Claim 1QT75460

IN THE CENTRAL LONDON COUNTY COURT

Date: 4 November 2013

Before:

MR RECORDER MONTY QC

BETWEEN:

PHILIP AFIA

Claimant

-and-

(1) DAVID MELLOR

(2) CHRISTOPHER JEMMETT

Defendants

Mr Gary Blaker (instructed by LSG Solicitors) for the Claimant

Mr Stuart Hornett (instructed by Jeffrey Green Russell) for the Defendants

Hearing dates: 21, 22, 23 and 24 October 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Recorder Monty QC

Mr Recorder Monty QC:

Introduction

1. This is quite a long judgment and it might be helpful if I say at the outset that for the reasons set out below I find for the Claimant.

(a) The background to the claim

2. In 2005 Amor Holdings Limited ("Amor") bought a majority shareholding in Partridge Fine Arts plc ("PFA"), a well-known New Bond Street dealer in fine art and antiques established in 1900 but which had by 2005 fallen on hard times. Amor had been set up for the purpose of the acquisition by Messrs Mellor, Jemmett and Law. On 18 November 2005 the board of PFA announced that they had agreed terms with Amor for a Recommended Partial Offer (the "RPO") to buy approximately 51% of PFA's shares.

3. The terms of the RPO were contained in a package of documents issued to the then shareholders and included letters dated 14 December 2005 from the PFA board and Corporate Synergy setting out the terms of the acquisition, which were subject to the City Code on Takeovers.

4. There were two stages. By the Partial Offer Amor offered to purchase 51% of PFA shares, which offer remained conditional until it was known whether the requisite number of shares would be acquired; once the offer became unconditional, Amor was obliged to purchase the shares of any shareholder who had accepted the offer, up to a maximum of 51% of the PFA shares. The offer became unconditional on 3 February 2006. By the Deferred Offer, any shareholder whose shares had not been purchased under the Partial Offer had the opportunity to sell to Amor at a later date.

5. The terms of the Deferred Offer were set out in a Deferred Offer Instrument (the "DOI") dated 17 November 2005. The DOI contained a personal guarantee, given by Messrs Mellor, Jemmett and Law, of Amor's obligations to purchase those remaining shares.

(b) The parties

6. The Claimant, Mr Philip Afia, was a shareholder in PFA. He owned 12,297 shares. He brings this claim against Mr Mellor and Mr Jemmett, the Defendants, who are two of the personal guarantors of Amor's obligations under the terms of the DOI, under their guarantee. The third guarantor, Mr Law, has played no part in this action.

(c) The guarantee

7. Clause 3 of the DOI sets out the obligation on Amor to purchase the shares. By clause 3.1 Amor undertook to each shareholder (defined as any person whose name was entered in the Register of PFA as a member) that it or a member of its Group will offer to purchase

all their shares on the terms set out in the DOI on or before the end of the Purchase Period.

8. Clause 3.2 provided that

> "Should the Company not have satisfied all its obligations under clause 3.1 on or before the date falling one month before the end of the Purchase Period then each Shareholder may by notice in writing to the Company at its registered office require the Company to buy all their Shares on the last day of the Purchase Period and on the such notice [*sic*] being given the Company shall become bound to buy and the Company will become bound to complete the purchase of all such Shares in accordance with the terms of this Instrument."

9. Clause 7 set out the guarantee as follows. By clause 7.1,

> "Each Guarantor guarantees due and punctual payment to the Shareholders by the Company of the Purchase Price provided that each Guarantor's liability under this Instrument is limited to the amount set opposite his name in Schedule 1. If any amount payable by the Company in respect of the purchase by it of Shares is not paid when due, then each Guarantor shall forthwith on demand (subject to the limitation referred to above) pay to the Shareholders the amount not paid by the Company."

10. Clause 7.3.1 provided that,

> "The Guarantors agree that each of the Shareholders shall be entitled to enforce this guarantee without making any demand on or taking proceedings against the Company and shall not be required before enforcing this guarantee to pursue, enforce or exhaust any other right, remedy or security which it may have. The obligations of each Guarantor shall continue in full force and effect until all the liabilities and obligations of the Company under this Instrument have been fully performed and discharged."

11. The DOI defined the Purchase Period as

> "from and excluding the date falling twelve months after the Partial Offer has become wholly unconditional to and including the date falling four years after the date hereof."

12. Thus the Purchase Period was between 3 February 2007 (one year after the Partial Offer became unconditional) and 18 November 2009 (four years after the date of the DOI). This is consistent with the dates in the RPO, which provided that the Deferred Offer would be made no earlier than 12 months after the Partial Offer became unconditional, which was in the event 3 February 2006, and no later than the fourth anniversary of the making of the Partial Offer (14 December 2005), which was therefore 14 December 2009.

(d) The claim under the guarantee

13. On 10 December 2009 Mr Afia wrote to each of the Defendants and Mr Law as follows.

> "Further to the Deed entered into by Amor Holdings Ltd ("Amor") and yourselves dated 17th November, 2005 Amor has failed to make the appropriate offer for my shareholding in PFA on the terms set out in that Deed.
>
> Pursuant to clause 7 of the Deed I now wish to claim under the guarantee given by each of you severally in respect of my holding of 12297 PFA shares.
>
> Please contact me as soon as possible at the above address with your proposals for payment including where you wish me to send the appropriate share transfer form and share certificates."

14. Mr Afia had not given notice to Amor in accordance with clause 3.1 of the DOI before the last day of the Purchase Period (18 November 2009); indeed he had not given notice to Amor at all.

15. It is clear, in my view, that under the terms of the DOI, the Guarantors' liability does not arise unless there has been strict compliance with the conditions set out in clause 3.2, and indeed HHJ Walden-Smith on 21 September 2012 made a decision to that effect, holding that the letter of 10 December 2009 was not compliant with the provisions of clause 3.2, which has not been challenged. That decision went on to find that Mr Afia had not complied with those conditions. Again, that has not been challenged.

16. There was at one stage in these proceedings the suggestion that Mr Afia was also relying on a letter dated 7 July 2011, but such reliance did not feature at the trial. In any event, HHJ Walden-Smith had also held that the 7 July 2011 letter failed to comply with clause 3.2 and again that decision was not challenged.

17. However, Mr Afia's claim is founded on his contention that the Defendants have waived the requirements of clause 3.2 and or in the alternative are estopped from denying his entitlement to be paid under the guarantee. Mr Afia seeks declarations to that effect, and a declaration of his entitlement to enforce the Defendants' promise representation or conduct towards him in agreeing to pay under the guarantee. He also seeks interest.

The witnesses

(a) The Claimant

18. I heard evidence from Mr Afia, who had also produced three witness statements which I read. Mr Afia was in my view a clearly intelligent honest and open witness. It was suggested by Mr Hornett for the Defendants that Mr Afia had a tendency to reconstruct and reinterpret certain documents and events with the benefit of hindsight, but for the reasons I shall set out when I deal with my findings of fact, I do not agree. In my view his evidence was wholly credible and consistent with the contemporaneous documents, and I accept his evidence in its entirety.

19. I also read the witness statements of a number of PFA shareholders who had engaged with the guarantors in seeking payment under the guarantee. They were Messrs Dudman, Burden, Taglight, Dixon and Wasserman. Two other such shareholders also provided

statements and gave oral evidence, namely Messrs Wedd and Franks. I will deal with all of their evidence when setting out my findings of fact.

(b) The Defendants

20. Neither of the Defendants gave evidence. I heard evidence in support of their defence of this claim from Mr Philip Cohen. Mr Cohen is the senior partner of Jeffrey Green Russell ("JGR"), a firm of solicitors which acted for the Defendants throughout the relevant period and has acted for the Defendants in this litigation.

21. I was extremely troubled by Mr Cohen's evidence from the outset. After some prevarication, which in my view was not fitting for a solicitor of Mr Cohen's experience, he accepted that he had not considered the SRA's Code of Conduct at any stage when acting for the Defendants, providing his several witness statements, and giving oral evidence at trial.

22. The Code is based on a number of Principles which define the fundamental ethical and professional standards expected of a solicitor when providing legal services. The Principles include upholding the rule of law and the proper administration of justice; acting with integrity; not allowing the solicitor's independence to be compromised; and behaving in a way that maintains the trust placed in the solicitor and in the provision of legal services. The Code sets out certain Outcomes, which are mandatory, supplemented by Indicative Behaviours, which specify, but do not constitute an exhaustive list of, the kind of behaviour which may establish compliance with, or contravention of the Principles. These Indicative Behaviours are not mandatory but (in the words of the SRA's Code) "they may help us to decide whether an outcome has been achieved in compliance with the Principles." In Chapter 5 of the Code, entitled "Your client and the court", the Outcomes include, "you do not place yourself in contempt of court", "you comply with your duties to the Court" and "where relevant, clients are informed of the circumstances in which your duties to the court outweigh your obligations to your client". The Indicative Behaviours include

> "not appearing as an advocate, or acting in litigation, if it is clear that you, or anyone within your firm, will be called as a witness in the matter unless you are satisfied that this will not prejudice your independence as an advocate, or litigator, or the interests of your clients or the interests of justice."

23. Mr Cohen had not considered whether it was appropriate for him to act for the Defendants and to be a witness for them (indeed, to be the sole witness) but maintained that he was satisfied that there was no prejudice to his independence or to his clients or to the interests of justice. However, as became clear in cross-examination, Mr Cohen had on two occasions deliberately been untruthful in emails he had written, and there were a number of other ways (which I shall highlight in my findings of fact) in which his oral evidence conflicted with what he had said in his witness statements and in the documents.

Mr Blaker, for Mr Afia, said that Mr Cohen's failure to consider the SRA's Code set the tone for Mr Cohen's approach to giving evidence generally. I agree. In my view, Mr Cohen was far too close to the events which have given rise to this litigation, and took those events far too personally, to have properly been in a position to act for and give evidence on behalf of the Defendants in this case. Mr Cohen's lack of objectivity has meant that I have had to test his oral and written evidence very carefully against the contemporaneous documents.

Findings of fact

24. On 19 November 2009 Farrer & Co, a firm of solicitors which had acted for PFA in 2005, wrote to all PFA shareholders including Mr Afia as follows.

> "As you may know, under the Deed entered into Amor dated 17 November 2005 ("the 2005 Deed"), Amor is obliged to make an offer for the outstanding shares of PFA before the end of the "Purchase Period" (which is defined in the Deed as ending on the fourth anniversary of the date of the Deed). On our calculations Amor was therefore obliged to make an offer to purchase your shares in PFA by 17 November 2009 at the latest. It has not done so.
>
> Amor's obligation to purchase the outstanding shares was partially guaranteed by three then directors of Amor, namely Mark Law, Christopher Jemmett and The Rt. Hon. David Mellor PC QC. If you would like a copy of the 2005 Deed constituting Amor's obligation and the guarantee, please let us know by emailing jpage@farrer.co.uk and we shall email a copy to you.
>
> As Amor failed to meet its purchase obligation a demand can be made forthwith on the guarantors for them to meet their obligations to you. Please find enclosed a copy of their latest residential addresses available from Companies House.
>
> We recommend that you take urgent advice on this matter (on which we are not advising you as a client) with a view to making a demand on the guarantors without delay.
>
> We will not be able to act for you in this matter because of potential conflicts of interest but we are concerned that you are aware of the position."

