Neutral Citation Number: [2011] EWHC 1897 (Ch)

Case No: HC10C01527

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2011

Before :

MR JUSTICE VOS

- -

Between :

Syed Azman Bin Syed Ibrahim	**Claimant**
- and -	
(1) Barclays Bank PLC	**Defendants**
(2) The Secretary of State for Business, Innovation and Skills	

- -

Mr Romie Tager QC and Mr Hugh Jackson (instructed by Winckworth Sherwood LLP) for the Claimant, Mr Ibrahim

Mr Patrick Goodall (instructed by Addleshaw Goddard LLP) for Barclays Bank PLC

Ms Sarah Harman (instructed by the Treasury Solicitor) for the Secretary of State

Hearing dates: 4th to 8th, 11th and 12th July 2011

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Judgment

Mr Justice Vos:

1. The Claimant, Mr Syed Azman Bin Syed Ibrahim ("Mr Ibrahim"), seeks, in this action, to be subrogated to the rights of the 2nd Defendant, the Secretary of State for Business, Innovation and Skills (the "Secretary of State"), in relation to secured funding provided by the 1st Defendant, Barclays Bank plc ("Barclays"), to the LDV Group, the well-known van manufacturer in the Midlands. At the relevant time, the Secretary of State's department was called the Department of Business Enterprise and Regulatory Reform. I shall call the Secretary of State's Department "BERR" in this judgment notwithstanding that it has undergone frequent changes of name both before and since the events in issue in this case.

2. LDV Holdings Limited ("LDV Holdings") had been owned by the English subsidiary of a well known Russian corporation, GAZ International Limited ("GAZ"), since 2005, but had been forced, by cash flow difficulties, to suspend production in December 2008. LDV Holdings owned two operating companies LDV Group Limited ("LDV Group") and Birmingham Pressings Limited. I shall refer to these three LDV companies together in this judgment as "LDV".

3. Mr Ibrahim is a successful Malaysian businessman who controls Weststar LDV Sdn Bhd ("Weststar"), a Malaysian company that had distribution rights for LDV's products in South East Asia and other areas. Weststar had invested sums approaching $100 million in Malaysia in the assembly and distribution of LDV vehicles. LDV stood for both "Leyland DAF Vans" and "light duty vehicle".

4. In broad terms, this action turns on the contractual relationships that the parties established, and the extent to which the equitable remedy of subrogation can or should be applied in the context of those contractual relationships. Much of the evidence concerned the negotiations between the parties that gave rise to the contracts that were ultimately signed up, and the expectations of the parties in entering into those contracts.

5. The facts are actually quite simple and may be summarised in the simplest of terms as follows:-

   i) LDV was indebted to Barclays for some £8.5 million. That loan was secured by debentures and by a guarantee from GAZ's Russian parent. LDV also owed Barclays a further sum of about £1.6 million in relation to asset finance facilities secured only by the debentures.

   ii) The Secretary of State was keen to save LDV from insolvency, and agreed to guarantee a £2.5 million new monies facility under which some £1.4 million was advanced by Barclays to LDV, on the basis that recoveries in LDV's insolvency would go 50/50 to Barclays and the Secretary of State up to £3.2 million. These arrangements were intended to keep LDV going so as to allow Weststar the time to undertake due diligence on LDV, Weststar having entered into a conditional sale and purchase agreement with GAZ, under which it had agreed to procure short term finance for LDV.

   iii) LDV entered into a counter-indemnity (the "Counter-Indemnity") by which it agreed to reimburse the Secretary of State for any monies he paid to Barclays under his guarantee.

   iv) The Secretary of State had asked Weststar to back his guarantee in case it was called. Ultimately, at Mr Ibrahim's personal request, UBS (Singapore) ("UBS") issued an irrevocable standby letter of credit (the "Letter of Credit") in favour of the Secretary of State payable on a certification that the "*amount demanded represents and covers the unpaid sums due*" to the Secretary of State from LDV. It will be noted that the wording of the Letter of Credit did not make it payable on proof that the Secretary of State had paid Barclays under his guarantee.

   v) Mr Ibrahim indemnified UBS against any sums it had to pay under the Letter of Credit.

   vi) In due course, Barclays called just over £1.4 million under the Secretary of State's guarantee, and the Secretary of State called for payment by UBS under the Letter of Credit, and Mr Ibrahim (and his wife) ultimately indemnified UBS.

6. The way in which Mr Romie Tager Q.C. and Mr Hugh Jackson, counsel for Mr Ibrahim, put their case changed somewhat during the course of the trial. But, in essence, when matters concluded, Mr Tager argued the case for subrogation in two ways, which I shall explain in a moment. He said that the payment by UBS to the Secretary of State did not discharge the debt due under the Counter-Indemnity from LDV to the Secretary of State. Mr Tager had to put his case that way, because he acknowledged that if the payment of the Secretary of State had discharged the debt due from LDV to the Secretary of State, Mr Ibrahim could not recover because the sharing provision (clause 2.1 of the so-called Realisation Agreement (the "RA") between the Secretary of State and Barclays) made it a condition of recovery by the Secretary of State that the debt due from LDV to the Secretary of State had not been discharged.

7. The two types of subrogation on which Mr Tager relied were what are described as follows in the academic texts:-

   i) Subrogation to extinguished rights (or what I called in argument "type 1 subrogation"). The most normal example of this kind of subrogation is when a guarantor discharges (or extinguishes) the principal debtor's liability, he (the guarantor) is subrogated to the principal creditor's rights against the principal debtor. It is axiomatic, as Mr Tager accepted, that for such subrogation, the guarantor must have discharged the principal debtor's liability to the principal creditor.

   ii) Subrogation to subsisting rights (or what I called in argument "type 2 subrogation"). The most normal example of this type of subrogation is where an indemnity insurer pays the insured in respect of an insured loss, and is then subrogated to the insured's claims against third parties. In this situation, the insurer's payment to the insured does not extinguish the insured's rights against the third party, but the insurer is allowed to benefit from those rights in place of the insured to avoid double recovery and unjust enrichment by the insured.

8. Mr Tager submits that Mr Ibrahim is entitled to engage type 1 subrogation (on the basis that the arrangements with UBS were simply a mechanism to ensure that Mr Ibrahim paid the Secretary of State, so that one should look at the substance rather than the form), because the debt due from LDV to the Secretary of State was not discharged by the payment by UBS. He submits that Mr Ibrahim can also engage type 2 subrogation because the agreement or understanding between all the relevant parties was that Mr Ibrahim (again regarding the arrangements with UBS as purely mechanistic) would be entitled to stand in the shoes of the Secretary of State to share in Barclays' recoveries from an administration of LDV if UBS paid up.

9. Mr Patrick Goodall, counsel for Barclays, raises a number of answers to these claims, but his primary submission is that Mr Ibrahim is faced with a Morton's fork. He submits that:-

   i) Mr Ibrahim cannot succeed under type 1 subrogation, because the debt owed by LDV to the Secretary of State under the Counter-Indemnity was expressly discharged by the mechanism employed when the Letter of Credit was called from UBS. The Secretary of State expressly certified that the amount

demanded "*represents and covers*" the unpaid sums due from LDV. Under clause 2.1 of the RA, the discharge of the LDV debt terminated the Secretary of State's right to share in recoveries, and also, of course, the rights of anyone subrogated to that right.

ii) As for type 2 subrogation, this is also affected by the same difficulties, because clause 2.1 of the RA allows no sharing once the debt due from LDV is discharged. But even if Mr Ibrahim were claiming to share in those recoveries outside the RA, or even if the debt due to LDV were not discharged, Mr Goodall submits that Mr Ibrahim cannot recover for three primary reasons:-

a) Because it was never the understanding or agreement of the parties that Mr Ibrahim would be able to subrogate in the light of the wording of the Letter of Credit, the demand under it, and clause 2.1 of the RA.

b) Because the Letter of Credit is an autonomous instrument whereby UBS is discharging its own primary, not secondary, liability, and there can be no rights of subrogation of any kind in UBS, or taken through UBS.

c) Because Mr Ibrahim has not sued in the Secretary of State's name as would be required for type 2 subrogation.

Issues

10. Against this background, it seems to me that I shall have to decide the following main issues:-

i) When UBS paid under the Letter of Credit, did its payment discharge LDV's liability under the Counter-Indemnity to the Secretary of State?

ii) If so, can Mr Ibrahim claim to be subrogated to the Secretary of State's rights against Barclays?

iii) Was there an understanding or agreement between the parties (BERR, Ibrahim and Weststar) that Mr Ibrahim would be subrogated to the Secretary of State's rights under the RA?

iv) Can UBS, and through UBS Mr Ibrahim, be subrogated to the Secretary of State's rights under the RA, even though the Letter of Credit is an autonomous instrument?

v) Can Mr Ibrahim claim to be subrogated to the Secretary of State's rights under the RA, notwithstanding that he has not sued in the name of the Secretary of State?

vi) Can Barclays rely upon a change of position defence?

11. Before dealing with these issues, I shall set out, as briefly as I can, (a) the somewhat tortuous chronological background to the implementation of the arrangements I have described and the events following the collapse of LDV, (b) the most important terms of the contractual documentation, (c) my view of the witnesses that gave live evidence

at the trial, and (d) a summary of the more important authorities that bear on the issues I have to decide.

Chronological background

12. In 2005, GAZ acquired LDV from Sun Capital, a US corporation.

13. Between December 2005 and June 2006, each of the 3 LDV companies executed debentures over their assets in favour of Barclays to secure their liabilities to Barclays (the "Debentures"). In June 2006, LDV Group also executed an assignment of book debts and a legal charge over its freehold and leasehold property in favour of Barclays.

14. On 22nd February 2007, Open Type joint stock society "GAZ" (the "GAZ parent"), GAZ's ultimate Russian parent company, executed a guarantee in favour of Barclays in respect of LDV's overdraft and short term loan facility up to a limit of £8.5 million (the "GAZ guarantee").

15. On 25th September 2007, Barclays renewed its overdraft and loan facilities to LDV.

16. In December 2008, LDV ceased production.

17. In mid-March 2009, Mr Ibrahim embarked upon discussions with a view to Weststar acquiring LDV.

18. On 19th March 2009, Mr Ibrahim wrote to LDV saying that Weststar had invested US$100 million in the LDV franchise and predicted sales volumes rising to 7,000-10,000 per annum in 2012. By this time, LDV was already in talks with the UK Government about support for LDV.

