OUTER HOUSE, COURT OF SESSION

[2024] CSOH 78

CA22/24

OPINION OF LORD SANDISON

In the cause

FLEMMING HANSEN

Pursuer

against

CLOSE INVOICE FINANCE LIMITED

Defender

Pursuer: Upton; DHM Law
Defender: Thomson KC; Addleshaw Goddard LLP

9 August 2024

Introduction

[1] In this action the pursuer, Flemming Hansen, seeks interdict against the defender, Close Invoice Finance Limited, from executing a charge for payment in respect of sums said to be due by him to it in terms of an indemnity granted by him in connection with obligations owed to the defender by a company called Bonar Yarns Limited ("the Company"), of which the pursuer is a director and which has been in administration since 31 March 2023. The pursuer claims that he is not liable in terms of the indemnity to pay the defender the sums in question. An identical action exists at the instance of his co-director in the Company, Raymond Denyer. The defender has made counterclaims in both actions,

which maintain that the sums in question are indeed due from the pursuer and Mr Denyer. Both actions originated in the Sheriff Court at Hamilton, but were remitted to this court and came before me on the commercial roll. I appointed the action at the instance of Mr Hansen to be the lead action on the basis that any decision made in it would have equal force in the action at the instance of Mr Denyer, and it came before me for a debate on both parties' preliminary pleas.

Background

[2] The pursuer and Mr Denyer are directors of the Company, which manufactured textiles. On 24 August 2022, the Company entered into a Debt Purchase Agreement ("DPA") -– essentially, an invoice factoring arrangement – with the defender. On the same date, it also entered into a Stock Loan Agreement ("SLA") with the defender. The defender originally maintained claims against the pursuer and Mr Denyer in relation to obligations due by the Company in terms of the SLA as well as in terms of the DPA, but by amendment on the morning of the debate before me it abandoned the claim based on the SLA.

[3] Clause 7.6 of the DPA obliged the pursuer and Mr Denyer "to sign deeds of indemnity in respect of obligations to [the defender] under this Facility". They did so on 19 August 2022. The defender maintains that, in the circumstances which have come to pass, the indemnity requires the pursuer and Mr Denyer to pay to it the whole debit balance of the "Current Account" between it and the Company, with credit being given against that balance for sums otherwise recovered by the defender in connection with the Company's affairs. The Current Account is an account maintained by the defender in the Company's name to which it debited all payments made by it to the Company, together with all fees, expenses and other sums payable by the Company to it in terms of the DPA, and to which it

credited all payments received by it in respect of debts which it had purchased from the Company. The arrangement was expected to be profitable to the defender because it purchased debt from the Company at a percentage discount to their face value as well as charging an administration fee, also (subject to a minimum amount) calculated as a percentage of the debt purchased. Both the Discount Charge and the Administration Charge, as the DPA respectively names those charges, were debited to the Current Account. The amount claimed to be due to the defender from the pursuer and Mr Denyer in this regard, after allowing for other recoveries made by the defender, is said to be £435,450.34. The pursuer denies that repayment of the Current Account balance has validly been demanded from the Company in the first place, argues that in any event the indemnity, properly construed, does not oblige him and Mr Denyer to pay that whole balance to the defender, and asks the court to interdict it from seeking to enforce any such putative obligation by way of the service of a charge.

Defender's submissions

[4] Senior counsel for the defender asked the court to dismiss the principal action and grant decree *de plano* as counterclaimed for. The defender claimed that the Company was in fundamental breach of the DPA, with the result that the full balance on the Current Account between those parties fell due for payment to the defender by the Company. On a proper construction of the indemnity granted by the pursuer, such element of that balance as had not otherwise been recovered by the defender was due from the pursuer, jointly and severally with Mr Denyer.

[5] Counsel examined the relevant terms of the DPA and indemnity in detail. The defender averred that a "Termination Event" (ie, an event entitling the defender to terminate

the agreement) had occurred in terms of the DPA as a result of the Company having issued (and the defender having bought from it) false invoices with a face value of £356,942.32. Although there might be a dispute as to the precise circumstances in which the invoices in question had been issued, there was no dispute that they related to debts not properly due at the point of that issue.