25. Mr Afia says, and I accept as correct, that the first he had heard of the details of the guarantee was when he received Farrer & Co's letter. He emailed Farrer & Co as suggested in that letter, and obtained from them a copy of the DOI. He read the DOI and as a result, wrote his letter of 10 December 2009 to the guarantors, the text of which I have already set out at paragraph 13 of this judgment. He said that his reaction when reading the DOI was that he must write to the guarantors. He did not turn his mind to whether he needed to serve a notice on Amor.

26. On 21 December 2009 Mr Cohen replied to Mr Afia's letter as follows.

> "Thank you for your letter of 10th December that has been passed to us by Mr Mellor. We are representing the Guarantors to the Amor Holdings Instrument of 17th November 2005 to which you refer.

> We enclose herewith a copy of proceedings that have been issued in relation to this matter which will explain some of our clients' reasons for not meeting what would otherwise be their obligations under the Instrument.
>
> We would add that these reasons are not exhaustive. We would point out that you have not actually complied with the contractually contemplated procedure in the Instrument, but we would not wish to take technical points when we have points of substance.
>
> We would also point out that the Instrument does not actually say what it appears to say as the obligations in the Instrument according to the definitions therein are an obligation on our clients to guarantee the purchase of shares in Amor Holdings Limited, not Partridge. We would invite you to read the Instrument more carefully. However, once again we would stress that we do not wish to take technical points when we have points of substance that are being taken in the proceedings.
>
> The idea behind the proceedings is that rather than include legions of residual shareholders as Defendants, it made sense to join in a sample of non-Partridge shareholders only on the basis that the other shareholders might wish to abide the outcome of these proceedings rather than be joined in as Defendants themselves. You will appreciate that that is by far the cheaper option especially as you appear to own a relatively small tranche of shares.
>
> We look forward to hearing from you with regard to these proposals."

27. The proceedings to which Mr Cohen referred were claims by Messrs Jemmett and Mellor against members of the Partridge Family and others, issued on 16 December 2009, which sought damages and an indemnity in respect of losses said to have been suffered by them arising from having entered into the DOI "by reason of the fraudulent misrepresentations of the First and Second Defendants or alternatively pursuant to s.2(1) of the Misrepresentation Act 1967, for which the other Defendants are vicariously liable." Those proceedings ("the fraud claims") were issued a matter of days after proceedings had been brought by the members of the Partridge Family against Messrs Law, Jemmett and Mellor and Amor seeking sums due under the guarantee ("the Partridge claims"). It is not clear whether copies of both claims were provided by Mr Cohen with his letter, but Mr Afia refers in his evidence only to the claim by the guarantors, and in so far as a finding on this point may be necessary, I find that it was only the Claim Form in that action which was enclosed with Mr Cohen's letter. The position therefore was that by the Partridge claims it was sought to enforce payment by the guarantors under the DOI, and by the fraud claims two of the guarantors were claiming damages from the Partridge Family.

28. Mr Cohen said that he was wary of the motives of the Partridge Family, that he did not trust them, and that they were intent on causing mischief. He pointed out that the Farrer & Co letter was sent after the expiry of the Purchase Period, and that any claims made after that would be out of time. He said that in August or September 2009 he had scrutinised the DOI and had appreciated then that in order for the guarantee to be engaged, a shareholder would have to serve a notice on Amor by 17 November 2009.

29. It must have been clear to Mr Cohen, therefore, and I find that it was clear to him, that Mr Afia could only make out a claim against the guarantors if Mr Afia had served notice on Amor by that date. Indeed, Mr Cohen stated in his letter

> "that you have not actually complied with the contractually contemplated procedure in the Instrument"

which in my view is clearly a reference to Mr Afia not having served such a notice. There can be no other interpretation, because Mr Afia's letter of 10 December 2009 was otherwise a good claim under the guarantee, subject of course to Mr Afia showing that he was indeed the owner of the shares.

30. Mr Cohen said that the reference in his letter to his clients not wishing to take "technical points" was in fact to a number of drafting and other errors in the DOI which he had identified, the major one of which he referred to in the letter, being the definition of the company (Amor or PFA). He sought to draw a distinction between these "technical points" and what he described in his evidence as "points of substance", examples of the latter being where the shareholder was not on the Register or was out of time for serving a notice on Amor; he explained in his third statement that

> "these were not technicalities and we would be obliged to take such points, not least because when we came to claim the payment back from the Partridges in our proceedings, they would say that we need not have made the payment in the first place and the loss would therefore remain with my client. It therefore became a necessary adjunct of the primary fraud proceedings that my firm had to audit each individual claim from a shareholder under the guarantees to ensure it was valid before it was paid out."

31. When one analyses what Mr Cohen actually said in his letter to Mr Afia, however, it is clear in my view that the distinction between technical and substantive points which he now in evidence seeks to make was not in his mind. As I have said, the letter states that Mr Afia has "not complied with the contractually contemplated procedure in the Instrument". That can only be a reference to Mr Afia not having served notice on Amor either at all or in time. There is no other "contractually contemplated procedure" in the DOI which a shareholder would have to comply with other than making a claim against the guarantors, which was made by Mr Afia's letter of 10 December 2009, and in respect of which clause 7.3.2 of the DOI stated that the guarantee and the liability of the Guarantors would not be affected by, for example, a late claim under the guarantee or a failure to make a demand on Amor (although clearly the service of a timely notice under clause 3.2 was an express requirement and one which was unaffected by the terms of clause 7.3.2). The letter went on to say, "but we would not wish to take technical points when we have points of substance." In my view, the "points of substance" were clearly those covered by the fraud claims, namely the allegations of fraud and misrepresentation. I reject Mr Cohen's evidence that the "points of substance" to which he was referring were those such as

whether a shareholder was on the Register or had served notice on Amor in time. I do so not simply because that is the natural reading of the letter, as I have explained, in which Mr Cohen expressly referred to Mr Afia not having complied with the terms of the DOI which can only have meant a failure to serve a timely notice on Amor, but also because in the next paragraph of the letter Mr Cohen went on to give an example of a "technical point" under the DOI which he then contrasted with "points of substance that are being taken in the proceedings". It is clear to me that the distinction Mr Cohen was seeking to draw in that letter was between issues in relation to the DOI (which included not only the question of the company name, but also compliance with its terms by a shareholder claiming under the guarantee) and points which would be taken in the proceedings (the allegations of fraud and misrepresentation). It seems to me that this letter established the basis upon which matters then proceeded between Mr Cohen and Mr Afia.

32. For his part, Mr Afia accepted in cross-examination that he did not regard the letter of 21 December 2009 as a promise by Mr Cohen that "other technical points would not be taken", but this was asked of Mr Afia before Mr Cohen had given evidence as to what he meant by "technical points".

33. Mr Afia replied on 6 January 2010. He pointed out that the claim brought by Messrs Jemmett and Mellor sought damages in excess of £300,000 and expressed concern over whether sufficient sums had been set aside to pay the PFA shareholders under the guarantee. He also mentioned that he had written to Companies House objecting to the striking off of Amor which was proposed for the end of February 2010. Referring to clause 7.3.1 of the DOI, Mr Afia said that shareholders were entitled to claim under the guarantee without having taking proceedings against Amor. Mr Afia accepted in cross-examination that this letter showed he had not taken the letter of 21 December 2009 as a waiver of any of what Mr Hornett called "the small print".

34. Mr Cohen replied by a lengthy email dated 8 January 2010. I will only set out the salient paragraphs.

> "My observations as to the wording of the guarantees are, as you correctly note, observations with regard to the true construction of the document, which is badly drafted. My clients would not wish to hide behind technical or drafting points when they have very good points of substance. However, having said that, on 16th November, after we had informed Farrer & Co solicitors that we had drafted proceedings in fraud against their client, Farrers decided somewhat scurrilously in my view to send a round robin letter to every Partridge shareholder, effectively inviting them to sue my clients and kindly providing their home addresses for that purpose. The idea was no doubt to distract my clients with a multiplicity of claims and proceedings so they would not keep their eye on the ball of their own proceedings. However, my clients have substantial resources at their disposal, and that ploy was unsuccessful.
>
> Nonetheless, as a result of the Farrer round robin my clients have received some letters from aggrieved shareholders in pretty peremptory black and white

> language, and therefore, as part of my wider response, I have mentioned to such shareholders that actually, things aren't quite as black and white as their letters contemplate: for a start, the agreement doesn't even say what they imagine it says. I think it worthwhile not to ignore such basic points."

Again, the distinction Mr Cohen was seeking to draw between technical and substantive points is in my view clear from this email. The substantive points were plainly those which his clients would be taking in the fraud claims and had nothing to do with whether a particular shareholder had or had not complied with the notice requirements in clause 3 of the DOI. If it was really Mr Cohen's position that his clients "would be obliged to take such points" as whether a claimant under the guarantee had served notice in time (see paragraph 30 above) then the time to take such a point would surely have been when a claim under the guarantee was intimated. Mr Afia's letter of 10 December 2009 should therefore have been met with a simple response from Mr Cohen, had the intention been to take the point, that no timely notice had been served by Mr Afia and there was thus no basis for his guarantee claim. Instead, Mr Cohen noted that there had been no notice (see paragraphs 29 and 31 above) but said that his clients did not wish to take such points. It was Mr Cohen's strategy to fend off any guarantee claims for as long as possible. His evidence was that such claims would be put in a "holding pattern" pending "audit". I will return to the question of what was meant by "audit" below. Suffice to say for the moment that I accept Mr Afia's evidence that he was persuaded by Mr Cohen's replies to hold off taking any formal steps to make a claim under the guarantee, and instead was persuaded to wait and see what happened in the fraud claims, and that that is indeed what he did.

35. For his part, Mr Afia in cross-examination accepted that this email of 8 January did not give him any further assurance and that what the DOI said, and what it meant, were all in play. He also accepted that he did not rely on anything Mr Cohen said as a promise that he would not take "technical points", but in my view this was, as he said, because Mr Afia did not want to get bound up in the bigger dispute between the Partridges and the guarantors if, as Mr Cohen told him, he would be better to await the outcome of the fraud claims.

36. On 22 January 2010 Mr Afia emailed Mr Cohen (incorrectly addressing his email to "Mr Green") and said,

> "I am currently considering my options vis-à-vis Mr Law and Amor Holdings and would appreciate any input you care to give."