19. On 23rd March 2009, Weststar's lawyer, Dato Aznan Jaya ("Mr Jaya") met British High Commission representatives in Kuala Lumpur to discuss Weststar's possible acquisition of LDV. On the same date, Mr Ken Ogilvie ("Mr Ogilvie"), a director of LDV, wrote to Mr Jaya saying that: "*Barclays has agreed in principle that they will allow a new party to take a first charge security debenture alongside themselves to secure the new money*".

20. On 30th March 2009, Mr Jaya, Mr Tet Shin Ho ("Mr Ho"), Weststar's group accountant and Mr Bob Rai ("Mr Rai"), Weststar's director of operations, met Mr Andrzej Kasperek and Mr Allen Thomas, representing GAZ, to discuss the possible acquisition. On the same day, Weststar's representative met Ms Jane Whewell and Ms Katherine Willerton ("Ms Willerton"), officials in BERR, who indicated that financial assistance from the Government could only be provided after GAZ was out of the picture. Ms Willerton's notes recorded that "*[if] this business fails, our investment in Malaysia fails*" and "*[i]f Weststar put money in (advances) it could rank pari passu [with] Barclays*".

21. On 31st March 2009, Mr Ho met Mr Ian Pearson, then Member of Parliament for Dudley and Economic Secretary to the Treasury, who assured Mr Ho that the Government would provide bridging finance if Weststar agreed to buy out GAZ, and fund LDV after the purchase.

22. On 15th April 2009, Mr Evgeniy Vereshchagin, the Chief Executive of LDV ("Mr Vereshchagin"), wrote to Mr Ibrahim chasing a response to an offer GAZ had made on 30th March 2009, and saying that the board of LDV would meet to decide whether to seek an administration. Also on 15th April 2009, Weststar made a counter-offer to GAZ to acquire LDV.

23. On 27th April 2009, the directors of LDV applied to the Court for an administration order.

24. On 2nd May 2009, Mr Vereshchagin emailed Sir Andrew Cahn, acting permanent secretary at BERR asking the Government to fund LDV in the interim period, saying that Barclays was not willing to advance any funds, but that the guarantor would "*by prior agreement with Barclays, rank alongside them in the event that things go wrong as a secured creditor*".

25. On Sunday 3rd May 2009, Mr Ho reported by email to Mr Ibrahim in relation to his discussions including in particular in relation to "*Bridging Finance*". Under that heading, Mr Ho reported as follows:-

> "*(a) To lift the administration proceedings, LDV's directors need assurance of funds.*
>
> *(b) To this, it was suggested that Weststar bridge the estimated GBP5.0 million requirement for 1 month by extending the finance through Barclays secured against LDV's assets, ranking pari passu with Barclays existing overdraft, or after it in event of liquidation.*
>
> *(c) I highly recommend this move because it appears that DSSA [Mr Ibrahim] has put "skin in the game", i.e. has taken a personal risk, by assuming personal responsibility for the amount. This perception is important in our dealings with Barclays, British Government, Malaysian Government and the LTAT [Malaysian Army Pension Fund as proposed lenders].*
>
> *(d) In fact, there is minimal risk, if any at all, because in event of liquidation, the order of disposing of the proceeds to creditors is HM Government for GBP3.5 million taxes, GBP8.5 million to Barclays and then whatever disbursed to LDV under responsibility of [Mr Ibrahim]*".

26. On 3rd May 2009, an agreement was reached in principle between GAZ and Weststar as to the buy-out whereby Weststar would buy the shares in LDV for £1, and GAZ's £17.3 million debenture loan to LDV would be discharged at completion by Weststar paying GAZ £2.3 million.

27. On the May Day Bank Holiday, Monday 4th May 2009 (though perhaps not signed until the 5th May), Weststar and GAZ entered into a sale and purchase agreement (the "SPA") for the sale of LDV with completion to be on 30th June 2009. The SPA provided by clause 5.5 that Weststar would use its best efforts to secure interim funding of £5 million, and that if such funding was not obtained by 9.00am on 6th

May 2009, then the SPA would become void. I shall set out the terms of the SPA in a little more detail in due course.

28. On Tuesday 5th May 2009, Mr Simon Rankin ("Mr Rankin") of BERR met Mr Ibrahim, Mr Ho and Mr Rai at the Dorchester Hotel, and informed them that the Government would not guarantee a Barclays bridging facility without recourse. Mr Ibrahim said initially that Mr Rankin had assured him on this occasion that, in the event of a call on the Government's guarantee, Weststar would be able to obtain the benefit of arrangements between BERR and Barclays.

29. In the evening of the 5th May 2009, the Government announced in the media that it had agreed to make a £5 million loan to save LDV from administration. It was that evening that Mr Ibrahim left the UK to return to Malaysia.

30. At 1.33am on Wednesday 6th May 2009, Mr Mike Copson ("Mr Copson") of Barclays emailed Mr Jonathan Williams ("Mr Williams") a lawyer working for Barclays, forwarding an email to Graham Rusling ("Mr Rusling"), managing director and Head of Barclays' business support group. Mr Copson attached some press articles and said that it "*would appear that we are not being asked to advance new money, but to share security for new money advanced by a third party (i.e Govt.). Would have thought that this must be a done deal (* again note that we have not formally been asked to share security or had any such direct approach from BERR) …*".

31. At about 09.30 on 6th May 2009, Mr Williams and Mr Rusling spoke on a telephone conference call to Mr Rankin and Mr Michael Birch ("Mr Birch") of BERR. This was the first of 4 calls that day. BERR was asking Barclays to provide £5 million of interim funding to LDV, guaranteed by BERR, and to give BERR super priority in any insolvency of LDV.

32. Some time after 10.30 on 6th May 2009, at least one petition to wind up LDV and the directors of LDV's administration application were adjourned for 7 days.

33. After an internal discussion, Mr Williams and Mr Copson tried to get in touch with BERR on the telephone, but could not do so. As a result, at 12.54 on 6th May 2009, Mr Williams emailed Mr Rankin saying that: "*[h]aving discussed this matter further, we are uncomfortable granting super priority and would prefer our ranking to be pari passu. … We consider it is equitable that risk should be shared equally*".

34. In the second telephone conference call on 6th May 2009, between all parties including Mr Copson and Mr Williams of Barclays, Mr Rankin and Mr Birch of BERR, Mr Ho for Weststar, Mr Rob Hunt of PriceWaterhouse Coopers who ultimately became the Administrators of LDV ("PwC"), and Mr Ogilvie and Mr Vereshchagin from LDV, it is not entirely clear what was discussed about Weststar's position. By that stage, the Letter of Credit had not been proposed, and indeed the elements of Barclays' further loan had not yet been agreed. Suffice it to say that Mr Ho probably did say that he wanted to make sure that Weststar recovered its monies, but BERR's representatives told him that there were too many people on the call to discuss that at that stage and that it would be discussed later.

35. At 11.25pm (probably Malaysian time, so 16.25 UK time) on 6th May 2009, Mr Ho reported to Mr Ibrahim on the outcome of the second telephone conference. His

email concluded as follows: "*PS: Made it clear to attendees that BERR guarantee is contingent on Weststar's corporate guarantee. The question of Weststar's ranking during administration is dealt with in separate email* [which never came]. *There were too many people present*".

36. At 17.03 on 6th May 2009, Mr Rankin emailed Mr Williams saying that "*if we are going in pari passu, then that will need to include sharing the guarantee on a prorata basis. Otherwise we are funding this business with less protection than you and this is unacceptable to HMG. Please advise urgently. We can do a call now*".

37. At 17.30 on 6th May 2009, the third telephone conference call of the day took place between Mr Rankin and Mr Birch of BERR and Mr Rusling, Mr Williams and Mr Copson of Barclays. Mr John Naccarato ("Mr Naccarato"), a banking partner in CMS Cameron McKenna LLP ("CMS"), BERR's solicitors, also joined the call. Security for the loan was extensively discussed. Mr Williams's notes show "*Government getting a guarantee from Weststar? … Mechanically you lend the money. We guarantee to you – risk is government wriggles out. Counter indemnity from Weststar -> they get first money in administration. 1. Pari passu across our security or 2. Super priority on English security. Weststar Counter Indemnity Barclays Bridging loan – senior lending status. Need to talk that through*". Mr Copson's notes record that Mr Rankin said that "*Government are lending to Weststar – with counter guarantee from Weststar. BERR takes risk via guarantee. Weststar believes LDV will generate £8m-£10m in administration. Pari passu across all. OR Super priority on LDV*". The proposed waterfall of distributions in the event of LDV's insolvency was discussed for the first time on this call.

38. Later on 6th May 2009, a final 4th telephone conference call took place between Messrs Rusling, Copson and Williams of Barclays, Mr Birch and Mr Rankin of BERR, and Mr Naccarato and Mr Edmund Robinson ("Mr Robinson") of CMS. It was in that discussion that the elements of the waterfall that was ultimately agreed (and encapsulated in clause 2.1 of the RA) started to take shape. Indeed, Mr Williams's evidence was that not only was the waterfall actually agreed in this call, but that it was also agreed that the sharing of recoveries by Barclays would be only with the Secretary of State. As will appear in due course, I was not able to accept this latter piece of evidence.

39. At 16.54 on Thursday 7th May 2009, Mr Ho emailed Mr Rankin and others saying that he had persuaded Mr Ibrahim to provide the required counter-indemnity for the Secretary of State personally, instead of Weststar.

40. On Friday 8th May 2009, the Secretary of State issued the so-called First Berlin Term Sheet headed "*Non-binding indicative term sheet for Government-Guaranteed facility to support continued trading of Berlin [LDV] to facilitate sale to Weststar*". It recorded that the Secretary of State would provide a guarantee in accordance with section 7 of the Industrial Development Act 1982 and the Community guidelines on state aid for rescuing and restructuring firms in difficulty. It further indicated under the side heading "*HMG Letter of Credit/ Bank Guarantee*" as follows: "*Guarantee from an entity or bank satisfactory to HMG … sufficient to cover £5.0m, to be arranged by Weststar in favour of HMG*". The term sheet also set out the waterfall arrangements for the first time as follows:

> "*In the event of an insolvency of Berlin [LDV] or change of control, any proceeds of the direct security provided by Berlin to Barclays to be shared as follows:-*
>
> *Up to the first £3.2m … to be shared 50:50 between HMG and Barclays.*
>
> *Thereafter all amounts are to be paid to HMG until any loss or contingent liability to Barclays under the Guarantee plus costs, interest and fees are discharged.*
>
> *Balance to be retained by Barclays.*"

41. On Monday 11th May 2009, Mr Birch emailed Mr Robinson of CMS saying: "*[g]iven the current discussions over the guarantee we can't rely on getting a decent guarantor. Also we need to ensure that we give the guarantor the subrogated position they are expecting*".

