mr Wordley's case that QED's membership of Lendy amounted to a promise that QED would receive funding. It is entirely accepted that binding obligations to provide funding only arose when Lendy had identified lenders who had agreed and authorised Lendy to agree as agent on their behalf, to lend to QED the aggregate amount of a relevant loan on the terms of a relevant Loan Contract and a relevant Loan Contract had been entered into. Moreover, and as Lendy makes clear, even then Lendy assumed no obligation to provide funding – it was the lenders for whom Lendy was (purportedly) acting as agent who assumed that obligation. But this only emphasises how key to the entire commercial structure making any sense, or being in any way practically workable, was Lendy's promise and representation that, at the time the Loan Contract was entered into, the lenders existed and had agreed to provide the loan which Lendy was claiming they had agreed to provide.

64. Third, Mr Harlow relies upon clause 14.5, the entire agreement clause [**C/28/218**]. Quite apart from the fact that Mr Wordley relies upon terms found within the contractual documents themselves (and thus within the entire agreement), it will be for Lendy/SSSHL to establish the reasonableness of that clause and – in any event – the clause did not purport to exclude liability for misrepresentation.

65. Set against the provisions identified by Mr Harlow are the following, amongst others:

65.1. Clause 3.7 of the Standard Terms provided that, once accepted, "*a loan cannot be cancelled for any reason*" [**C/28/212**]. Given that the Term Sheet put the loan amount at £6,127,805 (maximum) [**C/26/193**], it is difficult to see the basis upon which it could be asserted that there was anything less than a promise to provide funding up to that level.

65.2. Recital A of the Development Loan agreement provided that "*The Lenders <u>have agreed</u> to provide the Borrower with a loan as set out in this agreement*" [**C/25/169**], which, taken together with the definition of Lenders in clause 1 and clause 2, is consistent only with the condition/interpretation contended for by Mr Wordley.

65.3. The contract provides for the appointment of an Independent Monitoring Surveyor and a procedure for requesting and receiving further drawdowns. There would have been no purpose served by the inclusion of these provisions if, in fact, the Lenders were only obliged to provide the first tranche of the facility.

66. **Overall purpose of the clause.** Lendy/SSSHL's contention appears to be that upon completion of the Development Loan agreement:

66.1. Lendy itself was not obliged to provide any funding at all pursuant to the Development Loan.

66.2. Lenders were not obliged to provide any funding beyond, perhaps part of the initial tranche, because they had neither agreed to do any such thing nor authorised Lendy to agree any such thing on their behalf.

67. On Lendy/SSSHL's case, their standard documentation sets out contractual promises in respect of which nobody is legally liable and which cannot be enforced against anyone. This is, on Lendy/SSSHL's case, achieved by making false and fraudulent statements about non-existent commitments from lenders, in respect of which there is no legal remedy at all.

68. At this stage, although the Court may conclude that Lendy/SSSHL's approach is plainly wrong, Mr Wordley does not need to go so far in order successfully to resist this application. Suffice it to say, it is Mr Wordley's contention that the overall purpose of the clause – and of the agreement – was to set out the circumstances in which QED could draw down from the facility, not the circumstances in which Lendy would begin the task of raising funds to meet a valid (and validated) drawdown request.

69. **Facts and circumstances known or assumed by the parties at the point of execution**. Mr Wordley relies upon his pleaded case at paragraphs 41 to 42 of the Particulars of Claim [**E/40/317**].

70. Coupled with this, the broker, Mr Lloyd has given evidence that "*in my experience, lenders do not contractually commit to fund projects when they don't have the financial capability to meet those commitments. I would not have recommended Lendy to the Company if I had known that funds were not in place and that there was a risk that it would not be able to fulfil the drawdowns under the Development Loan…*" [**D/35/265: para.11**].

71. Disclosure and witness evidence may bear upon this aspect of the analysis. These steps have not yet taken place. This a further point to be taken against Lendy/SSSHL in the context of their application for summary judgment.