The email shows that Mr Afia remained concerned about Amor's assets. In reply, Mr Cohen emailed the same day saying,

> "If you are thinking of suing any of my clients, I have already given you my thoughts on the subject, namely that the cheapest option is to 'wait and see'."

He ended his email by asking Mr Afia to remind him how many shares he held. Mr Afia replied that,

> "I am certainly not interested in taking legal action without a substantial likelihood of success and if Mr Law has not been added to the main claim, I will not do so. … I have 12297 shares in Partridge."

37. At this point, and subsequently, some of the emails between Mr Afia and Mr Cohen were marked "Without Prejudice". The Defendants object to the admissibility in this action of any of this material. That Mr Afia would seek to rely on this material was clear from the Amended Particulars of Claim, and the Defendant's objection was made in the Amended Defence and maintained at trial. At the outset of the trial, I ruled that I would look at the material (which had been placed in a separate bundle) and allow evidence to be led and questions to be raised in cross-examination in relation to it on a provisional basis, and would at the end of the trial hear submissions in relation to its admissibility and its relevance, allowing Mr Hornett for the Defendants to reserve his position on both points. I will therefore, in setting out my findings of fact, make reference to that material, and will deal with questions of admissibility and relevance later in this judgment.

38. On 22 January 2010 Mr Cohen wrote to Mr Afia "Without Prejudice; Subject to Contract", explaining to him that this meant that the communication was strictly off the record and cannot be produced in any court. Mr Afia confirmed in his evidence that he understood what this meant, although he was not aware of all the ramifications of correspondence being without prejudice. Mr Cohen's email went on to offer Mr Afia a payment calculated at 30% of the value of his shares. In reply, Mr Afia said that he was not even slightly tempted at 30%, but would accept 75% if paid within a month. Mr Cohen replied that 75% was too high and he would not even put that suggestion to his clients. Mr Afia accepted that there was nothing in that exchange of emails on which he could rely as being a promise that he would be paid.

39. In July 2010 the claimants in the Partridge claims made an application for summary judgment against the guarantors. Mr Afia went along to court and on 1 August 2010 he sent an email to Mr Cohen as follows:

> "I listened to the Judgment on the various summary applications on Friday and gathered the impression that your clients will not succeed in avoiding their responsibilities to pay Partridge shareholders. Perhaps they will obtain some relief vis-à-vis John Partridge but perhaps not.
>
> I am now considering taking out a Small Claims Court action against each of the three guarantors – I would therefore be grateful if you would accept this email as notice of such actions following my letters dated 10 December 2009 to each of Messrs. Law, Jemmett and Mellor. Unless I hear from you or them by 16th August with proposals for payment of the amounts due to me under the 17th November, 2005 instrument (despite your reservations as to its weakness) I will issue these claims (online) without further notice to you or to them."

40. Mr Cohen replied the next day, 2 August 2010:

> If you listened to the judgment, you will have heard that it is stayed until 2nd September pending my clients applying to the Court of Appeal for permission to appeal by that date, and provided they do that, it is likely to remain stayed until the appeal is determined. I would therefore not recommend issuing proceedings as they will likewise be stayed.
>
> Could you be so kind as to remind me how many shares you hold please?"

41. Mr Afia replied on 2 August 2010.

> "I did listen to the judgment, and heard and understood concerning the stay! The stay has nothing to do with my (non-legal) instinct that your clients will not succeed. Given the time it will take for the Small Claims proceedings to come to court it is in my interests to start the actions as soon as possible.
>
> Would you please confirm that you are forwarding details of my earlier email to the guarantors (or confirm that I should correspond with them directly).
>
> I own 12297 shares."

42. Mr Cohen's response the same day was this:

> "I am handling a number of pieces of litigation by shareholders all in the same position as you, and I do not need to refer on each specific shareholder to my clients. All of the other shareholders' actions are stayed to be consolidated with our proceedings.
>
> Whether or not you commence proceedings is entirely up to you, but subject to the appeal, my clients would intend to treat outside shareholders who have not commenced proceedings exactly the same as outside shareholders who have commenced proceedings."

43. The reference to "outside shareholders" was to shareholders other than those within the Partridge family. Mr Afia says that this email showed that it was clearly the Defendants' intention, if they lost the appeal, to pay all non-Partridge family shareholders whether or not they had commenced proceedings. I certainly accept Mr Afia's evidence that this was how he read and understood that email. I also accept that it was reasonable for Mr Afia to have understood this email in this way. Mr Cohen said in cross-examination that what he meant was that Mr Afia would be in no better a position if he issued proceedings, and in no worse a position if he did not, than any other shareholder – in other words, that no shareholder would get better treatment by having commenced proceedings and that all shareholders would be treated the same. He explained that what was behind this was that all shareholders, whether or not they had issued proceedings, would be subject to audit, and as part of that audit process there would be a check as to whether or not a timely notice had been served on Amor under clause 3.2 of the DOI.

44. Mr Afia accepted in cross-examination that by this stage that although this was his understanding, it did not amount to a promise that he would be paid, and although he regarded Mr Cohen as having given an assurance that all shareholders would be treated

equally, he understood that he would still have to prove his shareholding and potentially "go through other hoops", as Mr Hornett put it to him. That was a rather vague question, in my view. It was not clear what "other hoops" Mr Hornett meant. If this question was meant to imply that Mr Afia understood that he would still have to prove that he had served notice on Amor, then in my view that should have been expressly put to him. In fact, it was never expressly put to Mr Afia that he realised, or must have realised, throughout the course of his dealings with Mr Cohen that he would have to comply with the terms of clause 3.2 of the DOI. I accept Mr Afia's evidence that at all times he was unaware of the requirement to give notice to Amor, and that nothing Mr Cohen said to him made him realise that he should have done so.

45. There was a further Without Prejudice exchange of emails between Mr Cohen and Mr Afia on 2 August 2010, started by Mr Cohen who asked Mr Afia if he was prepared to agree a discount in return for accelerated receipt. Mr Afia replied in an email which did not contain anywhere the words "Without Prejudice", for reasons which in my view are clear. The words "Without Prejudice" were not in the subject-header of Mr Cohen's email, to which he was replying, but in the body of the text, and Mr Afia simply pressed "Reply" without thinking of putting the words "Without Prejudice" in the body of his response. Nonetheless, the reply was clearly a response to a without prejudice offer and was itself without prejudice even though it did not expressly say so. Mr Afia's reply was to reject (as he had done in January) any discounted payment, and said that the guarantors "should not be wriggling out of responsibilities that should have been met in November." He asked Mr Cohen to confirm the guarantors' addresses for service of proceedings.

46. Mr Cohen replied that he was authorised to accept service, and went on to say,

> "You may well find that there are issues as to costs, as I have already informed you that, subject to the stay, my clients will honour their obligations, so proceedings are not necessary. The Judge has granted the stay. My clients would expect you to pay their costs of your proceedings in such circumstances."

Mr Cohen went on to observe,

> "It is unfortunate that you appear to have responded to a privileged without prejudice communication in purportedly open form. Please ensure you do not do this again, or I will have to decline to correspond with you save through solicitors."

47. Mr Afia replied apologising for that, and marked his email "Without Prejudice". He said,

> "I do not recall your saying previously that 'subject to the stay, my clients will honour their obligations'. I presume this means that if they decide not to appeal, of the Court of Appeal decides not to listen to the case, that the obligations will be met in a timely manner shortly after September 2nd? Could you please confirm at your convenience that this is your understanding?"

The next day, Mr Cohen replied, again on a without prejudice basis, that his clients had until 2 September 2010 to file their appeal, and that if they did so, the stay presently in place would continue until the determination of the appeal, which could take months. Mr Cohen went on to say this.

> "If the appeal succeeds, then the claims of the outside shareholders would have to await the trial of the main action, which would probably be in the back end of 2011. If the appeal fails, then my clients would have to pay the outside shareholders (subject to the caps on their guarantees). You should also be aware that Mr Law has lost several million pounds over Partridge and his guarantee may be of questionable worth. It was therefore against the fact that there will be a delay of several months (regarding the appeal) and possibly a year, if the appeal succeeds, and bearing in mind the caps on the guarantees – that I floated the idea of certainty and a discount for getting paid out early."

48. There is no reference in that email to any auditing of claims, or checking that a shareholder had served notice on Amor. This is not surprising in my view because Mr Cohen had already pointed out that Mr Afia had not complied with the terms of the DOI and indeed, I shall go on to set out, such a point was never taken in relation to any other shareholder whose claims were the subject of evidence in this case. The email is in my view clear: limited only by the cap on the guarantees, if the appeal failed the guarantors would have to pay the outside shareholders.

49. Mr Afia did not think that Mr Cohen had answered his question, and repeated it in his email of 3 August 2010, which was also without prejudice:

> "My question was whether, if no appeal is made, either because your clients decide not to proceed further or the Court of Appeal refuses to hear the case, your clients will then proceed to pay the outside shareholders for their shares shortly after September 2nd."

Mr Afia repeated his concern about whether there would be money available to meet shareholders' claims:

> "I also would have thought that payments made to shareholders should be on a pari passu basis, if that is the right term. Surely early payments to some shareholders earlier in the proceedings are potentially at the expense of other shareholders being paid later?"

50. Mr Cohen's without prejudice response on 3 August 2010 was this:

> "I didn't intend not to answer your question.
>
> John Partridge is definitely being sued to judgment. This has no bearing on the appeal.
>
> If the stay comes off the judgment, my clients intend to pay the outside shareholders.
>
> If shareholders sue or threaten to sue, there is no requirement that they be treated *pari passu*.

> Without wishing to be discourteous, if you do not wish to accept a lower sum for the certainty of payment, then this correspondence is costing my clients money, so I suggest we break it off while the stay remains in place, and then there will be all the more money left for small shareholders."

51. Again, in my view, this response could not have been clearer. The guarantors intend to pay all shareholders if the stay comes to an end. Mr Afia accepted in cross-examination that this was not a promise or assurance that he would be paid or that technical points would be waived. Mr Afia also said that he was beginning to think that Mr Cohen might be telling him things that were not true.

