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Case No: 2MA91153

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2015

Before :

THE HONOURABLE MR JUSTICE PICKEN

- -

Between :

THE ROYAL BANK OF SCOTLAND PLC	**Claimant**
- and -	
MICHAEL PATRICK McCARTHY	**Defendant**

- -
- -

Ms Charlotte Eborall (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Mr Duncan Kynoch and Mr Steven Fennell (instructed by **Teacher Stern LLP**) for the **Defendant**

Hearing dates: 19, 20, 21, 22 and 27 October 2015

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Judgment

The Honourable Mr Justice Picken:

ntroduction

1. This is a case which has as its backdrop the demise of the well-known and well-established Manchester firm of solicitors, Halliwells LLP ('the LLP'), previously known as Halliwell Landau ('Halliwells'), in 2010. I make it clear straightaway that the Defendant, Mr Michael McCarthy ('Mr McCarthy'), who became a Full Member of the LLP on 3 July 2007, when he and the LLP entered into the Limited Liability Partnership Deed (the 'LLP Deed'), and who remained a Full Member until 31 May 2010, had nothing whatever to do with the circumstances in which the LLP got into the difficulties which it did.

2. On the contrary, it was common ground at trial that, on joining the LLP, Mr McCarthy was led to believe that the LLP had only modest borrowings and that he knew nothing at any stage about the financial arrangements surrounding the LLP's move to new Manchester premises in Spinningfields, a move which had already taken place by the time that he became a Full Member. It was, therefore, common ground specifically that Mr McCarthy was unaware that the LLP's 32 Full Members at the

time of the move had personally and handsomely profited from the move as a result of a reverse premium paid by the landlord of the new premises, whilst the LLP had had to take on borrowings in the order of £17.8 million to finance fit-out costs. Mr McCarthy referred, in cross-examination, to feeling *"contempt"* for the 32 members involved, whom he regarded as having been *'greedy'* and as having acted contrary to what he considered to be the *"cornerstone of partnership"*, namely *"trust and faith"*, and it was this high level of debt which resulted in the financial difficulties which led to the LLP's demise, marked initially by the appointment of administrators pursuant to an administration order on 14 July 2010 and ultimately by a court order winding up the LLP on 13 January 2012.

3. In these proceedings the Claimant, The Royal Bank of Scotland PLC ('RBS'), seeks the repayment of the loan taken out by Mr McCarthy with RBS when he joined the LLP as a Full Member in order to finance his capital contribution in the sum of £120,000 pursuant to the LLP Deed. The loan took the form of an agreement which was described as a *"Professional Practice Loan Scheme Agreement"* (or 'PPL') and which was signed by Mr McCarthy on 1 November 2007 shortly after the LLP had provided RBS with an irrevocable letter of undertaking dated 29 October 2007 ('the LOU') under which the LLP undertook to repay Mr McCarthy's loan upon his ceasing to be a member of the LLP.

4. After only two years, in October 2009, the LLP gave Mr McCarthy 12 months' notice, requiring his compulsory retirement and placing him on gardening leave. The LLP agreed to pay Mr McCarthy's drawings whilst he was on gardening leave. Subsequently, however, Mr McCarthy and the LLP entered into a Retirement Deed on 5 March 2010 (the 'Retirement Deed'), under which it was agreed that Mr McCarthy's retirement date would be brought forward to 31 May 2010 and it was further agreed that the LLP would pay directly to RBS the £120,000 standing to the credit of Mr McCarthy's capital account on that date.

5. In the event, however, the LLP did not pay RBS this or any other sum of money, and that remained the position when the LLP went into administration in July 2010. Mr McCarthy's position is that the only reason why his capital was not repaid in accordance with the Retirement Deed and, indeed, pursuant to the LOU is that RBS actively prevented the LLP from repaying it. Specifically, Mr McCarthy points to the fact that RBS required the LLP to enter into a document described as a *"Reservation of Rights Letter"* (or 'ROR Letter') dated 16 April 2010 (albeit that it was never formally executed by the LLP), and so after the Retirement Deed had been executed by the LLP and Mr McCarthy, which contained an undertaking by the LLP not to repay the capital of any retiring Member of the LLP without first obtaining RBS's written consent. Mr McCarthy maintains that, notwithstanding the LLP's financial difficulties at the time, the LLP was in a position where it was able to repay his capital, in that it had sufficient 'headroom' in the facility which it had with RBS to enable it to pay £120,000, and that the only reason why there was no repayment was because RBS actively prevented it.

6. Mr McCarthy's case, therefore, is that, although under Clause 6.1 of the PPL he became obliged to repay the loan when he retired, on 31 May 2010, he is not liable to RBS primarily (although in opening this was Mr McCarthy's alternative case) because RBS induced the LLP to act in breach of its obligations under the Retirement Deed and/or the LOU and/or the LLP Deed to repay RBS the amount of his capital

and thereby discharge Mr McCarthy's own liability to RBS under the PPL. Mr McCarthy also contended, ultimately in the alternative rather than as his primary case, that he is entitled to rely upon the Contracts (Rights of Third Parties) Act 1999 to enforce the LOU notwithstanding that he is a third party to the LOU. Where this contention, even if right, ultimately takes Mr McCarthy is a matter which will need to be explored. Next, it was submitted on Mr McCarthy's behalf that the PPL should be treated as containing an implied term that, as it was put in the Written Closing Submissions served on Mr McCarthy's behalf, *"either party thereto will not do anything which will prevent performance of the terms of the contract"*. The submission made is that RBS thwarted performance of the repayment obligation contained in the PPL (an obligation which, it was submitted, was expressed in neutral terms) by inducing the LLP not to repay RBS the amount of his capital in breach of the Retirement Deed and/or the LOU and/or the LLP Deed. Lastly, although in opening this was his primary case, Mr McCarthy's case is that there was a collateral contract as between RBS and him arising from RBS's assurance, so it is argued, that it would require the LLP to provide the LOU so as to enable discharge of the PPL loan, and under which RBS undertook to call on the LLP, immediately on Mr McCarthy's retirement, to discharge the PPL loan in accordance with the terms of the LOU. It was submitted by Mr Duncan Kynoch and Mr Steven Fennell, on Mr McCarthy's behalf, that RBS failed to call on the LLP to discharge its obligation under the LOU, and that but for this failure there would have been no liability under the PPL.

7. Miss Eborall, counsel for RBS, took issue with each of the ways in which Mr McCarthy's case is put. She maintained that there is no defence to what is, in truth, a simple debt claim. Indeed, she referred to the fact that, in cross-examination, it was accepted by Mr McCarthy, himself a very experienced solicitor albeit specialised in insolvency law, that, but for the defences now relied upon, he is liable under the PPL. Miss Eborall went on to highlight how those defences have changed significantly from how the case was put in opening, not only because the inducement case has become Mr McCarthy's primary case but also because previously Mr McCarthy's primary case, based on collateral contract, had entailed the contention that there was a tri-partite contract as between RBS, Mr McCarthy and the LLP rather than a collateral contract only as between RBS and Mr McCarthy. Miss Eborall went on also to submit that there is no merit in any of the matters raised, specifically: (i) that the procurement of breach of contract case cannot succeed in circumstances where, so it is submitted, there is strong evidence that the LLP would not have repaid Mr McCarthy's PPL loan regardless of RBS's insistence that the LLP should enter into the ROR Letter; (ii) that Mr McCarthy's reliance on the 1999 Act is misconceived; (iii) that the case based on implied term is not sustainable; and (iv) that the collateral contract alleged did not exist.

8. These are matters to which I shall, obviously, have to return. First, however, I should say something about the witnesses who gave evidence at trial, and then set out some of the factual background.

The witnesses

9. A number of witnesses gave evidence before me. Mr McCarthy did so on his own behalf. There was no other witness called by him. For RBS, six witnesses were called: Lynne Kerr, at the relevant time a Senior Policy Analyst in RBS's Documentation Policy team; Peter Broughton, who in 2010 managed a team of private banking

managers and who became Mr McCarthy's primary contact with the retail side of RBS; Grierson Banton, a portfolio management director in RBS's Corporate team who managed the banking relationship with the LLP from 2006; Dave Clark, a regional director in the Corporate Restructuring Unit (CRU) within RBS's Global Restructuring Group ('GRG'), who was the key RBS contact with the LLP in the period from April to June 2010; Peter Ballard, who between 2009 and 2010 was head of CRU and the person to whom Dave Clark reported; and Stephen Hair, a solicitor by training who worked at the relevant time in GRG's Recoveries & Litigation team.

10. As for the RBS witnesses, Mr Kynoch's and Mr Fennell's position, in their Written Closing Submissions, was that Lynne Kerr, Peter Broughton and Peter Ballard were, as they put it, *"broadly, reliable witnesses – but their roles were limited"*. I agree with Mr Kynoch and Mr Fennell about both of these matters. I am in no doubt that these were witnesses who were straightforward and doing their best to assist the Court in giving the evidence which they did. It is nevertheless the case, as Mr Kynoch and Mr Fennell put it, that: Peter Ballard's role was somewhat limited, primarily consisting of overseeing Dave Clark; Peter Broughton was not told much by others at RBS concerning what was going on with the LLP since, as he explained, it was not unusual for him not to know about the financial performance of an LLP in which clients of his were members (or partners); and Lynne Kerr was also not fully informed and so she was not, as she described it, aware of the *"bigger picture"* – something which, she explained, was kept confidential to *"maintain stability and avoid panic"*.

11. As for Grierson Banton, I did not understand Mr Kynoch and Mr Fennell to suggest that he also was anything other than a reliable witness. I am clear that he was, indeed, this. Rather, in their Written Closing Submissions, Mr Kynoch's and Mr Fennell's only point was that, his role having effectively ended at the end of March 2010 (albeit that he had some involvement in early June 2010 to deal with a winding-up petition which Mr McCarthy had issued), it was *"somewhat curious"* that Grierson Banton's witness statement addressed events in April and May 2010. I reject that criticism in circumstances where the witness statement made it clear the extent to which there was direct or active involvement as opposed to, for example, merely being copied in on exchanges or sent documents.

12. The position adopted by Mr Kynoch and Mr Fennell, in their Written Closing Submissions, as far as Dave Clark and Stephen Hair are concerned was different. Mr Kynoch and Mr Fennell submitted that both were unreliable witnesses. They described Stephen Hair, in particular, as being *"evasive"* and *"defensive"* and as giving *"long pre-mediated speeches of what he wanted to say, rather than answering the most straightforward questions"*. Mr Kynoch and Mr Fennell criticised Stephen Hair specifically for refusing to acknowledge that he and Dave Clark engaged in a deliberate *"delaying strategy"* in relation to the LLP paying Mr McCarthy's PPL loan, suggesting that because he refused to do this his evidence generally lacked all credibility. This is a matter to which I shall have to return when considering the submissions advanced by Mr Kynoch and Mr Fennell in relation to the procuring breach of contract case. It is more appropriate that I deal with the criticism made in relation to these two witnesses evidence in context rather than in a freestanding way.

13. This leaves Mr McCarthy. Mr Kynoch's and Mr Fennell's submission, in their Written Closing Submissions, was that Mr McCarthy was, as they put it, *"unshaken in cross-examination"* and that his evidence was reliable. For my part, I formed the

impression that Mr McCarthy was an honest witness who was straightforward in the evidence which he gave. He was, in my assessment, frank. This was much to his credit, all the more so given the pressures which he is undoubtedly under facing a claim such as that brought by RBS in these proceedings. I was impressed, in particular, by Mr McCarthy's willingness to accept points which were put to him by Miss Eborall and which were not especially helpful to his case. Miss Eborall detailed some of these points in her Written Closing Submissions. They included his acceptance that, as a highly experienced solicitor, he fully understood the terms of the PPL; there was no attempt on his part to suggest that there was ambiguity where there was none. Similarly, although Mr McCarthy stated more than once during his evidence that the LOU gave him *"comfort"* when entering into the PPL with RBS, he readily accepted that it advantaged RBS also: there was, as he put it, *"comfort both ways; benefits on both sides"*. Mr McCarthy also took no issue with Miss Eborall when she suggested to him that nowhere in the contemporaneous correspondence had he ever suggested that there was a collateral contract such as that now suggested by Mr Kynoch and Mr Fennell on his behalf. Moreover, Mr McCarthy acknowledged that, if the LLP had been insolvent at the point that he retired from the LLP, he would have had to repay the PPL loan and there would have been no way of avoiding this.

14. Perhaps most significantly, and again reflecting very well on Mr McCarthy, was his acceptance not only that he could not say whether the LLP had made a request to RBS that the PPL loan be repaid, a matter to which I shall return, but that he himself suspected at the time, specifically when he sent Glenda MacGeekie of the LLP an email on 7 May 2010, that the LLP had not made such a request. This, again, to my mind, demonstrated that Mr McCarthy gave evidence which I could be confident was truthful and unvarnished. Otherwise, whilst I gained the impression that Mr McCarthy is capable of being on occasion somewhat impulsive, as demonstrated by his decision, with his deep knowledge and understanding of insolvency law, to issue a winding-up petition against the LLP in early June 2010, something which he described as being *"purely tactical"*, I nevertheless consider that this does not detract from his credibility.

Factual narrative

15. The background to the present dispute is relatively involved. It is, however, necessary that it is rehearsed to some degree, even though in considerable respects it is uncontroversial. The controversy is mainly, perhaps exclusively, in relation to what, if anything, RBS was doing in relation to Mr McCarthy's PPL loan in the period from late March to late May 2010, given the nature of the allegations which are advanced on Mr McCarthy's behalf. In such circumstances, in setting the scene, as it were, I shall endeavour in this part of the judgment to focus on the uncontroversial, leaving matters which are in dispute to when I address the parties' respective submissions. Inevitably, I cannot address every piece of correspondence as there was a great deal. I shall, however, focus on the most significant aspects. I can take much of what I set out below from the helpful and largely neutral narrative contained in Miss Eborall's Written Opening Submissions, whilst noting that I have myself been through the underlying material with care. I have not, therefore, merely accepted what Miss Eborall has had to say.

16. As I pointed out at the start of this judgment, Halliwells was a leading Manchester law firm; in fact, the firm had offices not only in Manchester but also in Liverpool,

Sheffield and London. RBS had been Halliwells' bankers before the formation of the LLP, the relationship dating back to 1988, and that relationship continued, with RBS becoming the LLP's bank after the LLP was formed on 1 July 2004 pursuant to the LLP Deed entered into on that date.

17. The LLP Deed, which went through a series of subsequent amendments (the version before me was the version which had been altered *"by Members Decision dated 26th January 2010"*), dealt with various matters, including distinguishing between, on the one hand, *"Full Members"* of the LLP and, on the other hand, *"Members"* who were not *"Full Members"*. In very broad terms, *"Full Members"* were, in effect, the LLP's equity partners, with full voting rights and a right to see financial and management information. Unlike mere *"Members"*, *"Full Members"* were required to make a significant capital contribution to the LLP upon joining, and, in return were entitled to a share of the profits calculated by reference to the number of points which they held, plus a small notional salary. *"Members"* did not have such entitlements, paid much less capital when joining the LLP and were entitled to what was described as a *"fixed share"*, meaning a fixed (and smaller) share of the profits made by the LLP. *"Members"* were split into *"FSM"* (Fixed Share Members) and *"Senior FSM"* (Senior Fixed Share Members), as well as *"SM"* who were people who had previously been *"Full Members"* but were not any longer.

18. Mr McCarthy joined the LLP on 3 July 2007. He did so as a *"Full Member"* working in the London office in his specialist field, namely insolvency. As required by the LLP Deed, on joining the LLP, he made a capital contribution to the LLP. This was pursuant to Clause 5.11, which required a new Member to contribute capital in an amount determined by the LLP's Board. That capital was then to be held in the *"Capital Account"*, which was defined in the LLP Deed, as being:

"a notional account or accounts for internal accounting purposes to which any Contribution made by him is credited and withdrawals of capital debited and the balance of which represents his share of the Capital for the time being".

The *"Capital Account"* was not the same as the *"Current Account"*, which was defined as being:

"the account established in the name of that Member in the books of account of the LLP to which is credited his share of the allocated Profits (inducting interest and notional salary) and from which is debited drawings (not being any amount credited to or drawn from his Tax Reserve Account his Capital Account Number 2 or his Current Account Number 2) together with any other debits and credits contemplated by this deed and Senior FSM Deed, FSM Deed or SM Deed to which he may be a party".

Clause 5.15 then went on to provide:

"Subject to clause 30 and except as expressly provided in this deed or the Third Contribution Deed or by Board Decision, no Member may draw out or receive back any part of his Contribution to the LLP."

19. As for Clause 30, as referred to in Clause 5.15, this was headed *"Former Members, SMs and their Entitlements"* and included the following provisions:

"30.1 A Former Member or his personal representatives and each SM shall, subject to clauses 30.15 and 30.17, be entitled to repayment of the amounts (if any) standing to the credit of his Capital Account, Capital Account Number 2, Current Account, Current Account Number 2 and Tax Reserve Account as at his Retirement Date or, in the case of a SM, as at the date of his SM Deed ('Deemed Retirement Date') as shown in the Accounts for the Accounting Period in which his Retirement Date or Deemed Retirement Date falls after providing for any amount owed by the Former Member or SM to the LLP.

…

30.3 Subject to clauses 30.15 and 30.20 the amount payable under clause 30.1 shall be paid as follows or otherwise as the Board by Board Decision may, with the agreement of the Former Member, determine:

...

Provided that:

…

(c) if the Retirement Date or Deemed Retirement date of a Member falls prior to 30th April 2013, any instalment falling due for payment prior to 30th April 2013 shall, notwithstanding the foregoing provisions of this clause 30.3 (but subject to paragraph (d) below), be paid on 1st May 2013.

…

30.15 The LLP shall retain from the balance standing to the credit of a Former Member's or SM's Capital Account, Current Account and Current Account Number 2 at the Retirement Date or Deemed Retirement Date, the amount required to meet such Former Member's or SM's liability to his bank in respect of any loan made to him for the purposes of investing in the LLP Business provided that any sum so retained shall be paid on his behalf directly to his bank as soon as practicable but in no circumstances shall it be released in a Member's bank earlier than 10 Business Days before the repayment date of such loan.

…

30.20 The provisions of any deed governing the terms of retirement of a Member entered into between the LLP and a Member prior to 1st February 2010 shall be binding on the LLP notwithstanding the provisions of any such deed may not be consistent with the provisions of this clause 30."

20. The effect of these provisions was that, upon a Member leaving the LLP, repayment of any sums from the Member's current account, into which his or her share of allocated profits was credited and from which the Member drew monies, or from a Member's capital account was not to be repaid until 1 May 2013. However, in respect

of monies borrowed under a PPL, Clause 30.15 of the LLP Deed required the LLP to retain monies standing to the credit of a current or capital account and use those monies to repay the PPL on the former Member's behalf.

21. Mr McCarthy funded his capital contribution by entering into the PPL with RBS. He did this on 1 November 2007, a few days after the LLP had signed the LOU, something which happened on 27 October 2007. The PPL began with the following introductory wording:

"THIS AGREEMENT is made between:-

...

The Royal Bank of Scotland plc of 38 Mosley Street, Manchester, M2 3AZ (the 'Bank') and

Mr Michael Patrick McCarthy of 8 The Chenies, Petts Wood, Orpington, Kent, BR6 0ED (the 'Customer')

to set out the terms and conditions on which the Bank is pleased to make available to the Customer a professional practice loan of £120,000 (the 'Loan')."

It continued as follows:

"1 Purpose

The Loan shall be utilised for the purpose of making a capital contribution to Halliwells LLP (the 'LLP').

2 Preconditions

2.1 The Bank shall not be obliged to provide the Loan unless the following conditions are satisfied by the date on which the Loan is drawn:-

(a) the Bank has received the duplicate of this Agreement signed by the Customer;

(b) a Letter of Undertaking from the LLP pursuant to Clause 8.1 is completed to the satisfaction of the Bank; ...

3 Drawdown

...

3.2 If the Customer maintains a current account with the Bank then the Bank may credit the Loan proceeds to such account. Otherwise the Loan will be drawn in accordance with the Customer's instructions.

...

6 Repayment

6.1 The Loan shall be repaid in full on the Customer ceasing to be a member of the LLP.

6.2 The Customer may at any time by giving 7 days notice in writing to the Bank (or such shorter period as the Bank may agree) prepay the Loan in whole or in part without penalty.

6.3 No amount repaid or prepaid may be redrawn under this Agreement.

7 Method of Payment

7.1. If the Customer:-

(a) maintains a current account with the Bank that the Bank will (in the absence of agreed arrangements to the contrary) be entitled to debit the interest and any other amounts payable by the Customer under this Agreement to such current account; or

(b) does not maintain a current account with the Bank then the Customer will be required by the Bank to make such arrangements as the Bank may reasonably require in respect of payments of interest and other amounts payable under this Agreement.

…

8 Security

8.1 The Customer's obligations to the Bank under this Agreement shall be secured by way of a Letter of Undertaking from the LLP in respect of the Customer's capital in the LLP (the 'Capital Account') substantially in the form set out in the Appendix to this Agreement.

...

10 Undertakings

…

10.5 The Customer shall ensure that the balance of the Capital Account shall not at any time fall below the outstanding balance of the Loan.

…".

22. Under the LOU, the LLP undertook to RBS that, upon Mr McCarthy ceasing to be a member of the LLP, it would remit immediately the monies standing to the credit of Mr McCarthy's Capital Account for repayment of the PPL loan. Specifically, the LOU stated as follows:

"MICHAEL McCARTHY

The above named Customer is a member of this Limited Liability Partnership (the 'LLP'). The Customer has told us that the Bank has made or is to make available to

the Customer a loan of £120,000 (the 'Loan') for the purpose of injecting capital into the LLP. We confirm that upon receipt of the Loan monies the said monies will be placed to the credit of the Customer's capital account with the LLP (the 'Capital Account').

As required by the Bank as a condition of the Loan we irrevocably undertake:-

(i) that if the Customer ceases to be a member of the LLP for whatever reason, sufficient of the monies standing to the credit of the Capital Account shall be remitted immediately to the Bank's office as mentioned above (or any other office of the Bank as the Bank may advise from time to time) for repayment of the Loan;

(ii) we will not permit the amount of the monies standing in the Capital Account to be reduced below the balance of the Loan without the Bank's consent; and

(iii) we will promptly provide the Bank with such financial information regarding the LLP as it may reasonably request.

The Undertaking in this letter shall remain in full force and effect and will only cease upon repayment of the Loan by the Customer."

23. Subsequently, in October 2008, the LLP made a capital call requiring Full Members, including, therefore, Mr McCarthy, to double their capital contribution. Mr McCarthy refused to do this and a dispute ensued between him and the LLP. This led, on 8 October 2009, to Mr McCarthy receiving a letter from the LLP, placing him on gardening leave and requiring him to retire on 31 October 2010.