[6] Clause 2.2 of the DPA incorporated into the agreement the defender's "standard terms and conditions with reference number 010720SCBRF". Clause 13 of those terms and conditions provided *inter alia*:

> "Each of the following will be a Termination Event, upon or at any time after the occurrence of which we may terminate this Agreement immediately by giving written notice of termination to you:
>
> > (a) you or any Associate of yours breaches or threatens to breach any of the provisions of this Agreement or any other agreement with us or any Associate of Ours, or any related guarantee or security;
> >
> > …
> >
> > (c) any of your other representations and warranties are untrue or incorrect in any material respect when they are made or deemed to be repeated under this Agreement;
> >
> > …
> >
> > (l) we consider, in our discretion, that there has been a material adverse change in your business, assets, financial condition, or operating performance; …"

[7] The standard terms and conditions contained a number of representations and warranties made by the Company, including the following:

> "10.2 Debt specific
>
> You represent and warrant to us in respect of each Debt that:
>
> …

> (f) you have performed all obligations required for enforcement of the Debt, including without limitation the delivery of Goods;
>
> …
>
> (j) each Debt is a bona fide debt and each Notification solely contains bona fide Debts within the ambit of and compliant with, sub-clauses (a) to (i) above."

[8] The undisputed facts averred by the defender fell within the foregoing categories of Termination Event under the DPA. The warranties and representations given in clauses 10.2(f) and (j) had been breached. One of the effects of a Termination Event occurring in terms of the DPA was to allow the defender to demand payment from the Company of all sums due by it to the defender under the DPA. Clause 14.2 of the standard terms and conditions provided:

> "On the expiry of the period of notice to terminate this Agreement given under Clause 12, or (if we so elect) at any time after a Termination Event has occurred and/or is continuing (whether we have chosen to exercise our right to terminate this Agreement or not), or upon termination of this Agreement pursuant to Clause 13, the following will apply:
>
> …
>
> (b) we may, upon demand, require you to pay to us the Current Account balance..."

[9] It was not necessary that the DPA be terminated in order to make the outstanding sums due for payment in full. The defender had issued a demand which, without terminating the DPA, required payment in full of the sums due under it. Those sums were accordingly due for immediate payment in full by the Company.

The only question which remained was whether the pursuer was liable to make payment of those sums under the indemnity. The indemnity was a stand-alone deed, not incorporated into any other document. It provided:

> "2. In consideration of Close entering into or continuing to provide facilities to Bonar Yarns Limited (with company number SC008924) (the "Client") pursuant to a debt purchase agreement dated 24/8/22 (the "Agreement") the Indemnifier hereby

agrees to indemnify Close and to keep Close indemnified against all and any losses (including for the avoidance of doubt, any Discount Charge and/or any Administration Charge), costs, damages, claims (whether prospective or actual and whether as claimant or defendant) interest and expenses ("Losses") Close may suffer or incur by reason of any of the following:

(a) any breach by the Client of any of clauses 10.1(a)(iii), 10.2(c), 10.2(d), 10.2(f) and 10.2(j) of the Agreement; and/or

(b) the failure of the Client to comply with the terms of any of clauses 7.1(d)(ii) and 7.1(d)(iv) of the Agreement.

3. The indemnity given herein shall be a continuing indemnity and shall not be discharged by any intermediate payment or part satisfaction by the Client.

4. The Indemnifier shall accept and be bound by a certificate signed by any of Close's directors for the purposes of determining the amount of any Losses. In any proceeding such certificate shall be treated as conclusive evidence (except for manifest error of the amounts so payable or of any Losses.

…

6. … and the Indemnifier shall be liable hereunder in every respect as principal debtor."

[10] There was a material dispute between the parties as to the scope of the obligations undertaken by the pursuer under the indemnity. The pursuer claimed that the scope of the indemnity was limited to any losses recoverable at common law and incurred by the defender by reason of any breach or non-compliance by the Company with the prescribed terms of the DPA. In particular, the pursuer's position necessarily involved a denial that the balance due under the DPA fell within the scope of the indemnity. Those averments were irrelevant.