52. Mr Cohen's evidence in relation to this exchange of emails in August was, in my view, unsatisfactory.

53. In relation to the email referred to at paragraph 46 above, Mr Cohen explained that he meant that when the stay came to an end, all shareholders who were eligible for payment would be paid, and that the key word was "obligations"; he said that this meant that if an obligation existed to pay, then payment would be made. Mr Cohen rejected the suggestion that he was trying now, with hindsight, to imply some other terms or caveats into the email which simply weren't there. In my view, that is exactly what he was trying to do in his evidence before the court. The correspondence is clear. If it had been intended that there should be a caveat, such as "subject to a check that you had complied with the notice requirement", then he would have said so. The reason why Mr Cohen said no such thing was, in my view, that it had already been decided that the failure to serve notice was a technical point which his clients would not wish to take: see paragraph 31 above. It would have been the easiest thing in the world to get rid of Mr Afia's claim (and indeed those of others who had not served a notice on Amor) by simply saying at the outset, you have no claim because you did not serve a notice on Amor in time or at all. That was never said at the outset, nor indeed at any stage until (as I shall come to) any liability to Mr Afia under the guarantee was eventually disclaimed in June 2011. Indeed, if that had been said and that position taken by the guarantors, there would have been no need for any without prejudice offers to be made to Mr Afia (or others) to pay out a discounted amount, because there would have been no liability (or obligation) to make any payments whatsoever. That was a point which Mr Cohen clearly appreciated: see the extract from his witness statement which I have set out at paragraph 30 above.

54. Remaining with events of 3 August 2010, Mr Afia replied that he did not intend to annoy Mr Cohen, and was happy to discontinue the correspondence for the time being, and that he would expect to hear from Mr Cohen shortly after 2 September. Mr Cohen's reply indicated that he was not annoyed. There matters rested until the beginning of September 2010 when there were further without prejudice exchanges as set out below.

55. On 2 September 2010, Mr Cohen emailed Mr Afia to say that the appeals had now been lodged, and to make a further without prejudice suggestion that if Mr Afia was prepared to take a discount now, he would take his clients' instructions. Mr Afia replied, saying that he felt instinctively that the guarantors would lose the appeal, and asked for information about how much had been paid out already to shareholders, how much had been paid out under the guarantees, and how much remained to be paid out under the guarantees if the guarantors had to pay at par all remaining shareholders' guarantee claims. There was no reply to that request, which Mr Afia repeated on 9 September 2010. There was still no reply, and on 11 September 2010 Mr Afia wrote to Mr Cohen, saying that he was now leaning towards issuing proceedings to protect his position. Mr Afia remained concerned about whether there would be enough money to meet the claims under the guarantee. Mr Cohen replied the same day that he could not give any advice to Mr Afia; that the limits on the guarantees were £1.25m for each of Messrs Mellor and Jemmett, and £1.5m for Mr Law; that if the appeal fails or is withdrawn, the Partridge shareholders other than John Partridge and the American party would be due £1.1m; and that less than £20,000 had been paid out to other shareholders. Mr Cohen confirmed that he was authorised to accept service, "but as previously indicated, I don't see that it gets you anywhere, as your proceedings will be stayed."

56. In cross-examination Mr Afia said that at this stage he was concerned that the guarantees might be exhausted by payments made to other shareholders, and that Mr Cohen was not treating all shareholders equally. He felt that Mr Cohen was trying to take advantage of him and would not treat his claim seriously unless he issued proceedings. Nonetheless, and although Mr Afia appreciated that Mr Cohen was saying that he could not give him any information on which he might act which would be detrimental to his clients, he regarded Mr Cohen as knowing what he was talking about, and again decided not to take any further steps such as issuing proceedings, because of what Mr Cohen had told him.

57. There was no further contact between Mr Afia and Mr Cohen in 2010.

58. On 30 November 2010, Ward LJ refused permission to appeal.

59. On 4 January 2011, Mr Afia emailed Mr Cohen, wishing him a Happy New Year and asking him whether there were any developments in the Amor matter. Mr Cohen replied in an email headed "Without Prejudice", wishing Mr Afia a Happy New Year: "No news. We are still waiting on the appeal." This was not the entire picture. Permission to appeal had been refused in November, and a decision had been made to request an oral hearing. Such a request was made, in time, and therefore the position as at January 2011 was that permission to appeal had been refused, but an oral hearing date was awaited. Mr Cohen was asked why he didn't simply say that; his reply was that it was "not necessary to go into that level of granularity." Mr Cohen's reply was therefore accurate, and I do not think he can be criticised for not telling Mr Afia the full position.

60. The oral hearing was set for 18 February 2011. At some stage in early February a decision was made to withdraw the appeal. At this point, the inside shareholders (the Partridge Family save for John Partridge) and those outside shareholders who had been part of the proceedings were paid out. Mr Cohen knew that now the appeal had been abandoned and thus the stay had come to an end there would be shareholders who would now make their claims.

61. On 26 April 2011, again without prejudice, Mr Afia emailed Mr Cohen, asking him if there were any developments. Mr Cohen did not reply.

62. On 28 April 2011, Frank and Claude Partridge wrote a letter to Mr Afia. A similar letter was written to all shareholders. This letter said,

> "I am writing to inform you that we have now received payment for the remaining shares that we held in Partridge Fine Arts plc. I am therefore recommending that you now contact Amor's solicitors to request payment of 54.95p per share for all your remaining shares."

The letter gave contact details for JGR and set out Mr Cohen's email address and direct telephone number.

63. Mr Cohen said that he first became aware of that letter when the telephone started ringing a day or two later and that was the start of a deluge of calls from shareholders wanting payment which he described as being constant for about 3 weeks. He said that hundreds of shareholders were calling him. He did not keep a note or a list of who called, but told them to write in with their claims. He described the callers as children who had to be dealt with and he told Messrs Law, Jemmett and Mellor how annoyed he was at having to field these calls, which had been precipitated by the letter of 28 April. I am prepared to accept Mr Cohen's evidence that there was a large number of callers and that this presented some practical difficulties for JGR in handling them.

64. There was then a further without prejudice exchange of emails between Mr Afia and Mr Cohen. As a result of receiving the letter of 28 April, Mr Afia emailed Mr Cohen on 3 May 2011. Referring to the letter, Mr Afia asked Mr Cohen to confirm that he was now in a position on behalf of Amor/the guarantors to pay him at 54.59p for his 12297 shares, and if so, he would prepare a simple exchange of letters and send this to him with a transfer form and his share certificates.

65. Mr Cohen replied the same day 3 May 2011 at 13.01. I need to set out almost all of that email:

> Firstly, may I say that there is no question of some shareholders being treated differently from others. Certain of the shareholders who are parties to the various sets of proceedings have been paid out, because there was an order to that effect in the proceedings, and the proceedings continue with the intended outcome that the Partridge family will then have to pay back my clients (the guarantors) the

monies those have been expended, including the monies that has been paid out to Claude. Claude's round-robin letter is therefore somewhat mischievous.

Secondly, I personally am not in receipt of funds to pay out shareholders, but if you would care to deliver your original share certificate(s) to me, assuming they are in order, I will request my clients to put me in funds to the value of your shareholding x £0.5459; you will be asked to confirm in writing (email will be fine) that you accept such sum in full and final settlement all of my clients' liabilities to you under the Guarantee, and I would then expect to pay you out within 28 days maximum. The reason for this delay is that my clients have not deposited millions of pounds with me to pay out guarantee liabilities, so we normally process these in batches and request funds, rather than ask for funds piecemeal, as most of the shareholders have quite small allocations, and my clients don't want me to be pestering them for odd sums of £500.00. So, depending on where your claim comes in the cycle, you will be paid within 28 days of the claim being approved, but hopefully more like 14.

There is no need for a contract or stock transfer form at this stage. The company is in administration and about to go into liquidation. Therefore, although this is stated to be part of the contractual mechanism for making a claim under the guarantee, my clients would propose to waive that.

The first step is to deliver your share certificate. If you wish to bring this in personally, please let me know the approximate time. A receipt can be given by either myself, my partner, Gareth Jones, or my P A, Letty Macmillan."

66. Mr Cohen was taken to this email in cross-examination. It was put to him that the first sentence shows that all shareholders would be treated the same. Mr Cohen replied that yes, that was the case, subject to audit. When asked why he did not say that, he replied that he did not think that close textual analysis of a without prejudice letter was a good approach and that had he been replying in open correspondence he would have been more guarded and more detailed. I find this a surprising response. When considering the question of the detail which should be put into correspondence, and in particular whether a statement should be caveated by the term "subject to audit", I see no distinction between whether the letter is without prejudice or open. In my view, had Mr Cohen intended Mr Afia's claim to be subject to audit in the sense of checking whether he had complied with the terms of clause 3.2, Mr Cohen should have said so; and again, the reason he did not say so was because there was, in my view, no intention to subject Mr Afia's claim to that check. Similarly, Mr Cohen was asked about the words "assuming them to be in order". This was clearly, in my view, the only check which Mr Cohen intended to apply to Mr Afia's claim; was he indeed the holder of 12297 shares in PFA? However, Mr Cohen referred to the word "approved" in the sentence "you will be paid within 28 days of the claim being approved" as showing that the claim was intended to be subject to audit in the wider sense of checking whether a notice had or had not been served. For similar reasons, I reject that this was in fact Mr Cohen's intention when writing this email.

67. I am fortified in this conclusion by the unhappy state of Mr Cohen's evidence in relation to the alleged audit process. Mr Cohen explained that "audit" meant that a member of his

staff would deal with the claims, ensure that there had been compliance with the DOI requirements, and check that the claimant was indeed a shareholder. Mr Cohen said that he had received advice from Mr Romie Tager QC about what should form part of the audit process, but immediately corrected himself because Mr Tager's advice had not been received until later in May. Mr Cohen accepted that he had not, as at 3 May, given instructions to his staff in relation to auditing any claims because no claims had yet come in, and that he had not therefore started the audit process yet. He then explained that this was the reason why he did not say, in his email to Mr Afia, that the claim was subject to audit. I simply do not accept Mr Cohen's oral evidence on this point. It is wholly inconsistent not only with what he actually said in the email, it is inconsistent with all of the correspondence up until this date. Mr Cohen said the suggestion that he didn't mention the word "audit" in the email was that he did not know until he received Mr Tager's advice that there should be an audit was preposterous. In my view, that is exactly the position. As at 3 May 2011, I find as a fact that Mr Cohen had no inkling that claims should be audited in the wider sense of checking compliance with the terms of the DOI and the audit only arose once Mr Tager's advice was received, later that month. It is not clear exactly when Mr Tager's advice was either commissioned or received, but it was certainly received by 13 May 2011, when Mr Cohen wrote to another shareholder, Mr Taglight (of which more in due course). Mr Tager's advice, which is clearly privileged, has not been disclosed in these proceedings. Mr Cohen said, in his third statement, that his clients in the face of a barrage of telephone calls "were obliged to seek leading counsel's advice to evolve a definitive acceptance criteria for payouts: either a claimant ticked a series of boxes, or his claim would be rejected." This again reinforces my conclusion that prior to receiving Mr Tager's advice there was no such audit system being used by Mr Cohen or any of his staff.