72. **Commercial common sense**. Mr Wordley bluntly describes it is a "*commercial suicide*" for QED to have entered the loan if funds had not been committed at the outset [**D/34/260: para. 49**]. It is submitted that he is obviously right about this, and it is difficult to see what can be said against this by Lendy/SSSHL. The whole point of the Development Loan was that it enabled a development project to commence and proceed; unless there were contractual agreements to provide the funding for the entirety of that project (subject to attaining the relevant milestones) it would make no sense at all to accept and spend an initial tranche. With no legal commitments in respect of the balance of the Development Loan, the risk that (as transpired) QED would be left high-and-dry with a half-finished project and financial commitments it needed to, but could no longer afford to, service was obviously immense. Further support for the relevance of these key and obvious factual matrix propositions can be derived from Mr Lloyd's witness statement [**D/35/263-265**]: see, in particular, paragraphs 11 and 12 cited above.

73. Linked to the submission on commercial common sense, it is clearly arguable (at least) that the term for which Mr Wordley contends, if not found within the express words of the contractual documents, is necessarily to be implied as a matter of obviousness and/or to give business efficacy to the agreement.[4]

74. In conclusion, therefore, it is submitted that Mr Wordley has (at least) a real prospect of success on the First Issue.

K. Submissions on the Second Issue

75. The Second Issue concerns the nature and extent of the obligations of the various lenders. Mr Harlow's contention (as explained at paragraphs 25 to 28 of his first witness statement [**D/32/242**]) appears to be that, upon their proper construction, the contractual documents rendered QED liable (and Mr Wordley therefore liable as guarantor) to anyone who contributed funding towards the facility, no matter when or to what extent they joined in.

76. Mr Harlow relies upon the assignability of the lenders' interests in support of Lendy/SSSHL's position. As to this:

[4] See *Chitty* at 16-007 [**Auth15/x584**]for implication of a term to give business efficacy and 16-008 [**x585**] in relation to obvious inference.

76.1. As pleaded in the Reply (at paragraph 11.4 [**A/4/60**]), the procedure for the assignment of an existing lender's interests to a new lender was circumscribed by clause 14 of the Development Loan agreement [**C/25/187**].

76.2. Recital (B) to the Development Loan agreement [**C/25/169**] did not give carte blanche for the introduction of new parties to the agreement, but provided that it could occur (only) "*pursuant to the terms of this agreement*".

76.3. In particular, and by clause 14.2.3, "*the New Lender becomes a party to this agreement as a Lender and is bound by obligations equivalent to those from which the Existing Lender is released under clause 14.2.2 above*".

76.4. In other words, there was no contractual mechanism for a New Lender to assume obligations beyond those of the Lender whom it was replacing.

76.5. Moreover, the entire clause is supportive of Mr Wordley's case, in that it clearly presupposes that New Lenders will replace Existing Lenders. Thus, at all times, and however the loan parts had been subdivided amongst the Lenders, the Lenders from time to time had (together) committed to fund the entirety of the facility (and therefore the maximum balance potentially available for drawdown).

77. This then begs the question – which Lendy/SSSHL appears unable or unwilling to answer – of what obligations the Lenders assumed upon completion of the agreement. Mr Harlow asserts (without stating the source of his knowledge or belief) that "*Lendy's business practice was not to offer the entirety of a development loan to investors at (or prior to) the date of completion"* [**D/32/241: para.23**]. Even if this were true, it does not give anything like the full picture, because what Mr Harlow does not say is what was the extent of the lenders' commitments at (or prior to) the date of completion.

78. It is submitted that this requires proper enquiry, and the sort of analysis that may only be undertaken at trial (or certainly not on the basis of the scant information so far provided on behalf of Lendy/SSSHL). For present purposes, it is submitted that the extent of the obligations is plainly a triable issue, for the following principal reasons:

78.1. One thing is very clear: Lendy is adamant that it was not the lender in any of the agreements from about early 2016 [**A/3/33 and 38: Def. paras.6 and 29(c)**].

78.2. On the footing that Mr Wordley's case as to breach of contract, in relation to the delays to the later tranches, is well-founded (which must be assumed for the purposes of the present application), it is necessary to ask who (if anyone) is liable for those breaches and to what extent.