[11] The matters in respect of which the indemnity obligation applied were the subject of a defined term (the "Losses") under the indemnity. One aspect of the defined term was itself "losses". More fully, the part of the defined term relating to "losses" was: "…any

losses (including for the avoidance of doubt, any Discount Charge and/or any Administration Charge)…"

[12] The phrases "Discount Charge" and "Administration Charge" were both defined terms in the DPA:

> "'Discount Charge' means the charge referred to in Clause 6.3, calculated daily by applying the rate per annum specified in paragraph 6.10 of the Debt Purchase Agreement (or such other sum as we may agree with you in writing) to the balance standing to the debit of the relevant Current Account (and any accrued Discount Charges or other charges accrued but not yet applied to the relevant Current Account) as at the close of business each day.
>
> 'Administration Charge' means the charge specified in paragraph 6.11 of the Debt Purchase Agreement, at the percentage rate specified therein accruing on each Debt notified to us or, if not a percentage, the amount therein recorded, or such other amount as may be agreed in writing between us, and subject in any case to the Minimum Administration Charge."

[13] The "Discount Charge" and the "Administration Charge" were both sums which the Company was liable to pay to the defender under Clause 6.1 of the standard terms and conditions. The Administration Charge was to be debited to the Current Account immediately upon Notification of Debts, and the Discount Charge was calculated daily and debited to the Current Account at the end of each month. It could be seen, then, that the Administration Charge and the Discount Charge both related to, and affected, the balance of the Current Account. Both charges were debited to the Current Account. It followed that the defined term "Losses" in Clause 2 of the indemnity included "for the avoidance of doubt" certain debit entries made to the Current Account, and was not restricted to common law damages arising from a breach of the DPA. In those circumstances, it would make no sense for the pursuer to be obliged to indemnify the defender in respect of certain charges applied to the Current Account (being charges which did not depend upon the occurrence of any breach of the DPA, far less upon the occurrence of a Termination Event) and yet not

obliged to indemnify it in respect of the principal sum outstanding under the DPA; namely, the Current Account debit balance itself.

[14] That such was the proper construction of the indemnity was reinforced when one considered the remaining aspects of its Clause 2. That Clause referred not just to "losses" but also to "costs, damages, claims (whether prospective or actual and whether as claimant or defendant) interest and expenses". The principal sum due under the Current Account could readily be described as a "cost" or "claim". Moreover, given that the reference to "claims" was expressly stated to cover claims "whether as claimant or defendant", the concluding words of the Clause ("…Close may suffer or incur by reason of any of the following") again pointed away from the notion that all that was being indemnified was in the nature of losses arising from a breach of contract which could be made the subject of an award of damages at common law. For example, one could hardly be said to "suffer or incur" a claim *qua* claimant and yet the Administration Charge and the Discount Charge were clearly sums due to the defender under the indemnity. Thus, when Clause 2(a) of the indemnity expressly referred *inter alia* to breaches by the Company of various clauses within the DPA which constituted Termination Events, it must follow that it was within the scope of the indemnity that losses, costs and claims arising from the occurrence of a Termination Event were within the scope of the indemnity obligation. As already explained, a Termination Event had occurred and the entire sums due under the DPA had become payable to the defender by the Company. On a proper construction of the indemnity, those sums were subject to the obligation undertaken by the pursuer under Clause 2 of the indemnity.

[15] In response to questioning by the court, counsel accepted that a possible construction of Clause 2 of the indemnity was that the references to Administration and Discount

Charges falling under its ambit could refer to such charges only insofar as they arose in relation to the false invoices, although he maintained that that construction would require some words to be read into the clause. He acknowledged that that alternative construction might be regarded as equally plausible to that which the defender advanced. Counsel further accepted, again in response to the court's questioning, that the reference in Clause 2 to the defender's ability to recover a loss as a claimant in a claim might refer to the situation where it had to take enforcement action in relation to a debt assigned in respect of which a problem had arisen, and being left out of pocket in that regard. He maintained, however, that the wider construction espoused by the defender made more commercial sense. It was clear that the parties had agreed that the pursuer, as the Company's director, was to bear some degree of personal responsibility for the Company's defaults; the question was how much.