68. Mr Afia appreciated that Mr Cohen's email of 3 May had a number of caveats and that there would be some sort of process which had to be undergone before he could be paid. When asked whether he took it as an unconditional promise that he would be paid for his shares, he said that it was moving towards one; in other words, he did not regard it as such. This of course is not to the point, because Mr Afia's claim that there had been a concluded contract was determined against him earlier in these proceedings. However, he said that his clear understanding of the email was that formalities would not be required. When asked whether he accepted that Mr Cohen might still be taking technical points, Mr Afia replied that Mr Cohen had never raised any such points with him.

69. Reverting to the chronology of events, on 3 May 2011 at 13.39 Mr Afia replied that he would send the share certificate in the post, to which Mr Cohen responded at 13.48, "Jolly good!" and asked Mr Afia to use a guaranteed method of delivery. In the event, Mr Afia hand delivered the share certificates to JGR that evening, with a covering letter in which he reserved his rights to require their return if payment had not been made within 30 days.

Mr Afia said, and I accept, that he chose 30 days because of what Mr Cohen had said about the time scale for payment in his email of 3 May. On 4 May at 09.50 Mr Cohen emailed to confirm receipt of the share certificates, and raised a query. The Register showed Mr Afia as holding 451 shares, but the Register had not been written up after 2007; Mr Cohen was therefore making enquiries about Mr Afia's remaining shareholding. Mr Afia replied that the balance of the shares had been held by nominees in an ISA and had later on been transferred into his sole name. There was a brief, but irrelevant, exchange of emails later on 4 May.

70. Mr Afia was not paid out. On 2 June 2011 Mr Cohen wrote an email explaining why not. I will set this out in full.

> "I apologise that you have not heard from me earlier, but I have been out of the country.
>
> The situation is that Claude and Frank Partridge sent a mischievous round robin letter to all the known shareholders telling them that they had been paid, so the shareholders should apply to me and they would receive payment likewise. No doubt you received a copy. The letter was completely misguided and no doubt sent for an ulterior purpose, but as a result of having my switchboard clogged up with meritless claims following dissemination of the round robin, we have taken leading counsel's advice. The advice is to the effect that the claims which my clients have been paying out in good faith hitherto, were in fact not due and payable, and we have therefore stopped making payments.
>
> In order for you to have a valid claim, you would have needed to send a specific notice to Amor Holdings Limited prior to November 2009 asking them to buy your shares. If they fail [*sic*] to do so, the guarantees then become engaged. As far as I can see you wrote to Amor concerning dissolution and requesting information, but you have never sent them a notice requiring them to purchase your shares and the Purchase Period for sending such a notice expired in November 2009.
>
> You have Claude and Frank to thank for the fact that your payment has not been processed.
>
> Any offer to purchase your shares is hereby withdrawn.
>
> Do you wish to collect your share certificates?"

71. The statement that Mr Cohen had been out of the country was not true. Mr Cohen said that he had suffered some form of breakdown as a result of the pressure of dealing with all of these claims. I have to say that I find that hard to accept at face value, because in the period between 3 May and 2 June Mr Cohen had prepared instructions to leading counsel, received leading counsel's advice, and acted upon that advice in relation to the claim made by Mr Taglight. Also in this period he had been dealing with claims by Mr Wedd and Mr Franks. Nonetheless, I accept Mr Cohen's evidence that he was finding everything too much to cope with. Mr Cohen said in terms that his email to Mr Afia was not candid and was not telling the truth, but that he was doing to the shareholders what the Partridges had

done to him. In a memorable phrase, he said that he was using the shareholders, including Mr Afia, as cannon fodder, hoping that they would turn their anger towards the Partridges. He wanted Mr Afia to believe that he should blame Claude and Frank Partridge for his not being paid out, which but for the Partridge letter would have happened, whereas in fact the truth (according to him) was that Mr Afia's claim would have been audited and rejected and he would not have received anything in any event. He accepted that he was sending what he called "disinformation" to the Partridges via Mr Afia with the intention of alienating one from the other. He said that he was not proud of all this, but it came at what was for him a very difficult moment.

72. This to my mind is an unacceptable way for a solicitor to act. It is of course perfectly permissible for a solicitor to fend off potential claims against his clients, so long as he does not misrepresent the true position, and that was what Mr Cohen had done, up until now. What is not permissible is for a solicitor to be untruthful in correspondence in an attempt to deflect a third party from discovering the true position. In my view, the true position was that until receipt of the advice from Mr Tager, there had been no intention to audit Mr Afia's claim in the sense of checking whether he had served a notice on Amor. Mr Cohen was not being truthful when he said, in his email of 2 June, that the reason why claims had been paid out before was that there was no intention of taking the technical point that claimants had failed to serve notice on Amor. Mr Cohen was using Mr Tager's advice to imply that previous payments had been made in good faith but in error by the guarantors. That was untrue. The point on serving notice was one which the guarantors never intended to take, particularly in Mr Afia's case as I have already found. I do, however, accept that once Mr Tager's advice was received, and in the light of the aggravation caused by the Partridge letter, a decision was made not to pay out to shareholders who had not served a timely notice on Amor. I will return to the implications of that decision later in this judgment.

73. What Mr Cohen said in his statements was that Mr Afia's claim

> "was in the process of being audited at the time the advice was sought, which is why there is a hiatus in the email traffic between us after the round robin letters".

Referring to the issue over Mr Afia's shareholding, Mr Cohen went on to say,

> "It then became apparent that he had not made his claim under the guarantee in time, and he therefore failed to tick a very major box. Had he been paid out, the payment would not have been recoverable from the Partridges for the very simple reason that he was not entitled to it."

I accept that the hiatus in email traffic was because a decision had been made to hold off making a payment until Mr Tager's advice had been received. However, I am unable to accept Mr Cohen's evidence in relation to the timing of the alleged audit. In my view, it is clear that up until receipt of Mr Tager's advice there was no audit process, there was no

intention to check whether Mr Afia had "failed to tick a very major box", and Mr Afia's claim was not being subjected to any form of audit other than checking that he indeed held 12297 shares. There was no evidence brought by the Defendants to show that any other outside shareholder had been subjected to an audit process which extended to checking whether a notice had been served. Mr Cohen said that from when he was first instructed he had his own checklist "in his head". I reject that evidence.

74. Mr Afia was understandably upset. He emailed Mr Cohen that this was "outrageous" and that

> "it is nothing to do with Claude and Frank that my 'payment has not been processed'. It is down to the mealy-minded nature of your clients who have at every turn sought to evade their moral and contractual responsibilities, aided no doubt by your good self and your delaying tactics."

One can readily understand Mr Afia's response. He said in cross-examination that he had believed Mr Cohen to be a man of his word, and that he would be asking his clients for funds.

75. Mr Cohen replied as follows:

> "Obviously you have jumped to your own conclusions, but the fact is that I have on behalf of my clients (in addition to the claims which are the subject of the litigation) voluntarily and in good faith paid out over £178,000 worth of small shareholder claims to which the majority of shareholders were not actually entitled (and was in the course of processing your own, as you are aware) until Claude and Frank thought it would be a good tactical idea to circulate all of the shareholders with false information, which has been very distracting and time-consuming, and as a result of which my clients' attitude has hardened."

76. I regret to have to find that Mr Cohen was not being truthful in this email either. First, there was nothing in the Partridge letter which could be said to be false information. Secondly, as JGR's letter of 25 March 2013 states, the figure of £178,000 related to payments made principally to Mr Wasserman (£107,276.40), who had served a timely notice on Amor on 29 October 2009 (see paragraph 26 of Mr Cohen's second statement), and of the remainder £10,574 was a payment to CEP Developments, Claude Partridge's company, £2,459 was paid to Elizabeth Partridge and almost £36,500 was paid to Mr Brown, who again had served a notice. It was therefore disingenuous of Mr Cohen to use the £178,000 figure to imply that the majority of shareholders had not been entitled to payment. Thirdly, as Mr Cohen accepted in cross-examination it was not his clients' attitude which had hardened as a result of the Partridge letter, but his own. Indeed there was no evidence called from the Defendants to show that they had decided or instructed Mr Cohen to take this position and to reject the claim because no notice had been served. In my judgment, and I so find, this was Mr Cohen's decision alone. This is to my mind another example of how Mr Cohen was simply too close to and too personally involved in the issues to have been acting for the Defendants in this action.

77. Mr Afia's response was to point out that Mr Cohen had not started to process any payment to him until after the Partridge letter, and had made every effort to delay any action on his part before that. He said that the reluctance of the Defendants to pay out had nothing to do with the Partridge letter.

78. I can now leave the exchanges between Mr Cohen and Mr Afia, and turn to the position of some of the other shareholders.

79. Mr Afia served statements of a number of other shareholders, as I have already mentioned, in order to show how the Defendants had dealt with other claims under the guarantee. Mr Afia accepted that he did not know about any of these other claims until after 2 June 2011, and it is clear for that reason that Mr Hornett is right in saying Mr Afia cannot advance any argument that there was a waiver or an estoppel in his favour because of them. However, Mr Blaker said that they were relevant because they showed that Mr Cohen's treatment of Mr Afia's claim was not unique but was part of a pattern and was of assistance to the court in deciding whether there was, or was not, the sort of audit which Mr Cohen asserted.

(i) Mr Wasserman

80. Mr Wasserman in fact did serve a notice in time. His statement said that he had not served a notice, and was unaware of the requirement to serve a notice, but as Mr Cohen pointed out in his second statement, Mr Wasserman had in fact served notice in time on Amor. I did not therefore find Mr Wasserman's statement of any assistance.

(ii) Mr Wedd

81. Mr Wedd provided two statements and was cross-examined about them. In my view, although Mr Wedd was a little hazy over the precise details, he was doing his best to help the court and I accept his evidence. I find as a fact that he had not served a notice on Amor. He made a demand under the guarantee and was paid out for the full value of his 36,000 shares but without any interest. Mr Wedd was under the impression that he had issued proceedings, but in that he was mistaken. Mr Wedd instructed a firm of solicitors, Darbys, to write a letter of claim on 10 May 2010. That letter attached "the material documents relied on by our client and we set out the material facts relied on by our client in respect of this claim." The letter does not mention the service of any notice on Amor. Mr Wedd said that the reference to "material documents" was to the offer document (the RPO), and I accept that he was right about that; he said that he could not imagine what else it might have been, and recalled no other such documents. Mr Wedd dispensed with Darbys' services on the grounds of cost, and did nothing until 23 February 2011, when he emailed Mr Cohen's colleague, Mr Jones. He said that he was a shareholder in PFA with 36,000 shares and asked for the money he was owed. In reply, on 25 February 2011 Mr Jones asked for Mr Wedd's share certificate or certificates as proof of ownership. Mr Wedd provided these the same day by email. On 8 March 2011, Mr Cohen emailed Mr

Wedd to say that "your application for payment under the provisions of the Instrument has been approved by my clients." Mr Wedd pressed for an additional payment for interest, but on 8 March 2011 Mr Cohen emailed rejecting the interest claim. Mr Cohen said, in that email,

> "I have written to you with an open offer on behalf of my clients, because you have complied with the various procedures in the Instrument and my clients would prefer not to become embroiled with you over the various technical defences that are available to them over a relatively small shareholding."