42. At 19.34 on 11th May 2009, Mr Birch emailed Mr Ibrahim enclosing a slightly revised Berlin Term Sheet, saying that Mr Ibrahim had agreed to ask UBS Singapore to provide their suggested wording for their Guarantee/Standby Letter of Credit overnight.

43. At 22.04 on 11th May 2009, Mr Copson emailed his colleagues saying that they needed to have the BERR, Weststar arrangements and Barclays' facilities in place by 10am on Wednesday 13th May 2009, when the adjourned administration petition and winding up petitions were due to be heard. He said that he needed formal sanction for the proposals including "*BERR to share in our debenture security through waterfall arrangements*".

44. On Tuesday 12th May 2009, GAZ parent executed a guarantor side letter waiving its rights of subrogation against other guarantors and in particular the Secretary of State.

45. On 12th May 2009, Mr Rankin issued a memorandum describing the transaction to Ministers and BERR personnel, saying that "*Mr Ibrahim will provide a £2.5m indemnity to BERR in the form of an irrevocable letter of credit from A+ rated UBS (Singapore)*".

46. At 11.16 on 12th May 2009, Mr Rankin circulated "*the standard [LC] template*". The draft form of demand included a certification by the Secretary of State that the sum demanded was "*due under the [Counter-Indemnity]*".

47. At 14.30 on 12th May 2009, Mr Rankin circulated BERR's "*comments on the UBS L/C reflected in the document*". The amended documents attached contain underlining that appears to represent BERR's "*non controversial*" amendments. The un-amended document provided that "*the amount demanded represents and covers the unpaid indebtedness … due to [The Secretary of State] by _____*". The amended document provided that "*the amount demanded represents and covers the unpaid indebtedness … due to [The Secretary of State] by LDV Group Limited …*".

48. At 03.59 on Wednesday 13th May 2009 (possibly Malaysian time), Mr Birch emailed Mr Ho and Mr Ibrahim saying that they had just completed a call with BERR's

lawyers, Barclays, LDV and Eversheds (for LDV) "*where we turned the pages on all the documents*".

49. On 13th May 2009, the petition and administration applications were adjourned for 7 days.

50. At 11.35 on 13th May 2009, the draft RA was finalised as between BERR and Barclays. At 13.03 on 13th May 2009, the draft RA was sent by CMS to Mr Ho.

51. At 13.56 on 13th May 2009, BERR circulated the "*final L/C draft for issuance tomorrow*". The wording had become: "*the amount demanded represents and covers the unpaid sums due to [The Secretary of State] by LDV Group Limited…*". At 20.56 on 13th May 2009, BERR once again circulated the "*final L/C draft for issuance tomorrow*".

52. On 13th May 2009, Barclays provided LDV with a new facility letter for £2.5 million up to a maximum of £5 million. The new facility letter was countersigned by LDV on 14th May 2009 (the "New Facility Agreement"). Also on 13th May 2009, Barclays wrote 2 letters restating its existing facilities to LDV. These restated facility letters were also countersigned by LDV on 14th May 2009.

53. At 07.34 (probably Malaysian time, which was 00.34 UK time) on Thursday 14th May 2009, Mr Ho emailed Mr Rankin asking for BERR's final OK to the modifications that UBS had come up with to the draft Letter of Credit. At 16.35 on 14th May 2009, BERR confirmed that the changes to the draft Letter of Credit were acceptable to BERR.

54. At 18.33 on 14th May 2009, Mr Rankin confirmed receipt of the Letter of Credit, which provided as follows: "*A claim under this Standby Letter of Credit must cite this SBLC No. _____ and must be accompanied by the Beneficiaries' duly signed request for payment certifying that the amount demanded represents and covers the unpaid sums due to yourselves by LDV Group Limited. One or more demands may be made under this Standby Letter of Credit subject to the aggregate amount set out above [£2.5 million]*". The draft demand attached to the Letter of Credit included a certification in similar terms. To secure the Letter of Credit, Mr Ibrahim gave UBS an indemnity dated 14th May 2009 in respect of the amounts that UBS might have to pay. The indemnity recorded that "*To accord with [Mr Ibrahim's] specific instructions and to meet [Mr Ibrahim's] particular requirements, [the Letter of Credit has] been drawn up as an independent contract whereby [UBS must promptly meet claims by [BERR] provided that [BERR complies] with the terms and conditions of the [Letter of Credit]*".

55. The following agreements were also entered into on 14th May 2009:-

    i) The RA between Barclays and the Secretary of State. Clause 2.1 provided, as I have said, for the waterfall and the sharing of recoveries from LDV.

    ii) The Guarantee Facility Agreement between the Secretary of State and LDV Group.

iii) The Counter-Indemnity executed by LDV Group in favour of the Secretary of State.

I shall deal with the important clauses of these agreements in due course.

56. At 16.59 on 18th May 2009, Mr Birch emailed his BERR colleagues saying that "*Given Weststar is taking the risk for funding of current expenditure, they have an incentive to make these decisions quickly*".

57. On 18th May 2009, the Secretary of State entered into a guarantee in respect of Barclays' £2.5 million loan facility to LDV Group (the "Guarantee").

58. On 20th May 2009, Mr Jaya emailed Mr Ibrahim advising him to reconsider the purchase in the light of the results of the due diligence enquiries into LDV.

59. On 29th May 2009, Mr Ho emailed BERR saying that, as a result of due diligence, Weststar could only proceed if £45 million of finance was made available from the Government, and that it would not give any further authorisation to draw down on the bridging facility. By 31st May 2009, LDV had drawn down £1.4m under the New Facility Agreement.

60. On 8th June 2009, an administration order was made in respect of LDV.

61. At 17.58 on 8th June 2009, Barclays faxed a demand to the Secretary of State for £1,423,064.63 under his Guarantee.

62. Also on 8th June 2009, Barclays demanded £9,470,153.11 from LDV Group, including the liabilities under the New Facility Agreement.

63. On 9th June 2009, the Secretary of State demanded from LDV £1,423,064.63 under clause 1 of the Counter-Indemnity and £6,900.00 in respect of costs and expenses due and payable pursuant to the Guarantee Facility Agreement (making a total of £1,429,964.63).

64. At 15.14 on 9th June 2009, Mr Williams emailed Mr Rankin saying that Barclays had made demand on BERR, that it expected to be paid, and that it had not agreed as a pre-condition that, before any payment to Barclays could be made, that BERR had first to be in funds from Weststar.

65. At 16.23 on 9th June 2009, Mr Rankin emailed Mr Copson and Mr Williams of Barclays saying: "*Please find attached our demand for repayment from UBS. I believe that Barclays has offered us the option of presenting the demand on our behalf. Can you please advise who I should send these letters to and what you require to verify our signature?*".

66. Later on 9th June 2009, the Secretary of State (through Barclays) demanded £1,429,964.63 (i.e. the same sum he had demanded from LDV under the Counter-Indemnity and the Guarantee Facility Agreement) from UBS under the Letter of Credit (the "Demand"). The Secretary of State's Demand for payment said that "*[t]he undersigned hereby certifies that the amount demanded represents and covers unpaid sums due to The Secretary of State for Business, Enterprise and Regulatory Reform by LDV Group Limited*".

67. At 10.39 on 10th June 2009, Barclays emailed Mr Birch with the details of Barclays' account into which BERR's monies should be paid saying he was "*looking into sending a swift message for you to UBS today*".

68. At 13.02 on 10th June 2009, Mr Birch emailed Mr Zahir Sachak at Barclays saying that BERR had asked Barclays to submit its demand for payment to UBS by SWIFT, and he was waiting for confirmation that that had been done.

69. At 13.17 on 11th June 2009, an internal email from Mr Crickmar of Barclays to Mr Williams confirmed the good news that the Secretary of State had paid £1,423,064.63 to Barclays under the Guarantee.

70. On 15th June 2009, UBS paid the sum of £1,429,964.63 to the Secretary of State under its letter of credit into BERR's bank account (the "Account"), which was the same account as was nominated for payments by LDV in clause 4.1 in the Guarantee Facility Agreement. On 17th June 2009, UBS (acting on Mr Ibrahim's instructions) debited the same sum to an account in the name of Mr and Mrs Ibrahim. UBS granted Mr and Mrs Ibrahim an overdraft on this account, which was ultimately paid off by them from other investments in early 2011.

71. On 18th June 2009, there was an exchange of emails between Mr Ho and Mr Birch in which Mr Birch said that it was his understanding that Weststar would stand in the shoes of the Secretary of State in respect of his claims against Barclays' security.

72. On 16th and 17th July 2009, a rather esoteric exchange of emails took place between DG Competition at the European Commission and BERR in which the Commission sought confirmation, for the purposes of its rules on state aid to industry, that LDV would reimburse the aid itself or be liquidated within 6 months. BERR told the Commission variously that (a) Weststar (meaning Mr Ibrahim) would be a "*senior secured creditor of LDV in the administration proceedings*", and that (b) the aid would be reimbursed by payment to Weststar or LDV would be liquidated, though they did not know when.

73. On 20th November 2009, in response to an enquiry from Mr Ho to Mr Birch, CMS emailed BERR saying that Barclays had to pay BERR under the RA, and that BERR needed to pass that money to UBS, who would then deal with it under the terms of any agreement (express or implied) that it (UBS) had with Weststar.

74. On 25th November 2009, PwC, by then the Administrators of LDV, emailed Mr Ho and Mr Birch saying that they would pay Barclays as the only secured creditor, and that they (Barclays) would distribute the monies in accordance with "*whatever agreements you have reached*".