24. This letter was sent, so it seems, in accordance with the *"Compulsory Retirement"* provisions of the LLP Deed, namely Clause 27.2 which provided:

"Any Full Member or Senior FSM may be required to retire from the LLP by not less than twelve months' notice in writing expiring on the last day of any calendar month requiring such retirement, served upon him by and with the sanction of a Members' Decision and any Full Member or Senior FSM on whom such notice is served shall forthwith retire from the LLP on the expiry of such notice provided that, no JCC Member may be required pursuant to this clause to retire from the LLP with effect from a date prior to 1st May 2008 although notice requiring him to retire on or after 1st May 2008 may be served on him at any time after the Third Effective Date."

25. Mr McCarthy and the LLP subsequently entered into settlement discussions and correspondence. These led, ultimately, to their entering into the Retirement Deed on 5 March 2010. I shall return to this later. In the meantime, however, the LLP was suffering from negative press publicity, and the LLP was underperforming which led to cashflow concerns. Specifically, whereas historically the LLP had had very little debt, in the first quarter of 2007, before Mr McCarthy joined the LLP, the LLP took on a £17.8 million revolving credit facility and a £2 million overdraft facility with RBS in order, as I have previously mentioned, to fund the fitting out of the LLP's new offices in Spinningfields. It is in this context that, as part of the letting arrangements for the Spinningfields offices, a reverse premium in the order of £20 million had been paid by the landlord to the LLP's Full Members. I repeat that Mr McCarthy was unaware of the reverse premium when he joined the LLP. He was also unaware of the

finance facility agreed between the LLP and RBS. As far as he was concerned, the LLP had only modest borrowings, even though by the end of 2007, and so shortly after he joined the LLP, the LLP's revolving credit facility to the LLP had increased to £29 million, albeit that that was to reduce at the end of 2008 to £24 million after a capital injection from the LLP's Members.

26. Despite this reduction in the level of the credit facility, however, by early 2009 the LLP's financial position had deteriorated still further as a result of the economic downturn, excessive partner drawings, the departure of partners and undercapitalisation. The position was, in fact, so bad that the LLP was expected to breach the financial covenants contained in the 2007 credit facility. Indeed, in August and September 2009 Grierson Banton had to seek deferments of the LLP's facilities in respect of covenant breaches and, by the time of the year end, he had to report further covenant breaches to RBS's Watch Committee. As a result, as explained in an internal RBS email from David Livingstone in RBS's Corporate Credit department sent on 30 October 2009 to Dave Clark, Grierson Banton and others, *"in normal circumstances"* there would have been a *"full transfer to GRG"*, but it was decided instead, as stated in Mr Livingstone's email, that *"a somewhat hybrid approach makes sense for the time being"*, owing to concerns about a number of matters, including the risk that the position of the LLP's new managing partner, Jonathan Brown, would be undermined, the risk that of further partner unrest and partner departure, and the risk of further adverse publicity. This hybrid approach entailed RBS's Corporate team *"remaining involved from a Credit perspective and GRG (as part of an enlarged 'Shadow' role) effectively taking over relationship responsibility"*.

27. As part of this approach, on 21 January 2010, GRG made a credit submission, described as *"Project Owen Credit Submission"* (*"Owen"* being the project name being used by RBS to describe the LLP), in which credit sanction was sought for the restructuring of the finance facilities afforded to the LLP. The document described the background, consistent with what I have described above, as entailing the LLP having *"very little debt" before 2007 but as having taken on "a £21m RBSG package ... as part of a headquarter relocation to new leased premises in Spinningfields"*. The document then went on to refer to funding as having increased to £29 million in the fourth quarter of 2007 *"to fund member's tax payments as trading plateaued and a cash outflow emerged"*, to a capital injection of £5 million as having reduced that exposure on RBS's part to £24 million albeit that *"At the same time Owen entered into a new external HP facility for £5m to further aid liquidity"*, and to trading continuing *"to deteriorate in 2009 placing further pressure on cash despite £4m cost cutting and a £3m reduction in member drawings"*. There was then reference to *"A sharp downturn in trading ... in May/June as the result of significant fall in transactional business (down from 45% in 2007 to 26% 2009)"* and to *"Difficult trading conditions"* having *"resulted in members leaving during the year with an additional drain on cashflow as their capital is repaid"*. The position was described as remaining *"fragile"*. The proposal was described later in the document as entailing the Revolving Credit Facility being *"reduced from £17.8m to £12.8m and a new £5.0m Term Loan"* being provided, with both these facilities being *"made available until April 2013, extending the existing maturity by approximately 2 years"*. Under *"Key Risks"*, the following was, *inter alia*, stated:

"One of the major risks to both the form and the Bank is that a significant number of the key income generators move to another partnership. This has the added impact that when a partner leaves Owen must repay their invested capital within a specified timeframe (for the partner's own funds to be repaid via instalments over 19 month period but in the case of capital invested via PPLs this must be repaid to the PPL provider immediately)."

This was a reference, of course, to Clause 30.15 of the LLP Deed, a matter which was then further developed in what followed:

"Although we are seeing problems at a number of partnerships across the region, there is evidence (most notably from Sheffield) of continuing mobility between firms and therefore this issue needs to be considered and addressed."

This was then stated:

"We have therefore sought to tie partners into the firm through a variety of methods. The first incentive comes from the new c. £3m capital that will be invested on completion of the refinance. However we have also insisted on more formal assurance whereby each partner must personally undertake that if they leave the firm at any time prior to April 2012 their capital will not be repaid until after expiry of our facilities (Owen is in discussion with the PPL providers, including RBS, to release the partnership from its undertaking to repay capital immediately so that any capital invested via PPLs can also be retained in the business until April 2013). The added benefit being the preservation of the firm's capital base during this critical period."

This last matter was something in relation to which the LLP obtained advice from CMS Cameron McKenna LLP ('Camerons'). That advice, which was dated 23 January 2010, highlighted that the *"bigger issue"* concerned *"the Undertaking given to banks"*, making the point, as reflected in the above passage, that the *"terms of each such Undertaking would have to be amended in order to ensure Haliwells can comply with such Undertakings in the future"*.

28. The same day as the credit submission was being presented, Jonathan Brown, the LLP's Managing Partner, emailed RBS, copying in Dave Clark, to inform RBS that *"We have already entered into retirement deeds with partners and agreed to re-pay capital on a basis that is reflected in the model"*, then referring, by way of example, to a particular partner who was to retire on 31 July 2010. This email was sent in the context of the wording of the proposed Refinance Agreement, Jonathan Brown suggesting that the wording recognise that the LLP had already entered into certain retirement deeds. That proposed wording was then reflected, if not entirely replicated, in the Refinance Agreement which shortly afterwards, on 1 February 2010, and along with a new overdraft facility, was entered into between RBS and the LLP. Clause 9.10 (*"Equity Modifications"*), accordingly, referred to the LLP (*"the Borrower"*) as undertaking, at (d):

"to ensure that each Exiting Member's capital shall be retained by the Borrower on a fully subordinated basis with respect to the Facilities and the Overdraft Facility until the Termination Date unless it is required to be distributed to a Third Party Capital Provider in accordance with any obligations binding upon the Borrower with respect to such a Third Party Capital Provider or to the 4 Exiting Members … in respect of

whom the Borrower has already agreed to repay their capital prior to the Closing Date".

As such, Clause 9.10(d) prohibited withdrawal of capital contributions from the LLP upon a Member's retirement until the 'Termination Date' (30 April 2013) of the Refinance Agreement, but there was a 'carve out' for PPLs in respect of which capital could be released not more than 10 Business Days before the repayment date. As Miss Eborall put it, this replicated the terms of the LLP Deed (as amended) and took account of Jonathan Brown's recent information that the LLP had entered into retirement deeds with some retiring Members. Mr McCarthy was not, however, one of *"4 Exiting Members"* identified in the Refinance Agreement.

29. The same day, 1 February 2010, the LLP not only entered into the new overdraft facility, but also immediately issued 'waiver' letters, under which the LLP requested that RBS consent to the waiver of the covenants owed by the LLP but which the LLP had broken as regards the collection of capital contributions from Members, as contractually required under the new finance arrangements.

30. The LLP's entry into the Refinance Agreement required Members' approval to amendment of the LLP Deed in relation to deferral, as set out in Clause 9.10(d) of the Refinance Agreement. This placed departing Members on notice of possible difficulties regarding the repayment of their capital contributions, specifically in Mr McCarthy's case prompting him to send Jonathan Brown an email on 26 January 2010, in which he explained that, having been *"excluded from the LLP on 7th October my email account was turned off and I have received no financial or other information whatsoever until your communication of last night"*. Moreover, two days later, on 28 January 2010, Mr McCarthy both spoke to and wrote to his retail banking manager, Steve Walker, who reported to Peter Broughton as his Area Manager, informing him that he was *"in the process of leaving the LLP having been served with notice to do so on 7th October 2009"* and that he would *"cease to be a member by no later than 31st October 2010"*. Mr McCarthy went on to state as follows:

"Recently it has been brought to my attention that the LLP is in the process of renegotiating its banking facilities with RBS and one of the proposed terms provides for all capital to be retained within the LLP until April 2013. While I have been lead [sic] to believe that this does not apply to me, I think that it is prudent for me to write to RBS to confirm my position. In the circumstances please note that the terms of the irrevocable undertaking which you hold from the LLP for the repayment of my capital in the sum of £120,000 within 7 days of me leaving the LLP should not be released, varied or in anyway relaxed without my express permission in writing to do so. The PPL loan was only taken out on the back of the irrevocable undertaking given by the LLP and the guarantee which this effectively provided to me that these moneys would be repaid to RBS."

31. This email and similar emails from other departing Members of the LLP led Grierson Banton to email Dave Clark on 2 February 2010, asking for GRG's input, and to Michelle Kemp at GRG emailing Jonathan Brown at the LLP the same day, seeking an explanation as to how departing Members' capital contributions would be funded. This email was followed on 10 February 2010 by a further email from Michelle Kemp to Iain Cadman at the LLP, in response to an email on 4 February 2010 which attached two spreadsheets giving details of retired Members and Members who were

"working their notice". Michelle Kemp explained that RBS wanted to know how payments to retiring Members were to be funded.

32. The LLP's position appears to have been that the strategy was to seek deferment of the LLP's repayment obligation under the LOU. This is demonstrated by an email which Jonathan Brown sent Michelle Kemp and Grierson Banton on 12 February 2010 and which attached a draft letter. That letter stated as follows:

"3 It would be advantageous in discussions on the exit terms with such Equity Partners if RBS allowed that their capital was retained within Halliwells for a longer period than being repaid within 7 days of their retiring. All the exiting Equity Partners although subject to 12 months notice do not wish to work their full 12 months notice. Therefore if Halliwells releases them early from their 12 month notice period not only are the departing partners receiving a benefit in not having to work their full 12 months notice but due to the undertaking with RBS receive their capital earlier than would have been the case if they worked their full 12 months notice.

4 It is disadvantageous to Halliwells for a partner to work their full 12 months notice as it appears that most exiting partner's productivity ceases as they work their notice and look forward to their new practice or opportunity."

The draft then listed certain partners in paragraph 7, including Mr McCarthy, describing those partners as retiring from the LLP. Paragraph 8 then stated as follows:

"We are writing to set out our formal request that RBS amends the undertakings provided by Halliwells to RBS to allow repayment of capital to the following individuals on the following dates", stating as regards Mr McCarthy that the amount concerned was £120,000 and giving 7 May 2010 as the relevant date.

33. Grierson Banton's response to this email and the attached draft letter was in the form of an email to Jonathan Brown on 17 February 2010. In that email, which was copied to Dave Clark and Michelle Kemp, Grierson Banton stated as follows:

"We have been considering the request from the firm for the bank to consent to a deferral of the repayment of the PPLs of departing partners.

In considering this request we have taken into account certain submissions from the departing partners that they do not personally consent to such deferrals. Specifically, they are claiming that the Letters of Undertaking from the firm pursuant to which the firm agreed to repay the capital upon the departure of the member is a key term of the PPL's and that it was only on the basis of the undertaking that they agreed to enter into the PPL.

Whilst we have taken a degree of comfort from the advice of Freshfields that this undertaking is actually granted in favour of the bank by the firm and that the bank can potentially agree to an amendment and variation of it, Freshfields do have a concern that the undertaking could be construed as an inducement or other assurance that prompted the member to enter into the PPL and that the undertaking is in effect a collateral contract of which the member is a third party beneficiary. You will understand that the bank is reluctant to induce a breach of this collateral contract or

to create a potential defence for a member in the event that a PPL is not repaid in accordance with the terms of the undertaking and the bank subsequently seeks direct the course against apartment in question.

To assist us in considering these risks it would be helpful if you can explain the contractual basis upon which the LLP is entitled and able to make the amendment and variation to the Letter of Undertaking in a manner that binds the member."

34. Jonathan Brown replied to this email on 21 February 2010. He stated that he believed that the LLP *"is entitled to amend the Members Agreement to provide that capital is repaid on a different basis from time to time as contained in the LLP Deed"*. He also attached the advice which had been received from Camerons. He went on:

"The departing partners will raise the following arguments:-

(a) The Undertaking although only between Halliwells/RBS, they will argue is an integral part of a triangular, three party arrangement. You will note from the Loan Agreement between RBS/the Partner in clause 2.1(b) that the letter of undertaking is a condition precedent and at clause 8.1 the letter of undertaking is referred to as security.

(b) The Member will argue that a representation was made when he took out the loan and provided the capital that he was aware of the undertaking and took comfort that if he ceased to be a partner the capital would be repaid immediately or within 7 days in the case of Handelsbank.

(c) Clauses 6.1 and 10.6 of the Loan Agreement state that when a Partner ceases to be a Member of the LLP the loan is to be repaid and therefore the undertaking becomes of increased importance to the individual as he could be placed in a position where the LLP does not repay the capital due to the bank agreeing a relaxation of the undertaking but that the bank still requires repayment of the loan.

I have expressed the view that partners may well re-write history as to their understanding of the circumstances when they took out their loan as I am not sure how many would have read the paperwork carefully at that time."

The letter then went on, over the page, to state the "Conclusion/Proposals", as follows:

"I would suggest that a compromise be put forward to the retiring partners that as a minimum their capital is repaid when their 12 month notice period would have expired in the event of them being released early".

Jonathan Brown went on, however, to say this:

"In relation to Mike McCarthy, as the firm gave him notice and put him on garden leave I think we will have to settle for April/May 2010."

35. It was Lynne Kerr's evidence that the LLP's deferment request caused RBS difficulties since, although it assisted the RBS's corporate finance arm, it increased the credit risk assumed by RBS's retail division. It was with this in mind that, on 15 March 2010, Michelle Kemp sent Peter Ballard and Dave Clark an email in which she

referred to the fact that the LLP had made *"a formal request ... setting out the timeframe over which they [the LLP] would like to extend the repayment of these facilities"*, a reference to the various letters of undertaking provided by the LLP to RBS in respect of partners' PPL loans. Mr McCarthy's position was noted separately from the other retiring members, with the following stated at the foot of a table identifying other retiring partners:

"One further partner, Mike McCarthy, also retires at the end of May 2010 however given this partner was invited to retire by the firm rather than volunteering himself [the LLP] are reluctant to enter into negotiations over his capital loans (totalling £120,000) and are prepared to repay in full upon his departure."

36. In the meantime, the LLP's financial position had continued to deteriorate, with the LLP sending RBS further 'waiver' letters in respect of the Refinance Agreement had to be issued. The position had worsened so much by March 2010 that, on 23 March 2010, Jenna Picken, Grierson Banton's assistant, emailed Malcolm Buchanan, Head of Portfolio Management in the Corporate Relationship Unit, attaching a document described as *"Owen RMP"* which recommended *"transfer of relationship to GRG"*. Malcolm Buchanan responded the next day, describing how *"This has been under GRG management since last summer"* and how *"significant progress has been achieved but matters are deteriorating quickly"*, before going on to state as follows:

"Given recent restructure and equity raise has been concluded and the poor trading and discord within the firm that has emerged since there is no case for the hybrid PM/GRG arrangement. The original purpose was to manage external perception and maintain co-operation of key people at the firm. Matters have moved on meriting full GRG transfer in view of the deteriorating risk position and stressed loss."

37. Earlier the same month, on 5 March 2010, Mr McCarthy had entered into the Retirement Deed with the LLP. The Retirement Deed contained a recital which stated:

"This deed is supplemental to a limited liability partnership deed dated 1st July 2004 as altered by Members Decision from time to time prior to the date hereof and made between the members of the LLP (1) and the LLP (2) (the 'LLP Deed') containing the terms on which the LLP shall carry on the business of solicitors."

The document continued in Clause 1.1 (*"Retirement"*), as follows:

"The Retiring Member shall retire from the LLP at close of business on 31 May 2010 (the 'Retirement Date'). The Retiring Member shall continue on garden leave up to the Retirement Date and during the period to the Retirement Date shall continue to be entitled to benefit from membership of the LLP's life Insurance and private medical insurance schemes."

Clause 2 (*"LLP Deed"*) then stated:

"The provisions of the LLP Deed shall apply to the retirement of the Retiring Member save where inconsistent with the provisions of this deed, in which case the provisions of this deed shall apply."

Clause 3 (*"Capital Account"*) went on:

"The LLP shall pay directly to Royal Bank of Scotland plc ('RBS') the amount of £120,000 standing to the credit of the Retiring Member's Capital Account being the amount required to discharge the LLP's obligations under the undertaking which was given to RBS upon RBS making a professional practice loan to the Retiring Member for the purposes of enabling him to make a capital contribution to the LLP in accordance with the LLP Deed. The LLP will forthwith request the consent of Royal Bank of Scotland plc to make this payment within 7 days of the signing of this Deed and will make such payment:-

3.1 If such consent is given within 5 days of the signing of this Deed, 7 days from the date hereof; or

3.2 If such consent is given later than 5 days from the date hereof, within two business days of such consent being given; or

3.3 If such consent is not given or has not been received prior to the Retirement Date, on the Retirement Date."

38. It was accepted by RBS in Miss Eborall's Written Opening Submissions that RBS had seen the Retirement Deed by 7 April 2010. This was in line with an internal RBS email which was sent by Lynne Kerr on that date, in which she stated that *"We have sight of the Retirement Agreements the firm has signed with the partners...."*. This was an email which was sent in the lead-up to the ROR Letter when the LLP's financial situation was causing so much concern within RBS that it had been brought to the attention of RBS's Chief Executive Officer, Stephen Hester. A *"Project Owen"* credit update report being circulated internally in draft on 7 and 8 April 2010 put matters in the following way, when describing the background:

"Poor trading in January and February have de-railed the recovery plan with STCF now showing that the Firm runs of cash in June without further assistance from the Firms [sic] landlords. Plan A is now a sale of all or part of the Firm with three potential bedfellows in the process of signing NDAs. In the event that the Firm cannot sell itself before it runs out of cash then the most likely alternative is liquidation ...".

39. It will be necessary to consider certain of the exchanges, internal and external, later, when dealing with Mr Kynoch's and Mr Fennell's submissions concerning RBS's role in relation to the payment of Mr McCarthy under the Retirement Deed. In the circumstances, I do not set out that detail at this juncture. However, it is to be noted that on 14 April 2010 Dave Clark met with David Kelly, an accountant at PwC who had been advising the LLP and RBS since October 2009, as well as with James Hayward, the LLP's Chief Restructuring Officer, to discuss the strategy for sale or recovery of the LLP. It was at this meeting that it was confirmed that RBS would issue the ROR Letter, agreeing to continue to provide the Refinance Agreement facilities on condition that the LLP did not pay PPL providers amounts due under PPL loans without RBS's consent.

40. The background to this appears to have involved two concerns on the part of RBS: first, that RBS did not want the LLP paying retiring partners in circumstances where the LLP did not have the funds with which to make such payments; and secondly, that RBS was concerned that any payments made by the LLP would constitute preferences. As to the former, although these are exchanges to which I shall have to

return later when addressing Mr Kynoch's and Mr Fennell's submissions, the position is demonstrated by Lynne Kerr's email on 7 April 2015, to which I have previously referred. After stating that RBS had had sight of *"the Retirement Agreements"*, Lynne Kerr went on to state as follows:

"Regardless of these retirement deeds however, the firm can't afford to pay out the capital to either Bank, and GRG are refusing to increase Corporate exposure to repay unsecured lenders. It has therefore been made clear to the firm that there will be no capital payments to any Bank. ... It has also been confirmed again that there will be nothing issued to the partners of the firm concerning Retail loans, that Retail have not approved and signed off."

41. As to the concern about preferences, the position is apparent from Peter Ballard's email to Dave Clark on 10 April 2010, in which he stated as follows when referring to the *"Project Owen"* credit update report:

"Back to the credit. As we discussed this situation is dire and absent an acquisition, merger this business will fail. I agree with everything in the report and we must maintain the pressure here for them to engage with all potential suitors this is distressed M+A process and we/they do not have the luxury of trying to present it as otherwise. Weekly or even more frequent updates should be obtained.

No money should be paid to leaving partners (whether they are on the signing, retiring or being encouraged to leave) nor should any funds be reimbursed by the company to the PPL providers. The present circumstances be considered to do so would be a preference."

42. Dave Clark's email in response, sent on 12 April 2010, is also instructive. His focus appeared to be more on the position of RBS as a secured creditor than on a preference concern. He stated as follows in relation to *"Departing Members Capital"*:

"The management team have been advised on a number of occasions that no monies should be paid to departing Members given situation we find ourselves and the secured/priority position the Bank has. The Management Team have confirmed very clearly that they understand the Bank's position and that no such payments will be made".

43. Both matters were raised in an email sent directly from RBS's solicitors, Freshfields, to Jonathan Brown on 14 April 2010. In the first paragraph of that email, which had as its focus the case of another retiring partner, David Grant, but which is relevant to Mr McCarthy as well, the following was stated:

"I am sure that you will appreciate that this is effectively a request for a payment guarantee in favour of an unsecured creditor and creating a contractual obligation on RBS to make the payment. Commercially RBS may not be willing to do that. I will let RBS respond on this commercial question."

This, then, seems to be the point about RBS not being willing to allow funds to be spent which the LLP did not have. Freshfields then went on, however, to deal with the legal question concerning preferences:

"We assume that the board are taking appropriate advice in relation to its trading and specifically its commitment to make payments to retiring partners, but in any event I would simply query whether this is a preference in favour of Grant given the financial position of the firm and the fact that contractually he is not a ransom creditor exerting normal commercial leverage because of your own view that he is not contractually entitled to retire."

44. As I say, these are matters to which I shall return, specifically when considering Mr Kynoch's and Mr Fennell's submission that the ROR Letter, and what followed from it, effectively meant that the LLP could not meet its obligations to Mr McCarthy under the Retirement Deed and, more than that, means that RBS is to be regarded as having procured the LLP's breach of those obligations. For present purposes, what matters is that on 16 April 2010 RBS sent the ROR Letter to Jonathan Brown for signature under cover of an email from Dave Clark which described the ROR Letter as being a document *"which effectively prohibits the payment of retiring members capital without prior Bank consent…"*, and the ROR Letter was in the following terms:

"2 EVENT OF DEFAULT

2.1 The Borrower has not received the amount of £229,175 of the Equity members capital outstanding as at the Closing Date which was due to be received by the Borrower by 1 April 2010 pursuant to paragraph 2 of the 19 March Waiver Letter.