Mr Cohen said that he was under the impression from the Darbys letter and from what Mr Wedd said in evidence that Mr Wedd had in fact served notice on Amor. Mr Cohen was in my view wrong in saying that. I have found as a fact that no notice was served and that therefore no copy of any notice was sent with that letter, and Mr Wedd did not assert that he had served a notice. I note that in his statement Mr Cohen said that Mr Wedd's claim was audited by a colleague who had left the firm and whose checklist he was now unable to find. This was a reference to Amy Brice, and Mr Cohen said that Ms Brice had given him the share certificates, the notice to Amor and the demand made of the guarantors. He said that she had been instructed to look for these things as part of the audit. I reject Mr Cohen's evidence. As I have already held, there was no audit process at this time other than to check that the claimant was in fact a shareholder. Mr Cohen produced no checklist, not even a draft checklist in relation to any other claim, nor any working papers in relation to any audit which he asserts was carried out on Mr Wedd's claim. I recognise that Mr Cohen used the words in the email of 8 March 2011, "you have complied with the various procedures in the Instrument". In my view this cannot have meant that Mr Wedd had actually served a notice, because as I have already found Mr Wedd served no notice and there was no process for making such a check. In my view, the true position was that when writing that email Mr Cohen believed that a notice had been served, but there is no evidence upon which I can find that JGR had in fact made any checks as to whether a notice was served. I therefore conclude that the evidence shows that Mr Wedd was paid out without JGR having checked to see if he had served notice on Amor, and that Mr Cohen believed that one had been served, but he was incorrect in that belief. In Mr Afia's case, Mr Cohen knew that no notice had been served, and proceeded on that basis, and in Mr Wedd's case, Mr Cohen authorised the payment in the belief that a notice had been served. I therefore derive very little if any assistance from Mr Wedd's evidence.

(iii) Mr Dudman

82. Mr Dudman made a claim under the guarantee on behalf of his wife and his mother, both of whom were PFA shareholders. Mr Dudman ran an antiques restoration business which had been owned by PFA and which had to enter into a creditors' voluntary arrangement when PFA went into administration owing the business a substantial sum of money. Neither of Mrs Janet Dudman nor Mrs Pamela Dudman had served notices on Amor. On

15 March 2011 Mr Dudman wrote to Mr Jones at JGR asking for payment under the guarantees. Mr Jones acknowledged the email, and asked for copies of the share certificates, which were provided. Mr Cohen then wrote to Mr Dudman seeking his confirmation of the shareholdings, which he gave. Payment was then made to both Mrs Janet Dudman and Mrs Pamela Dudman in full. Mr Cohen accepted that no checks were made to see if there had been service on Amor. He said that the Dudman claims were on the borderline of the category of claims which were too small to spend time and money auditing. I accept Mr Cohen's evidence that he was given authority by his clients to exercise a discretion in respect of small shareholders. He also said that Mr Dudman might have been a potential witness in the proceedings, and his clients wanted therefore to keep them onside. Again, I find I get no assistance from how the Dudmans were dealt with by Mr Cohen and JGR.

(iv) Mr Franks

83. Mr Franks provided a statement and was cross-examined. Mr Franks held 2,500 shares in PFA. He had not served a notice on Amor. Mr Franks accepted Mr Cohen's without prejudice offer of a payment based on 30% of the value of the shares in full settlement of any claim under the guarantee and he was paid out £405. Mr Cohen's evidence was that Mr Franks' shareholding was small, and since he was prepared to accept the 30% offer, there was no auditing of his claim because of its value. On 11 February 2010 Mr Franks wrote an email to Mr Cohen, asking whether he was able to accept on behalf of the guarantors or Amor

> "service of a demand or claim from me in respect of the alleged failure to complete, as covenanted by deed dated 17 November 2005 in my favour (inter alia), the payment for shares within the stipulated period and/or for the class action pending."

Mr Cohen replied,

> "I am not able to accept service of a notice as you suggest, because there is a specific procedure laid down in the Instrument for service; so if you do not follow that procedure, service would be bad. Whilst it is not my position to advise you, I would however suggest that it is not a good idea for you to serve any notices at this time. A number of the shareholders have done so, and the consequence is that they find themselves joined into our proceedings. I have proposed to shareholders wishing to serve notices that it would make more sense for them to await the outcome of these proceedings… If the proceedings are successful, then my clients would be under no obligations to the shareholders; alternatively, there is a middle way, whereby they might have such obligations, but subject to an indemnity from the Partridge family. If on the other hand, the proceedings are not successful, then you would have a clear shot at my clients then that would be less costly to you."

Mr Cohen was asked why he didn't simply reply to Mr Franks that if he hadn't served a notice on Amor in time, he had no claim. I have some sympathy with Mr Cohen's

response that he was not really sure what sort of claim or demand Mr Franks was referring to; I find that sentence in Mr Franks' email quite hard to follow. However, I do think that Mr Cohen meant to refer to "claim" rather than "notice" in his reply, because otherwise it does not really make sense. In my view, the service of a notice on Amor was not in Mr Cohen's mind, because that was a simple and straightforward reply which he could have given and would have done so. That cannot have been what he meant by "notice". He also cannot have meant that making a demand under the guarantee would have led to Mr Franks (or any other shareholder who made a guarantee demand) being joined as a defendant to the action, because that would not have been correct. In my view, the reference to the "specific procedure" was to the making of a guarantee demand, and the subsequent references to serving a notice really should have been to serving a claim. In my view, Mr Cohen's reply was in its own way confusing, but was consistent with his intention of putting all potential claims off for as long as he could. I do not find myself assisted in determining the present claim by looking at the way in which Mr Cohen dealt with Mr Franks. An extraordinary postscript to Mr Franks' claim is that following the Partridge letter on 4 May 2011, knowing full well that in March of that year he had already accepted a 30% reduction in full settlement of his claim, and had received payment, Mr Franks sent an email to Mr Cohen saying, "I am a shareholder of 2,500 shares and I have been advised to request payment for my remaining shares of 54.59p per share by Claude Partridge." Mr Franks said in evidence that "there was no harm in asking." As a retired solicitor, Mr Franks really ought to have known better.

(v) Mr Dixon

84. Mr Dixon held 2253 PFA shares, and therefore also fell into the "small shareholding" category. He had not served notice on Amor. He had no share certificates, and accepted a reduced sum to reflect the cost of waiving an indemnity. I accept Mr Cohen's evidence that in paying out Mr Dixon he was exercising the "small shareholding" discretion given to him by his clients. Mr Dixon's evidence does not help me in determining the issues in this case.

(vi) Mr Burden

85. Mr Burden also served no notice on Amor. He held 676 PFA shares. Again, he was paid in full. For similar reasons to those in relation to Mr Dixon, I am not assisted by Mr Burden's evidence.

(vii) Mr Taglight

86. Mr Taglight held 18109 PFA shares. He had not served notice on Amor. He emailed Mr Cohen on 2 May 2011, having received the Partridge letter, requesting payment for his shares. He provided his share certificate at Mr Cohen's request. Mr Cohen then replied, saying that if Mr Taglight confirmed that he would accept £9,836.72 in full and final

settlement of the guarantors' liability, he would ask to be put in funds. That figure represented the full value of Mr Taglight's shareholding. Mr Taglight provided that confirmation, and Mr Cohen replied that he would request funds. However, Mr Taglight received no payment. On 13 May 2011 Mr Cohen sent an email to Mr Taglight as follows:

> "As a result of a scurrilous round-robin letter disseminated by Claude and Frank Partridge to shareholders, it became necessary for me to take leading counsel's advice on the question of payouts to the various shareholders, including yourself.
>
> The advice that came back was to the effect that my clients have no further liability to shareholders, and in fact, the payouts that my clients were making as recently as yesterday were not due and should not have been made. So I am afraid my clients will not be paying out further shareholders. You have Claude and Frank to thank for this. But for their round-robin letter, my clients would have carried on paying out shareholders in ignorance, and you were due to be paid today."

Mr Taglight asked for a copy of the advice, but Mr Cohen quite rightly refused to provide it.

87. It seems to me that Mr Taglight was in a different position from the other shareholders whose evidence I have reviewed. He was not a small shareholder. There was no suggestion in any correspondence that his claim was being audited to check if he had served notice on Amor. Mr Cohen said in his email of 13 May that but for the advice, Mr Taglight would have been paid, and that he wasn't being paid not because of his failure to serve a notice (contrast the email of 13 May with the email of 2 June to Mr Afia) but because the advice was to the effect that the guarantors were under no liability whatsoever to the shareholders. For that reason, in my view Mr Cohen's evidence in relation to Mr Taglight's claim was most telling. Mr Cohen said that he had thought that Mr Taglight was due a payment, but that was a mistake which was corrected. When asked what had happened to the application of the audit checklist, Mr Cohen said that Mr Taglight had slipped through under the radar, but had subsequently been caught. When asked about the words, "you were due to be paid today", Mr Cohen said in terms that this was dishonest misinformation; he wanted Mr Taglight to be so upset that he would take out his anger against the Partridges. It was certainly not true that as a result of Mr Tager's advice the guarantors had no liability whatsoever to any shareholders, nor was it true that all the payouts which had been made should not have been made; for example, the evidence in this case shows that small claims were being paid without any checks other than shareholdings, and the claims of shareholders who had served notice (Mr Wasserman, for example) were also being met. Mr Cohen then asserted that in fact Mr Taglight's claim was in fact in the process of being audited. That was also in my view untrue. It is regrettable that a solicitor can have thought it appropriate to provide deliberate misinformation. I reject Mr Cohen's evidence that Mr Taglight's claim was being audited

or that part of any audit would have been to check whether a notice on Amor had been served.

88. There are clear parallels between how Mr Cohen deal with Mr Taglight on the one hand and Mr Afia on the other. In my view, here just as with Mr Afia there was no intention to check whether Mr Taglight had served a notice. That point was not taken until Mr Cohen replied to correspondence from Davenport Lyons, solicitors for Mr Taglight, on 22 June 2011, and I rather suspect from the detail in that reply that it is based upon Mr Tager's advice. In my view, the position in respect of Mr Taglight's claim appears to be very similar to that of Mr Afia. The reason why Mr Cohen was going to pay out Mr Taglight was that, as in the case of Mr Afia, there was no intention of checking whether he had served a notice on Amor. The reason why no payment was made to Mr Taglight was because Mr Cohen saw the opportunity to use Mr Tager's advice to get back at the Partridges through Mr Taglight in the same way as he was then to attempt to do with Mr Afia. This was in my view highly discreditable conduct on the part of Mr Cohen.