75. On 2nd December 2009, Mr Williams emailed Mr Birch saying that "*[m]y understanding is BERR has been fully repaid under the guarantee and therefore the [RA] has been satisfied and has lapsed. Barclays has no obligation to BERR under the [RA]. Weststar cannot be subrogated to an Agreement which has been satisfied*". Mr Birch responded on 7th December 2009 saying that "*[t]o suggest that the rights of subrogation no longer apply because we have been repaid ignores the nature of subrogation rights which, by definition, will only arise once a repayment has been made, and vest by operation of law … in the person ultimately bearing the loss …*" .

76. On 11th December 2009, Barclays recovered £1,097,699.74 from the Administrators of LDV.

77. On 14th May 2010, Barclays recovered a further £2 million from the Administrators of LDV.

78. On 8th June 2010, LDV went into liquidation.

79. On 25th June 2010, Barclays recovered a further £500,000 from the Administrators of LDV.

80. On 29th July 2010, Mr Ogilvie, latterly of LDV, wrote from his personal email address to Weststar saying that the shortfall in the Administrators' realisations had been increased by the payment of the BERR Guarantee, as "*this money is c 50% of the fixed charge realisations which would otherwise have been kept by Barclays*".

81. On 24th December 2010, Barclays entered into a confidential settlement agreement with GAZ parent compromising its claims under the GAZ guarantee. It is sufficient for the purposes of this judgment to recite that Barclays accepted significantly less than the full amount to which it was entitled under the GAZ guarantee.

82. On 10th May 2011, Barclays recovered a further £200,000 from the Administrators of LDV. It is possible that some further sums may yet be recovered.

83. On 4th July 2011, Mrs Ibrahim assigned to Mr Ibrahim her rights of subrogation under the RA against Barclays.

The Sale and Purchase Agreement dated 4th May 2009

84. The SPA included the following relevant provisions:-

> i) Section 5.2 provided as follows: "*Conduct of Business Pending Closing. From the date of this Agreement until the Closing, except as consented to by the Buyer in writing, subject to the availability of the line of credit and draw-downs thereunder as referred to in Section 5.5, the Seller will use all reasonable efforts to cause Holdings, Group and each of the Principal Subsidiaries:*
>
> *(a) to maintain itself at all times as corporations duly organised and validly existing under Applicable Law;*
>
> *(b) to carry on its businesses and operations in the ordinary course and substantially in the manner carried on as of the date hereof (noting that at the date hereof, Group and the Principal Subsidiaries is in an extended "Christmas shut-down" period) and to preserve its assets and businesses in such manner as is consistent with its economic circumstances; without limiting the foregoing, the Seller will consult with the Buyer regarding all significant developments, transactions and proposals relating to Group's business, other than in the ordinary course of business or which would not have a material effect on such business; …*"

ii) Section 5.5 provided as follows:- "*Interim Loan. Simultaneously with, or promptly after, the execution of this Agreement, the Buyer will use its best efforts to secure an interim line of credit to Group of not less that (sic) £5,000,000 for working capital of Group from the date hereof to the Closing hereunder. It is the understanding of the Parties that the proceeds of the borrowings under such line of credit shall be used primarily for the payment of salaries, utilities and other payments necessary to avoid the necessity of Group or any of the Principal Subsidiaries applying for administration prior to the Closing. If such interim loan is not so obtained on or before 9.00 a.m. London time on 6th May 2009, this Agreement shall immediately and without notice by either Party become null and void. Any draw-down by Group on such line of credit shall only be made with the prior consent of the Buyer, which consent shall not be unreasonably withheld*".

The Guarantee Facility Agreement

85. The Guarantee Facility Agreement constituted the terms on which the Secretary of State agreed with LDV Group that he would enter into the Guarantee of LDV's liability under the Guarantee Facility Agreement in favour of Barclays. The Guarantee Facility Agreement included the following terms:-

i) By clauses 2.2 and 2.3, that on the 12th June 2009, all amounts due would become immediately and automatically due and payable, unless all parties including Weststar agreed to an extension.

ii) By clause 4.1, that sums payable by LDV Group to the Secretary of State under the New Facility Agreement (including the Counter-Indemnity) should be made to the Account.

iii) By clause 5.1, that it was a condition precedent that the facility could not be drawn until the Secretary of State had received documents including (a) the duly executed Counter-Indemnity, and (b) the Letter of Credit.

The Counter-Indemnity

86. Clause 1 of the Counter-Indemnity provided that: "*[LDV Group] shall pay [the Secretary of State] on demand all sums paid by [the Secretary of State] under or in connection with any Guarantee [provided pursuant to the Guarantee Facility Agreement] and indemnify [the Secretary of State] on demand against all actions, charges, claims, costs, damages, demands, expenses, liabilities, losses and proceedings which may be brought or preferred against [the Secretary of State]…*". At one point, Mr Tager suggested that it had not been open to the Secretary of State to make demand on LDV before it had paid under the Guarantee, but Mr Goodall pointed out (correctly I think) that this clause 1 provided that the Secretary of State should be indemnified against all claims, so that it was open to him to make the demand on LDV prior actually to paying Barclays.

87. Clause 6 of the Counter-Indemnity provided that it should not be necessary for the Secretary of State before demanding payment to endeavour to enforce any other guarantee or security whether from the LDV Group or any other person, and that the

Secretary of State "*shall have the right and power to claim all amounts due and payable in respect of the liabilities hereunder from [LDV Group] or any other person in such order and at such times as [the Secretary of State] may in its absolute discretion consider appropriate*".

The Realisation Agreement (RA)

88. The RA is at the core of the claims in this action. Recital D provided as follows: "*(D) In consideration of the issue of the Guarantees by [the Secretary of State][Barclays] has agreed that any Distribution Moneys received by [Barclays] in respect of the Bank Liabilities will be shared between them in accordance with the terms of this Agreement ...*".

89. The relevant terms of the RA provided as follows:-

> "1.1 In this Agreement:
>
> **"*Asset Finance Facilities":*** *means each of:*
>
> *(a) the loan facility made available to the [LDV Group] by [Barclays] (acting through its agent Barclays Mercantile Business Finance Limited) pursuant to an agreement dated 29 April 2008; and*
>
> *(b) the loan facility made available to the [LDV Group] by [Barclays] (acting through its agent Barclays Mercantile Business Finance Limited) pursuant to an agreement dated 5 March 2008;*
>
> ***"Bank Liabilities":*** *means the aggregate of the amounts in various currencies at any time and from time to time owing by [LDV Group] or any Related Party to [Barclays] and unpaid in respect of principal, interest, default interest, commissions, charges, fees, expenses and indemnities. For the avoidance of doubt any liabilities owing by [GAZ parent] are expressly excluded from this definition (without prejudice to the inclusion of any liabilities owing by [LDV Group] or any Related Party in respect of which [GAZ parent] is under any liability as surety).*
>
> ***"Bank Security":*** *means*
>
> *(a) any mortgage, pledge, lien, charge, assignment or security interest or any other agreement or arrangement having a similar effect which has been granted by [LDV Group] or any Related Party; and*

(b) any guarantee or indemnity from [LDV Group] or any Related Party or any other person, in respect of the Bank Liabilities, but expressly excluding the Guarantees and the Gaz Guarantee.

"Counter Indemnity": *means the counter indemnity entered into by [LDV Group] on or about the date of this Agreement in favour of [the Secretary of State] in respect of its liabilities under the Guarantees.*

"Creditors": *means each of [Barclays] and [the Secretary of State].*

"Distribution Moneys": *means any moneys received by [Barclays] or any person acting on behalf of or on the instructions of [Barclays] in respect of the Bank Liabilities or the Guarantor Liabilities, as the case may be, including but not limited to those received from:*

(a) the enforcement of the Bank Security or any part thereof;

(b) the proceeds of dissolution and liquidation of [LDV Group] and/or any Related Party or distribution of its assets among its creditors (however such liquidation or distribution may occur);

(c) any payment in respect of default interest, commissions, charges, fees, expenses and indemnities; and

(d) any repayment or prepayment (partial or in full) of principal and/or interest pursuant to the terms of the Bank Liabilities or the Guarantor Liabilities, as the case may be,

together with an amount equal to the amount of any reduction in any liability of [Barclays] effected by set-off, consolidation or combination of accounts with regard to [LDV Group] or any Related Party, but excluding any amount recovered pursuant to the Guarantees or the Gaz Guarantee.

…

"Gaz Guarantee": *the Financial Guarantee dated 22 February 2007 and made by [GAZ parent] in favour of [Barclays].*

"Guarantor Liabilities": *means the aggregate of the amounts in various currencies at any time and from time to time owing by [LDV Group] or any Related Party to [the Secretary of State] and unpaid in respect of principal, interest, default interest, commissions, charges, fees, expenses and indemnities.*

"Realisation Sharing Amount": *means an amount equal to the lesser of:*

(a) £3,200,000; and

(b) an amount equal to the amount of principal owing under the Asset Finance Facilities, multiplied by two, as at the first date on which any part of the same becomes due and payable (whether as a result of a scheduled repayment, any prepayment, or any default or demand by [Barclays]).

…

Third Party Rights

1.3 Nothing in this Agreement is intended to confer on any person any right to enforce or enjoy the benefit of any provision of this Agreement which that person would not have had but for the Contracts (Rights of Third Parties) Act 1999.

2. ***Sharing Arrangements***

Turnover of Distribution Moneys

2.1 Unless and until the Guarantor Liabilities have been paid and discharged in full and [the Secretary of State] has no further actual or contingent liability under or in respect of the Guarantee, to the extent that [Barclays] receives any Distribution Moneys for application against the Bank Liabilities or the Guarantor Liabilities as applicable, it shall;

2.1.1 as soon as reasonably practicable following receipt pay to [the Secretary of State] (and pending such payment, hold on trust for the [the Secretary of State]) for application to the Guaranteed Liabilities (or to be held by [the Secretary of State] pending such application) an amount equal to 50% of the Distribution

Moneys, to the extent the aggregate Distribution Moneys received do not exceed the Realisation Sharing Amount; and

2.1.2 as soon as reasonably practicable following receipt pay to [the Secretary of State] (and pending such payment, hold on trust for [the Secretary of State]) for application to the Guaranteed Liabilities (or to be held by [the Secretary of State] pending such application) an amount equal to the total amount of the Distribution Moneys, to the extent the aggregate Distribution Moneys received exceed the Realisation Sharing Amount.

2.2 [Barclays] shall be entitled to retain for its own account and apply to the Bank Liabilities as it sees fit any amount of Distribution Moneys received which are not required to be held on trust for and/or transferred to [the Secretary of State] pursuant to Clause 2.1 above.