2.2 Therefore there is now an Event of Default which is continuing under Clause 12.1(c) (Misrepresentation) and Clause 12.1(d) (Breach of Other Obligations) of the Facility Agreement pursuant to the Borrower's non-compliance with Clause 7.1(h) (Conditions Precedent) and Clause 8.1(l) (No Default) of the Facility Agreement.

2.3 Under Clause 12.1 of the Facility Agreement the Lender is now entitled to: (i) cancel the Facilities; (ii) terminate its obligations under the Facility Agreement; and (iii) declare all outstanding Advances together with accrued interest and all other sums owning under the Facility Agreement to be immediately due and payable. Upon the Lender making this declaration the Borrower would be required to pay all such amounts to the Lender immediately.

2.4 Whilst it is not the current intention of the Lender to take the action described by paragraph 2.3 above, the Lender will continue to review the position regularly and reserves it's right to take such action at any time.

2.5 However, as a condition of the Lender not immediately taking the actions set out in paragraph 2.3 above, the Borrower agrees, from the date of this letter:

(a) not to make any payments to any retiring Member pursuant to any retirement deed or similar agreement or arrangement between the Borrower and a Member; and

(b) not to discharge for the benefit of a Third Party Capital Provider, any professional practice loan (either in whole or in part),

without the prior written consent of the Lender.

3 RESERVATION OF RIGHTS

3.1 All rights of the Lender under the Facility Agreement and Overdraft Facility Agreement are expressly reserved and may be exercised without further notice. Any time indulgence, delay or failure to take any action by the Lender shall not constitute any waiver of any contravention of the Facility Agreement or the Overdraft Facility Agreement."

45. As I have previously mentioned, the ROR Letter was never signed by the LLP. This is because of concerns expressed by Jonathan Brown, as recorded by Dave Clark, among others, in a document described as *"Project Owen Update"* and dated 22 April 2010. Under the heading *"Disclosure/Wrongful Trading/breach of contract"*, that document stated as follows:

"Jonathan Brown is very concerned about:

…

(c) signing the reservation of rights letter - JB thinks signing the letter would automatically put Owen in breach of the retirement deeds and Camerons are to advise. Freshfields have advised that as Owen have received the RoR letter they are on notice of the Bank's position, and therefore legally the Bank does not have to insist on it being signed.

(d) breach of the partnership deed, retirement deed and letter of undertaking if payments are not made under the retirement deeds when due, Camerons are to advise, but we have made clear that we see this as contractual breaches in respect of unsecured creditors and given where the value breaks, Owen's primary duty should be to the Bank and Owen should not be using the Bank's money to fund these payments."

As noted in paragraph (c), Freshfields' advice was that it did not matter that the LLP did not sign the ROR Letter. Indeed, no point was taken on this at trial by either side, the parties agreeing, in effect, that, whether the ROR Letter was signed or not, it had the effect intended by RBS in sending it to the LLP.

46. The ROR Letter was followed, on 30 April 2010, the LLP having failed to pay its instalment under the Refinance Agreement, by RBS issuing the LLP with an Amendment Letter, deferring payment until 31 July 2010.

47. In the meantime, on 19 April 2010 (albeit that the letter in the trial bundle bears the date 21 August 2013 because that is the date when the document was produced for the purposes of these proceedings), Peter Broughton of RBS wrote to Mr McCarthy, in the following terms:

"We write with reference to your recent correspondence in connection with the professional practice loan (the PPL) extended by The Royal Bank of Scotland plc (RBS) to you for the purpose of making a capital contribution to Halliwells LLP

(Halliwells). To introduce myself I am the RBS Private Banking Area Manager for the North region, and Steve Walker has referred matters to me in light of your concerns.

We understand that you are due to retire from Halliwells on 31 May 2010 (the Retirement Date).

We would kindly like to remind you that under clause 6.1 of the PPL scheme agreement between you and RBS signed on behalf of RBS on 26 October 2007 and yourself 1 November 2007 (the PPL Agreement) the PPL must be repaid in full on you ceasing to be a member of Halliwells.

As the primary obligor under the PPL Agreement you will be required to comply with all of your obligations under the PPL Agreement including the discharge of all outstanding amounts on the Retirement Data pursuant to clause 6.1.

As a security for and in addition to your primary obligation to repay all outstanding amounts under the PPL Agreement, Halliwells has independently undertaken certain obligations to RBS pursuant to the letter of undertaking from Halliwells to RBS dated 29 October 2007 (the Letter of Undertaking). Halliwells obligations under the Letter of Undertaking will continue and have not been amended, but at this juncture we would remind you that there is no obligation In the PPL Agreement or the Letter of Undertaking on RBS to request repayment from Halliwells prior to seeking repayment from you as the primary obligor.

Whilst we would point out that we reserve all of our rights against you as the borrower under the PPL Agreement and separately against Halliwells with respect to its direct security obligations under the Letter of Undertaking, we do think it would be worthwhile to meet with you to discuss your plans for discharging all outstanding amounts under the PPL on the Retirement Date pursuant to clause 6.1."

48. There then followed a series of events which led, ultimately, on 1 June 2010, to Mr McCarthy issuing a winding-up petition in respect of the LLP and, later the same month, Mr McCarthy having withdrawn the winding-up petition, to the LLP filing, on 21 June 2010, of a notice of intention to appoint administrators and to an administration order being made the following month, on 20 July 2010. These events will need to be explored in some detail later. For now, however, it is sufficient that I set out in fairly broad terms what happened. Again, I do so by reference to Miss Eborall's helpful summary in her Written Opening Submissions. In doing so, it needs to be appreciated that, in December 2009, eight partners from the LLP's insurance litigation team in Sheffield had told Jonathan Brown that they intended to resign to join Kennedys LLP ('Kennedys'). Jonathan Brown responded quickly by agreeing a sale of the entire Sheffield insurance litigation business to the new firm and Heads of Terms were agreed and signed, with a completion date of 30 July 2010. Mr McCarthy was not in that number since it would appear that at that stage Mr McCarthy had not made arrangements to join Kennedys, although, as it happened, he did, in the event, become a partner at Kennedys.

49. There were, however, other potential purchasers for the LLP's business. These were each given codenames (*"Botham"*, *"Hutton"*, *"Morgan"*, *"Dyson"*, *"Chappell"*, *"Bradman"*, *"Flintoff"* and *"Kestrel"*) and discussions took place throughout April 2010 with a view to agreeing heads of terms as soon as possible. Details of these

discussions were described in the *"Project Owen Update"* report dated 22 April 2010 to which I have referred. I need not set out details of all of the various proposed deals. However, it is instructive to note that the document stated as follows on the first page:

*"**1. Time Pressure** – Owen remains under considerable financial pressure. The latest cash flow we have received shows that Owen will run out of cash at the end of July. Owen think that the figures for March and April will be in line with projections agreed for the January 2009 restructure. However, in May-July there is c£674K of retiring partners' capital to be returned by Owen. We have issued Owen with a reservation of rights letter stating that no capital can be paid to retiring partners without the Bank's consent. There is therefore the possibility that the retiring partners and/or Handelsbanken (to whom payments are due to be made under the various PPLs) could issue a winding up petition. The first payment is due on 7th May – being £140K to Handelsbanken in respect of the return of Suzanne Liversidge's capital. Suzanne is joining Kennedys as part of the Sheffield Insurance Litigation business sale. WIP/ Drs acquired at nearly par, refer comments below.*

2. PPLs

The critical factor from a time perspective is the retiring partner's PPLs to the Bank and Handelsbanken which are due for payment in May, June and July. Letters have gone out to each of the partners from the Bank stating that such partner is the principal obligor and the Bank will look to each partner for recovery of the PPL. We have yet to receive any responses, but we envisage that we will need to meet with each of these partners and Handelsbanken in the next week or so to discuss the current position with them and to attempt to avoid them taking precipitous action so far as possible.

Owen are due to meet Handelsbanken on 21st April. Whilst it is recognised that Owen will need to brief Handelsbanken on its current position in due course, it is felt that discussion is better held after Owen have met with Botham/GT and a solution in principle can be presented to Handelsbanken. At the time of writing, we have not yet received an update on the outcome of this meeting.

Owen are going to write to the Bank regarding the £9K over-payment owing to Fearon. ***To keep the noise down we recommend that this payment, which is now overdue, is allowed****. The £9k repays an RBS PPL.*

***3. Sheffield Insurance Litigation business to Kennedys** – Heads of Terms have been reached and signed with completion date of 30th July. This sale is expected to realise circa £1.7 for Owen (dependant on WIP and Debtors on the date of completion). However, as noted above, the fact that Owen cannot pay sums due to retiring partners in May-July means that the Kennedys sale could be put in jeopardy. Most specifically there are 10 partners vested in the deal with £400k at stake to be paid, of which Suzanne Liversidge is owed £280k. Suzanne retires on 30th April and her PPLs fall due on the 7th May, £140k to Handelsbanken and £140k to RBS albeit the retirement deed she has signed with the Firm indicates that the Firm have committed to repay her PPL to RBS in December 2010. The Bank has not agreed to this deferral. Partners who do not receive their capital may issue a winding up petition to Owen and jeopardise the sale process to Kennedys and indeed the Firm as a whole. Owen believes there is no prospect of this part of the business being sold*

elsewhere if the Kennedys deal did fall through as the clients have already been told they will go to Kennedys, and most are local authorities who have long standing relationships with the individual partners who are transferring. As such if the agreed sale fell through, the partners would just transfer of their own accord anyway (though client files are the property of Owen, not the partner and Owen may be able to claim a lien over those files in respect of unpaid bills). We have suggested that the Kennedys deal be accelerated and it may be that we have to consider Suzanne's capital position in order to protect the overall transaction. …".

50. It can be seen, therefore, that RBS was contemplating making payments to departing Members because of their involvement in the Kennedys sale and the risk of jeopardising that transaction, and approving a £9,000 payment of a PPL loan relating to a retiring Member because it was already overdue. There was also a concern about winding-up petitions being issued against the LLP insofar as any repayment actually fell due. In view of these concerns, on 29 April 2010, Eric Sokolowski, a Manager within GRG, sought internal approval, in an email sent to Peter Ballard and others, and copied to Dave Clark and Stephen Hair, to make certain PPL loan repayments in relation to retiring Members of the LLP .

51. A few days later, on 4 May 2010, James Hayward emailed Stephen Hair, copying in Jonathan Brown, Grierson Banton and Dave Clark, in relation to Mr McCarthy. The email stated as follows:

"Steve - further to our conversation earlier please see the email trail below re Michael McCarthy. Summary of the backgrounds:

- *McCarthy is an insolvency partner known to GRG (Peter Ballard amongst others) he has told us he knows we are in GRG;*

- *a firm starting negotiations with him in Q4 last year when he was put on garden leave*

- *a retirement deed was signed on 8th March – see attached; leaving date is 31st May*

- *Per clause 3 of the retirement deed:*

- *He is pushing very hard on trying to obtain proof that RBS were a) spoken to about his PPL and b) have not given consent to payment of his capital prior to 31st May. We have stated that conversations were held with our relationship manager and this was the outcome but he wants 3rd party evidence;*

- *I understand that RBS may not want to put anything in writing but it's best you're aware of the correspondence in case he tries to contact anyone directly himself."*

52. Mr Kynoch and Mr Fennell placed particular reliance on this email, specifically suggesting that it demonstrates that RBS had been asked to consent to Mr McCarthy's PPL loan being paid. This is a matter to which I shall, therefore, have to return. I shall also have to do so in relation to the email which Glenda MacGeekie, the LLP's Partnership Secretary and In-house Counsel, sent Mr McCarthy three days later, on 7 May 2010, in which she stated in the second paragraph as follows:

"We've tried to obtain written conformation from the bank that they will not consent to our request to repay your capital prior to your retirement date but their response was to suggest another standard letter stating your obligations under the PPL which, we pointed out, was not helpful. A letter was sent to Grierson at the beginning of February requesting payment but following that the terms of your retirement were negotiated and changed and discussions after the date of your retirement deed were, as with discussions concerning all other partners, conducted in meetings. Unfortunately, the bank will not consent to repayment of capital to a partner whilst he or she is still a partner in the firm. I am not sure what more I can tell you."

Mr Kynoch and Mr Fennell submitted that this letter shows that RBS was asked to give its consent to payment of Mr McCarthy's PPL loan but that consent was refused.

53. The same day, 7 May 2010 (albeit that the letter states 23 September 2013), Mr Broughton wrote to Mr McCarthy in similar terms to his letter dated 19 April 2010. This followed a conversation between Peter Broughton and Mr McCarthy on 29 April 2010 and appears to have been sent before Mr McCarthy sent Peter Broughton an email, again on 7 May 2010, referring to the letter sent on 19 April 2010 and the conversation on 29 April 2010, and stating as follows:

"As you know I am to formally retire from the LLP on 31st May 2010 and my PPL loan in the sum of £120,000 is due to be repaid to RBS by the LLP under the terms of the retirement deed entered into on 5th March 2010. I have recently been informed by the LLP that they have requested that RBS transfer these funds before 31st May 2010 but that you have declined such a request. Can you please confirm that such a request has been made of RBS, when you received such request and your decision. I dare say you are curious as to why I am asking such questions. Suffice to say that I was led to believe that the repayment of my capital was a formality and had been agreed by RBS some time well before the retirement deed was entered into."

This email was sent by Peter Broughton to Lynne Kerr, who emailed him back to say that Stephen Henn, her Line Manager, *"will come back to you with a response next week"*, which is what he did by email on 11 May 2010, sending him a draft letter in which apologised for getting the retirement date wrong but which, Stephen Henn explained, said nothing in relation to Mr McCarthy's *"questions concerning whether RBS declined to allow repayment"*. It is not altogether clear whether a letter in the terms drafted by Stephen Henn was sent by Peter Broughton before he then went on holiday.

54. The same day, 11 May 2010, Jonathan Brown provided RBS with an updated schedule of retiring Members' capital repayments, seeking formal consent for payment of specific retiring Members' loans in order to prevent the collapse of sale discussions with Kennedys. Importantly, and this is acknowledged by Mr Kynoch and Mr Fennell, the email did not include reference to a request for repayment of Mr McCarthy's PPL loan. This is apparent from the facts that Jonathan Brown described the *"quantum of capital due to retiring partners immediately due"* as amounting to *"£212k plus £50k in respect of tax balances"*, and the make-up of the £262,000 total is identified in the schedule accompanying the email by blue shading on the relevant entries (£140,000, £20,000, £20,000, £30,000, £20,000, £20,000 and £12,0000). Although next to Mr McCarthy's name, there is an entry, like the others for May 2010, in the amount of £120,000, this is not shaded in blue. Nor is Mr McCarthy

mentioned in the covering email, in which Jonathan Brown referred by name to the partners to whom the request for consent to payment was being made. That said, although this is not a point which was made on Mr McCarthy's behalf at trial and not a point which was explored with Dave Clark, on reviewing the documents, it is to be noted that there is a document described as *"Owen – Update to Credit Wednesday, 12 May 2010"*, in which the following appears:

"1. Payment of retiring partners' capital

Owen have provided the Bank with a revised schedule (attached) showing an amount of capital of £382k due out to retiring partners by 31st May 2010. This is a significant increase from the amount previously advised to the Bank (£160k). The key changes are:

- *Mike McCarthy (£120k). The Bank previously understood that McCarthy's retirement date was 31st May, which would have led to his capital being contractually due for repayment on 7th June. We now understand that under the terms of his retirement deed, 31 May is the last day on which the capital can be repaid. McCarthy has already started working for Kennedys and whilst he does not form part of the purchase of Owen's Sheffield Insurance Litigation practice, he is becoming very vocal with Owen and Owen fear that without payment the Kennedys' deal may be jeopardised.*

- *Chris Gough (£20k), George MacMillan (£30k), Simon Wortley (£20k) and Chris Briggs (£20k). These are FSMs whose retirement deeds were reached with their respective department heads that neither Owen central management team nor finance were aware of. We have been assured that all retirement deeds are now being dealt with centrally by Jonathan Brown and James Hayward to avoid this situation happening again.*

- *Paul Rose (£12k). Rose was initially due to be paid in April but this payment was deferred to May. Rose stepped down as a full member in April 2009 (on retirement age) but continues to work full time in the firm and is in charge of training and development. The money due to him is in respect of his current account.*

The other retiring partners whose capital is due to be repaid before the end of May (and which were included in the previous schedule sent to the Bank) are:

- *Chris Fletcher (£20k) – this is a tax balance due.*

- *Susan Liversidge (£140k) – already credit approved on 29th April as being integral to the Kennedys' transaction.*

Owen have requested payment of the above amounts in order to maintain stability in the business and avoid jeopardising the Kennedy transaction and to give further time to progress a possible White Knight transaction (See below). Whilst we would not ordinarily consent to equity being paid out in distressed situations such as this, these payments are contractually due and payable. If not paid, we believe that Owen's distressed state would very quickly become common knowledge, thus jeopardising the potential sales and lead to a rapid deterioration in Owen's situation. Indeed, the

retiring member (or his/her PPL provider) could issue a winding up petition against Owen. We therefore request approval to allow Owen to pay the above amounts.

There are further capital amounts in aggregate of £296k due to be paid to retiring partners in June. However, we hope that by then Owen will have at least signed heads of terms with a white knight suitor which would allow communication with retiring partners about non-repayment of their capital to be conducted."

The document, it can be seen, therefore, refers to a schedule, presumably that attached to Jonathan Brown's 11 May 2010 email, as *"showing an amount of capital of £382k due out to retiring partners by 31st May 2010"* and then goes on to identify Mr McCarthy. This would appear to suggest that Dave Clark was regarding Jonathan Brown's email as constituting a request for consent to payment of Mr McCarthy's PPL loan. However, the document appears in the trial bundles behind an email from Dave Clark sent to Eric Sokolowski and Stephen Hair, in which he stated as follows:

"I've made a small amendment to the recommendation re payments of May capital ie I've carved out the McCarthy payment for now".

Whether the document in the trial bundles is the amended version seems unlikely. However, either way, there is some support to be found in it for RBS having regarded Jonathan Brown's 11 May 2010 email as including a request for consent which applied to Mr McCarthy.

55. This is a matter to which, in the circumstances, I shall return. However, continuing with the narrative, after a formal credit submission (in the form of the document from which I have just quoted) and emails passing between Eric Sokolowski, Peter Ballard, Dave Clark and Stephen Hair on 13 May 2010. The first of these emails is from Eric Sokowloski, who appears to have adapted the language of the document in telling Peter Ballard (with Dave Clark and Stephen Hair copied in) the following:

"Owen have provided the Bank with a revised schedule showing an amount of £382k due out to retiring partners by 31st May 2010. This is a significant increase from the amount previously advised to the Bank of £160k. The difference is largely due to retirement deeds that were reached with department heads that neither Owen central management team nor finance were aware of, in part because the issue and quantum of capital repayment is not something that majority of partners would even consider taking into consideration when reaching an agreement. ...

We are requesting that the Bank pay PPLs to the following departing members in order to avoid threatening the AMA process that has progressed with a few potential White Knights and avoid wind up petitions which would revoke Owen's license [sic] to trade."

There then followed a listing of names and amounts, and then this:

"Mike McCarthy (£120k) is also due on May 31st, but we hope to have more positive news on a sale of the business (HoTs for example) before considering this payment. ...".

56. Again this is an email to which I shall have to return. What matters, for present purposes at least, is that, after these internal exchanges on 13 May 2010, the same day, Stephen Hair emailed Jonathan Brown in response to his email and schedule as sent on 11 May 2010, confirming that *"we have received internal Bank approval to consent to Owen making the following payments on the contractual due date (as requested by you below)"*, and then listing names and payments amounting to £262,000.

57. Subsequently, on 25 May 2010, James Hayward telephoned Stephen Hair and informed him that Mr McCarthy's current account at the LLP was £138,000 overdrawn. Stephen Hair, a number of whose emails Mr Kynoch and Mr Fennell placed particular reliance on, reported on this conversation to Dave Clark (copying in Freshfields) the same day. In his email, he said this:

"Apparently his [Mr McCarthy's] retirement deed also says that he is entitled to partner drawings in June and July, notwithstanding he is retired and has also started work at Kennedys. His current account is also in deficit to the tune of c£138k. Apparently he only has to repay this once the 09/10 accounts are signed off - which is due to be January 2011 (query whether you can construct an argument that if they are never signed off - eg due to administration - he doesn't have to repay it?).

Camerons… - and this seems right given the obligation on Owen is to repay RBS for McCarthy's PPL, and the obligation is on McCarthy to repay Owen's current account so no mutuality - but I wonder whether there is enough smoke/issues to delay things for a short while.

James is going to forward me … a copy of the retirement deed, then we can get our thinking caps on".

Later the same day, Stephen Hair emailed Dave Clark again (and Freshfields), saying this:

"Apologies for the stream of consciousness, but one thing I would like to explore further. Can we approach McCarthy like this: Owen don't pay RBS under the PPL; RBS therefore go after McCarthy. When McCarthy pays, he then claims against Owen for breach of his retirement deed (loss - £130k). At which point Owen says McCarthy owes them £138k therefore set off.

Problems could be:

1. Chris's previous point about McCarthy just putting a winder in as soon as Owen don't repay the RBS PPL;

2. McCarthy claiming specific performance of the retirement deed (to which Owen could believe that it cannot pay, though that would then give McCarthy evidence of being unable to pay its debts for the purpose of a winding up petition);

3. McCarthy claiming his current account is not repayable until the 2010 accounts are signed off by the members (which may never happen) - though the amount is unlikely to change given he has left the firm, so the sign off by members would appear to be purely perfunctory so far as McCarthy is concerned."

Mr Kynoch and Mr Fennell submitted that these emails demonstrate that Stephen Hair and Dave Clark were driving the strategy to delay payment of Mr McCarthy's PPL loan. Again, this is a matter to which I shall return.

58. The next day, 26 May 2010, the LLP wrote to Mr McCarthy, telling him about the overdraft, which it was explained *"after provision for tax liabilities"* amounted to £94,954.41. Mr McCarthy telephoned James Hayward the same day, an email from James Hayward to Stephen Hair, Eric Sokowloski and Jonathan Brown confirming that, in view of the conversation he had had with Mr McCarthy, there was *"absolutely no way he is going to agree to any set off"*, Mr McCarthy denying *"all knowledge of his current account deficit"*. The email added that James Hayward could *"pretty safely say that he [Mr McCarthy] is going to go for the jugular next Tuesday"*. In an email sent that evening by James Hayward to Stephen Hair, copying in Jonathan Brown and Dave Clark, James Hayward referred to Mr McCarthy having told him that *"he will be forced to issue a winder against the firm failing payment of his PPL to protect himself on the basis that RBS will pursue him for his loan next week"*. The email went on to state that *"As a counter to this we have put a proposal to him that if he pays off his current account we will seek RBS' consent to repay his PPL in line with these payments"*. This email was followed shortly afterwards by James Hayward telling Stephen Hair (with Jonathan Brown copied in) that *"if we can get consent from RBS by Friday then we can neuter his position with regard to any winder"*, a statement which ended with a *"?"*.