The without prejudice material

89. Having reviewed the evidence, it seems to me that the first thing I must decide is the status of the without prejudice material. This is important for two reasons. First, if the material cannot be admitted as evidence, then Mr Afia cannot advance a case that he relied on it. Secondly, if it is admitted as evidence, there is an issue over whether such material can properly be the basis for a finding of waiver, estoppel or equitable forbearance.

(i) The without prejudice material

90. The first stage is to define the relevant material. It is as follows:

Description	*Paragraphs of this judgment*
The email chain between Mr Cohen and Mr Afia 22 January 2010 at 11.37 to 17.20	38
The email chain between Mr Cohen and Mr Afia 2 August 2010 at 13.46 to 22.03	40-42, 45-51
The email chain between Mr Cohen and Mr Afia 2 September 2010 11.45 to 2 June 2011 17.28	55-59, 61
The email chain between Mr Cohen and Mr Taglight 3 May 2011 17.18 to 13 May 2011 17.12	64, 65, 69

(ii) The without prejudice rule

91. The second stage is decide whether the communications were indeed without prejudice.

92. The without prejudice rule is that written or oral communications, made for the purpose of a genuine attempt to compromise a dispute between the parties, may generally not be admitted in evidence. The policy behind the rule is set out in *Cutts v Head* [1984] Ch. 290, 386:

> "Parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of that negotiation (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings. They should...be encouraged fully and frankly to put their cards on the table... The public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability."

93. For correspondence to be truly without prejudice, there must be a dispute between the parties, and the correspondence must evidence a genuine attempt to settle that dispute. It is the substance of the correspondence which is important, rather than whether the parties expressly attached the without prejudice label to it. Correspondence marked without prejudice will only truly be without prejudice if there is a genuine attempt to resolve the disputes, and correspondence might still be without prejudice even if it is not marked as such.

94. In my view, all of the emails above between Mr Cohen and Mr Afia were genuinely without prejudice as they were negotiations between Mr Cohen and Mr Afia aimed at settling Mr Afia's claim under the guarantee without the need for litigation. Even the fairly anodyne New Year exchange formed part of this exchange.

95. In my view, the emails between Mr Taglight and Mr Cohen, which were not marked without prejudice, were nothing more than Mr Taglight making his claim, and Mr Cohen dealing with it, and were not without prejudice. Mr Cohen did not seek to head his correspondence with Mr Taglight without prejudice. In my view, it was open correspondence.

(iii) Admissibility

96. The third stage is to decide whether Mr Afia is able to rely on the without prejudice material.

97. It is to be noted that:

> "Nearly all the cases in which the scope of the 'without prejudice' rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the

present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement."

Rush & Tompkins Ltd v Greater London Council [1989] AC 1280, 1299 *per* Lord Griffiths.

98. In my judgment, Mr Afia is entitled to refer to the without prejudice material, for the following reasons.

99. First, the correspondence between Mr Afia commenced in December 2009 on an open basis. Mr Cohen expressly said, as I have found, that the failure to serve a notice would not be a point his clients would wish to take against Mr Afia. In the without prejudice correspondence, Mr Cohen maintained that position until 2 June 2011. When Mr Cohen, acting on behalf of the Defendants, announced in his email of 2 June 2011 for the first time that the point was being taken, it was surrounded by untruths and misinformation. Mr Cohen knew full well that his clients would not be taking the point, on an open basis, and had been dealing with Mr Afia accordingly. There was, as I have found it, no truth in Mr Cohen's assertion that Mr Afia's claim was being rejected because he had failed to serve a notice on Amor. The truth was that it was rejected because Mr Cohen had decided to take that stance as a way to get back at the Partridge family, and there was no evidence that this was a decision of the Defendants as opposed to being Mr Cohen's own decision, and I have found that it was indeed his decision alone. I see no basis for affording the protection of the without prejudice rule where one party has behaved with conscious impropriety, and that is indeed how I characterise Mr Cohen's behaviour. Knowing that his clients would not take the point, he corresponded with Mr Afia on that basis, and then made his own decision to take the point without reference to his clients and for his own purposes.

100. In *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 763, Robert Walker LJ as he then reviewed the authorities and said at 792c as follows:

> "Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' (the expression used by Hoffmann LJ in *Forster v Friedland* [1992] CA Transcript 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise (4th edn, 1996) p 153–154 (para 9-32)) are two first-instance decisions, *Finch v Wilson* (8 May 1987, unreported) and *Hawick Jersey International v Caplan* (1988) Times, 11 March. But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* (1993) Times, 19 March, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

101. Later in the judgement, Robert Walker LJ held that there was nothing to suggest that the defendant had "acted in any way that was oppressive, dishonest or dishonourable": 797b.

102. I do not go so far as to hold that Mr Cohen was acting dishonestly, but in my view his actions and his correspondence have the clear stamp of unambiguous impropriety and dishonourable conduct, in circumstances where throughout he well knew that the point on notice would not be taken, and it would be a clear case of an abuse of the without prejudice rule were this material not now to be admitted into evidence.

103. I therefore find that the material is admissible under this first ground.

104. Secondly, in the *Unilever* case, Robert Walker LJ held as follows at 792b:

> "Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178 at 191, and his view on that point was not disapproved by this court on appeal ([1998] FSR 530)."

105. It seems to me that the open correspondence in December 2009 was a clear statement by Mr Cohen that his clients would not wish to take the point that no notice had been served, and that the without prejudice correspondence continued on that basis. Whilst not determinative of whether any of this amounted to a clear statement for the purposes of an estoppel, in my view it was clearly intended to be a clear statement of the Defendants' position in relation to Mr Afia's claim, that the lack of notice would not be a point taken against him. For the reasons set out by Robert Walker LJ, it seems to me right that I should therefore admit the without prejudice material into evidence, and decide whether or not that material (either on its own or together with the open correspondence) is capable of founding the estoppel, waiver or equitable forbearance alleged by Mr Afia. I will return to the *Hodgkinson* case below.

106. Thus, for this second reason, I hold that the without prejudice material can be admitted into evidence.

107. For completeness, I should mention that there is no basis, in my judgment, for holding that the Defendants have waived the protection of the without prejudice rule. Mr Afia has sought to rely on the without prejudice material in this claim from the outset. The basis of his initial claim was that there had been a concluded contract between him and the Defendants that he would be paid under the guarantee, and in putting forward that claim he sought to rely on the without prejudice material.

108. In their Defence, at paragraph 16, it was pleaded that the allegation, based as it was on without prejudice material, was an abuse of process and should be struck out as scandalous.

109. The Defendants applied for summary judgment. That application was supported by witness statements made by Mr Cohen.

110. In his first statement of 6 September 2011, Mr Cohen produced a bundle of the without prejudice material, and said as follows at paragraph 19:

> "Without waiving the privilege in that correspondence, and purely so that the Court can evaluate the claim that it resulted in a concluded contract, the relevant correspondence is now produced and shown to me in a separate bundle marked C".

Mr Cohen then proceeded to analyse that without prejudice material in support of the contention that there was no concluded contract.

111. In his second statement of 21 November 2011, Mr Cohen said this at paragraph 14:

> "In paragraph 18 [of Mr Afia's statement] the Claimant deals with without prejudice correspondence. As I made clear in paragraph 19 of my 1st witness statement, I felt obliged to disclose this simply because the Claimant was then asserting in his Particulars of Claim that he had reached a stand-alone agreement with me in this without prejudice correspondence. I note that he has now abandoned that point, so I do not need to deal with it further, save that it will be relevant as to costs."

112. Paragraph 16 of the Defence was clear. It took issue with Mr Afia's reliance on the without prejudice material. The Defendants' position has always been that it has maintained privilege in this material. Once the summary judgment application was dealt with, and Mr Afia served his Amended Particulars of Claim, the Defendants served an Amended Defence in which they repeated their objection. I do not see how the Defendants could properly have asked the court to find, on the summary judgment application, that there was no concluded agreement without looking at the without prejudice material. In my view, the form of words used by Mr Cohen was clear and unambiguous and did not amount to a waiver of privilege in relation to the case as a whole.

113. I agree with Mr Hornett's submission that there can be no waiver where the without prejudice material was deployed, as it was by the Defendants, discretely in the summary judgment application and not in relation to the "wider merits of the case as a whole", a phrase taken from the decision of the Court of Appeal in *Dunlop Slazenger International Ltd v J0E Bloggs Sports Ltd* [2003] EWCA Civ 901, which makes it clear that there can be a limited waiver; see also *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm), in which Gloster J referred to the Dunlop case as showing that where a party uses privileged material to support its case on the substantive merits, there will be a collateral waiver for all purposes. The difference in the present case is that it was Mr Afia who sought to deploy the privileged material, and in my view the use by the Defendants was limited to the summary judgment application only, and did not amount to a waiver in the proceedings as a whole.

114. Nonetheless, for the two reasons I have identified, it is in my view right that the without prejudice material should be admitted into evidence. There is no need, therefore, to strike out parts of the witness statements which refer to it.

Waiver, estoppel and equitable forbearance

115. I was taken in submissions to a large number of authorities and textbooks which set out the principles applicable to waiver, estoppel and equitable forbearance. In my judgment, as Mr Hornett submitted, the principles are at least for present purposes the same in respect of each of these three equitable doctrines, and are as follows (see Wilken & Ghaly, The Law of Waiver, Variation, and Estoppel, 3rd Edition, Chapter 8, and Snell's Equity, 32nd Edition, Chapter 12):

    115.1. There must be a pre-existing legal relationship.

    115.2. There must be a promise or representation by one party that he will not enforce his strict legal rights. That promise must be clear, unequivocal, unambiguous and unconditional. Nothing less will do.

    115.3. The promise must have been intended to affect the legal relationship between the parties.

    115.4. The promisor must have intended the promise to be acted upon or have known that it was acted upon.

    115.5. The promisee must have acted in reliance on the promise.

    115.6. It must be inequitable for the promisor to withdraw from the promise.

(i) Pre-existing legal relationship

116. The first requirement is plainly satisfied in this case, because of the guarantee provided to shareholders, of which Mr Afia was one, by the Defendants as guarantors under the DOI.

(ii) Promise or representation

117. The second requirement presents substantial hurdles for Mr Afia. First, the letter of 21 December 2009 says that the Defendants "would not wish to take technical points", and does not state in clear terms that the notice point would not be taken. Indeed, there is nothing in the correspondence which amounts to an express representation, in terms, that the point would not be taken. Secondly, Mr Afia accepted in evidence that he did not regard Mr Cohen as ever having confirmed expressly that the point would not be taken. Thirdly, there is authority which states that representations made without prejudice will not be sufficiently equivocal.