2.3 To the extent that at any time prior to the Guarantor Liabilities being satisfied in full, the Bank Liabilities in respect of the New Facility (including any interest, fees or costs) are satisfied in full, [the Secretary of State] shall be subrogated to the rights of [Barclays] in respect of the Bank Security but [Barclays] shall continue to collect all Distribution Moneys in accordance with Clause 2.1 above as Agent for [the Secretary of State] until the Guarantor Liabilities have been so satisfied.

…

*4. **Term of Agreement***

4.1 This Agreement shall continue in force until the date that [the Secretary of State] has no further actual or contingent liability under or in respect of the Guarantee, and the Guarantor Liabilities have been irrevocably discharged in full.

…

*9. **Successors and Assigns***

9.1 This Agreement shall bind and inure to the benefit of the respective successors and assigns of the Creditors, provided, however, that no Creditors shall assign or transfer any interest it has under this Agreement unless

> *the assignee or transferee undertakes to be bound by the provisions of this Agreement.*
>
> *9.2 Notwithstanding Clause 9.1 above, the rights and obligations of [the Secretary of State] under this Agreement shall be binding on, and enforceable by, any successor in title to [the Secretary of State]*".

The Claimant's witnesses

90. Mr Ibrahim, the Claimant, gave evidence first. He was involved in the transaction only at a high level, leaving all the day-to-day discussions to Mr Ho. In general, he was a refreshingly open witness, who accepted that he was a successful businessman, to whom it was important to buy LDV in order to protect his advantageous vehicle marketing business in Malaysia and other countries. Two essential paragraphs in his witness statement were, however, challenged. In the first, he had said that he had been told in the meeting with BERR on 5th May 2009 that his money would be "*safeguarded against a back-to-back arrangement with Barclays to share the realisation proceeds so that we could share in the secured position that BERR would obtain via the Realisation Agreement, that is that if I had to pay out then I would get the benefit of the arrangements between BERR and Barclays*". In the second, he said, in effect, that he had never wished to put his money at risk when he entered into the transaction. In the result, I was unable to accept either of the propositions in his statement, not because I do not believe that, with the benefit of hindsight, they represented how he now saw the matter, but because they are not based on contemporaneous fact. As to the first, Mr Ibrahim accepted in cross-examination that such a statement could not have been made to him directly by BERR at any meeting he attended, and the waterfall was not even discussed until the last two telephone conference calls between BERR and Barclays on 6th May 2009. And as to the second, because it was abundantly clear that Mr Ibrahim and Weststar had every reason to risk some money in order to investigate the acquisition of LDV to secure the valuable distribution network that it had established in South East Asia.

91. Mr Ho is a UK qualified chartered accountant and, since 2002, the group accountant for Weststar. I found Mr Ho a straightforward and credible witness. He did not have instant recall of events now more than 2 years ago, and there were some small errors in his witness statement, but broadly I was able to accept what he had to say. Mr Ho was clear that he always understood that Weststar/Mr Ibrahim would have what he described as "*a clear path to recover the money*". He accepted that there was no document identifying that path, but said he was assured by BERR's representatives that Weststar/Mr Ibrahim would be able to share in Barclays' recoveries if LDV went into administration. I accept Mr Ho's evidence that this was discussed, although he was not very clear as to precisely when that conversation took place. Undoubtedly, Mr Ho's understanding was that they would be entitled to claim through BERR, and that BERR's lawyers, CMS, would protect Weststar's and Mr Ibrahim's position when the documentation was drafted. This may have been a naïve approach, as Mr Ho disarmingly admitted, but it was what he thought. Mr Ho also accepted that he had not read the RA at the time, but left it to CMS to see that Weststar's interests were protected knowing, as he did, that CMS were not acting for Mr Ibrahim or Weststar, even though Weststar was paying their fees.

92. Despite Mr Tager having opened his case on the basis that the SPA fell away on 13th May 2009, because the interim loan had not, at that date, been put in place, Mr Ho gave clear evidence that that was not his understanding at the time, and that "*the intention was not for it to fall away*".

Barclays' witnesses

93. Mr Copson is a director of Barclays in Business Support, Corporate Risk Management. He has been with Barclays in various roles since 1978. Mr Copson freely admitted that he had had no previous experience in transactions of this kind. When first cross-examined, he was cagy about the recoveries that Barclays had made from GAZ parent. In the result, I ordered that the settlement agreement, to which I have already referred, should be disclosed. Mr Copson's evidence was, in effect, of a piece with the other Barclays' witnesses. They all maintained that they were not interested in or focused on the relationship between the Secretary of State and Weststar, and that all they were concerned about was obtaining a Government guarantee for any new lending they allowed to LDV. They were prepared to consider sharing their security under the Debentures broadly because they did not believe that much was likely to be recovered by that route in any event, and whilst they thought there were problems also with the GAZ guarantee, they regarded that as more likely to produce some return. Overall, I found Mr Copson's evidence to be reasonably reliable.

94. Mr Williams was Barclays' senior legal counsel in 2009 working with Barclays' Business Support Group in the Corporate Division. He had joined Barclays in 2006 following a secondment from Addleshaw Goddard. Mr Williams was a plain speaking and likeable witness. It was he that described how the tone of the events on 6th May 2009 was set. In the first call of the day between Mr Williams and Mr Rusling for Barclays and Mr Birch and Mr Rankin for BERR, Mr Rankin's opening gambit did not go down well with Mr Rusling, who made it clear that Barclays was not interested in Weststar, and that BERR's relationship with Weststar was BERR's business. Barclays was interested in working out its relationship with BERR and nothing more.

95. Mr Williams explained his note of the 3rd telephone conference on 6th May 2009 by saying that Mr Birch was speaking throughout the citation I have set out at paragraph 37 above until the Barclays' side said: "*Need to talk that through*". And that he was still being guided by the way in which Mr Rusling had set the scene at the start of the day on the 1st telephone conference by making it clear to BERR that Barclays was not interested in what BERR's arrangements with Weststar were to be.

96. The only part of Mr Williams's evidence which I found hard to accept was when he told me (orally for the first time) that the agreement pleaded in paragraph 19.3 of the Defence to the effect that it was agreed in the 4th telephone conference on 6th May 2009 that the sharing arrangements were to be afforded only to the Secretary of State, at the same time as the waterfall arrangements was negotiated and agreed. I am doubtful about this, not only because it was not mentioned in Mr Williams's statement, but also because I do not think that anything was finally agreed in the 4 telephone conferences on 6th May 2009. Much was discussed in a fast moving day, but ultimately everyone knew that whatever was discussed and agreed in principle had to be documented before it would become binding. The lawyers were intimately

involved by this time, and I do not think that Mr Williams would have laid himself open to the allegation that he had bound Barclays to anything that day before he had had a chance to review the documentation. The same goes for the others to whom Mr Williams was speaking.

97. Mr Rusling is a managing director and global head of Barclays' Business Support Group. He was an impressively straightforward witness. He explained how the first telephone conference on 6th May 2009 had been a very aggressive call: as he put it, "*we were listening*". Barclays was asked to write off its money and step back and allow priority to BERR. Mr Rusling said that he had made it clear that he would not allow super priority. On the third call on 6th May 2009, BERR said again that they wanted super priority and a share in the GAZ guarantee, and Mr Rusling had made clear that that was not on. Mr Rusling said he made it very clear throughout that Barclays' relationship was with BERR alone.

The Secretary of State's witnesses

98. Mr Birch is now a senior director in the Global Restructuring Group of the Royal Bank of Scotland ("RBS"). He was seconded to BERR between 5th May 2009 and July 2010. He was an impressive and reliable witness. Paragraph 16 of Mr Birch's witness statement included the following:-

> "*I can confirm that at no point were CMS instructed that subrogation rights would be excluded by the terms of the [RA] (or any other agreement) and the document was not drafted on this basis. It was not the Department's or CMS's intention or understanding that paragraph 2.1 of the [RA] had or has the effect of dis-applying subrogation. … It was my view [on 14th May 2009], and that of the Department, that the rights of the Secretary of State pursuant to paragraph 2.1 were capable of subrogation to UBS and from UBS to the provider of their counter indemnity in the event that the Department called upon its counter-guarantee with UBS and UBS called for payment under its counter indemnity from the Claimant …*"

99. Mr Birch had no doubt about the view that he took about subrogation and confirmed in his statement that he had told Mr Ho and Mr Rai at the time that, whilst he could not give Weststar legal advice, it was BERR's view that "*in the event that the guarantee was called upon, UBS would be subrogated to the rights of the Secretary of State pursuant to the [RA] and the party indemnifying UBS would be subrogated to UBS' rights once they had paid them*". But he made clear in cross-examination that he had not told Weststar that its interests would be protected by CMS, even though everyone on their side had thought that Weststar was to have a right of subrogation, and CMS was drafting so as not to cut across that right.

100. Mr Birch also confirmed what Mr Rusling had said about Barclays' position on the 6th May 2009, when Mr Birch recalls Mr Rusling saying something to the effect of "*our agreement is with you … and we do not want to get involved with whatever guarantees you get*". Moreover, Mr Birch confirmed that the sharing arrangements in the RA were agreed before they knew what kind of counter-indemnity (if any) BERR would obtain from Weststar/Mr Ibrahim. He took the view that the sharing arrangements might have proved to be BERR's primary source of recovery, since officials were always conscious that Ministers might have decided to put the money in

without any backing at all from Weststar. Ultimately, Mr Birch was pleasantly surprised when the Letter of Credit arrived on the 13th May 2009.

101. In cross examination by Mr Tager, Mr Birch said that it never occurred to him that taking the money from UBS cancelled the obligations of Barclays under the RA. He said he discussed subrogation several times with Mr Ho and with Mr Ibrahim. He said that he and Mr Rankin were trying to help, but emphasised that they (Messrs Ibrahim and Ho) should take their own advice. In answer to a question from me, Mr Birch confirmed that what was discussed on 6th May 2009 was not thought to be binding before the lawyers had prepared and agreed the documentation.

102. In relation to the crucial question about the discharge of the LDV debt under the Counter-Indemnity, Mr Birch said that he did not consider whether, when Mr Ibrahim and UBS paid up, "*there would be nothing more owed by LDV to the Government, and therefore nothing in which or in respect of which the Government could share under the [RA]*".