59. The day after this, 27 May 2010, Mr McCarthy wrote to Jonathan Brown, stating that his overdrawn current account had never before been mentioned and seeking confirmation that his PPL loan would be repaid by the LLP, indicating that failure to do this would result in a winding-up petition being issued. The following day, 28 May 2010, having taken legal advice from Freshfields, the LLP wrote to Mr McCarthy rescinding the Retirement Deed for misrepresentation, namely the suggestion that Mr McCarthy had told the LLP that he had no firm to join at the time of negotiating his retirement when, in fact, he had an offer from Kennedys. The LLP asserted that Mr McCarthy had no monetary claim under which to issue a winding-up petition.

60. Notwithstanding what was stated in this letter, it emerged when Mr McCarthy gave evidence that he had not misrepresented his employment prospects when entering into the Retirement Deed. Indeed, as Mr McCarthy explained in evidence, without contradiction from Jonathan Brown, who did not give evidence, Jonathan Brown had told Mr McCarthy at the time of his retirement in October 2009 that he should *"go and get another job"*, so that the LLP knew very well, and indeed encouraged, Mr McCarthy to find another position at a different firm. Accordingly, it seems to me that there is some force in Mr Kynoch's and Mr Fennell's submission that the rescission letter was something of a ploy.

61. The other thing to note at this stage is that the letter was sent to Mr McCarthy against the backdrop of Stephen Hair sending Dave Clark, Eric Sokowloski and Freshfields an email the same day, a Friday, just after 6 pm, in which he stated as follows:

"James Hayward just called me. The letter going out to McCarthy isn't going to mention rescission as Camerons have advised Owen's actions and correspondence with McCarthy since it found out about his Kennedys employment have effectively

ratified to retirement deed. He didn't go into any detail as to what the letter will actually say.

He said that Owen were very concerned McCarthy would just go straight to the press when he got the letter on Tuesday, and the feeling was they should just pay off his PPL to keep everything quiet. It's clear they feel he is a loose cannon.

I said if that was their approach then Owen would have to make a formal request of the bank, but whilst I was not the person who would ultimately make the credit call, for the reasons we all ran through on the court earlier I did not think we would recommend to credit to allow this payment given the number of arguments against McCarthy exception. If we think the threat of a winder can't really hurt is, the only thing we have to fear is the PR - and £120k is expensive to manage PR, when there is plenty of defence/mud to fly the other way."

62. This is another email which Mr Kynoch and Mr Fennell submitted strongly supported Mr McCarthy's case, albeit that apparently Stephen Hair was under the impression that there would be no mention of rescission, along with, he also submitted, Dave Clark's short response sent at just after 7.30 pm:

"Everything you say is spot on.

Next week will be tough but the Firm need to just batten down the hatches and get on with it. In a funny kind of way it's probably quite good that the first person we say No to is MM as it will really test our arguments."

63. The 31 May 2010 deadline then arrived, and no payment was made to RBS, whether from Mr McCarthy or from the LLP. The next day, 1 June 2010, the Tuesday after the Bank Holiday Monday, Mr McCarthy was in touch with RBS, leaving a telephone message asking if funds had been received to repay his PPL loan. The same day he issued his winding-up petition. Also on 1 June 2010, however, at about 3.45 pm Glenda MacGeekie emailed Stephen Hair in, *inter alia*, the following terms:

"As you are aware, Halliwells LLP is contractually obliged under the Retirement Deeds of Mike McCarthy [and others who were named] and its undertakings to RBS … to repay their capital in the following amounts and on the dates set out below:

M McCarthy – RBS £120k - … payment due 31.05.10

…

… Halliwells has … endeavoured to 'buy time' with Mike McCarthy by rescinding his retirement deed on the basis of the misrepresentation during the negotiations and to invite him to a meeting with a view to negotiating a set off against his current account deficit. However, the lapse of time between discovering the misrepresentation and taking steps to rescind the retirement deed together with the fact that we have complied with certain terms of the retirement deed thereby affirming the retirement deed mean that Halliwells is unlikely to succeed if challenged.

Notwithstanding the above, the Board of Halliwells are of the view that failure by Halliwells to meet its contractual obligations to its retiring partners ... will have serious repercussions:

…

We fully understand and share the reluctance of the Bank to consent to the payments being made, but we believe they are in the category of ransom creditors who will fully pursue their rights to recover.

We still intend to try to arrange a meeting between Mr McCarthy and Camerons/BDO to see if there can be an agreed offset in relation to the overdrawn current account but in the event such meeting is unsuccessful we will need an urgent alternative option.

We therefore formally request the bank to consider giving its consent to the payments scheduled above. We look forward to hearing from you as a matter of urgency."

64. Just over an hour later, at 4.55 pm, Stephen Hair emailed back, saying this:

"Following our call earlier, I understand this request is no longer on the table and Owen will be reverting to the Bank with a revised request/suggestion in the next couple of days."

No subsequent request was made concerning Mr McCarthy by the LLP.

65. The winding-up petition having been issued, the LLP's accounts were then frozen three days later, on Friday 4 June 2010. This was followed the following Monday, 7 June 2010, by the Court granting a validation order for accounts to be unfrozen, something which Mr McCarthy agreed not to oppose, and Mr McCarthy ultimately agreeing to withdraw the petition on Wednesday 16 June 2010. Withdrawal followed a meeting on 4 June 2010 between Dave Clark, Stephen Hair and Mr McCarthy, at which Mr McCarthy offered to withdraw if RBS allowed his PPL loan to be repaid, plus his monthly drawings and costs, totalling £169,000, all after a sale of the LLP. In the event, the proposed deal came to nothing.

66. The same day as the winding-up petition was withdrawn, 16 June 2010, RBS informed the LLP of its intention to withdraw the Overdraft Facility, and this is what was done on 25 June 2010. On 21 June 2010, the LLP resolved to file a notice of intention to appoint administrators and, on 20 July 2010, an administration order was made when the Court also sanctioned the purchase by four law firms of various assets of the LLP.

67. It is against this factual background, albeit that there are more matters which I shall have to explore in what follows, in particular in relation to various points made by Mr Kynoch and Mr Fennell by reference to internal RBS exchanges, that I now come on to consider the various defences which have been raised by Mr McCarthy to RBS's claim. This, in circumstances where, as I have indicated and as Mr McCarthy fairly accepted in cross-examination, but for these defences, it is common ground that he is liable to RBS by virtue of Clause 6.1 of the PPL.

Inducing breach of contract

68. I start with the case which, although put forward in the alternative in the Written Opening Submissions served on Mr McCarthy's behalf, in Mr Kynoch's and Mr Fennell's Written Closing Submissions became Mr McCarthy's primary case. This is the allegation that RBS induced the LLP to act in breach of the Retirement Deed and/or the LLP Deed and/or the LOU by not repaying RBS the amount of his capital and thereby discharging Mr McCarthy's own liability to RBS under the PPL. In addressing this issue, I shall endeavour to deal with the vast majority of the points raised by the parties. However, there were very many points indeed, and it is not feasible that I address every single point. I confirm nevertheless that I have taken into account everything which was submitted to me, by both sides, and all of the evidence before me. If I do not specifically address any particular point, therefore, it should not be assumed that I have failed to take it into account as that is not the case.

69. It was submitted by Mr Kynoch and Mr Fennell that, in insisting on the ROR Letter and, accordingly, on being asked for its consent to any PPL loan payments being made, RBS created what Mr Kynoch and Mr Fennell described as a *"platform"* to induce a breach of the LLP's obligations. Mr McCarthy's case is that this *"platform"* was then used when, as it was suggested, the LLP made requests for consent to Mr McCarthy's PPL loan being repaid, and those requests were turned down, alternatively, if there were no such requests made, in circumstances where the only reason why that was the case was that RBS had made it clear to the LLP that requests concerning Mr McCarthy would not be met with agreement that his PPL loan should be repaid.

70. It was additionally submitted that this is not a case where the defence of justification applies. This last matter is one to which I shall return. It is convenient to address it separately, after first setting out the legal principles which apply to the cause of action itself, as opposed to this particular defence.

The law

71. The elements of the tort of procuring/inducing a breach of contract are described in *Clerk & Lindsell (21st Ed., 2014)* at paragraph 24-14:

"Knowingly to procure or, as it is often put, to induce a third party to break his contract to the damage of the other contracting party without reasonable justification or excuse is a tort. In Quinn v Leathem Lord Macnaghten said that 'a violation of a legal right committed knowingly is a cause of action, and ... It is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.' It had been so decided in Lumley v Gye by a majority in the Queen's Bench with respect to contracts for personal services, and later by the Court of Appeal when it was held to extend to other classes of contract. It has now been held to apply to contracts of all kinds. But where A induces B to break his contract with C, it has been held that C can sue A but B cannot (at any rate where the procurement is direct) because B 'must resist A's effort by strength of will'. Thus, where cricket authorities imposed a ban aimed at persuading players who had entered into contracts with a promoter to withdraw from the contracts whether or not it was lawful so to do, the promoters (not the players) brought an action based on this tort. The ingredients of the tort were restated by the House of Lords in OBG Ltd v

Allan with a view to drawing a clear line between this, the Lumley v Gye tort, and the tort liability for unlawful interference.

72. Based largely on what the House of Lords had to say in ***OBG Ltd v Allen*** [2008] 1 AC 1, paragraph 25-15 then goes on to state as follows:

"'An act of inducement is not by itself actionable.' The procurer must act with the requisite knowledge of the existence of the contract and intention to interfere with its performance: a 'two-fold requirement'. The claimant must show that there was an intentional invasion of his contractual rights and not merely that the breach of contract was the natural consequence of the defendant's conduct; he must show that the breach of contract was an end in itself or the means to an end. The defendant must be shown to have knowledge of the existence of a contract; but 'in many cases a third party may be deemed to know of the almost certain existence of a contract and indeed of some of its likely terms'. The defendant need not know of the precise terms to be liable, for given that he knew of the existence of the contract, the test of his intention is objective. However, it has been accepted that an honest belief by the defendant that the outcomes sought by him would not involve any breach of contract was inconsistent with an intention to induce breach of contract even where the belief was mistaken in law, muddleheaded or illogical. Good faith as such is no defence if knowledge and intention are proved. If the defendant is in 'honest doubt' about the contract, he may escape liability, but only where that doubt goes to the existence of the contract, not to 'the legal result of known facts'."

73. As to intention, Miss Eborall referred to the following passages in the speech of Lord Hoffmann in the ***OBG*** case at [42] and [43]:

"[42] The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. As I said earlier, the Dunlop employees who took off the tyres in GWK Ltd v Dunlop Rubber Co Ltd (1926) 42 TLR 376 intended to advance the interests of the Dunlop company.

[43] On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended That, I think, is what judges and writers mean when they say that the Claimant must have been 'targeted' or 'aimed at'. In my opinion the majority of the Court of Appeal was wrong to have allowed the action in Millar v Bassey [1994] EMLR 44 to proceed. Miss Bassey had broken her contract to perform for the recording company and it was a foreseeable consequence that the recording company would have to break its contracts with the accompanying musicians, but those breaches of contract were neither an end desired by Miss Bassey nor a means of achieving that end."

74. Miss Eborall went on to make the point that, if a defendant merely prevents performance of another's contractual obligation, but does not persuade the third party to break its contract, then no tort of inducing a breach of contract is committed. To induce a breach of contract, a defendant's conduct must actually have caused a breach of contract. As a result, the range of acts which can amount to wrongful procurement falling within the tort of inducing breach of contract is reduced from what would otherwise be the case. Lord Hoffmann put it in the following way in the ***OBG*** case at [44]:

"Finally, what counts as a breach of contract? In Torquay Hotel Co Ltd v Cousins [1969] 2 Ch 106 , 138 Lord Denning said that there could be liability for preventing or hindering performance of the contract on the same principle as liability for procuring a breach. This dictum was approved by Lord Diplock in Merkur Island Shipping Corpn v Laughton [1983] 2 AC 570, 607–608. One could therefore have liability for interference with contractual relations even though the contracting party committed no breach. But these remarks were made in the context of the unified theory which treated procuring a breach as part of the same tort as causing loss by unlawful means. If the torts are to be separated, then I think that one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability. Cases in which interference with contractual relations has been treated as coming within the Lumley v Gye tort (like Dimbleby & Sons Ltd v National Union of Journalists [1984] 1 WLR 67 and [1984] 1 WLR 427) are really cases of causing loss by unlawful means."

75. Lord Nicholls described the position at [178]-180] as follows:

178. ... There is a crucial difference between cases where the defendant induces a contracting party not to perform his contractual obligations and cases where the defendant prevents a contracting party from carrying out his contractual obligations. In inducement cases the very act of joining with the contracting party and inducing him to break his contract is sufficient to found liability as an accessory. In prevention cases the defendant does not join with the contracting party in a wrong (breach of contract) committed by the latter. There is no question of accessory liability. In prevention cases the defendant acts independently of the contracting party. The defendant's liability is a "stand-alone" liability. Consistently with this, tortious liability does not arise in prevention cases unless, as was the position in GWK, the preventative means used were independently unlawful.

179 Jenkins LJ made this point in D C Thomson & Co Ltd v Deakin [1952] Ch 646 , 693:

'acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such breach.' (Emphasis added.)

Evershed MR was of the same view. Suppose, he said, a defendant buys up all the commodities of a particular character with the object of preventing performance of a contract whereby the claimant would receive a supply of those commodities. The defendant would not act tortiously in such a case: p 680.

180 Given this difference between prevention and inducement, it is confusing and misleading to treat prevention cases as part and parcel of the same tort as inducement cases. The rationale is not the same, nor are the ingredients. But the rationale and ingredients of liability in prevention cases are the same as those of the tort of interference with a business by unlawful means. Prevention cases should be recognised for what they are: straightforward examples of the latter tort, rather than as exemplifying a wider version of Lumley v Gye labelled "interference with contractual relations."

76. Miss Eborall pointed out that this issue was considered also by Arden LJ In ***Meretz Investments NV v ACP Ltd and others*** [2008] Ch 244. In that case, the second claimant granted a development lease to the first defendant for the construction of penthouses. The first defendant undertook to give to the first claimant a share of the sale proceeds plus a leaseback option of the penthouses, should the first defendant fail to develop in accordance with the agreed timetable. The second defendant, the first defendant's parent company, guaranteed the first defendant's obligations and also provided funding to the first defendant for the development. The second defendant held a charge over the first defendant's development lease by way of security for that funding. When the second defendant exercised its power as mortgagee to sell the development lease to the fifth defendant, the first and second defendants were in breach of their contractual obligations to the first and second claimants under the preliminary agreement and the guarantee. The first and second claimants alleged that the second and fifth defendants had induced a breach of contract by exercising the power of sale and by purchasing the development lease.

77. Arden, Toulson and Pill LJJ held that there was no inducement by the second defendant's exercise of its sale rights as mortgagee, or by the fifth defendant's purchase. Arden LJ stated as follows at [136]-[140]:

"136 It is not suggested in the OBG case that there was any difference between the approach of Lord Nicholls and that of Lord Hoffmann to the question of inducement ...

137 On the face of it the distinction drawn by Lord Nicholls as between prevention of performance and inducement would suggest that there was an inducement in this case. ACP was, as Mr Boyle points out, a party to the wrap around agreement and FP and ACP, as parent and subsidiary respectively, could not be said to act independently. However, in my judgment, it is necessary to look to the substance and not the form. Although ACP was a party to the wrap around agreement, it had no role to play in FP's decision to enforce the charge or in its arrangements for the sale to Mr Tamimi. This was not, after all, the normal case where a contracting party is induced to commit a breach of contract. In the normal situation a contracting party has an option whether to perform his contract or to pay damages. Here the creation of the FP charge removed that choice once the power of sale became exercisable and had been exercised. In these circumstances the only course of action open to ACP was to pay compensation.

138 Thus the present case is not a persuasion case but a prevention case, as those terms are defined by Lord Nicholls. It therefore has to be shown that the preventative means used by FP were "independently unlawful". This cannot be

done because FP was contractually entitled as against ACP and Britel to exercise its power of sale. (There is no evidence that the defendants caused any breach of ACP's obligation to pay damages.)

139 I consider that Lord Hoffmann's test leads to the same answer. It is not enough to show that there was a relationship of parent and wholly-owned subsidiary between ACP and FP or that ACP was a party to the wrap around agreement or to some of the negotiations which preceded it. It would have to be shown that FP's "acts of encouragement, threat, persuasion and so forth have a sufficient causal connection with the breach by the contracting party to attract accessory liability". But there is no evidence of any acts of encouragement or any conduct on the part of FP in the form of the wrap around agreement which had the effect of preventing ACP from delivering the development sublease when the leaseback option was exercised. The fact was that Britel had agreed to the creation of a contractual structure which gave FP a charge over the development lease and it was part and parcel of that structure that FP could take it out of ACP's power to deliver the development sublease. The die had been cast long before the wrap around agreement was thought of. In the circumstances the instrumentality of FP, which exercised its power of sale and, as it were, lit the blue touch paper which caused the proprietary rights conferred by the leaseback option to be destroyed, did not in the circumstances constitute a sufficient causal connection to attract accessory liability.

140 An analogy can be drawn between the inducement by exercising contractual rights as a secured creditor and the situation where, to enable it to obtain moneys to repay funds borrowed to purchase shares in the company, a secured creditor of a company enforces a pre-existing charge. In MT Realisations Ltd v Digital Equipment Co Ltd [2003] 2 BCLC 117 this court held that the company did not give "financial assistance" contrary to section 151 of the Companies Act 1985 by allowing a secured creditor to exercise its secured rights because the secured creditor was entitled to exercise those rights by reason of a charge granted prior to that purchase. So, too, here ACP has not been induced by FP and Mr Tamimi to breach its contract with Britel. FP had a contractual right to exercise its power of sale as a secured creditor as against both Britel and ACP."

78. Accordingly, Miss Eborall submitted and I agree, it is for Mr McCarthy to prove that the LLP would not have breached Clause 3 of the Retirement Deed but for what RBS did. The Court of Appeal in the ***Meretz*** case held also that the second and fifth defendants did not have the requisite intention to induce a breach of contract. In this regard, Miss Eborall drew attention to Arden LJ's summary of the legal requirements for knowledge and intention at [114]:

"Accordingly, to be liable, a person must know that his action will result in a breach of contract: per Lord Hoffmann [in OBG v Allan] at para 39. He need not have a desire to injure the claimant: per Lord Nicholls of Birkenhead at para 192. If a defendant genuinely believes facts which if true show that there was no breach of contract he is not liable: British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479…Knowledge of the contract is required, but this may include "shut eye" knowledge, that is, knowledge that would have been obtained had not a decision been made not to inquire as to the existence of a relevant fact: per Lord Hoffmann at para

41 and per Lord Nicholls at para 192. If a person intends to cause a breach of contract it does not matter that he intended thereby to achieve some other purpose of that he would have preferred not to induce a breach: per Lord Hoffmann at para 42. Merely to foresee that breach of contract will occur is not the same thing as intending it: per Lord Hoffmann at para 43. The intention would not be present simply because he reached the view that there would be no breach of contract because of a muddle-headed or illogical belief: per Lord Nicholls at para 202."

79. Accordingly, Miss Eborall submitted, it is not enough for a claimant to prove that a defendant knows his actions will cause harm to the claimant, when that is the mere by-product of the exercise of the defendant's lawful rights. If the defendant believes at all times that it is acting lawfully, then albeit that it may foresee the consequences of its actions, he does not intend to induce a breach of contract. In the present case, therefore, Mr McCarthy must prove that RBS must have actually realised that the effect of its actions would induce a breach of the Retirement Deed. It does not matter, if RBS did not have this knowledge, whether it ought reasonably to have done so. Thus, in ***Mainstream Properties Ltd v Young***, one of the cases considered by the House of Lords in ***OBG***, the alleged inducer, Mr De Winter, had raised the question of a conflict of interest and had received an assurance (from the contract breaker) that there was no conflict. Accordingly, Mr De Winter honestly believed that his actions would not involve them in the commission of breaches of contract: see [67]-[69] (per Lord Hoffmann). This meant that he was not guilty of the tort of inducing a breach of contract. As to intention, Miss Eborall went on to submit that it is necessary to distinguish between means, ends and consequences: ***OBG*** at [42] (again per Lord Hoffmann). If the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then it cannot be said to have been intended. Accordingly, Miss Eborall submitted and again I agree, Mr McCarthy must prove: first, that RBS knew that its acts would result in a breach of the Retirement Deed; and, secondly, that RBS intended the LLP to breach clause 3 of the Retirement Deed with Mr McCarthy.

The matters relied on by Mr McCarthy

80. Turning, then, to the matters relied on by Mr McCarthy in support of his case, it is fair to say that by the time of Mr Kynoch's and Mr Fennell's Written Closing Submissions there had been something of a shift in how the case was put. No longer was it suggested that the ROR Letter in itself constituted procurement of a breach. Rather, as I have pointed out, the case became that the ROR Letter was the *"platform"* which allowed RBS to *"orchestrate"* and control the strategy as to whether or not Clause 3 of the Retirement Deed, and the LOU, were honoured. The focus of Mr McCarthy's case, then, was not on the ROR Letter itself but on whether the LLP made requests to RBS for consent to Mr McCarthy's PPL loan being repaid, and whether any such requests were turned down, alternatively, if there were no such requests made, whether this was because RBS had, in effect, made it clear to the LLP that there was no point in requests being made because they would not result in consent being given by RBS.

81. Although, given this shift in Mr McCarthy's position, it is no longer in dispute that the ROR Letter itself amounted to procurement, both sides agreeing that it did not of itself do so, it is appropriate nonetheless that I explain why the case based on the ROR Letter, and only the ROR Letter, was not a case which could succeed. Mr Kynoch and

Mr Fennell suggested that the LLP really had no choice in the matter of the ROR Letter since, if the LPP had not, as they put it in their Written Closing Submissions, *"played ball"*, RBS was likely to have withdrawn its financial support. That may well be right, but it does not mean that requiring that the LLP abide by the ROR Letter entailed procurement by RBS of any breach of contract to which the LLP was a party.

82. As Miss Eborall explained, the context needs to be borne in mind, specifically the fact that since 2007 the LLP had been indebted to RBS to the tune of £21 million and the LLP had consistently failed to meet budgets leading up to the parties' entry into the Refinance Agreement. This agreement was designed to preserve as much capital within the LLP as possible, hence provisions such as Clause 9.10(d) to which I have referred, as well as another obligation which I have not yet mentioned, Clause 9.10(f), under which the LLP undertook not to amend the provisions of its constitutional documents in relation to the existing terms of notice to be provided by any exiting Member. In these circumstances, news that the LLP had entered in to the Retirement Deed with Mr McCarthy, bringing forward his retirement date forward from October to 31 May 2010, allied with the LLP telling RBS on 25 March 2010 that the LLP had also agreed retirement dates in June 2010 with three other retiring Members in June 2010 unsurprisingly caused some concern at RBS and explained why Dave Clark sent a request by email on 30 March 2010 asking to be sent by the LLP *"as a matter of urgency"* a schedule of retiring Members, including what had been agreed and a copy of the retirement deeds. Indeed, in respect of one particular retiring Member, Jonathan Brown told Dave Clark that he was going to sign a retirement deed which effectively deferred repayment of capital until after the retirement date, to which Dave Clark responded by making the point that RBS did not agree to this happening. This was what led to Freshfields' email to Jonathan Brown on 14 April 2010. It is also what led, directly so it seems, to the ROR Letter.