118. Dealing with that third point first, Mr Hornett relies on the statement to that effect in Wilken & Ghaly, paragraph 8.15, on the case cited as authority for that proposition in that paragraph, *IMT Shipping & Chartering GmbH v Chansung Shipping Company Ltd, "The Zenovia"*

[2009] EWHC 739, on Chitty on Contracts, 31st Edition, at paragraph 3-091, on *China-Pacific SA v The Food Corporation of India* [1980] 2 Lloyds's Rep 2213, and on *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752.

119. In my view, the proposition that a promise made in without prejudice negotiations can never form the basis of an estoppel is far too widely put. I need only refer to the last of the authorities relied on by Mr Hornett, and to the decision in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* (see paragraph 104 above).

120. In *Cobbe*, there had been a promise made in subject to contract negotiations. At paragraph 28, Lord Scott of Foscote said as follows, at paragraph 28:

> "The reality of this case, in my opinion, is that Etherton J and the Court of Appeal regarded their finding that Mrs Lisle-Mainwaring's behaviour in repudiating, and seeking an improvement on, the core financial terms of the second agreement was unconscionable, an evaluation from which I do not in the least dissent, as sufficient to justify the creation of a 'proprietary estoppel equity'. As Mummery LJ said (para 123), she took unconscionable advantage of Mr Cobbe. The advantage taken was the benefit of his services, his time and his money, in obtaining planning permission for the property. The advantage was unconscionable because immediately following the grant of planning permission, she repudiated the financial terms on which Mr Cobbe had been expecting to be able to purchase the property. But to leap from there to a conclusion that a proprietary estoppel case was made out was not, in my opinion, justified. Let it be supposed that Mrs Lisle-Mainwaring were to be held estopped from denying that the core financial terms of the second agreement were the financial terms on which Mr Cobbe was entitled to purchase the property. How would that help Mr Cobbe? He still would not have a complete agreement. Suppose Mrs Lisle-Mainwaring had simply said she had changed her mind and did not want the property to be sold after all. What would she be estopped from denying? Proprietary estoppel requires, in my opinion, clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so. This is not, in my opinion, a case in which a remedy can be granted to Mr Cobbe on the basis of proprietary estoppel."

121. It seems to me from that paragraph that Lord Scott concluded that it was possible to found a "proprietary estoppel equity" on the basis that in the subject to contract negotiations there was a representation that the financial terms were agreed, but that failed to assist because there would still not have been sufficient clarity as to the remaining terms of the agreement which the party was estopped from denying, because the without contract negotiations covered more than just the financial terms. Each case must turn on its own facts. Where the promise relates to the only point which is at issue, it seems to me that the position is different. In the present case, the only point in issue was whether or not a notice had been served. There is nothing in the authorities so far as I can see which

prevents a promise being made without prejudice if it relates to the one issue which is at stake.

122. In *Hodgkinson* Neuberger J as he then was held as follows (190-1), in a passage referred to with approval by Robert Walker J in the *Unilever* case:

> "As a matter of principle, it seems to me that, even where a party can in principle rely upon correspondence being 'without prejudice' on contractual as well as public policy grounds, the court will not allow him to do so if it is satisfied that it would be unconscionable. So far as the public policy ground is concerned, it seems to me self-evident that, just as much as it is in the public interest that parties should feel completely free to negotiate under the cloak of 'without prejudice', so it is in the public interest that they should not be able to use the protection of 'without prejudice' for the purpose of 'unambiguous impropriety' …. Equally, so far as the contractual ground is concerned, a contractual right to 'without prejudice' privilege should not be upheld or enforced where it is invoked for an improper purpose. However, mere inconsistency, in the absence of dishonesty will not do - see *Independent Research Services Ltd v. Catterall* [1993] I.C.R. 1 .
>
> By analogy with this line of authority, there is, to my mind, a powerful argument for saying that if a clear and unambiguous statement is made by one party in 'without prejudice' correspondence, and the statement is acted on, and reasonably acted on, by the other party, an objection by the first party to the correspondence being put in evidence by the second party in order to justify the step taken by the second party would be plainly unconscionable and would not be upheld by the court. There is another reason for reaching that conclusion. In *Tomlin v. Standard Telephones & Cables Ltd* [1969] 1 W.L.R. 1378 , it was held that 'without prejudice' correspondence could be looked at by the court to see if the negotiations therein contained resulted in a settlement. Although, of course, contract and estoppel are quite separate concepts, it appears to me logical and consistent that, if 'without prejudice' correspondence can be looked at to see if it gives rise to a contract, then such correspondence can also be looked at to see if it gives rise to an estoppel. However, I do not suggest that there is an absolute rule to that effect."

123. In my judgment, since as I have held there was conscious impropriety on the part of Mr Cohen, acting for the Defendants in the without prejudice correspondence, the present case is one in which it is possible to use a statement made without prejudice to found a waiver, estoppel or equitable forbearance.

124. The first point to which I have referred above (paragraph 115) is whether there was a clear, unequivocal, unambiguous and unconditional promise that the fact Mr Afia had not served notice on Amor would not be taken by the Defendants.

125. Mr Hornett's approach is that I should look at each individual piece of correspondence, and that I should conclude that on the face of each letter, or each email, there was nothing which could be said to amount to such a promise.

126. Mr Blaker says that I should look at the exchanges as a whole in order to determine whether such a promise was made.

127. In my judgment, Mr Blaker is right, for the following reasons. First, whether a promise was made is an objective test: see Wilken & Ghaly, op. cit., paragraph 8.17 and the authorities cited in that paragraph. Secondly, a promise does not have to be express. It can be inferred from conduct and from a common assumption that the parties were negotiating on a particular basis: see Wilken & Ghaly, op. cit., paragraph 8.19 and in particular *Co-Operative Wholesale Society v Chester-le-Street DC* [1997] 73 P&CR 111.

128. In my view, there was a clear promise by the Defendants that they would not take the point as to failure to serve notice against Mr Afia. First, as I have held, the whole basis upon which the correspondence proceeded from December 2009 was that the Defendants would not wish to take the point. Secondly, Mr Cohen appreciated that the point was there to be taken. Thirdly, Mr Cohen said that all the shareholders would be treated equally and that Mr Afia should abide the outcome of the main proceedings, which as I have held Mr Afia reasonably understood to mean that if the main proceedings went against the Defendants, all shareholders would be paid. All of this was in open correspondence. In my judgment, this amounted to a clear promise, inferred by how it was reasonably understood by Mr Afia, and on which the parties proceeded throughout, that the point would not be taken and that Mr Afia should not issue proceedings but await the outcome in the main action.

129. Further, in the without prejudice correspondence, Mr Cohen and Mr Afia again were acting on the same basis: see the email of 3 August 2010 at 15.07 in which Mr Cohen said, "If the stay comes off the judgment, my clients intend to pay the outside shareholders"; the email of 3 May 2011 at 13.01 in which Mr Cohen clearly indicated that payment would be made subject to Mr Afia proving that he was a shareholder; and the email of 2 August 2010 in which Mr Cohen said that "subject to the stay, my clients will honour their obligations". Having rejected Mr Cohen's evidence that Mr Afia was subject to any form of audit by which the question of whether he had served notice would be checked, it seems to me that the position in relation to the without prejudice material is the same as the open correspondence, and it again amounted to a clear promise that the notice point would not be taken and that Mr Afia should not issue proceedings because he would be paid out in due course.

130. I therefore conclude that on the basis of the open correspondence, either on its own or taken together with the without prejudice correspondence, amounted to a clear and unequivocal promise.

131. I do not base this finding upon how any of the other shareholders were dealt with, as Mr Afia was unaware of these matters at the time.

(iii) Intention to affect legal relationship

132. The third requirement is that the promise must have been intended to affect the legal relationship between the parties. In my view, it was so intended. Mr Cohen had appreciated from the outset that the point could be taken, but that it would not be, and that Mr Afia would be paid out subject to what happened in the main action. In my judgment, the promise was intended to be relied on by Mr Afia and to bind Mr Cohen's clients.

(iv) Intention that promise be acted on

133. The fourth requirement, that the promisor must have intended the promise to be acted upon or have known that it was acted upon, is also in my view made out, for the same reasons. Mr Cohen in my judgment intended Mr Afia to rely on the fact that the Defendants would not take the point, would treat all shareholders the same, and would pay all shareholders out subject to what happened in the main action.

(v) Reliance

134. The pleaded reliance is that had the promise not been made, he would have issued proceedings earlier.

135. It is clear from the facts as I have found them that Mr Afia did not issue proceedings because he relied on Mr Cohen's promise that there was no point in him doing so because he would be paid out with the other shareholders subject to the main proceedings. I find as a fact that but for this promise, Mr Afia would have issued proceedings at some time in about August 2010. The key question is whether that reliance is such that it gave rise to detriment or inequity when the promise was not fulfilled.

(vi) Detriment and inequity

136. I accept Mr Hornett's point that by the time a promise was made (if one was indeed made, and I have held that it was) Mr Afia was out of time to serve a notice, and therefore he had no contractual rights to enforce. However, I disagree with his conclusion that this presents an insuperable obstacle to the claim.

137. The facts as I have found them in my view show that had Mr Afia issued proceedings earlier, they would probably have been stayed, but as soon as the inside shareholders were paid out, so would Mr Afia have been paid. This is a timing issue. I find as a fact that had Mr Afia issued proceedings, then shortly after February 2011 and before the Partridge letter of 28 April 2011 Mr Afia's claim under the guarantee would have been met. It was never subject to audit and never would have been. Mr Afia would have been paid even though he had not served a notice. The payment would have been actioned and approved by the Defendants (in the sense that Mr Afia would have been able to prove his shareholding, and the Defendants would have put Mr Cohen in funds to make the

payment) before the Partridge letter led to a change in attitude by Mr Cohen. In my judgment this establishes that Mr Afia had acted to his detriment in reliance on the promise.

138. Further, in my judgment it would be inequitable to permit the Defendants to rely now on Mr Afia's failure to serve the notice. In *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 at 399, Lord Goff held that the doctrine requires

> "such reliance by the representee as it will render it inequitable for the representor to go back on his representation."

The time of assessment as to whether there is an inequity is when the promise is withdrawn, and the inequity must arise because of the reliance on the promise. In my view, the requirements are satisfied in the present case.

Conclusion

139. My conclusion is therefore that Mr Afia succeeds in his claim.

140. Mr Afia was asked in cross-examination whether he agreed that this claim had escalated out of all proportion to its value. He agreed, and for what it is worth so do I. But Mr Afia strikingly said that this was a matter of principle and it was a question of whether principles are worth something or not. It is impossible to gauge the attitude of the Defendants to the enormous sums which have been expended in this litigation, because to all intents and purposes they have remained invisible. It is a great pity that a more sensible and proportionate view of what was actually at stake was not taken by Mr Cohen on behalf of the Defendants, and I rather suspect that had Mr Cohen not become so personally involved matters might well have proceeded rather differently.

141. I am grateful to both counsel for their careful, thorough and clear submissions.

(End of judgment)