103. Mr Simon Rankin was, until very recently, managing director in the Emerging Markets and Illiquids Team within the Global Capital Markets Group of Deutsche Bank, who was seconded to the Department between April and October 2009. He has just joined J.P. Morgan. He had a less clear recollection of dates and times than Mr Birch, but broadly confirmed Mr Birch's account of the important events and the attitude of BERR towards the transaction.

Authorities on subrogation

104. In Boscawen v. Bajwa [1996] 1 WLR 328, Millett LJ (as he then was) described the nature of the remedy of subrogation as follows at pages 335C-E:-

> "*Subrogation, therefore, is a remedy, not a cause of action: see Goff & Jones, Law of Restitution, 4th ed. (1993), pp. 589 et seq.; Orakpo v. Manson Investments Ltd. [1978] A.C. 95, 104, per Lord Diplock and In re T. H. Knitwear (Wholesale) Ltd. [1988] Ch. 275, 284. It is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment. Equity lawyers speak of a right of subrogation, or of an equity of subrogation, but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff. A constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other*".

105. In Banque Financière de la Cité v. Parc (Battersea) Limited [1999] 1 A.C. 211, it was held by the House of Lords that the availability of subrogation as a restitutionary remedy, unlike contractual subrogation, did not depend on the intention of the parties. The appropriate questions were, in each case (i) whether the defendant was enriched at the claimant's expense, (ii) whether such enrichment would be unjust, and (iii) whether there were nevertheless policy reasons for denying the remedy. Lord Hoffmann (with whom Lords Griffiths, Steyn and Clyde expressly agreed and with

whom Lord Hutton concurred in the result) said at page 234 that, in posing the three questions; "*[t]his does not of course mean that questions of intention may not be highly relevant to the question of whether or not enrichment has been unjust*", and that whilst he did not want to express a view on burden of proof, it could be argued that on general principles it was for the claimant to make out his case of unjust enrichment.

106. In an important passage at pages 231-2, Lord Hoffmann drew attention to the importance of maintaining a distinction between contractual subrogation (which is not relied upon in this case) and subrogation to prevent unjust enrichment (which is relied upon here). Though Lord Hoffmann expressed the view in that passage that subrogation in insurance cases (type 2 subrogation as I have described it) rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract, that view has been doubted academically (see Burrows on the Law of Restitution 3rd edition at page 162, and Mitchell and Watterson on Subrogation at paragraph 1.08). Lord Hoffmann said this:-

> "*My Lords, the subject of subrogation is bedeviled by problems of terminology and classification which are calculated to cause confusion. For example, it is often said that subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations: see, for example, Lord Keith of Kinkel in Orakpo v. Manson Investments Ltd. [1978] A.C. 95, 119. As a matter of current terminology, this is true. Lord Diplock, for example, was of the view that the doctrine of subrogation in contracts of insurance operated entirely by virtue of an implied term of the contract of insurance (Hobbs v. Marlowe [1978] A.C. 16, 39) and although in Lord Napier and Ettrick v. Hunter [1993] A.C. 713 your Lordships rejected the exclusivity of this claim for the common law and assigned a larger role to equitable principles, there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived.* ***The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution. Unless this distinction is borne clearly in mind, there is a danger that the contractual requirement of mutual consent will be imported into the conditions for the grant of the restitutionary remedy or that the absence of such a requirement will be disguised by references to a presumed intention which is wholly fictitious****. There is an obvious parallel with the confusion caused by classifying certain restitutionary remedies as quasi-*

contractual and importing into them features of the law of contract" (emphasis added).

107. I will not lengthen this judgment by explaining the facts in Banque Financière, but it is important to note that Mr Tager relied strongly on the passages in the speeches of Lord Steyn (at page 227), Lord Hoffmann (at page 235) and Lord Clyde (at page 238) for the proposition that equity looks to the substance rather than the form, so that the fact that Mr Herzig was interposed between Banque Financière and Parc (Battersea) Ltd did not prevent the conclusion that Omi Overseas Ltd had been enriched at the expense of Banque Financière. Mr Tager argued that, though Lord Hoffmann said that that was because Banque Financière's money could be traced into the discharge of the debt due to the Royal Trust Bank, he had not meant to make tracing a requirement. Mr Tager made this point because he acknowledged in this case that Mr Ibrahim's money could not be traced through UBS.

108. Next, I should refer briefly to Brown Shipley & Co. Limited v. Amalgamated Investment (Europe) BV [1979] 1 Lloyd's Rep. 488, upon which Mr Tager also placed considerable reliance. There, the claimant guaranteed a loan from a Dutch bank, Bank Mees & Hope ("M&H") to the defendant borrower, a Dutch subsidiary of an English company, Amalgamated Investment & Property Co Ltd ("AIP"). The claimant took a counter-guarantee from AIP. The defendant defaulted, and demands were made by M&H on the claimant and by the claimant on AIP. The claimant paid M&H, and later reimbursed itself from a loan it had agreed to make to AIP for the purpose. Donaldson J rejected the claimant's claim to be subrogated to M&H's rights against the defendant, holding that the claimant's rights against AIP under the counter-guarantee had been lost by operation of law when it (the claimant) had agreed to make the loan to AIP, and that the claimant had lost its right of subrogation against M&H at the same time. Donaldson J considered *obiter* at the end of his judgment, in a passage that is not perhaps wholly clear, what would have happened if AIP had simply paid up on the demand under the counter-guarantee. He concluded that, even then, the claim would fail either because the claimant's subrogation rights against the defendant were transferred to AIP by operation of law, or because the loan monies had been used to discharge the claimant's guarantee liability to M&H, thereby (I suppose) giving the subrogation rights to AIP and not the claimant. I do not find much help in this authority, because although it acknowledges the possibility of type 1 subrogation rights passing down the chain to the giver of a counter-guarantee (which could not I think be much in doubt anyway), it says nothing about issues that I have to decide.

109. I should mention two cases relied upon by Mr Goodall. In both Morris v. Ford Motor Co. Ltd. [1973] 1 Q.B. 792 per Lord Denning M.R. at page 800, and in Esso Petroleum Co. Ltd & others v. Hall Russell & Co Ltd & another [1989] 1 A.C. 643 per Lord Goff at pages 662-3, it was held that a claimant relying on type 2 subrogation cannot sue in his own name, but must sue in the name of the indemnified party.

110. Much time was spent in argument debating whether LDV's liability to the Secretary of State was discharged by the payment made by UBS to the Secretary of State. But little time was spent by the parties examining the authorities on the discharge of debts. I was, however, referred to paragraph 1-018 of Goff & Jones on the Law of

Restitution 7th edition 2007, where the learned authors say this in relation to benefits conferred or enrichment gained by a defendant at the claimant's expense:-

> "*The most common example of a positive benefit is money, which has the peculiar character of a universal medium of exchange. The mere receipt of money is therefore a benefit to the recipient. It is for this reason that restitutionary claims for money had and received are so frequent. Such claims are generally personal rather than proprietary for the legal title to money, being currency, will generally have passed to the recipient with delivery. The defendant may also benefit if money is paid not to him but to a third party, to his use. But at common law he will only benefit if the claimant's payment discharges a debt which he owes to a third party. It is not easy to discharge another's debt in English law. This will occur only if the debtor authorised, or subsequently ratified, the payment. (Conversely, no creditor can be compelled to accept payment.) There are few exceptions to the principle that a debt can only be discharged if the debtor authorised or subsequently ratified the payment. The principle appears to be of little merit now that debts are freely assignable. The most important common law exceptions are if the claimant is compelled to make the payment by compulsion of law, and if he pays because he has an interest in the defendant's property which he wishes to protect. Furthermore, in Crantrave Ltd v Lloyds Bank plc Pill L.J. was of the view that:*
>
> > *"There will be circumstances in which a court may intervene to prevent unjust enrichment either by the customer in having his money from the bank as well as having the claim of his creditor met, or by the creditor who has double payment of the debt. The onus is in my judgment on the bank to establish the unjust enrichment on the evidence."*"

111. In relation to the change of position defence, Pill LJ said this in Haugesund Kommune & anr v. DEPFA ACS Bank [2011] 1 All ER 190 at paragraph 152:-

> "*The defence is not fixed in stone, and has developed and can be expected to develop further over time on a case by case basis. Broadly speaking the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require them to make restitution or alternatively to make restitution in full … Concepts of relative fault are not applicable; good faith being a sufficient requirement in this context … The defence is to be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim or to pursue it in full …*".

First issue: When UBS paid under the Letter of Credit, did its payment discharge LDV's liability under the Counter-Indemnity to the Secretary of State?

112. This is the central question in the case. Mr Tager submits that UBS's payment cannot have discharged LDV Group's liability without express authority from LDV Group, and that it is very hard to discharge another person's debt (see the passage set out above from paragraph 1-018 of Goff & Jones on the Law of Restitution, and Pill LJ at

page 923 in Crantrave Ltd v. Lloyds Bank plc [2000] Q.B. 917). Mr Goodall, on the other hand, submits that the whole structure was established so that, when UBS paid under the Letter of Credit, LDV Group's liability under the Counter-Indemnity was to be "represented" and "covered" by the payment. LDV Group specifically authorised such a state of affairs in clause 6 of the Counter-Indemnity, which gave the Secretary of State "*the right … to claim all amounts due and payable in respect of the liabilities hereunder from [LDV Group]* ***or any other person*** *in such order and at such times as [the Secretary of State] may in its absolute discretion consider appropriate*" (emphasis added).

113. It seems to me that what is important, as in any case of the alleged discharge of a debt is the intention of the parties. In this case, the intentions of two parties are primarily engaged: the Secretary of State as the party to whom the debt under the Counter-Indemnity was due, and LDV Group as the obligor under the Counter-Indemnity. The intentions of these parties must primarily be divined from the documents they entered into, but it is permissible to look at other evidence to consider what the parties' understandings were. I bear in mind, however, that there is no claim here for rectification or to suggest that the documents were not intended to be construed according to ordinary principles.

114. I had no direct evidence of the intentions of LDV beyond clause 6 of the Counter-Indemnity and the document that Mr Ogilvie wrote long after he had ceased to be a director of LDV.