83. In short, RBS was quite clearly taking steps to ensure that its position was safeguarded and, so far as possible, to ensure also that the LLP was able to continue. RBS could obviously have taken a different course and not entered into the Refinance Agreement, refusing to provide any further lending and enforcing its existing rights as against the LLP. RBS chose, however, not to do this, provided that the condition in the ROR Letter that payments to PPL providers could not be made without RBS's consent was abided by.

84. Once this context is understood, and perhaps in any event looking simply at the terms of the ROR Letter itself, it will be appreciated that the ROR Letter cannot conceivably have amounted, in and of itself, to a procurement of a breach of contract by the LLP. The ROR Letter does not prevent repayment of PPLs but simply requires that the LLP seeks RBS's consent to repayment. There was nothing to stop the LLP making a repayment provided that consent was sought and obtained from RBS. Indeed, as the evidence demonstrated, consent was sought in relation to other partners (or Members) and consent was given. The other option for the LLP was to finance repayments out of other (non-RBS) funds, something which appears to have happened in one case. Mr Kynoch understandably poured some scorn on the likelihood that this would happen in any significant way. However, what matters for present purposes is that the ROR Letter did not constitute RBS's refusal to repayments being made, merely a requirement that, if repayments were to be made using monies lent by RBS to the LLP, then consent should first be sought and obtained.

85. I agree with Miss Eborall's submission that, in these circumstances, it cannot sensibly be suggested that the ROR Letter involved the type of persuasion to which Lord Nicholls referred in the ***OBG*** case at [178]. The case is, at the most, an instance of RBS preventing performance of the LLP's contractual obligations. Even then, however, there would only be prevention if consent had been sought and it had been refused. The ROR Letter did not itself constitute the refusal of consent; it simply set up a mechanism by which consent could be sought. In any event, prevention is not enough to establish liability, as Arden LJ also made clear in the ***Meretz*** case at [139]. I agree also with Miss Eborall that, were the ROR Letter to be regarded as giving rise to liability, it would result in a *"startling consequence"*, as she put it, namely that any lender who is aware of contracts held by its debtor would face potential liability for inducing breaches of those contracts if it issued any reservation in respect of its contractual rights.

86. I come on, then, to consider Mr Kynoch's and Mr Fennell's submissions concerning requests made by the LLP to RBS for consent to payment of Mr McCarthy's PPL loan. The first thing to note about this case is that Mr Kynoch and Mr Fennell were not in a position to point to any document which contained an express request for consent in respect of Mr McCarthy. Their submissions instead concentrated on references in various documents which, they suggested, indicated that such requests had been made. I address these in what follows. First, however, having made the point that Mr Kynoch and Mr Fennell did not suggest that there is any document in the trial bundles in which an express request concerning Mr McCarthy's PPL loan was made, I should deal with the request made in Jonathan Brown's email to RBS sent on 11 May 2010. This is a matter to which I have previously referred, noting in particular that it was not suggested by Mr Kynoch on Mr McCarthy's behalf that the email constituted a request for consent from RBS to make a payment as regards Mr McCarthy. In circumstances where in the email itself Jonathan Brown did not include reference to a request for repayment of Mr McCarthy's PPL loan, as borne out by the fact that Jonathan Brown described the *"quantum of capital due to retiring partners immediately due"* as amounting to *"£212k plus £50k in respect of tax balances"*, and this did not include anything in respect of Mr McCarthy, I consider that it would be wrong to conclude that Jonathan Brown was making a Mr McCarthy-related request in his email. I say this notwithstanding that in the updated schedule attached to the email there is an entry in the amount of £120,000 next to Mr McCarthy's name. Had Jonathan Brown intended to make a request in respect of Mr McCarthy, it would have been very straightforward to have included such a request in the body of the email. The fact that he did not do this must be taken as conclusive of the fact that no such request was made by the LLP to RBS in this email. I take account of the fact that in the document described as *"Owen – Update to Credit Wednesday, 12 May 2010"* reference is made to the updated schedule showing payments in the sum of £382,000, so including £120,000 in respect of Mr McCarthy, and that there is specific mention of Mr McCarthy when it is explained why there is an increase on the previous position. This does appear to suggest that internally RBS was under the impression that Mr McCarthy's indebtedness was to be discharged. The document then refers to the LLP having made a request that *"payment of the above amounts"*, so possibly including the £120,000 in respect of Mr McCarthy be made. However, this is followed by the email from Dave Clark to Eric Sokolowski and Stephen Hair, in which he described having made *"a small amendment to the recommendation re payments of May capital ie I've carved out the McCarthy payment for now"*. It would

seem, therefore, that Dave Clark appreciated, ultimately, perhaps in the final version of the *"Owen – Update to Credit Wednesday, 12 May 2010"* document, that Jonathan Brown had not actually made a request as regards Mr McCarthy. In circumstances where Dave Clark was not asked about this matter and where, in any event, the email sent on 11 May 2010 from Jonathan Brown to him does not specifically refer to a request as regards Mr McCarthy, I do not regard it as appropriate to conclude that the email did contain such a request.

87. I turn now to the matters on which Mr Kynoch and Mr Fennell did place reliance. As I shall explain, I am not persuaded that it has been established, on the evidence, that the LLP made a request for repayment of Mr McCarthy's PPL loan. On the contrary, I am clear that there is, in truth, no evidence to support Mr McCarthy's case that such consent was ever sought from RBS. It follows that, since there was no request, there was never a refusal on the part of RBS. There is no document in which a request concerning Mr McCarthy can be seen. Nor is there any document which suggests that such a request was made. Nor is there any evidence from any witness stating that a request was made. Dave Clark, in particular, was very clear that the LLP never made a request in respect of Mr McCarthy. Jonathan Brown was not called as a witness on Mr McCarthy's behalf. Nor was any other witness from the LLP called to give evidence that a request was made. Mr McCarthy himself, with characteristic fairness, acknowledged in his evidence, when asked by Miss Eborall, that, although as far as he was concerned there must have been a request made, he had no positive evidence which he himself could give that this was the case. This, it should be noted, is entirely consistent with his position at the time, as reflected in an email which he sent to Glenda MacGeekie on 7 May 2010, in which he stated as follows:

"More alarmingly you cannot tell me when and to whom the LLP made the request for repayment of my capital at RBS. The terms of the deed are clear and unambiguous. In the absence of a reply I am concerned that the LLP has no intention of honouring its obligations under the deed."

88. This email was sent in response to an email the same day from Glenda MacGeekie to Mr McCarthy stating as follows:

"we tried to obtain written confirmation from the bank that they will not consent for a request to repay your capital prior to retirement date but their response was to suggest another standard letter stating your obligations under the PPL which, we pointed out, was not helpful.

Unfortunately, the bank will not consent to repayment of capital to a partner whilst he or she is still a partner in the firm. I am not sure what more I can tell you."

Glenda MacGeekie did not state in this email, in terms at least, that a request had actually been made by the LLP concerning Mr McCarthy. The wording is vague and imprecise. It is quite evident that, on receiving Glenda MacGeekie's email, Mr McCarthy was himself dubious that a request had been made, given the lack of information as to when and to whom the request had been made. It is evident, too, that Mr McCarthy regarded the LLP as not intending to pay, which would be consistent with a view held by him at the time that no request had actually been made by the LLP to RBS. Tellingly, Glenda MacGeekie, another person who was not called to give evidence on Mr McCarthy's behalf despite being somebody who could easily say

whether a request was made concerning Mr McCarthy, does not appear to have replied to Mr McCarthy's email with the information which Mr McCarthy sought. There was, in fact, no further email correspondence between the LLP and Mr McCarthy leading up to his retirement on 31 May 2010 in which there was any reference to a request having been made. The only communications between the LLP and Mr McCarthy were in relation to his overdrawn current account deficit and the LLP's suggestion that it was entitled to rescind the Retirement Deed.

89. In contrast, there *are* documents from the LLP to RBS in which requests for RBS's consent were made in relation to other retiring Members. There can be no doubt, therefore, that, as is to be expected, the LLP knew how to go about making requests when it wanted consent to be provided by RBS. One example is, of course, the email sent to Dave Clark by Jonathan Brown on 11 May 2010. In the circumstances, I say no more about that email. However, it will be recalled that this email was preceded, as I have previously mentioned, by an earlier request which was mentioned in the *"Project Owen Update"* report dated 22 April 2010 and which involved repayment of a £9,000 PPL loan in respect of a different partner.

90. Despite the absence of any document in which an express request was made as regards Mr McCarthy and the absence of any evidence from any witness stating that a request was made, Mr Kynoch's and Mr Fennell's submission was that the fact that a request was made could be inferred from various documents. Indeed, Mr Kynoch and Mr Fennell even suggested that, on a proper reading of his witness statement, Dave Clark's own evidence was that such a request had been made. I shall return to this latter aspect in a moment. First, however, I should refer to the primary documents which Mr Kynoch and Mr Fennell submitted supported the drawing of the inference to which I have referred, starting with a letter which Jonathan Brown sent to Dave Clark on 17 June 2010. In that letter, Jonathan Brown stated as follows:

"Another huge distraction of senior management time has been dealing with the issue of retiring partners. In early April, we recommended to you that the firm should meet their legally binding obligations. We considered at the time that this would be in the wider commercial interests with the firm and the Bank. Given subsequent and ongoing events, we believe that this judgment call was correct."

Mr Kynoch and Mr Fennell placed heavy reliance on the reference to Jonathan Brown having *"recommended to you that the firm should meet their legally binding obligations"*. They submitted that this demonstrates that the LLP made a request not only in relation to other retiring Members but in relation also to Mr McCarthy. They furthermore suggested that the reference in the last sentence to a *"judgment call"* having been made by the LLP illustrates that, the request having been made in relation to all retiring Members (including Mr McCarthy), RBS had not given its approval to what the LLP had proposed, so establishing that RBS refused its consent as regards Mr McCarthy even if RBS gave consent in relation to other retiring Members.

91. I do not agree with Mr Kynoch and Mr Fennell about this. There is no mention in Jonathan Brown's letter of Mr McCarthy specifically. Nor, it follows, is there any mention of RBS having refused a specific request made in relation to Mr McCarthy. The letter is, in such circumstances, weak evidence, at best, that a request relating to Mr McCarthy was made by the LLP and that that request was refused by RBS. The

position would be different, or might be different, had there been a letter from Jonathan Brown in which mention was made specifically of Mr McCarthy, still more so if in that letter there was complaint that a specific request had been made but that it had been refused. The letter dated 17 June 2010 is far removed from such a message.

92. So, in my judgment, is one of the other main communications relied on by Mr Kynoch and Mr Fennell, namely Jonathan Brown's email to Dave Clark on 4 June 2010. This was sent in the context of Mr McCarthy having commenced the winding-up proceedings to which I have referred. Jonathan Brown stated as follows:

"Halliwells does not need the consent of RBS to make the payment to the retiring partner in question and did not need to adopt a position to enforce the payment. Halliwells could have paid the amount provided its account was not frozen but took cognizance of the Bank's views and wishes".

Mr Kynoch and Mr Fennell suggested that this email serves as further demonstration that discussions had taken place between Jonathan Brown and Dave Clark in which the LLP had asked that RBS agree to Mr McCarthy's PPL loan being repaid but that consent had been refused. Again, I cannot agree. Although it is right to acknowledge that this email was concerned specifically with Mr McCarthy, there is nonetheless no mention of any specific request having been made concerning Mr McCarthy's PPL loan. The email is in only general terms. It is also instructive that Jonathan Brown started the message by making the point that the LLP did not need RBS's consent to make the relevant payment as regards Mr McCarthy. This seems to me to make the very point which Miss Eborall made, namely that there was nothing to stop the LLP making the payment and so making it all the more difficult for it to be suggested that the only reason why a payment was not made as regards Mr McCarthy's PPL loan was that the LLP decided not to make a payment. The fact that the LLP might have taken *"cognizance of the Bank's views and wishes"* does not mean that RBS is liable to Mr McCarthy in the manner suggested by Mr Kynoch.

93. Mr Kynoch and Mr Fennell also highlighted the email from James Hayward to Stephen Hair and Dave Clark on 4 May 2010, to which I have previously referred and in which, dealing with Mr McCarthy specifically, James Hayward described him as *"pushing very hard on trying to obtain proof that RBS were a) spoken to about his PPL and b) have not given consent to payment of his capital prior to 31 May. We have stated that conversations were held with our relationship manager and this was the outcome but he wants 3rd party evidence"*. Mr Kynoch and Mr Fennell submitted that this email is especially important because James Hayward was referring to the LLP having asked RBS for consent as regards Mr McCarthy specifically, the reference to *"our relationship manager"* being to the LLP's RBS relationship manager. Again, I do not agree. Indeed, it is interesting that the email does not say, in terms, that a request for consent was made. Instead, the email is more vague than this, with its reference to RBS having been *"spoken to"*. It would have been a straightforward matter for James Hayward to have referred to a request as having been made, and to have done so with some precision concerning identity and timing. This was not done, and I find that curious. The more so, given that the context in which this email was sent was that Mr McCarthy was *"pushing very hard"* for precisely such information, as demonstrated by the email which he sent a few days later, on 7 May 2010, to Glenda MacGeekie. This is also demonstrated by an email sent by Mr McCarthy to Glenda MacGeekie on 30 April 2010, in which Mr McCarthy

asked, specifically, when the meeting when RBS was asked for consent took place and *"to whom at RBS the request was made"*. This email was sent in response to an email from Glenda MacGeekie saying that *"RBS was asked to consent to the repayment of your PPL and the request was made verbally in a meeting"*. Nor am I impressed by Mr Kynoch's and Mr Fennell's reliance on the reference to RBS not wanting *"to put anything in writing"*. Whatever that may have been concerned with, the fact remains that nowhere, whether in this email or in any other document, is there a reference to a specific request having been made and, unless there was a request, there was nothing to which RBS could consent.

94. There are other documents on which reliance was placed by Mr Kynoch and Mr Fennell and to which I shall come on to refer. I mentioned, however, that Mr Kynoch and Mr Fennell also suggested that it was Dave Clark's evidence, in his witness statement, that the LLP had made a request to RBS concerning Mr McCarthy's PPL loan. He relied specifically on the following passage at paragraph 44:

"On 4th May 2010 I received an email from James Hayward attaching correspondence between the Firm and the Defendant regarding repayment of the capital and PPL and specifically the Firm's request to the Bank for approval to repay his PPL".

Mr Kynoch and Mr Fennell submitted that this was Dave Clark saying that there was a request. They described the evidence as being *"clear and unequivocal"*, and as putting *"the nail in the coffin of [RBS's] 'no request' point"*. Mr Kynoch and Mr Fennell are quite wrong about this. As the passage quoted above amply demonstrates, Dave Clark was simply referring to the email from James Hayward which he and Stephen Hair received on 4 May 2010. He self-evidently was *not* saying that the LLP had actually made a request to RBS concerning Mr McCarthy. To suggest the contrary is to distort what is stated in paragraph 44; it is also to ignore Dave Clark's consistent evidence, both in his witness statement and whilst giving oral evidence, that no such request was made. Indeed, it is somewhat surprising that the point made concerning paragraph 44 was not a point which was explored with Dave Clark in cross-examination. It is clear that it should have been given the tenor of the other evidence given by Dave Clark and in view, indeed, of the language used in paragraph 44 itself. I reject Mr Kynoch's suggestion that there was no obligation to explore the matter with Dave Clark in cross-examination because this was a matter which is in Mr McCarthy's favour. That might well be the case when the position is consistent and clear. Here, however, if Mr Kynoch's reading of what is stated in paragraph 44 is correct, there was a very considerable lack of clarity and consistency; there was nothing *"clear and unequivocal"*. As such, the evidence needed obviously to be tested in cross-examination. It is clear to me that Mr Kynoch's and Mr Fennell's reliance on paragraph 44 was an afterthought and that its mention in their Written Closing Submissions was as opportunistic as it was mistaken.

95. Having concluded that no request was made by the LLP in respect of Mr McCarthy's PPL loan, I need now to consider Mr McCarthy's alternative case that the reason why no such request for consent was made is that RBS had, in effect, made it clear to the LLP that there was no point in requests being made because they would not result in consent being given by RBS. In this respect, Mr Kynoch and Mr Fennell pointed to an email exchange between Dave Clark and Stephen Hair on 4 May 2010. The first of these emails was from Stephen Hair to Dave Clark, in which Stephen Hair said this:

"It concerns me slightly but anything we may say or bring the heat from 31st of May (when his payment is due). Isn't the most straightforward way of dealing with this for Owen to play a straight bat and reiterate that RBS will only consider payments to retiring members once they fall due. McCarthy will be like a dog with a bone and not let it go no doubt, but they will just have to put up with that noise for the time being?

Thoughts?

In his reply the same day, Dave Clark stated:

"I think that least said is better in this instance. The Retail Bank along with Chris are drafting a very factual letter and that should be the end of it. We should mention this on tomorrow's call and advise that no one should be entering into direct debate with McCarthy (or anyone else for that matter) unless we agree it.

We just have to batten the hatches down and going towards the prize as best we can. It'll get hot but that's why Rita and Shay are there … ."

96. Mr Kynoch and Mr Fennell submitted that this exchange demonstrates that Dave Clark and Stephen Hair knew that Mr McCarthy was pressing to know whether RBS consented to repayment of his PPL loan on 31 May 2010, and that they also knew that the LLP would be in breach of the Retirement Deed if payment was not made on that date. They also submitted that it demonstrates that Stephen Hair and Dave Clark agreed a quite deliberate strategy to *"batten down the hatches"* and say as little as possible if Mr McCarthy were to ask any questions. In other words, Mr Kynoch and Mr Fennell submitted, Dave Clark and Stephen Hair decided, in effect, to operate a 'stonewalling' strategy. This strategy, Mr Kynoch and Mr Fennell submitted, is further supported by two further emails between Stephen Hair and Dave Clark on 25 May 2010. These are the emails to which I have previously referred. In the first Stephen Hair referred to James Hayward having called and to his being told by James Hayward that Mr McCarthy *"is due his £130k on 31st May"*. It will be recalled that this was the email which ended with Stephen Hair saying that he wondered *"whether there is enough smoke/issues to delay things for a short while"*.

97. Mr Kynoch and Mr Fennell submitted that this email shows that it was Stephen Hair and Dave Clark who were driving a strategy whereby payment of Mr McCarthy's PPL loan was delayed. This, Mr Kynoch and Mr Fennell suggested, was the conception of the *"smoke/issues"* delaying strategy. Mr Kynoch and Mr Fennell suggested that Stephen Hair gave wholly unsatisfactory and unreliable evidence when asked about this email, together with a further email which he sent on 28 May 2010 and in which he spoke of there being plenty of *"mud"* to fly the other way at Mr McCarthy. Mr Kynoch and Mr Fennell submitted that this was a strategy which was designed to prevent the LLP honouring its obligation to repay Mr McCarthy's PPL loan. The suggestion was that Stephen Hair refused to answer straightforward questions in relation both to this email and to a previous email which he sent on 25 May 2010, apologising *"for the stream of consciousness"* and suggesting an approach under which: *"Owen don't pay RBS under the PPL; RBS therefore go after McCarthy. When McCarthy pays, he then claims against Owen for breach of his retirement deed (loss - £130k). At which point Owen says McCarthy owes them £138k therefore set off"*.

98. It was Mr Kynoch's and Mr Fennell's submission that there could not be clearer evidence of Stephen Hair and Dave Clark conniving between themselves to procure a breach of Clause 3 of the Retirement Deed, with RBS as the puppet-masters orchestrating a strategy intending to procure a breach of the LLP's obligations to honour Clause 3. Mr Kynoch and Mr Fennell suggested that there is no other proper inference to be drawn from Stephen Hair stating that the LLP (*"Owen"*) should not make a payment and making no mention of the LLP having made no request for consent from RBS, with James Hayward 'in the loop' but not directing the strategy. Mr Kynoch and Mr Fennell highlighted in this context that Stephen Hair knew that the set-off argument which had been raised was a bad point, with Mr McCarthy likely to take the point, correctly, that any deficit on his current account was not due until 2011 when the LLP's accounts were to be signed off, as James Hayward emailed him on 26 May 2010 effectively cutting and pasting Camerons' advice that *"the deficit in the current account cannot be set off against the balance in the capital account"*, yet still Stephen Hair was keen that the point be maintained. Mr Kynoch and Mr Fennell submitted that, in these circumstances, it is clear that the strategy was not that of the LLP but that of RBS and specifically Stephen Hair together with Dave Clark, Mr Kynoch and Mr Fennell suggesting that the LLP was a 'reluctant passenger' in that strategy, as demonstrated by the fact that, in his email to Stephen Hair (and Dave Clark) on 26 May 2010, James Hayward stated:

"With regard to the RBS reservation of rights letter of 16 April we can assure you that no payments are being made to retiring partners without your consent but the letter itself legally puts the firm in a very difficult position. Could you consider a way of structuring it to take into account Cameron's advice?"

99. Mr Kynoch and Mr Fennell went on to refer to James Hayward's subsequent email the same day, in which he followed up on another email from him, to which I have referred, saying that *"As a counter to this we have put a proposal to him that if he pays off his current account we will seek RBS' consent to repay his PPL in line with these payments"*, by telling Stephen Hair (and Dave Clark with Jonathan Brown copied in) that *"if we can get consent from RBS by Friday then we can neuter his position with regard to any winder"*. Mr Kynoch and Mr Fennell suggested that the latter email indicates that the LLP was more comfortable paying Mr McCarthy's PPL loan than RBS was. Mr Kynoch and Mr Fennell suggested, however, that the most damaging emails as far as RBS is concerned are the emails which were sent between Stephen Hair and Dave Clark on Friday 28 May 2010, the last working day before Mr McCarthy was to retire (on 31 May 2010, which was a Bank holiday). I have referred to these emails earlier and so do not repeat their entire contents here. They are emails in which Stephen Hair told Dave Clark about a conversation he had had with James Hayward earlier, in which James Hayward had reported that *"the feeling was they [the LLP] should just pay off his PPL to keep everything quiet"*, Stephen Hair explaining to Dave Clark that he had said to James Hayward *"that if that was their approach then Owen would have to make a formal request of the bank, but whilst I was not the person who would ultimately make the credit call, for the reasons we all ran through on the court earlier I did not think we would recommend to credit to allow this payment given the number of arguments against McCarthy etc"*. Dave Clark's response was to state that "*In a funny kind of way it's probably quite good that the first person we say No to is MM as it will really test our arguments"*. This exchange, Mr Kynoch and Mr Fennell submitted, demonstrates that Stephen Hair and

Dave Clark, and so RBS, induced James Hayward not to make a request for consent from RBS as regards Mr McCarthy's PPL loan on the basis that, were a request to be made, it would be turned down.