[16] If the defender's construction of the indemnity was correct, it followed that the principal action was irrelevant, as the pursuer's position proceeded upon a material misconstruction of the indemnity. Diligence on the basis of the indemnity would not amount to a legal wrong, and so there was no justification to restrain the defender from taking such action. The principal action should be dismissed. There was no relevant defence to the counterclaim, in which decree *de plano* should be pronounced. If the court favoured the pursuer's construction of Clause 2 of the indemnity, the defender should be allowed an opportunity to amend the counterclaim to reflect the lesser sums which it considered might in any event be recoverable from the pursuer and Mr Denyer.

Pursuer's Submissions

[17] Counsel for the pursuer submitted that the scope of the indemnity was limited to such defined losses as might be incurred by the defender by reason of any breach or non-compliance by the Company with the listed clauses of the DPA.

[18] The defender alleged that it had triggered a Termination Event by writing to the Company alleging a breach of Clause 10.2(j) of the DPA in respect of its rendering of false invoices, and that the whole sums then due under the DPA to it by the Company thus fell due for payment. However, quite apart from any issue of construction of the indemnity, the defender had not relevantly stated a case that it had indeed validly triggered any obligation on the part of the Company to repay the debit balance on the Current Account. The DPA provided at Clause 14.2(b) that, on the occurrence of a Termination Event, the defender might, "upon demand, require [the Company] to pay to us the Current Account Balance". It had become apparent by way of the amendment made by the defender on the morning of the debate that it relied in this regard on a letter sent by it to the Company on 30 March 2023.

[19] That letter, which was in sophisticated terms and which accordingly fell primarily to be construed by straightforward textual analysis, referred to both the DPA and the SLA as the "Facilities". It claimed that both had been terminated by letter dated 23 March 2023 and, under the heading "Demand for Repayment", narrated the provisions of the SLA setting out that the "Loan Account Balance" due in terms of that agreement was repayable on demand in the event of its being terminated. It made no express reference to the terms of the DPA. It went on to state: "Accordingly, Close hereby makes demand for the immediate repayment of the sum of £1,337,281.19 being the Loan Account Balance due under the Facilities which are immediately due and payable." Although that sentence referred to sums being due and payable in terms of the "Facilities" (i.e. both the DPA and the SLA), and it would have been

known to the Company that the sum £1,337,281.19 was in excess of the Loan Account Balance alone, the letter did not in law constitute a demand for repayment of the sums due under the DPA, and in particular did not constitute a demand for repayment of the debit balance of the Current Account. That was because its terms failed to convey to a reasonable recipient that payment of sums due in terms of the DPA was being demanded. In *Our Generation Ltd* v *Aberdeen City Council* [2019] CSIH 42, 2019 SLT 1164, the First Division had considered a similar argument in a case where a demand for payment was a contractual pre-condition of termination of the contract in question. An issue arose as to whether a particular e-mail had represented such a demand. The Court held at [27] that:

> "When the question, of whether the terms of the email were sufficient to convey the necessary information to the defenders, is asked, the answer must be in the negative. What was needed was a clear statement (*Mannai Investment* (supra), Lord Clyde at p. 782) [i.e. *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [[1997] AC 749, [1997] 2 WLR 945 at 974], not just that sums were overdue, but, as a bare minimum, that the pursuers were requiring the defenders to pay these sums".

[20] Consequently, the defender's averments that payment of the sums in question had been demanded from the Company were irrelevant. Since it was a prerequisite of any possible triggering of the indemnity in relation to the debit balance on the Current Account that that balance should have become payable by the Company, which in turn required in terms of Clause 14.2(b) of the standard terms incorporated into the DPA that such payment should have been demanded, the indemnity (even on the defender's construction) could not apply to the Current Account balance and the counterclaim was irrelevant.

[21] Further, the defender's averments amounted to nothing more than a claim that the Company owed a debt to the defender by reason of the terms of the DPA. They were not averments of "losses … costs, damages, claims (whether prospective or actual and whether as claimant or defendant) interest and expenses" that the defender had suffered or incurred

by reason of breach of any of the enumerated clauses of the DPA. That fell to be read as a reference to the proximate cause of any loss. Any loss suffered by the defender in relation to the debit balance of the Current Account had been suffered only because a Termination Event had occurred, the defender had chosen to demand repayment of that balance, and the Company had been unable to pay it. The defender's claim that any such loss fell within the terms of the indemnity was accordingly irrelevant.