115. UBS was a party to an autonomous instrument, namely the Letter of Credit. Its intentions may not be strictly relevant to this issue, but it was undoubtedly bound by the terms of the Letter of Credit and there has been no other evidence as to its intentions or expectations. UBS's intentions could only, therefore, be ascertained from its instrument. The instrument required that any claim for payment had to be accompanied by the Secretary of State's "*duly signed request for payment certifying that the amount demanded represents and covers the unpaid sums due to [the Secretary of State] by [LDV Group]*". It seems an inevitable conclusion, therefore, in the absence of any other evidence, that UBS understood that it was making a payment which would represent and cover the unpaid sums due from LDV Group to the Secretary of State.

116. Mr Tager has sought to argue that the requirement for the certificate of the Secretary of State was simply a definition of the amount that was due under the Letter of Credit. It was submitted that it may be compared to a certificate of quality required to be produced by the seller to the issuer of a documentary credit when goods are sold. The existence of such a certificate would have no bearing, submits Mr Tager, on the outcome of an action by the buyer against the seller for damages based on the defective quality of the goods. In my judgment, this submission has some merit so far as it goes, but it only goes so far. As between UBS and the Secretary of State, the requirement for a certificate that the amount demanded represents and covers the unpaid sums due from LDV Group, is simply a mechanical pre-requisite for payment. That is how documentary credits work. Paragraph 5 of the Uniform Customs and Practice for Documentary Credits ICC Publication No 600 ("UCP 600") incorporated into the Letter of Credit expressly provides that "*banks deal with documents and not with goods, services or performance to which the documents may relate*". But that provision does not mean that when the parties set up a more complex transaction for

which a letter of credit is an essential element of the payment mechanism, their intentions cannot, in some measure, be gauged by the conditions they accept for the payment of that letter of credit. In this case, as is demonstrated by the events that I have set out in the above chronology, the terms of the Letter of Credit were negotiated between the Secretary of State and UBS, and approved by Weststar/Mr Ibrahim. Those terms reflect the deal that these parties were doing. Whilst the negotiations are not admissible to construe the meaning of the Letter of Credit itself, they are admissible to the question of whether or not the parties intended any payment by UBS to discharge the debt due from LDV under the Counter-Indemnity.

117. It is reasonably clear from the evidence that none of the parties to that negotiation understood the (alleged) significance of the wording of the Letter of Credit. And Barclays did not even see the wording until a quite separate department in Salford was asked to act as correspondent bank in assisting the Secretary of State to collect the payment from UBS in Singapore.

118. As for the Secretary of State, both Mr Birch and Mr Rankin gave evidence, in effect, that they never considered whether UBS was guaranteeing LDV's liability under the Counter-Indemnity, or whether there would be anything more owed to the Secretary of State after UBS had paid up. I am, therefore, thrown back to the documentation.

119. It appears that it was CMS, acting for the Secretary of State, that first suggested in the drafting process that the UBS letter of credit should refer to the amount due under the Counter-Indemnity, but it is not clear precisely where the "represent and cover" wording originated. It hardly matters. All parties including Weststar and those representing Mr Ibrahim (even including solicitors acting on his behalf, Dass solicitors) saw the wording of the Letter of Credit, commented upon it, and ultimately agreed to it. The Secretary of State's lawyers specifically agreed to the wording and must be taken to have understood that any demand on UBS would be in respect of monies that would "represent and cover" LDV Group's liability to the Secretary of State.

120. The question is what the words "represent and cover" mean in the context in which they are used in the Letter of Credit and in the demand that the Secretary of State made upon UBS. Both parties referred to the Oxford English Dictionary, but I prefer to use the most recent online version of the complete version rather than any more ancient or shorter edition. In the online edition, the most relevant definition of the word 'cover' is as follows: "*[t]o be sufficient to defray (a charge, or expense), or to meet (a liability or risk of loss); to counterbalance or compensate (a loss or risk) so as to do away with its incidence; to be or make an adequate provision against (a liability); to protect by insurance or the like*". Mr Tager referred to other definitions, but none of them seems to me to be appropriate to the usage of the word "cover" in the context here. Mr Tager also pointed out that in the Letter of Credit, the first paragraph also uses the word 'cover' as follows: "*We [UBS] hereby issue our Irrevocable Standby Letter of Credit No. _____ in favor of the Secretary of State for [BERR] covering credit facilities provided by [the Secretary of State] to LDV …*". He submitted that the word "covering" in this paragraph must mean "relating to", and that on normal construction principles, the word should have the same meaning in the following paragraph. In my judgment, the word "cover" does not have precisely the same meaning in the first and second paragraphs of the Letter of Credit (c.f. Lord Hoffmann at paragraph 27 in Oxfordshire County Council v. Oxford City Council and

others [2006] 2 A.C. 674, where he decided that the word "locality" was singular where it first appeared in section 22(1A) of the Commons Registration Act 1965, and plural where it next appeared). In the first paragraph of the Letter of Credit, the word "covering" obviously means "protecting". In the second paragraph of the Letter of Credit and in the Demand, the word "covers" means either "be sufficient to discharge" or "discharges or pays". Therefore, the wording is either saying that the Secretary of State must certify that the amount demanded "is sufficient to discharge" or "discharges" the unpaid sums due from LDV to the Secretary of State.

121. Before reaching a conclusion on this quite stark choice, I have considered the documents created after the event on which both parties rely as supporting their point of view. I have sought to summarise these documents in the chronology above. None of them seems to me, however, to take the matter much further. It is true that Mr Birch and Mr Rankin argued the case for Mr Ibrahim's subrogation. But they never expressly turned their minds to whether UBS's payment would discharge LDV's debt under the Counter-Indemnity. LDV was simply agreeing to whatever was necessary to ensure its survival before its administration, and its directors were wholly out of the loop after its administration.

122. Since Barclays did not see the wording of the Letter of Credit before it was agreed, it cannot be accused of a Machiavellian scheme to bring about a situation in which the LDV debt was inadvertently discharged, thus defeating the right to recoveries under clause 2.1 of the RA. Barclays had negotiated the RA without any detailed knowledge of the precise counter-indemnity arrangements being agreed between Weststar/ Ibrahim, UBS and the Secretary of State. Indeed the waterfall arrangements were agreed even before it was suggested that Mr Ibrahim might arrange for a letter of credit from UBS, and at a time when even BERR thought that Ministers might agree to go ahead without any backing from Weststar at all. Thus, even if Barclays can now be accused of taking advantage of a situation that has arisen, they cannot be accused of engineering it for their benefit. And, moreover, Barclays can justly say that they deliberately kept the arrangements between Weststar/Mr Ibrahim and the Secretary of State behind a curtain. Barclays always said they did not want to know what the Secretary of State's arrangements were – it was doing a deal with the Secretary of State and that was it. Mr Tager argues that Barclays is wrong about that, primarily because of the provision in the Berlin Term Sheet referring to the requirement for a bank guarantee to be provided by Weststar. But I do not think that this term changes the position. Of course, Barclays became aware that the Secretary of State was seeking backing from Weststar. Of course, Barclays eventually became aware of the nature of those arrangements, but Barclays did not do anything to bring them about, and, in any event, its intentions and understandings are almost irrelevant to the question of whether the LDV debt was or was not discharged when UBS made its payment.

123. I have considered the disparity between the amounts demanded by Barclays from the Secretary of State, and by the Secretary of State from UBS. The Secretary of State added on the £6,900 in costs and expenses as he was permitted to do under clause 6.1 of the Guarantee Facility Agreement and clause 1 of the Counter-Indemnity. There does not seem to me to be anything in Mr Tager's submission that this demonstrates that there was no intention that the UBS payment should wholly discharge the debt due from LDV Group to the Secretary of State. Rather, I think, to the contrary.

124. I have given some thought to the question of why the Letter of Credit might have been drafted to include the certification that I have now repeated many times. Had the draftsman been wishing to preserve a right of subrogation for UBS, Weststar or Mr Ibrahim, one would have thought that almost any other wording would have been better. Mr Birch thought that CMS were drafting so as not to cut across the right of subrogation, even though they were not acting for Mr Ibrahim. It seems strange to me that CMS should have thought (as they apparently did) that Mr Ibrahim would have a right of subrogation, when they would have known that the received wisdom was that issuers of a letter of credit could not acquire a right of subrogation, albeit that some academics questioned that wisdom (see, for example, McCormack and Ward on Subrogation and Bankers' Autonomous Undertakings (2000) L.Q.R. 121).

125. All that said, I am unable to answer why all the parties on the Secretary of State's side of the line might have been prepared to agree the wording of the Letter of Credit. They could, quite easily I would have thought, have asked UBS to accept a certificate that payment had been made to Barclays under the Guarantee, leaving the LDV debt question more obviously open.

126. In deciding this question, I gain little from the evidence I have accepted that the Secretary of State, Weststar and Mr Ibrahim all expected a right of subrogation to arise if payment were made by UBS. This, as it seems to me, tells me little about whether the LDV debt was actually discharged by the payment which, as I have said, turns on the intentions of the parties to that debt.

127. I have considered also Mr Goodall's argument that Mr Ibrahim had given his indemnity to UBS and arranged the Letter of Credit in fulfilment of Weststar's obligation under clause 5.5 of the SPA. Therefore, he received full value for his money and could not have expected any recovery by way of subrogation. Accordingly, the discharge of the LDV debt was only sensibly to be the expected consequence of UBS's payment. Mr Tager's retort was that the SPA had lapsed at 09.00 on 13th May 2009 (the time in clause 5.1 having been extended by 7 days by an addendum to the SPA dated 4th May 2009), because the New Facility Agreement was not, by that time in place (only being counter-signed by LDV on 14th May 2009). In my judgment, Mr Tager's unpleaded response does not work, because none of the witnesses, who were asked (including Mr Ho), thought the SPA had lapsed, and the parties to the SPA clearly continued to act upon it after 09.00 on 13th May 2009. Had it been suggested by one of the parties at the time that the SPA had lapsed in the 24 hours or so before the New Facility Agreement was signed, I feel sure that an estoppel would have been available to prevent that conclusion being reached. I do not anyway need to decide that issue, because as it seems to me the fact that Mr Ibrahim put the Letter of Credit in place in order (in part) to fulfil Weststar's obligations under clause 5.5 of the SPA does not have very much bearing on the intention to discharge the LDV debt once UBS made payment. It could, perhaps, be said that these arrangements point towards a situation in which Weststar would have wanted the LDV debt discharged, had Mr Ibrahim been called on his indemnity, and yet Weststar bought LDV. But that possible ramification is rather too speculative to give much assistance in the decision I have to reach.