100. I cannot accept these submissions. It is apparent that Stephen Hair and Dave Clark were by the stage that these emails were being sent not wanting Mr McCarthy's PPL loan to be repaid using finance provided by RBS. This, it should be remembered, was just before the LLP was due to repay Mr McCarthy's PPL loan, indeed arguably on the very day (in fact, after close of business on that day) when repayment was due given that the Monday (31 May 2010) was a Bank holiday, Mr Kynoch and Mr Fennell making the point in their Written Closing Submissions that the Friday was the last day on which payment could have been made. It does not follow from this, however, that Stephen Hair and Dave Clark, and so RBS, had been asked to give consent to such repayment and had turned down the request. On the contrary, it is self-evident from Stephen Hair's email report of his conversation with James Hayward that no request had been made by the LLP, whether on 26 May 2010 or at any earlier juncture. Nor does it follow that, as Mr Kynoch and Mr Fennell suggested, in telling James Hayward that, were RBS to receive a *"formal request"*, he *"did not think we would recommend to credit to allow this payment"*, Stephen Hair should be taken as having induced or procured the LLP to act in breach of contract. In my judgment, Stephen Hair was merely telling James Hayward what, hypothetically, would likely be the position were a request to be made. He was not telling James Hayward not to make a request. In any event, even if he is to be regarded as telling the LLP (through James Hayward), as Mr Kynoch and Mr Fennell would have it, not to bother making a request because it would be refused, it still seems to me that this would not amount to inducement or procurement such as to give rise to liability on RBS's part.

101. This is because, ultimately, it was for the LLP to decide whether to repay Mr McCarthy's PPL loan, and whether to seek to do so by seeking RBS's consent under the ROR Letter to utilise the financing provided by RBS or to use other resources. This was not RBS's decision. As Jonathan Brown succinctly, and accurately, put it in his email to Dave Clark on 4 June 2010, *"Halliwells does not need the consent of RBS to make the payment to the retiring partner in question"*. It was a matter for the LLP to decide whether to seek RBS's consent. The LLP chose not to do so, until 1 June 2010 when Glenda MacGeekie sent Stephen Hair her email at about 3.45 pm in which she sought RBS's consent as regards Mr McCarthy's PPL loan, only subsequently in conversation with Stephen Hair to withdraw, or at least not to pursue, the request. This, in any event, was after the 31 May 2010 deadline had passed. It is, accordingly, difficult to see how it could be relied on as an act of inducement or procurement, although I agree with Mr Kynoch when he submitted that Stephen Hair was somewhat cagey in cross-examination when asked about the matter, something which did not reflect especially well on him. Overall, however, in my assessment, Stephen Hair and, more so perhaps, Dave Clark were straightforward enough witnesses. I do not consider that Mr Kynoch's and Mr Fennell's charge that they were disingenuous is justified. On the contrary, Dave Clark in particular, despite being cross-examined at some length, was clear. He explained that he, and so RBS, knew about the various obligations which were owed by the LLP to retiring Members (including Mr McCarthy). As far as he was concerned, he was trying to make sure that those obligations were satisfied, hence the fact that consent was given when requests were

made by the LLP. He insisted, and I accept, that, had the LLP made a request in respect of Mr McCarthy, RBS would have considered the request *"appropriately"*. He also candidly accepted that, in the immediate lead-up to the 31 May 2010 deadline, he and Stephen Hair, and presumably others at RBS who were involved, were aware that breach was, as he put it, *"a possibility"*.

102. More generally, I agree with Miss Eborall that, whilst clearly Stephen Hair and Dave Clark were aware of, and to some extent involved in, the LLP's decision not to repay Mr McCarthy's PPL loan, this does not mean that RBS is to be treated as having induced or procured any breach of contract by the LLP. It was not RBS but the LLP which took the decision to tell Mr McCarthy that the Retirement Deed was rescinded because of a misrepresentation which Jonathan Brown, wrongly, suggested had been made. RBS knew about this decision and, it seems, was happy that the position taken by the LLP was taken. This does not mean, however, that RBS was orchestrating things in the manner suggested by Mr Kynoch, and so that RBS is liable as alleged. As made clear in the ***OBG*** case, by Lords Hoffmann and Nicholls at [39] to [44] and [168] to [193] respectively, there needs to be a causal connection between the inducement and the breach and alleged loss suffered. It is, therefore, for Mr McCarthy to establish in the present case that the LLP would not have breached Clause 3 of the Retirement Deed had it not been for what RBS did. I am wholly unsatisfied that this burden has been discharged by Mr McCarthy. In fact, having regard to the evidence as a whole, it simply cannot be concluded with any degree of confidence that the LLP would have repaid Mr McCarthy's PPL loan had it not been for RBS. The absence of a request for consent is highly significant in arriving at this assessment, in circumstances where it would have been so very easy for the LLP to make a request as the LLP did in relation to other retiring Members. Had this been done and had RBS refused to give its consent, then, the position in this case might have been different, although even then it would not necessarily follow that the claim would succeed given that the LLP was able to find the funds to pay another retiring Member without having to have recourse to RBS finance. That, however, is not the issue which in this case I have to determine. This case is more straightforward: the LLP made no request, and so RBS was never called upon to give its consent in respect of Mr McCarthy's PPL loan; RBS was never given the opportunity to veto repayment.

103. Nor, I might add, do I consider that it has been demonstrated that RBS realised that the effect of its actions would induce a breach of the Retirement Deed, bearing in mind that, in line with the approach adopted by the House of Lords in the ***OBG*** case (specifically when addressing the ***Mainstream Properties*** case), it is not enough that a claimant proves that a defendant knows that his actions will cause harm to the claimant since what is required is that the defendant intends to induce a breach of contract. In my judgment, it cannot be concluded in the present case that RBS knew that *its* acts would result in a breach of the Retirement Deed, given that as far as RBS was concerned the LLP did not need RBS's consent in order to pay out of non-RBS funds, and so that RBS intended the LLP to breach Clause 3 of the Retirement Deed. I am clear that it was not the target or aim of RBS that the LLP should be in breach of its contractual obligations. Breach may very well have been a foreseeable consequence, but that is not sufficient having regard to the approach described by Lord Hoffmann in the ***OBG*** case at [43].

104. I am not swayed from these conclusions by Mr Kynoch's and Mr Fennell's reliance in their Written Closing Submissions, at the end of the section addressing these issues, on an email sent by Dave Clark to Peter Ballard (copying in Stephen Hair and Eric Sokowlowski) on 6 June 2010. In that email, which was sent in the context of Mr McCarthy having started winding-up proceedings, Dave Clark said this:

"… had we just agreed that MM's capital could have been paid on the due date and I guess that would have been the end of it. We have challenged the position given his (disputed) overdrawn Current-Account and as a result we are looking to align his contractually due Capital against any sales proceeds we may receive for the business and in doing so avoid a chaotic insolvency. In doing this I agree that we may have to receive APS approval given it will be a deduction from the Sales proceeds, however had we not challenged then the payment would have been made. …".

The submission made was that Dave Clark was here accepting that it was only because he and Stephen Hair, and so RBS, had done what they had done that the LLP did not make repayment of Mr McCarthy's PPL loan. Mr Kynoch and Mr Fennell suggested that, as such, this email *"completely sinks [RBS's] flawed argument that the reason there was no payment of D's PPL was because there was 'no request'"* and, continuing the nautical theme, that the email *"completely torpedoes [RBS's] false claim"* that the reason that the LLP did not pay was because the LLP did not want to pay. I do not agree. The fact is that the email makes no mention of the LLP having made a request that RBS consent to payment. A consent was what was required by the ROR Letter if RBS finance was to be used by the LLP, and without a request payment utilising such finance could not be made. There may, therefore, have been a challenge by RBS but, without a request, RBS was never called upon to refuse its consent.

105. For all these reasons, I consider that the case advanced against RBS by Mr McCarthy cannot succeed. In the circumstances, it is not strictly necessary that I should go on and consider the defence of justification. It would only be necessary to do so were I to have decided that RBS had procured the LLP's breach of contract. Nonetheless, out of completeness, it is appropriate that I should address this issue.

Justification

106. It was common ground that there is no single definition of what is 'sufficient justification' and that the scope of the defence is inherently unclear. The existence of the defence was recognised, however, albeit that it was not considered in detail, in the ***OBG*** case: see per Lord Nicholls at [193]. It involves wide consideration of all the relevant facts, as the following extract from *Clerk & Lindsell* at 24-55 demonstrates:

"To this principle some exception has been made on the ground of justification but it has been recognised that 'it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is 'sufficient justification'. Regard may be had 'to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means used to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and … the object of the person in procuring the breach;' but it is for 'the good sense of the tribunal which [has] to decide … to analyse the circumstances and discover on which side of the line each case' falls."

107. Where a defendant possesses an equal or superior right he is justified in taking reasonable steps to protect it even though he knows they will cause a breach of the claimant's contract: ***Edwin Hill & Partners v First National Finance Corp plc*** [1989] 1 WLR 255. The relevant facts of that case were that: the plaintiff firm of surveyors were engaged by Mr Pulver, a solicitor and property developer, to perform architectural services on a particular development; Mr Pulver had raised finance for his developments from the defendant bankers, secured on the development; shortly after the purchase of the development, the property market collapsed and Mr Pulver's borrowings increased from £5 million to £9 million. The defendant bankers had three options: they could call in the loan; agree for Mr Pulver to refinance elsewhere; or finance the 'build-out' of the development themselves. The defendant bankers chose the third option, but only on condition that the plaintiff surveyors were replaced by a prestigious firm in order for the development to be a success. The Court of Appeal held that the surveyors' claim against the defendants for the tort of procuring a breach of contract failed because the defendants were entitled to rely on the defence of justification. At page 230 Stuart-Smith LJ reviewed the authorities and set out the following guidance on the scope of the defence of justification:

"Thus the following matters have been held not to amount to justification: (1) absence of malice or illwill or intention to injure the person whose contract is broken: Smithies v. National Association of Operative Plasterers [1909] 1 K.B. 310 and Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation [1905] A.C. 239; (2) the commercial or other best interests of the interferer or the contract breaker: Read v. Friendly Society of Operative Stonemasons of England, Ireland and Wales [1902] 2 K.B. 88 and 732, per Darling J. at p. 97 and per Collins M.R. at p. 737; Glamorgan Coal Co. Ltd. v. South Wales Miners' Federation [1905] A.C. 239 ,per Lord James at p. 252; Pratt v. British Medical Association [1919] 1 K.B. 244 , per McCardie J. at p. 266 and De Jetley Marks v. Lord Greenwood [1936] 1 All E.R. 863 , per Porter J. at p. 873; (3) the fact that A has broken his contract with X does not of itself justify X in revenge procuring a breach of an independent contract between A and B: Smithies v. National Association of Operative Plasterers [1909] 1 K.B. 310 , particularly, per Buckley L.J. at p. 337.

On the other side of the line justification has been said to exist where: (1) there is a moral duty to intervene, as, for example, in Brimelow v. Casson [1924] 1 Ch. 302 , where it was held that the defendants were justified in their actions since they owed a duty to their calling and its members to take all necessary steps to compel the plaintiff to pay his chorus girls a living wage so that they were not driven to supplement their earnings through prostitution; (2) the contract interfered with is inconsistent with a previous contract with the interferer (see per Buckley L.J. in the Smithies case [1909] 1 K.B. 310 , 337)."

108. The defence of justification in the context of actions taken by a secured creditor was explained by Stuart-Smith LJ at pages 232D-233B:

"Mr. Judge's submission to us is to the effect that the words, 'sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves', must be confined to the exercise of that right by the defendants. But I can find no warrant for this proposition and in my judgment it confuses right with the remedies available to protect the right. The defendants had the rights of a secured creditor, that is to say the right to be repaid their loan together with interest; in

support of that right they had the remedies or rights granted by the legal charge and the law, namely, to sell the land or appoint a receiver. They were not bound to exercise these remedies in defence of their rights, but they could do so. Had they done so, it is common ground at least in so far as the power of sale and I think probably also on the appointment of a receiver, that the plaintiffs' contract would have come to an end. If, instead of exercising these remedies in their full rigour, they reach an accommodation with the mortgagor in defence and protection of their right as secured creditor, which has the same result of putting an end to the plaintiffs' contract, it would in my judgment be anomalous and illogical if they were justified in the one case, but not in the other. Nor can it make any difference that the accommodation reached is one that is more beneficial to the defendants and Mr. Pulver than the straightforward exercise of the right of sale or appointment of a receiver.

Why, it may be asked, should the defendants be justified in interfering with the plaintiffs' contract if they exercise their power of sale as mortgagee in possession, but not if by agreement they permit the mortgagor to conduct the sale in the hope of achieving a better deal for both? Why should they be justified if they appoint a receiver, who has power to build-out the development and appoint architects, but not if they agree to finance the mortgagor to perform this task? I cannot find any logical answer to these questions.

Moreover, I think it would be undesirable if the law were to insist that a mortgagee in such a position should exercise his strict legal rights if he is to be justified in interference with contracts between the mortgagor and third parties; and could not be justified if he reached some sensible and reasonable accommodation which may be to the benefit of both himself and the mortgagor, but which has the same effect on the third parties' contract. The accommodation is designed to protect or defend the mortgagees' equal or superior right as a secured creditor, who had in this case financed the entire purchase and development of the site so far. And the accommodation was reached against the background of the remedy of sale or the appointment of a receiver. There can be no doubt that these rights existed once a formal demand for payment was made, a demand which could not have been met."

109. Stuart-Smith LJ went on at page 233F-G:

"Justification for interference with the plaintiff's contractual right based upon an equal or superior right in the defendant must clearly be a legal right. Such right may derive from property, real or personal, or from contractual rights. Property rights may simply involve the use and enjoyment of land or personal property. To give an example put in argument by Sir Nicolas Browne-Wilkinson V.-C., if X carries on building operations on his land, they may to the knowledge of X interfere with a contract between A and B to carry out recording work on adjoining land occupied by A. But unless X's activity amounts to a nuisance, he is justified in doing what he did. Alternatively, the law may grant legal remedies to the owner of property to act in defence or protection of his property; if in the exercise of these remedies he interferes with a contract between A and B of which he knows, he will be justified. If, instead of exercising those remedies, he reaches an accommodation with A, which has a similar effect of interfering with A's contract with B, he is still justified notwithstanding that the accommodation may be to the commercial advantage of himself or A or both. The position is the same if the defendant's right is to a contractual as opposed to a

property right, provided it is equal or superior to the plaintiff's rights. In my judgment that is the position in this case; I therefore agree with the judge's conclusion and would dismiss the appeal."

110. Nourse LJ described the defence on the facts of the case in the following way at page 235C-D:

"*… it is again correct to say that the new contract was entered into in the defendants' own commercial interests, in the sense that they had an interest in getting their money back plus interest. But that was an interest under the pre-existing contract and not the extraneous kind of general commercial interest which was under consideration in the authorities to which Stuart-Smith L.J. has referred. Had the purpose of the new contract been to give the defendants a profit over and above that which would have come to them through a return of principal plus interest at a normal rate, the position might have been different. But that was not what happened in the present case and this objection therefore fails."*

111. The defence was more recently considered in ***Lictor Anstalt v Mir Steel UK Ltd*** [2011] EWCH 3310 (Ch), [2012] EWCA Civ 1397, [2014] EWHC 3316 (Ch). In summary, the relevant facts of that case were that the claimant alleged that the purchaser of assets from administrators procured a breach of its contractual and equitable rights over them. Asplin J dealt with justification at [265] to [282], explaining at [280] and [281] that the defence is narrow, even in the context of a formal insolvency appointment:

"280. It seems to me that even if the defence of justification is open to the Administrators in this case, it is not open to Mir. In my judgment there is no reason of public policy or otherwise why a defence available to an administrator should also be available to a purchaser from the administrator in circumstances where the purchaser knows that a third party asserts rights to the asset, intending to defeat those rights and purchasing at a discount to take account of the risk. This is a long way from the circumstances considered by Lord Hodge in the Rangers case. Further, I agree with Mr Braithwaite that Mir had no rights until after it had procured the breach.

281 If I am wrong about that, in any event, I do not consider that the Administrators themselves could rely upon the defence here. First, in my judgment, the circumstances of this case are similar to those in re Samuel Allen Ltd which was approved in Melluish v BMI (No 3) Ltd. Accordingly, in addition to its contractual rights, Lictor had an equitable proprietary right in relation to the Site, superior to the competing rights. Furthermore, I agree with Mr Braithwaite that it was not necessary in order to further the objectives of the administration, nor was it in the public interest to defeat Lictor's rights. There were other avenues which the administrators could have properly taken, including seeking the directions of the court."

112. In the circumstances, despite setting out the relevant law at some length, I do not propose to explore every aspect of the parties' submissions on the justification issue. As I say, it is not an issue which, in view of my earlier determination, strictly even arises. In summary, however, it was Miss Eborall's submission that, RBS having been the LLP's bank for some appreciable time (and, before the formation of the LLP,

Halliwells' bank) and the LLP having been significantly indebted to RBS since early 2007, and so before Mr McCarthy became a member of the LLP, RBS was justified in doing everything which it did as regards Mr McCarthy's PPL loan. Specifically, Miss Eborall highlighted how the debts which the LLP owed to RBS had become secured by a debenture which had been granted in December 2008, and this meant that RBS's contractual rights were superior, as Miss Eborall put it, *"in both quality (in that they were secured) and quantity (in that the LLP's indebtedness was over £20m)"*. Miss Eborall made the point also that any right which Mr McCarthy had to be repaid the PPL loan was a right which, under the terms of the LLP Deed, was only exercisable on 12 months' notice, which (at least until the Retirement Deed was entered into) was not until October 2010. Miss Eborall furthermore relied on the fact that the Refinance Agreement and the overdraft facility entered into at the same time were negotiated and concluded between the LLP and RBS on 1 February 2010, prior to the Retirement Deed being concluded, and under these agreements RBS was entitled to place restrictions on the utilisation of the finance which it was providing. Indeed, the Refinance Agreement was negotiated on the basis that the LLP would not enter into further retirement deeds, only for the LLP then to enter into the Retirement Deed with Mr McCarthy under which his Retirement Date was brought forward to 31 May 2010. In these circumstances, Miss Eborall submitted, RBS was fully justified in requiring the LLP to abide by the ROR Letter as a means of ensuring that working capital within the LLP was preserved. The same applied to RBS's subsequent actions, albeit that no request under the ROR Letter was ever made as regards Mr McCarthy.

113. Mr Kynoch and Mr Fennell, in their Written Closing Submissions, took a different position. They submitted that the ***Edwin Hill*** case is distinguishable from the present case because Mr McCarthy was himself a customer of RBS and RBS chose, as they put it, to disregard Mr McCarthy's legitimate expectation that the LLP would comply with its undertaking in the LOU by repaying his capital when he retired. In contrast, Mr Kynoch and Mr Fennell pointed out, the ***Edwin Hill*** case involved a situation in which the surveyors were not themselves customers of the defendant bankers. Mr Kynoch and Mr Fennell also suggested that RBS's conduct in relation to the LLP was the type of conduct to which Nourse LJ was referring at page 235 in the ***Edwin Hill*** case in that it entailed RBS, as Mr Kynoch and Mr Fennell put it, choosing to keep the LLP trading and concealing the LLP's dire financial situation from its Members as a whole, including Mr McCarthy. They suggested that RBS cannot, on the one hand, choose to keep the LLP trading *"to increase its return on a sale of its business, and at the same time prevent [the LLP] from complying with its obligations to [Mr McCarthy] which arise by the very reason of its continued trading"*.

114. I cannot accept these submissions. I do not agree that the ***Edwin Hill*** case is distinguishable, nor that the type of conduct engaged in by RBS in the present case falls within the category of case envisaged by Nourse LJ. As to the former, the question is not whether Mr McCarthy also had rights as against the LLP, but whether RBS's rights as against the LLP are superior to Mr McCarthy's rights as against the LLP, although actually, in line with the approach explained by Stuart-Smith LJ in the ***Edwin Hill*** case, it would be sufficient if RBS merely had rights which were equal to Mr McCarthy's rights as against the LLP. It is clear to me that RBS had such rights for the reasons given by Miss Eborall: RBS was a secured creditor whereas Mr McCarthy was not.

115. Mr Kynoch and Mr Fennell submitted in their Written Closing Submissions that since throughout 2010 there had been 'waiver' letters issued in respect of the LLP's breaches of the RBS financing facilities, it cannot be said that RBS had a cause of action against the LLP. They suggested that RBS cannot have it both ways, *"picking and choosing the 'pecking order' of creditors to suit its purpose"*. They suggested that if RBS *"chose to keep [the LLP] 'afloat' it took the risk of creditors, like [Mr McCarthy], accruing valid claims during the 'twilight period' that the [LLP] had to meet"*. I regard this as an exceptionally artificial approach to adopt in a case such as the present. Whether RBS chose to invoke its security entitlements, and in so doing effectively put the LLP out of business, is not what matters in this context. What is important is that RBS was a secured lender and, as such, enjoyed a superior right as against the LLP to the right enjoyed by Mr McCarthy as against the LLP. The artificiality of the submission is further illustrated by the fact that, strictly speaking, Mr McCarthy had no entitlement to be paid anything until after he had retired. Mr Kynoch and Mr Fennell submitted that Mr McCarthy had an accrued right as against the LLP as at 31 May 2010. That may be right, but what matters in the present context is that, in any event, and on any view, unlike RBS, Mr McCarthy was not, and never was, a secured creditor. This is what matters for present purposes, and it is this feature which make the present case an ***Edwin Hill*** type of case.