78.3. There are various possibilities. For example, Lendy might have recruited some, but not enough, lenders to fund a proportion of the whole facility (e.g., x% of the value of the whole facility, across the various tranches). On the other hand, Lendy might have recruited enough lenders to fund the first tranche, but not more. Or Lendy might itself have provided funding (whether as well as or instead of third party investors). Or there may have been some combination of these arrangements (or others).

78.4. Lendy's contractual status depends upon what the actual position turns out to have been. It may have been an agent for an unidentified principal (as defined in *Bowstead & Reynolds* at 9-016) or the principal may have been fictitious or non-existent (with the different consequences as set out in *Bowstead* at 9-084ff. [**Auth16/x649**]), or both.

79. All of this *does* matter, not least because – if Lendy/SSSHL are right that it was the lenders who made the representations [**A/3/39: Def. para. 35**] and so incurred liability, then it is necessary to work out the extent of each lender's liability. If a lender agreed only to fund 1% of the first tranche, for example, and made no commitment to fund later tranches, is that Lender nevertheless liable for 1% (or 100%) of losses? On Lendy/SSSHL's case, QED was 100% liable under the Development Loan agreement but there was no matching obligation from the lenders, which is legally incoherent, commercially absurd and offensive to common sense.

80. It is submitted that Mr Wordley's case has (at least) a real prospect of success. In any event, if Mr Wordley is (for the reasons set out above) successful on the First Issue such that there is an arguable case that no Loan Contract came into existence at all, it makes little sense to award summary judgment on the Second Issue which is effectively an alternative case that proceeds on the basis that, insofar that there were some lenders who had indeed agreed to provide all tranches of their agreed part of the loan, the relevant Loan Agreements may be enforceable by them to that extent.

L. Submissions on the Third Issue

81. For the reasons set out above, is submitted that Mr Harlow is simply wrong to assert (as he does, at paragraph 31 [**D/32/243**]) that "*The provision of Standard Terms by Lendy to QED cannot of itself be a representation*".

82. There is no suggestion (by either side) that the assurance in question was a warranty, such that the words could not enjoy the dual quality of contractual terms and representations, as explained in *Sycamore Bidco* [**Auth7/x257**].

83. Indeed, as set out above, some of the key written representations relied upon are recitals, rather than contractual terms. These are plainly statements of pre-existing factual matters and no possible basis has been advanced to explain why these untrue factual representations are somehow immune to the English law of misrepresentation.

84. It is therefore submitted that Mr Wordley has a real prospect of success on this aspect of his claim, and it is, in any event, unsuitable for summary determination, in light of the limited jurisprudence and the developing state of the law.

M. Discretion/Some other compelling reason for a trial

85. It is Mr Wordley's primary submission that his case on all three Issues enjoys (at least) real prospects of success.

86. However, even if the Court were sceptical about the prospects, it is submitted that this is a case that should be allowed to proceed to trial.

87. First, Lendy/SSSHL have not identified any material saving of time or expense that the removal of these issues from trial might bring. Second, the Court is in the unsatisfactory position of being asked to determine contractual interpretation questions which – on Lendy/SSSHL's case – affect the rights only as between Mr Wordley and the lenders, without being shown even the full contractual picture, let alone the background documentation in relation to the arrangements between those lenders and their purported agent, Lendy. Third, the nature of the remaining issues are such that the trial Judge will necessarily need to traverse the same factual ground and make findings which, if not exactly the same as those which the Court is behind invited to determine now, are so closely linked that there is a significant risk that the trial Judge will be stifled (when he or she will be

armed with the full factual matrix and therefore in the best position of all) or make a decision that is not wholly consistent with a summary judgment.

88. Whether these are characterised as reasons for the Court to decline to exercise its discretion to give summary judgment or strike out the relevant parts of the claim, or as representing some other compelling reason for a trial, it is submitted they form a further basis for the dismissal of the application.

N. Disposal

89. It is submitted that the Court should dismiss the application with costs and allow the claim to proceed to trial without further delay or distraction from the Defendants.

ANDREW GEORGE, QC,
BLACKSTONE CHAMBERS, TEMPLE
&
BENJAMIN WOOD
4 NEW SQUARE, LINCOLN'S INN

10 DECEMBER 2021