128. Weighing all the factors that I have mentioned together, I return to the question of the proper meaning of the Secretary of State's certificate to UBS. It seems to me that the common or garden usage of the word "cover" in this context is indeed "discharge",

rather than "is sufficient to discharge". If there were any extraneous material to suggest that the wording was required for another reason, that might have been significant. But I can only rely on the evidence that is available. And that shows that the Secretary of State was required, in order to make his claim against UBS, and for reasons that have not been explained in the 7 days of the trial, to certify that the amount demanded represented and covered (meaning discharged) the debt due from LDV Group to the Secretary of State. In those circumstances, the Secretary of State cannot properly approbate and reprobate. He has secured the payment from UBS on the basis of a representation that the payment would discharge the LDV debt. He must be taken to have intended that it would do so. LDV had itself given the Secretary of State authority to demand the money due from it from any other person. That is precisely what the Secretary of State did. The fact that the certification may have been ill-thought out or even ill-advised and may turn out to have had unintended consequences is nothing to the point. Taking the evidence and the documentation at its face value, it is clear to me that the parties to the Counter-Indemnity must be taken to have intended what the Secretary of State said was happening when it asked UBS for the money.

129. I have considered whether there might have been some argument available to Mr Ibrahim (not advanced by Mr Tager) as to the timing of the certification. It could, perhaps, be said that the certificate is in the present tense and, therefore, is only speaking of the position when it was signed, and before the payment by UBS was made. It need not, therefore, follow that, because the Secretary of State has certified before payment was made that the payment "covers" or "discharges" the LDV debt, the payment was actually used (later) to discharge the LDV debt. In other words, there is a time interval between the certificate and the payment, which makes it inappropriate to use the earlier certificate as evidence of the later discharge of the LDV debt when payment was actually made. The problem with this argument, in my judgment, is that there is no contrary evidence, which gainsays the continuing effect of the certificate when payment is actually made by UBS. Having represented in effect that the payment "would discharge" the LDV debt, the Secretary of State's intention to that effect can only sensibly be taken to have continued over the time when payment was made. Thus, it seems to me that the only viable conclusion is that, when UBS paid the Secretary of State, the debt due from LDV Group to the Secretary of State under the Counter Indemnity was discharged.

Second issue: If so, can Mr Ibrahim claim to be subrogated to the Secretary of State's rights against Barclays?

130. Since the answer to the first issue is that UBS's payment did discharge LDV's liability to the Secretary of State, this issue does not arise. This is because, despite some prevarication in submissions, it was ultimately common ground between the parties that, that if LDV Group's debt to the Secretary of State was discharged by UBS's payment, Mr Ibrahim could not make either a type 1 or a type 2 subrogation claim against Barclays.

131. The reason for that concession was simply the unambiguous wording of the distribution provision in clause 2.1 of the RA, which is prefaced by the following condition, namely that distributions are permitted to the Secretary of State: "*[u]nless and until the Guarantor Liabilities have been paid and discharged in full and [the Secretary of State] has no further actual or contingent liability under or in respect of*

the Guarantee". This condition was undoubtedly fulfilled when UBS made its payment to the Secretary of State because by that time:-

i) The Guarantor Liabilities (meaning the aggregate of the amounts owing by LDV Group to the Secretary of State and unpaid in respect of principal, interest, default interest, commissions, charges, fees, expenses and indemnities) had been discharged for the reasons I have given; and

ii) The Secretary of State had no further actual or contingent liability under or in respect of the Guarantee.

132. Accordingly, when UBS paid the Secretary of State, the Secretary of State's right to "*Distribution Monies*" as defined in the RA ceased. It was at no time suggested that, when this right ceased, any other right of the Secretary of State against Barclays, whether at common law or in equity, could survive. Nor was it suggested that any right of subrogation could survive the termination of the Secretary of State's contractual right to Distribution Monies.

Third issue: Was there an understanding or agreement between the parties (BERR, Ibrahim and Weststar) that Mr Ibrahim would be subrogated to the Secretary of State's rights under the Realisation Agreement?

133. On the basis of the conclusions that I have reached on the first two issues, this and the following issues do not arise for decision. I will, however, express briefly the conclusions that I would have reached had they been relevant to the outcome of the case.

134. As I have already indicated, there was, in my judgment an understanding, and indeed an expectation, between BERR, Weststar and Mr Ibrahim that the arrangements that they were putting in place would allow Mr Ibrahim as a matter of law (not contract), in the event of payment by UBS and indemnity by Mr Ibrahim, to become subrogated to the Secretary of State's rights under clause 2.1 of the RA.

135. The effect of this understanding, which obviously could not have amounted to a binding agreement, is less clear. It seems to me that it could be of no relevant effect in the light of the findings I have already made. Plainly the understanding was mistaken because of the effect of the agreed terms of the Letter of Credit and the agreed certification by the Secretary of State required to trigger payment under the Letter of Credit. Had the LDV debt not been discharged by UBS's payment to the Secretary of State, Mr Goodall hesitantly accepted that, in theory, subrogation would be available to UBS, subject to the important points that are raised in issues 3-6 and some additional issues that he raised.

Fourth issue: Can UBS, and through UBS Mr Ibrahim, be subrogated to the Secretary of State's rights under the Realisation Agreement, even though the Letter of Credit is an autonomous instrument?

136. This is a very difficult question that has, as I have already mentioned, been the subject of a lengthy and detailed article by Professor Gerard McCormack and Mr Alan Ward in the Law Quarterly Review. I would not propose to give a definitive answer because the matter was not argued as extensively as would have been required for me to reach a reliable conclusion.

137. Suffice it to say that, as the text-books and the article makes clear: "*[t]he orthodox view seems to be that, since the bankers' undertaking involves a primary obligation, subrogation, which relates to the law regarding secondary obligations, has no place*". The article continues by saying that "*[t]his view is justified by two assumptions: first, that the doctrine of subrogation is necessarily confined to secondary obligations, such as those of the surety; and second, that the doctrine of the autonomy of the primary obligation necessarily excludes the derivation of any rights from the underlying commercial relationships*". The learned authors advance persuasive arguments as to why subrogation should be available, but a detailed treatment of the question must, I fear, await another case in which it is central to the necessary decision.

138. I conclude my treatment of this issue by saying that I do not think that the Banque Financière case offers any authority for the proposition that subrogation can be allowed where payment is made by way of documentary credit. Whilst the House of Lords acknowledged that equity would look to the substance rather than the form, it gave no warrant for the argument that an action for unjust enrichment would lie at the behest of a party in the position of Mr Ibrahim at the end of a lengthy chain of obligors. That question still remains to be argued, but on the existing law, it seems to me that Mr Ibrahim's claim would have failed on this ground too.

Fifth issue: Can Mr Ibrahim claim to be subrogated to the Secretary of State's rights under the Realisation Agreement, notwithstanding that he has not sued in the name of the Secretary of State?

139. Mr Tager argued that the question of Mr Ibrahim's *locus standi* to bring this claim was a procedural issue that could be determined after judgment, once his right to subrogation had been established. I do not agree. If Mr Tager had been forced to resort to type 2 subrogation, it seems to me that he would have had to have been able to sue in the name of the Secretary of State (as is clearly demonstrated by the Morris and Esso cases to which I have already referred).

140. In the result, however, had Mr Ibrahim overcome the other hurdles represented by issues 1-4 and 6, he would have been able to claim a type 1 subrogation for which his failure to claim in the name of the Secretary of State would not have been a problem. Equally in that situation, I am not sure that Mr Goodall's other points, namely that Mrs Ibrahim and UBS needed to be parties, would have been fatal to Mr Ibrahim's claim. But I reach no firm conclusion on these points.

Sixth issue: Can Barclays rely upon a change of position defence?

141. The unjust enrichment analysis has not been necessary in this case as a result of my decisions on issues 1 and 2. In effect, Mr Ibrahim did not get to first base in his subrogation claim. In the circumstances, I do not think it would be useful to spend long on Mr Goodall's very last point, namely that Barclays had changed its position since it had received payment of the LDV debts in good faith from the recoveries

made from the Administrators. Nor should I spend time on Mr Tager's answer, namely that a change of position defence must be based on steps taken (or not taken) by the defendant before he had notice of the claimant's claim (as to which see Continental Caoutchouc & Gutta Percha Ltd v Kleinwort, Sons & Co (1904) 90 LT 474, at 477 per Romer LJ and Nizam of Hyderabad v Jung [1957] Ch 185 per Lord Evershed MR at 239-240 (reversed at [1958] AC 379)).

142. I should mention, however, that there would also have been problems for Mr Ibrahim at each stage of the unjust enrichment analysis. I have already mentioned the problems occasioned by the interposition of the UBS Letter of Credit making it hard to show that either Barclays or the Secretary of State was enriched at Mr Ibrahim's expense. In addition, Mr Tager never satisfactorily answered the question as to the nature of the injustice upon which he relied (see Chapter 5 of Burrows on the Law of Restitution 3rd edition as to the unjust factors available). He shunned mistake, and even a mistaken belief as to whether subrogation was available. Mr Tager ultimately contended that it was unjust that Barclays had not complied with its contractual obligations under the RA. I am extremely doubtful as to whether such a factor could ever properly be regarded as sufficient to establish that the enrichment, even if it were at the expense of Mr Ibrahim, was unjust. But again, I prefer not to express a concluded view on this point. I would say the same about the change of position defence advanced by Mr Goodall, though on the basis of the very limited argument I heard, I would have thought, at first sight, that the change of position he points to would have been rather less compelling than the other points he has made on the claim for unjust enrichment.

Conclusions

143. For the reasons I have given, I have reached the clear conclusion that the payment by UBS under the Letter of Credit had the effect of discharging LDV Group's liability to the Secretary of State under both the Counter-Indemnity and the Guarantee Facility Agreement. In those circumstances, Mr Ibrahim cannot claim to be subrogated to the Secretary of State's right to Distribution Monies under clause 2.1 of the RA, because that right terminated on the discharge of LDV's liability. Mr Ibrahim claimed to be subrogated to no other right, save for that under clause 2.1.

144. In these circumstances, Mr Ibrahim's claim must be dismissed.