116. In short, I consider that this is a case which falls squarely within the category of case identified in the ***Edwin Hill*** case. It follows also that I fail to see how this is a case such as that described by Nourse LJ, where a party (the alleged inducer or procurer) has acted in its own commercial interests in some *"extraneous"* kind of manner. Nourse LJ was careful to distinguish between that type of case and a case where the party has acted, admittedly in its own commercial interests, those interests entailing *"getting their money back"* under a pre-existing contract. That seems to me to be precisely the present case, and so I reject Mr Kynoch's and Mr Fennell's submission to the contrary. This conclusion is probably sufficient, without more, to warrant a determination that RBS was justified in doing what it did in this case. I certainly do not accept that it can be right for Mr Kynoch and Mr Fennell to suggest, as they did in their Written Closing Submissions, that RBS must have appreciated *"at the very least"* that its conduct involved *"highly questionable conduct"*. I do not understand how it can have been questionable, still less highly so, that RBS should have wanted to safeguard its own commercial interests borne out of the substantial indebtedness which the LLP had with RBS. The fact that RBS went along with points which were legally bad concerning set-off and possible unlawful preference seems to me to have no bearing on the analysis. Similarly, I reject the suggestion, also made in Mr Kynoch's and Mr Fennell's Written Closing Submissions, that Mr McCarthy was somehow treated differently by RBS from other retiring Members in circumstances where, as I have explained, the LLP made no request that RBS consent to payment in respect of Mr McCarthy, in contrast to other retiring Members. In any event, even if Mr McCarthy had been treated differently, it seems to me that RBS was justified in doing this given its status as a substantial and secured creditor of the LLP. Lastly, I am not persuaded either that there is anything in Mr Kynoch's and Mr Fennell's reliance on the fact that in Lynne Kerr's email sent internally within RBS on 9 June 2010 and in the context of the proposal to do a deal with Mr McCarthy discussed at the meeting between Dave Clark and Mr McCarthy on 4 June 2010 reference was made to the matter having been *"escalated up to the GRG head Derek Sach"* and to it having been decided not to go ahead with the deal for a number of reasons which Mr

Kynoch and Mr Fennell characterised as *"bad reasons"*. Dave Clark suggested that Lynne Kerr had got it wrong in her email when she suggested that Derek Sach had been asked to approve the deal, suggesting that Derek Sach was asked not about the proposed deal concerning Mr McCarthy but about the overall sale of the LLP. Whether that is the position or not does not seem to me to matter, however, bearing in mind that, on any view, this was at a time when the 31 May 2010 deadline had already passed. In any event, for the reasons which I have given, I consider that RBS is entitled to rely on the defence of justification, irrespective of the reasons (good or bad) set out in Lynne Kerr's 9 June 2010 email and irrespective of whether those reasons were reasons given by Derek Sach or anybody else within RBS.

117. Nor do I consider it helpful for Mr Kynoch and Mr Fennell to point, in their Written Closing Submissions, to the Financial Services Authority Handbook, specifically the principles which are there set out requiring that business is conducted with integrity, that due regard is paid to customers who are treated fairly, that consideration is given to the needs of customers, that information is communicated clearly, fairly and not in a misleading way, and that conflicts of interests between customers are managed fairly. RBS was entitled to act in what were its commercial interests. Those were the interests to which I have referred. RBS was also, no doubt, obliged to act vis-à-vis Mr McCarthy in accordance with the principles to which I have just referred. I do not accept that adherence to those principles required RBS to act differently in this case. If Mr McCarthy has grounds for complaint, it is for him to make an appropriate complaint in the appropriate venue alleging that the principles have not been complied with. That, however, is not the claim which is before me; indeed, no such complaint has, at least as I understand it, ever been asserted.

118. In conclusion on the justification issue, had I concluded that there had otherwise been an actionable procurement or inducement, I would have been inclined to have gone on nonetheless to decide that RBS was justified in acting as it did in this case. As such, I would have decided that this aspect of Mr McCarthy's claim would, in any event, have failed.

The 1999 Act

119. I come on now to consider Mr McCarthy's case based on the 1999 Act. Section 1 of the 1999 Act is entitled *"Right of third party to enforce contractual term"* and provides as follows:

"(1)Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract."

120. Mr Kynoch relied specifically upon section 1(1)(b). He pointed out that section 1(3) is satisfied in Mr McCarthy's case, as Miss Eborall acknowledged is plainly the case. This is not, however, by itself sufficient. On the contrary, two further questions arise: first, as the LOU does not expressly provide that Mr McCarthy may enforce it and so this is not a section 1(1)(a) case, it needs to be considered whether *"the term"* (whatever that may be) *"purports to confer a benefit on him"* under section 1(1)(b); and, secondly, whether section 1(1)(b) is treated as not applying because *"on a proper construction of the contract, it appears that"* RBS and the LLP *"did not intend the term to be enforceable by"* Mr McCarthy (see section 1(2)).

121. That these questions arise was made clear in ***Nisshin Shipping Co Ltd v Cleaves & Co Ltd*** [2003] EWHC 2602 (Comm), in which Colman J stated as follows at [23]:

"It is to be noted that section 1(2) of the 1999 Act does not provide that subsection 1(b) is disapplied unless on a proper construction of the contract it appears that the parties intended that the benefit term should be enforceable by the third party. Rather it provides that subsection 1(b) is disapplied if, on a proper construction, it appears that the parties did not intend third party enforcement. In other words, if the contract is neutral on this question, subsection (2) does not disapply subsection 1(b). Whether the contract does express a mutual intention that the third party should not be entitled to enforce the benefit conferred on him or is merely neutral is a matter of construction having regard to all relevant circumstances. The purpose and background of the Law Commission's recommendations in relation to subsection (2) are explained in a paper by Professor Andrew Burrows who, as a member of the Law Commission, made a major contribution to the drafting of the bill as enacted. He wrote at [2000] LMCLQ 540 at 544:

'The second test therefore uses a rebuttable presumption of intention. In doing so, it copies the New Zealand Contracts (Privity) Act 1982, s 4, which has used the same approach. It is this rebuttable presumption that provides the essential balance between sufficient certainty for contracting parties and the flexibility required for the reform to deal fairly with a huge range of different situations. The presumption is based on the idea that, if you ask yourself, "When is it that parties are likely to have intended to confer rights on a third party to enforce a term, albeit that they have not expressly conferred that right", the answer will be: "Where the term purports to confer a benefit on an expressly identified third party". That then sets up the presumption. But the presumption can be rebutted if, as a matter of ordinary contractual interpretation, there is something else indicating that the parties did not intend such a right to be given."

122. As to section 1(1)(b), the starting point, of course, is to identify which *"term"* it is suggested *"purports to confer a benefit on"* Mr McCarthy. In this regard, both Mr Kynoch and Miss Eborall referred me to ***The Prudential Assurance Company***

Limited v Ayres [2007] EWHC 775 (Ch), [2007] 3 All ER 946. In that case, Lindsay J said as follows at [28]:

"'Express' provision of a right to enforce is dealt with in s.1(1)(a) of the 1999 Act and what 'appears' from a proper construction is dealt with in s.1(2), so it might be thought that the verb 'purport' in 1(1)(b) is intended to deal with something that differs in some way from 'express' provision and from the "appearance" of an intent. However, the first meaning given to the noun in the Oxford English Dictionary is:

'That which is conveyed or expressed, esp. by a formal document; bearing, tenor, import, effect; meaning, substance, sense.'

The verb is defined as, inter alia, 'to bear as its meaning; to express, set forth, state; to mean, imply'. It thus seems to me that s.1(1)(b) is satisfied if on a true construction of the term in question its sense has the effect of conferring a benefit on the third party in question. There is within s.1(1)(b) no requirement that the benefit on the third party shall be the predominant purpose or intent behind the term or that it denies the applicability of s.1(1)(b) if a benefit is conferred on someone other than the third party. The 1999 Act has no such additional requirement and Laemthong International Lines Company Limited v Abdullah Mohammed Fahem & Co, unreported, [2005] EWCA Civ 519, a decision of the Court of Appeal of May 5, 2005, illustrates that there is no such additional requirement."

123. The Court of Appeal reversed Lindsay J's decision on the ground that the contract, on its true construction, purported not to benefit the third party seeking to rely on the term, but, in fact, to restrict that party's rights: [2008] EWCA Civ 52. It is clear, however, that Lindsay J's analysis of the approach to be taken when considering section 1(1)(b) is correct since not only was it not criticised by the Court of Appeal on appeal from his decision but also it is treated as a correct statement of the law in *Chitty on Contracts (31st Ed.)* at paragraph 18-091. The same approach was also adopted in ***Dolphin Maritime & Aviation Services Limited v Sveriges Angfartygs Assurans Forening (The Swedish Club)*** [2009] EWHC 716 (Comm), [2009] 2 Lloyd's Rep. 123, a case which involved a letter of undertaking given by a P & I Club, which undertook to the owners and/or underwriters to pay to Dolphin, on behalf of the owner/underwriters, such sums as may be due upon a final settlement of a potential shipping claim. Instead, settlement monies were passed directly from the P & I Club to the underwriters, which left Dolphin with no opportunity to recover its commission fees from the settlement achieved. Christopher Clarke J (as he then was) held that the LOU was an agreement as to the means by which the P & I Club's obligation to pay underwriters was to be discharged, rather than an indication that the agent payee was an intended beneficiary. This was even though he accepted that Dolphin derived benefit from receipt of the monies, as it would habitually deduct its commission from the settlement sums. This, the judge decided, was not sufficient to confer a benefit upon Dolphin such that it was entitled to enforce it.

124. Christopher Clarke J expressly relied on Lindsay J's decision in the ***Prudential*** case at [72]-[73], before going on at [74] to say this:

"A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the term purporting to "confer" a benefit seems to me to

connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party."

(It is to be noted that this paragraph was cited with apparent approval by Teare J in ***San Evans Maritime Inc, Livanbros Maritime SA, Mrs Chariklia Livanou v Aigaion Insurance Co SA*** [2014] EWHC 163 (Comm), [2014] 2 Lloyd's Rep 265 at [39]). Christopher Clarke J continued as follows in passages relied on by Mr Kynoch and Mr Fennell:

"75. In my judgment the term in question does not purport to confer a benefit on Dolphin in the sense meant by section 1(1)(b) of the 1999 Act. The provision in the LOU that payment should be made to Dolphin or underwriters' solicitors was an agreement as to the means by which the Club's obligation to underwriters was to be discharged. It was not an indication that the agent payee was an intended beneficiary of the promise. The intended beneficiaries were the underwriters on whose behalf the payment was to be received.

76. A provision for payment of a sum to an agent on his principal's behalf is to be contrasted with an agreement by A and B that A will pay C (C not being A's agent or trustee). Further, the fact that payment is to be made either to one company (Dolphin) or any firm or company in a specified category (underwriters' solicitors) seems to me to indicate that it is not the purpose of the provision to benefit Dolphin or the solicitors rather than to specify the appropriate mode of payment.

77. Even if it be established that recovery agents usually deduct their commission from the recovery and agree with their clients that the recovery should be paid to them that would not in my judgment transform this agreement into one whose purpose was to confer a benefit on Dolphin. There are, no doubt, many agents who habitually deduct their fees or commission from the recovery that they make. That is not, in my judgment, sufficient to make an agreement to pay an agent on behalf of his principal an agreement which purports, so far as the contracting parties are concerned, to confer a benefit on the agent for the purposes of section 1(1)(b) of the 1999 Act."

125. In Mr Kynoch's oral opening submissions, it was not entirely clear which *"term"* was being relied upon. The focus of those submissions was somewhat more general: that the LOU conferred a benefit on Mr McCarthy simply because the PPL loan would thereby have been discharged, the suggestion being that it was, in fact, the LOU which was the primary payment mechanism for the PPL loan. Pressed by me, Mr Kynoch sought to rely upon the second sentence of the LOU where it is stated that *"the Bank has made or is to make available to the Customer a loan of £120,000"*.

126. In Mr Kynoch's and Mr Fennell's Written Closing Submissions, it was submitted that it was the irrevocable undertaking in the LOU to pay RBS which *"purports to confer a benefit on"* Mr McCarthy in circumstances where the repayment of his capital by the LLP forthwith on his retirement, irrespective of any dispute between him and the LLP, involved the obvious benefits to Mr McCarthy of not only the discharge of his debt owed to RBS under the PPL, but also the further benefit of preventing the LLP seeking to exercise any right of set-off in relation to his capital in the event of a

dispute. These were benefits, it was submitted, which were not merely incidental or ancillary, since the PPL specifically refers to the execution of the LOU as a precondition.

127. As to the specific *"term"* relied on by Mr McCarthy, in the Written Closing Submissions it was suggested that *"all of the LOU"* purported to confer the requisite section 1(1)(b) benefit, since *"it was an unconditional undertaking to discharge his liability, which loan [Mr McCarthy] would not have taken out but for the LOU"*. Specifically, it was submitted that the following *"terms"* of the LOU specifically contemplated a benefit to Mr McCarthy: (i) the reference to Mr McCarthy being *"the customer"*, allied with the description of *"the loan"* being for the purpose of injecting capital into the LLP; (ii) the reference to the LOU being *"irrevocable"* and so, it was submitted, being a benefit both to RBS and Mr McCarthy in that it could not be withdrawn by the LLP for any reason; (iii) paragraph (i)'s reference to the monies being repaid on retirement *"for whatever reason"*; (iv) paragraph (ii) which, it was contended, was for RBS's and Mr McCarthy's mutual benefit in that it prevents the capital account being depleted by the LLP to below the level required to repay the PPL loan; and (v) the last sentence of the LOU which, it was submitted, made it clear that the LOU was to the mutual benefit of RBS and Mr McCarthy because the obligations under the LOU were described as only ceasing upon repayment of the PPL loan.

128. It was Mr Kynoch's and Mr Fennell's submission that it was, at the very least, *"a purpose"* of the LOU that there would be benefit to Mr McCarthy. As Mr Kynoch and Mr Fennell put it, it would simply be impossible for the LLP to discharge Mr McCarthy's liability to RBS without a benefit being conferred on Mr McCarthy, and RBS and the LLP must be taken to have known and intended this. Since, so Mr Kynoch and Mr Fennell submitted, there is a *"term"* purporting to confer a benefit upon Mr McCarthy, then, in line with Colman J's observations in the ***Nisshin*** case at [23], there is a rebuttable presumption that the term was intended by RBS and the LLP to be enforceable by Mr McCarthy, and it is for RBS to show that *"the parties"* did not intend the term to be enforceable by Mr McCarthy.

129. This, it was common ground between Mr Kynoch and Miss Eborall, and as confirmed in *Chitty* at paragraph 18-091, is a question of construction. As such, the most recent statement of the appropriate approach is that described by the Supreme Court in ***Arnold v Britton*** [2015] UKSC 36, [2015] All ER (D) (Jun). At [15] Lord Neuberger summarised the position as follows:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by _ocusing on the meaning of the relevant words, in this case Clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the Clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the Clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's

intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

130. Lord Neuberger went on to stress that the words of the contract should not be undervalued by over-reliance on business common sense, and that, as the parties have control over the language they use in a contract, the courts should be very slow to reject the natural meaning of a provision as correct. He did this at [17]-[23] as follows:

"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a

very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that 'any ... approach' other than that which was adopted 'would defeat the parties' clear objectives', but the conclusion was based on what the parties 'had in mind when they entered into' the contract (see paras 17 and 22).

23. Seventhly, reference was made in argument to service charge Clauses being construed 'restrictively'. I am unconvinced by the notion that service charge Clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not 'bring within the general words of a service charge Clause anything which does not clearly belong there'. However, that does not help resolve the sort of issue of interpretation raised in this case."

131. Mr Kynoch and Mr Fennell submitted that RBS has failed to discharge the burden of showing that the term was not intended to be enforceable by Mr McCarthy. They put forward a number of reasons for saying this: (i) the facts that the LOU was on RBS's standard terms and that a letter of undertaking such as the LOU in this case is a standard provision when capital is lent to equity members of professional services firms; (ii) the fact that the LOU is described as a condition precedent in the PPL; (iii) the fact that the 1999 Act is not expressly excluded by the terms of the LOU, yet this could easily have been done had the parties intended that the 1999 Act should not apply; (iv) the relevant factual matrix includes the standard practice of lenders, as Mr Kynoch and Mr Fennell described it, not to give up security and nevertheless expect the borrower to pay; (v) the relevant factual matrix also includes the risk to a member

of the LLP that a dispute between himself and the firm could leave him exposed to substantial liability to RBS in the absence of the LOU being enforced; (vi) the LLP's bank borrowings were modest at the time and neither party had any expectation that they would increase to permit the then-Full Members to take the benefit of the Spinningfields reverse premium for themselves; and (vii) the LOU expressly uses the word *"undertaking"* which, in the context of a firm of solicitors, carries the implication that failure to comply will be far more serious than a mere breach of contract.

132. I cannot accept that Mr Kynoch and Mr Fennell can be right in relation to these or their other submissions concerning the application of the 1999 Act in this case. In any event, as I shall explain, even if Mr Kynoch and Mr Fennell were right and Mr McCarthy were to be treated as enjoying a right of action under the LOU, it is not clear to me how this assists him in defending RBS's claim under the PPL given that whatever right of action Mr McCarthy might have would be a right of action not against RBS but against the LLP, an entity which is now in liquidation.

133. Essentially, I agree with Miss Eborall when she submitted that the fact that the LOU and the PPL are related documents which could accurately be described, together with the LLP Deed, as a *"suite of contracts"* does not mean that it is appropriate to treat the present case as one in which the 1999 Act applies to the LOU. There has to be more than this if the 1999 Act is to be treated as applying. Specifically, it must be demonstrated that the requirements of section 1 are satisfied. It is not sufficient that there should, in a general sense, some benefit for Mr McCarthy in the fact that the LOU was provided by the LLP to RBS.

134. Miss Eborall submitted, in her Written Closing Submissions, that the benefit of the LOU was, as she put it, *"all in one direction – to the Bank alone"*. Although I am not entirely convinced by this submission, I am nevertheless still not persuaded that the 1999 Act applies in this case. I explain why in a moment. First, however, I should address Miss Eborall's prior submission that RBS enjoyed the benefit of the LOU exclusively and there was no benefit enjoyed also by Mr McCarthy. Miss Eborall suggested that the tripartite relationship between RBS, the LLP and Mr McCarthy needs to be understood. She highlighted how Mr McCarthy entered into the LLP Deed before he entered into the PPL with RBS and, indeed, before the LLP provided the LOU to RBS. Under the LLP Deed, Mr McCarthy was required to invest capital into the LLP in consideration for the acquisition of a profit share by reference to his six equity points. On his retirement, Mr McCarthy was entitled to repayment of the amounts standing to his Capital Account and Current Account (see Clause 30.1). As for the PPL, this, Miss Eborall emphasised, was entered into between RBS and Mr McCarthy, not also the LLP. It was, as Miss Eborall characterised it, a straightforward, unsecured loan agreement under which the *"Customer"* (Mr McCarthy) had all the obligations, including the repayment obligation contained in Clause 6.1 which, despite its apparently neutral wording, clearly imposed the repayment obligation on Mr McCarthy and not a non-party such as the LLP. Indeed, as Miss Eborall pointed out, Mr McCarthy accepted in cross-examination that he was liable for repayment under this provision in the PPL and that the *"Bank would go after him"* pursuant to this Clause. In contrast, the LOU was an arrangement to which Mr McCarthy was not a party which was plainly entered into because of RBS's concern that, as Miss Kerr put it in evidence before me, £120,000 is a *"lot of money*

for the Bank to lend unsecured". In these circumstances, Miss Eborall submitted, the LOU is to be regarded as having been entered into between the LLP and RBS not for the benefit of Mr McCarthy but in order to give security and protection to RBS.

135. I consider that this description of the arrangements represents too rigid an analysis. Whilst I have no difficulty with the legal analysis, it seems to me that Miss Eborall's depiction of how the LOU fits into the arrangements between RBS, the LLP and Mr McCarthy overlooks the reality that, without the LOU or without knowing that the LOU would be forthcoming from the LLP, not only would RBS not have entered into the PPL but Mr McCarthy would not have done so either. It is one thing for Mr McCarthy to acknowledge, as he did in evidence, that it would be open to RBS to pursue him for repayment of the loan under the PPL in the event that the LLP did not honour the LOU because the PPL imposed a repayment obligation upon him. It does not follow from this, however, that Mr McCarthy did not rely upon the fact that the LLP provided the LOU, or that the LLP would provide the LOU, when deciding to enter into the PPL. In these circumstances, it seems to me that it is unrealistic to regard the LOU as not also being to Mr McCarthy's benefit.

136. This is nevertheless not the end of the matter. It is still necessary that Mr McCarthy should be able to show that the requirements of the 1999 Act are satisfied. As I have indicated, I do not consider that he has succeeded in this. I am clear that, despite Mr Kynoch's and Mr Fennell's best efforts, they have not managed to demonstrate that the 1999 Act applies so as to give Mr McCarthy the right to enforce the LOU. I say this for a number of reasons. First, I remain unclear how it can sensibly be suggested that an obligation on the part of the LLP to repay RBS monies owed by Mr McCarthy to RBS is to be regarded as a *"term"* which *"purports to confer a benefit on"* Mr McCarthy as required by section 1(1)(b) so as to enable Mr McCarthy (RBS's debtor) to enforce that repayment obligation (the obligation by the LLP to repay RBS). The focus here must, as it seems to me, be not on benefit in a general sense, but on whether the *"term"* itself *"purports to confer a benefit on"* Mr McCarthy. I struggle to see how the repayment obligation or any other language used in the LOU can be read as purporting to do such any such thing. Having been pressed in opening to focus on this specific issue, I remain unconvinced that Mr Kynoch has been able to improve on the position advanced in opening.

137. As I have previously indicated, I am quite clear that the LOU was for the benefit of Mr McCarthy in a general sense, but this is not sufficient for the purposes of the 1999 Act. As it was put in the ***Dolphin Maritime*** case, it was simply *"one of the incidental effects if performed"* of the LOU. I agree with Miss Eborall that, similarly, Mr McCarthy's repeated evidence that he derived *"comfort"* from the LOU that, if there were a dispute between him and the LLP, he could rest assured that his Loan would be repaid by the LLP directly to RBS, is not sufficient since this is not the same as Mr Kynoch and Mr Fennell being able to show that the LOU contains a term purporting to confer a benefit upon him.

138. This is sufficient by itself to mean that the case based on the 1999 Act cannot succeed. However, analysis of the position serves to underline the conclusion which I have reached. It is to be noted, therefore, and this is the second of the reasons why I have felt obliged to reject Mr Kynoch's and Mr Fennell's submissions, that the LOU specifically provides that *"The Undertaking in this letter shall remain in full force and effect and will only cease upon repayment of the Loan by the Customer."* As Miss

Eborall submitted, the LOU, therefore, expressly contemplated that Mr McCarthy was liable to repay the PPL loan. It is not easy to square this express recognition with a case which requires the LOU to be regarded as purporting to confer a benefit on Mr McCarthy.

139. Thirdly, I agree also with Miss Eborall that, had RBS and the LLP intended that Mr McCarthy should be entitled to enforce the LOU, this could have been stipulated. I acknowledge that this would be an answer to any case where what is sought to be relied upon is section 1(1)(b) rather than section 1(1)(a). There is, accordingly, an inherent limit to the force of Miss Eborall's submission. It is nevertheless the case that either the LOU could have contained an express term to this effect or RBS, the LLP and Mr McCarthy could have included in their suite of contracts a further agreement, namely a tripartite agreement in which the position was made abundantly clear. The simple fact is that this was not done, and nor was any language included in the LOU to suggest that the terms purported to confer a benefit upon Mr McCarthy. As Miss Eborall submitted, the LOU could, for example, have provided that the monies were not to be paid to the Bank by the LLP "*on behalf of Mr McCarthy*" or *"in order to discharge the Loan"*.

140. I agree with Miss Eborall that the absence of such language and the absence of any tripartite agreement point against any benefit being conferred on Mr McCarthy. It cannot have been the result of error or coincidence that no tripartite agreement was concluded or that the LOU did not contain the type of express wording to which Miss Eborall referred. The LLP Deed, the PPL and the LOU were clearly intended to be the complete suite of contracts and comprehensively so. I consider it unrealistic to suggest that something was overlooked in so sophisticated a context as the present.

141. This leads on to a fourth reason why I do not consider it realistic to suggest that the 1999 Act applies in this case. This is that, as Miss Eborall emphasised, Mr McCarthy already enjoyed a separate route of recovery of his capital contribution from the LLP, namely under the LLP Deed which required the LLP to return his capital contribution to RBS. Specifically, Clause 30.15 required the LLP to pay *"on his behalf"* monies standing to the credit of the Capital Account to the Member's bank. As Miss Eborall pointed out, even after Mr McCarthy had entered into the Retirement Deed, this term of the LLP Deed could have been enforced. This is because the Retirement Deed provided that it was supplemental to the LLP Deed. As such, it is apparent that Clause 3 of the Retirement Deed merely interposed the obligation of the LLP to seek the 'consent' of the Bank; it did not remove the obligation under Clause 30.15.

142. Importantly, the obligation under Clause 30.15 was owed to Mr McCarthy and, as such, was an obligation which he could enforce against the LLP. In circumstances where, in the context of the 1999 Act, what Mr Kynoch and Mr Fennell have argued for is an ability on the part of Mr McCarthy to enforce the LOU as against the LLP, it makes little sense for the parties to the LOU (RBS and the LLP) to have intended that Mr McCarthy should have a discrete ability to bring a claim against the LLP not under the LLP Deed, the contract which he himself had with the LLP, but under the LOU, a contract to which, on any view, he is not a party.

143. It follows that I reject Mr Kynoch's and Mr Fennell's (and Mr McCarthy's) reliance on the 1999 Act. I do not consider that this is a case in which it has been demonstrated that there is a *"term"* which *"purports to confer a benefit on"* Mr McCarthy. Even if

I am wrong about this, I am quite clear that, in any event, on a proper construction of the LOU, RBS and the LLP *"did not intend the term to be enforceable by"* Mr McCarthy. Even if I am wrong about this also, however, it seems to me that reliance on the 1999 Act goes nowhere in this case. This is because, as I have just explained, all that the 1999 Act would permit Mr McCarthy to do would be to enforce the LOU against the LLP. The only obligations owed under the LOU are obligations owed by the LLP to RBS. These, therefore, are the only obligations which, even if Mr Kynoch and Mr Fennell were right, it would be open to Mr McCarthy to enforce. There are no obligations owed by RBS under the LOU. In these circumstances, understandably, Mr Kynoch's and Mr Fennell's sole focus has been on Mr McCarthy being able to enforce the obligations owed by the LLP to RBS. Yet a claim against the LLP provides Mr McCarthy with no defence to the present claim – a claim by RBS under the PPL. When I put this point to Mr Kynoch in closing submissions, he was unable to offer any reason why this might not be the case. In truth, there is no reason. Any ability to claim against the LLP under the LOU also adds nothing to Mr McCarthy's already existing entitlement to claim against the LLP under the LLP Deed. Reliance on the 1999 Act is, accordingly, as a matter of analysis, irrelevant.

Implied term

144. Mr Kynoch and Mr Fennell relied, in the further or alternative, on what is alleged to have been a breach of an implied term of the PPL that, as it was ultimately put in their Written Closing Submissions, *"either party thereto will not do anything which will prevent performance of the terms of the contract"*. The suggestion made was that RBS acted in breach of this implied term in thwarting repayment of the PPL loan by the LLP pursuant to the LOU. It was no longer contended, as it had been in Mr McCarthy's Written Opening Submissions mirroring how the case had been pleaded on Mr McCarthy's behalf, that there existed a 'three-way' contract as between RBS, Mr McCarthy and the LLP, and that this contract contained the implied term suggested. The case instead had as its focus the PPL and this contract alone.

145. Mr Kynoch and Mr Fennell submitted that the implication of the implied term alleged is supported by a wealth of authority. He relied, in particular, on *Lewison, The Interpretation of Contracts* (5th Ed.) at paragraph 6.14 where it is stated that *"In general, a term is necessarily implied in a contract that neither party will prevent the other from performing it"*. The paragraph which follows states:

"Both parties to a contract are taken to contract on the footing that they wish the contract to be performed, and accordingly must be taken to have agreed that neither will actively prevent performance. It is possible that the duty does not rest upon the implication of a term, but may be a positive rule of the law of contract that conduct of either the promisor or the promisee, which can be said to amount to himself of his own motion bringing about the impossibility of performance, is itself a breach of the contract. However, since ultimately the rule of law (if such it is) depends upon the intention of the parties, it is submitted that it may properly be categorised as an implied term. The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. The classic formulation of the implied term is that of Cockburn C.J. in Stirling v Maitland:

'I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative.'"

146. *Lewison* continues later in the same paragraph:

"There are three main circumstances in which an implied term not to prevent performance needs to be considered. The first is where the action of one party to the contract prevents performance of an obligation imposed on the other. A party will often have an interest in performing his own obligation and may wish to complain if the other party's action prevents him from performing his own obligation. The second is where one party to the contract has an obligation which is to be performed in the future or is a contingent obligation. It is then relevant to ask whether a term should be implied that he should not disable himself from performing those obligations if the contingency were to come about. The third is where one party's obligation is subject to a pre-condition and the suggested implied term is that he should not do anything to prevent the pre-condition being satisfied. In addition the principle applies to a contract made between more than two parties. In such a case one party to a contract may not take steps to prevent performance by a second party to the same contract of an obligation owed to a third party to that contract."

Mr Kynoch and Mr Fennell placed particular reliance on the last sentence of this paragraph. They did so in support of the submission that, as they put it in their Written Closing Submissions, the implied term *"also applies to third party obligations"*.

147. The difficulty with this submission is that the last sentence is concerned with a situation where there is a tripartite contract, hence the reference to the second party being a party *"to the same contract"* and to the prevention of that party's obligation under that same contract *"to a third party to that contract"*. In short, the sentence does not support the submission that a term is to be implied into a contract between A and B that B will not prevent the performance by C of an obligation to be found in a contract between A and C. This is clear not only from the sentence itself but also from the authority which is cited in support of the proposition set out in the sentence: ***F&C Alternative Investments v Barthelemy*** [2011] EWHC 1731 (Ch), [2012] Ch. 613. As Miss Eborall pointed out in her Written Closing Submissions, that case involved a limited liability partnership dispute, in which it was argued that there was an implied term that an LLP's holding company breached an implied term not to prevent the performance by the LLP of its contractual obligation to pay partners (or members) of the LLP advanced drawings. Crucially, the relevant contract was a tripartite contract entered into between the holding company, the LLP and the partners (or members) of the LLP. In those circumstances, Sales J (as he then was), in observations which were strictly speaking *obiter dicta*, stated as follows:

"267. The formulations at (iii) and (iv) are based on the submission that the principle relevant to a situation in which there are two parties at an agreement (to the effect that one party may not take steps to prevent the performance of the contract by the other, as illustrated by Stirling v Maitland (1864) 5 B & S 840 , Barque Quilpué Ltd v Brown [1904] 2 KB 264 and Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701) is also applicable,

by extension, to a three party situation: one party to a contract may not take steps to prevent performance by a second party to the same contract of an obligation owed to a third party to the contract. In my view, the relevant principle does extend to a three party situation as Mr Thompson contends.

268. *In both the two party and the three party situations the parties to the contract are taken to contract on the footing that they wish the contract to be performed, and on an objective interpretation of their agreement have therefore impliedly agreed that they will not actively prevent performance (adapting the way in which the position is summarised in Lewison, The Interpretation of Contracts , 4th ed (2007), para 6.12). It was an implied term of the agreement that Holdings would not take steps to prevent the LLP from fulfilling its obligation to pay the defendants advanced drawings under Clause 11.1 (or, putting the same obligation in different language, that Holdings would not procure the non-performance by the LLP of what it was required to do by Clause 11.1 of the agreement).*

269. *I also consider that the implication of such a term in the present context is supported by reference to the well-known statement of Lord Blackburn in Mackay v Dick (1881) 6 App Cas 251 , 263:*

'I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'

270. *In the present case, all the parties to the agreement agreed that the advance drawings should be paid by the LLP to the defendants under Clause 11.1. Holdings, acting by Mr Ribeiro, was in a position to prevent that from happening. In my view, a fortiori, the natural conclusion here is that the reasonable expectation of the parties was that Holdings should be bound by an obligation not to take active steps to prevent that thing being done (ie a negative form of obligation of a kind that may more readily be found to be implied than an obligation to take positive steps to bring about the doing of a particular thing, as contemplated by Lord Blackburn)—that is to say, by an obligation not to procure the non-performance by the LLP of its obligation under Clause 11.1.*

271. *In my view, the term in question is properly to be implied into the agreement on the basis of the principles governing implication of terms set out in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 , in particular at para 21: this is what the agreement, read as a whole against the relevant background, would reasonably be understood to mean. It can equally be said that this term is necessary to make the contract work (using the language of Lord Clarke of Stone-Cum-Ebony MR in summarising the effect of Attorney General of Belize's case and other authorities in Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc [2010] 1 All ER (Comm) 1 , para 15). Where Holdings was in a position to prevent the defendants having the benefit of a payment which Holdings had agreed they*

> *should have, it was obviously incumbent on Holdings not to take positive action to prevent such a payment being made and by those means stopping the contract from working in the way it was intended to."*

148. It is clear to me that central to Sales J's reasoning was the fact that the implied term which was sought to be implied was a term of a tripartite contract. That is the *"three way situation"* to which Sales J was referring in the last two sentences of [267], not a case where two separate contracts are involved albeit with an overlap between those contracts in the sense that one party (in my example A but in the present case RBS) is a party to both contracts.

149. This is the position in relation to Mr Kynoch's and Mr Fennell's contention that RBS was in breach of the implied term alleged by, as they put it in their Written Closing Submissions, *"actively preventing the performance of the LOU"*, a contract between RBS and the LLP equivalent in my example to a contract between A and C. It is *a fortiori* the position in relation to Mr Kynoch's and Mr Fennell's further contention that there was a breach of the implied term alleged because of any active prevention of the performance of Clause 3 of the Retirement Deed, a contract between Mr McCarthy and the LLP to which RBS was not even a party. Furthermore, I do not accept the proposition advanced by Mr Kynoch and Mr Fennell that because the LLP did not pay RBS under Clause 3 of the Retirement Deed, so there was a prevention on the part of RBS of the obligation to repay the PPL loan contained in Clause 6.1 of the PPL. This was an obligation which was freestanding and the performance of which was not prevented by anything done or not done by RBS.

150. Although in Mr Kynoch's and Mr Fennell's Written Closing Submissions the case was not ultimately put in this way, the only contention being advanced, at least as I understand it, that there was breach of an implied term of the PPL, I should make it clear that, were it to have been suggested, as it had been in opening, that it was open to Mr McCarthy, by virtue of the 1999 Act, to rely upon a similar, non-prevention term implied into the LOU (and so as between RBS and the LLP), I would have rejected such an argument. This is because I have determined that the 1999 Act does not operate in favour of Mr McCarthy. However, even if I had reached a different conclusion in relation to this issue, I do not see how it would be realistic for Mr McCarthy to suggest that, as a result of section 1(1)(b) of the 1999 Act, he can rely upon a term of the LOU which is not an express term but merely an implied term. I do not mean to imply that it would never be possible to rely on an implied term. However, it does seem to me that the position is all the harder when what is being considered is an implied term.

151. For these reasons, even had I decided that Mr McCarthy's case on procuring breach of contract should succeed, I would not, in any event, have found for Mr McCarthy in relation to the implied term case which has been advanced on his behalf.

Collateral contract

152. This leaves the collateral contract case which was relegated in Mr Kynoch's and Mr Fennell's Written Closing Submissions from the position which it held at the forefront of the Written Opening Submissions served on Mr McCarthy's behalf (and drafted by Mr Fennell). Not only is this case no longer Mr McCarthy's primary case but, in addition, it is a case which no longer has as its focus a tripartite collateral contract

entered into between RBS, Mr McCarthy and the LLP. The case, as advanced in closing, was instead a somewhat reduced case.

153. Mr Kynoch and Mr Fennell relied in this context on the very well-known decision, ***Shanklin Pier v Detel Products Ltd*** [1951] 2 KB 854. They pointed out how in that case Shanklin Pier hired contractors to paint Shanklin Pier but spoke themselves to the paint manufacturers, Detel Products, about whether a particular paint was suitable to be used. Detel Products assured them that it was suitable and that it would last for at least seven years. On the basis of this conversation, Shanklin Pier instructed the contractors to use a particular paint, which they did. The paint started to peel after three months, and Shanklin Pier attempted to claim compensation from Detel Products. McNair J held at pages 855-856:

"This case raises an interesting and comparatively novel question whether or not an enforceable warranty can arise as between parties other than parties to the main contract or the sale of the article in respect of which the warranty is alleged to have been given. ...

In the result, I am satisfied that, if a direct contract of purchase and sale of the D.M.U. had then been made between the plaintiffs and the defendants, the correct conclusion on the facts would have been that the defendants gave to the plaintiffs the warranties substantially in the form alleged in the statement of claim. ...

Counsel for the defendants submitted that in law a warranty could give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty was given. In principle this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A."

154. Mr Kynoch and Mr Fennell highlighted how Clause 2.1 of the PPL, under the title *"Preconditions"*, states that RBS *"shall not be obliged to provide the Loan unless the following conditions are satisfied by the date on which the Loan is drawn"*, and that one of the conditions was that the LOU should have been *"completed to the satisfaction of the Bank"* (sub-paragraph (b)) In these circumstances, Mr Kynoch and Mr Fennell submitted, the LOU and the PPL being, as they put it, *"linked"* and *"not to be read in isolation"*, there was *"good consideration passing from [Mr McCarthy] to [RBS] for the loan in not only in agreeing to repay the loan, but in having the LOU completed 'to the satisfaction of the bank'"*. It was suggested that the required assurance from RBS, in order to found a collateral contract claim, was that RBS would require the LLP to offer a LOU to discharge the PPL loan. So, it was argued by Mr Kynoch and Mr Fennell, a collateral contract arose between RBS and Mr McCarthy that RBS, immediately on Mr McCarthy's retirement, would call on the LLP to discharge the PPL loan in accordance with the terms of the LOU. Mr Kynoch and Mr Fennell went on to explain that, as RBS failed to call on the LLP under the LOU to discharge the PPL loan, RBS is to be regarded as having been in breach of this collateral contract. Had RBS done what it should have done and, as Mr Kynoch and Mr Fennell put it, *"honoured the collateral contract"*, then, the LLP would have repaid the PPL loan and would have no claim against Mr McCarthy.

155. The difficulty with these submissions is that I do not consider that it is possible to spell out of the fact that Clause 2.1(b) of the PPL is in the terms which it is the assurance which Mr Kynoch and Mr Fennell identified as the foundation of the collateral contract alleged. The fact that RBS required the LOU from the LLP before the PPL loan was drawn down does not mean that RBS was telling Mr McCarthy, still less assuring him, that it would call on the LLP to discharge the PPL loan immediately on his retirement. This is demonstrated by the fact that, whilst Mr Kynoch and Mr Fennell identified the relevant assurance as being that RBS would require the LLP to offer a LOU to discharge the PPL loan, the collateral contract for which they contended involved something more, namely that RBS, immediately on Mr McCarthy's retirement, would call on the LLP to discharge the PPL loan in accordance with the terms of the LOU. As I see it, it is one thing for RBS to have told Mr McCarthy that it required the LOU as that is effectively what is stated in Clause 2.1(b). It is quite another thing for it to be suggested that Clause 2.1(b) amounts to an assurance that RBS will call on the LLP immediately on retirement, all the more so in circumstances where Clause 2.1(b) is contained in the PPL itself, the very contract under which Mr McCarthy assumed his own liability to repay the PPL loan.

156. As Miss Eborall submitted in her Written Closing Submissions, aside from Mr Kynoch's and Mr Fennell's reliance on Clause 2.1(b) of the PPL, there is no evidence that any assurance was given by RBS which could be relied upon as establishing a collateral contract. Indeed, nowhere in Mr Kynoch's and Mr Fennell's Written Closing Submissions is it suggested that there is; the case is put solely on the basis that the assurance is to be found in, or spelt out of, Clause 2.1(b).

157. Miss Eborall pointed out, in particular, in her Written Closing Submissions, that in the Written Opening Submissions submitted on Mr McCarthy's behalf at paragraph 20 the following was stated:

"D's evidence is that there was an implied representation by RBS…[D] says he would not have borrowed £120,000 from RBS without the assurance that the money would be repaid by the LLP when he ceased to be a member [1/E/150 para 22]. Indeed, it is D's evidence that without such comfort, it is unlikely that anyone would borrowed from RBS other than on that basis."

The bracketed reference was to Mr McCarthy's witness statement. That, however, did not refer to RBS giving him the assurance suggested in paragraph 20. What Mr McCarthy stated in paragraph 22 of his witness statement was as follows:

"I never believed that RBS would refuse to enforce the Letter of Undertaking if I left the LLP, whatever dispute there may have been between me and the LLP. I believed that it was obvious that RBS would not waive the LLP's obligations under the Letter of Undertaking without my consent or take any steps to dissuade or prevent the LLP from repaying the loan. I do not believe that any member of a professional services firm would borrow from RBS or any other bank on any other basis. A dispute between the member and the LLP could lead to the member leaving the LLP and then having to repay the bank straight away, while it might take months or years to resolve the underlying dispute with the LLP. This would be a wholly unacceptable risk, particularly in relation to a large firm where individual members will always have limited scope to manage the LLP's business."

158. In this paragraph Mr McCarthy's focus is not on any assurance given to him by RBS but on his own thinking and understanding when he entered into the PPL with RBS. The same applies to the earlier parts of Mr McCarthy's witness statement relied upon by Mr Kynoch and Mr Fennell in their Written Closing Submissions, namely paragraphs 16 and 17 which state as follows:

"16. I relied on this undertaking when I borrowed the capital from RBS. I would not have borrowed the money without such an undertaking. I had the alternative of joining the LLP as a senior fixed share member making only a nominal capital contribution of a few thousand pounds at most.

17. It is not uncommon for disputes to arise between a professional services firm and a member who has given notice to resign. An undertaking of this nature means that the LLP cannot find reasons to refuse to repay the retiring members capital: for example, it cannot claim a set-off in relation to it."

It should be noted that these paragraphs follow paragraph 15, which is in the following terms:

"My experience is that undertakings of this nature are a standard feature of all capital loans by all banks to members of professional services firms in general."

This serves to confirm that what, in cross-examination, he described as the *"comfort"* which he derived from the knowledge that the LLP had provided RBS with the LOU was not something which stemmed from any assurance given by RBS to him but was based on his own experience from having been a partner in other solicitors' firms and having taken out partnership loans in the past.

159. In their Written Closing Submissions, Mr Kynoch and Mr Fennell, when referring to Mr McCarthy's evidence in cross-examination, described that evidence as being that *"The LOU was a 'comfort' to him in that it gave him an assurance that the LLP would discharge his PPL regardless of his, and HLLP's, future relationship"*. That may well be the case. It does not follow, however, that Mr McCarthy can establish that there was the assurance necessary in order to make good his collateral contract case. The passage from which I have just quoted, with its reference to Mr McCarthy being given *"an assurance"*, does not support the case which is sought to be advanced. This is because the *"assurance"* to which reference is made is something which Mr McCarthy appears to have felt not from anything which was represented by RBS but as a result of his own past experience. In short, this is not evidence which makes out a case that any assurance was given by RBS. Without such evidence, the collateral contract case cannot succeed. I do not consider, in particular, that Mr Kynoch's and Mr Fennell's attempt to spell the necessary assurance out of Clause 2.1(b) of the PPL works. There is no assurance in that provision, and that is the case even if, as Mr McCarthy explained, the fact that RBS required the LOU gave him *"comfort"* (or, indeed, assurance).

160. I see no reason to change my conclusion in this regard by reason of the fact that, in an email sent by Grierson Banton to Jonathan Brown on 17 February 2010, the following was stated:

"We have been considering the request from the firm for the bank to consent to a deferral of the repayment of the PPLs of departing partners.

In considering this request we have taken into account certain submissions from the departing partners that they do not personally consent to such deferrals. Specifically, they are claiming that the Letters of Undertaking from the firm pursuant to which the firm agreed to repay the capital upon the departure of the member is a key term [emphasis added] of the PPL's and that it was only on the basis of the undertaking that they agreed to enter into the PPL.

Whilst we have taken a degree of comfort from the advice of Freshfields that this undertaking is actually granted in favour of the bank by the firm and that the bank can potentially agree to an amendment and variation of it, Freshfields do have a concern that the undertaking could be construed as an inducement or other assurance that prompted the member to enter into the PPL and that the undertaking is in effect a collateral contract of which the member is a third party beneficiary. You will understand that the bank is reluctant to induce a breach of this collateral contract or to create a potential defence for a member in the event that a PPL is not repaid in accordance with the terms of the undertaking and the bank subsequently seeks direct the course against apartment in question.

To assist us in considering these risks it would be helpful if you can explain the contractual basis upon which the LLP is entitled and able to make the amendment and variation to the Letter of Undertaking in a manner that binds the member."

Mr Kynoch and Mr Fennell submitted that this is an important email because it demonstrates that, as they put it in their Written Closing Submissions, RBS was *"alive to the retiring partners' arguments that the LOU's could be construed as an 'inducement' or 'assurance' and that prompted the member to enter into the PPL and that the undertaking is in effect a collateral contract of which the member is a third party beneficiary"*. I see no merit in this point if and to the extent that it is suggested that it follows that RBS recognised that an assurance of the sort necessary to found a collateral contract claim had actually been given. It clearly does not do this, and even Mr Kynoch's and Mr Fennell's submission is framed in terms which do not go that far.

161. In any event, the reference to Freshfields having a concern in relation to the existence of a collateral contract has as its focus a different collateral contract from that which is now alleged. Whereas the collateral contract case advanced at trial entails a collateral contract said to have come into existence as between RBS and Mr McCarthy, the collateral contract to which Grierson Banton's email referred was a collateral contract which it was thought by Freshfields might exist as between the LLP and Mr McCarthy. This is demonstrated by the reference to *"the undertaking"* being *"in effect a collateral contract of which the member is a third party beneficiary*": in other words to Mr McCarthy having a collateral contract based on the LOU with the LLP which provided the LOU. It is also demonstrated by the later reference in the email to there being a reluctance *"to induce a breach of this collateral contract"*, which must be a collateral contract to which RBS was not itself a party.

162. It follows, given that I have rejected the case based on Clause 2.1(b), that I must reject the collateral contract arguments advanced by Mr Kynoch and Mr Fennell on Mr McCarthy's behalf.

Conclusion

163. In conclusion and by way of summary, my decision is that RBS is entitled to judgment in the amount claimed (£120,000, the amount of the PPL loan), together with interest. In reaching this conclusion, I have necessarily rejected the various defences which have been raised by Mr McCarthy, as well as Mr McCarthy's counterclaim which repeats the matters pleaded by way of defence and counterclaims the amount claimed against him by RBS.