[22] In any event, the construction of the indemnity for which the defender argued made no commercial sense. The DPA required the pursuer to sign the indemnity "in respect of obligations" to the defender, without further specification. It certainly did not say that an indemnity would be required in relation to all of the Company's obligations to the defender. It was not expressed as a guarantee of the Company's obligations to the defender. Clause 2 of the indemnity was very selective; it specified only certain breaches of obligation on the part of the Company as potentially triggering a right to indemnification, omitting reference to other serious, indeed fundamental breaches of the DPA which would constitute Termination Events. The common theme to the DPA Clause 10 breaches which had been selected as potentially triggering the indemnity was that they were all matters which might have induced the defender to give more value for debts it purchased from the Company than ought to have been ascribed to them. From that, it could be seen that the purpose of Clause 2 of the indemnity was to enable the defender to be made whole in respect of debts for which it had, as a result of some fault on the part of the Company for which its directors might fairly be held responsible, given excessive value.

[23] The defender's construction of the indemnity would, further, render it an onerous and unusual obligation. Indemnities and guarantees were distinct. By a contract of indemnity, an obligant undertook an independent obligation to indemnify, as distinct from a

collateral cautionary contract by which he undertook to answer for the default of another person who was to be primarily liable to the creditor. The indemnity expressed itself to be such, not a guarantee. The defender's position required that it be construed as having the same effect as a guarantee of the Company's obligations; in other words, that a contract described as of one kind should have effect as a contract of a different kind. That would have been an onerous and unusual obligation. Such a construction was not to be adopted in the absence of averments that it was specifically drawn to the obligant's attention before he agreed to its terms: *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd*, [1989] QB 433 at 443, [1988] 2 WLR 615 at 624, per Bingham LJ; *Montgomery Litho Ltd v Maxwell*, 2000 SC 56 at 59 – 60, 1999 SLT 1431 at 1433, per the Extra Division; *Freelands* v *McClue*, Hamilton Sheriff Court, 1 December 2014, unreported, per Sheriff Principal Lockhart at [18] – [19]. The defender made no such averments. Its pleadings were for that reason also irrelevant.

[24] Finally, if there was ultimate dubiety as to the proper construction of Clause 2, the application of the *contra proferentem* principle of construction ought to be applied to resolve any doubt in favour of the pursuer, who had simply been presented with a detailed contract pre-drafted by the defender which he was required to sign.

[25] The court should sustain the pursuer's second and third pleas-in-law in the principal action, his first and second pleas-in-law in the answers to the counterclaim, grant decree of interdict in terms of the principal action, and dismiss the counterclaim.

Response for the defender

[26] Senior counsel for the defender acknowledged that the letter sent to the Company on 30 March 2023 could have been better framed, but maintained that a reasonable recipient with the background knowledge to be attributed to the Company would have been left in no

doubt from its terms that immediate repayment of the debit balance on the Current Account was amongst the sums being demanded by it.

[27] The indemnity was directed at the essential obligations of the Company under the DPA in respect of which it was reasonable to expect its directors to accept some personal responsibility. Clause 5 of the indemnity made it clear that the indemnifier was to be liable to the defender as a principal obligant and not as a mere cautioner.

[28] As to the indemnity being an onerous and unusual obligation which ought to have been specifically drawn to the attention of the pursuer, *Interfoto* and *Montgomery* were not in point. In *Brandon Hire plc* v *Russell* [2010] CSIH 76, an Extra Division had made it clear that *Montgomery* concerned cases in which an onerous condition had, in effect, been hidden away in a set of standard terms which would not reasonably be expected to house it. In the present case, no such situation arose. The indemnity was a stand-alone document in relatively brief terms and the pursuer had, on its face, acknowledged that it had been suggested to him that he should take independent legal advice before signing it. The ratio of *Montgomery* was simply inapplicable to such a situation.

[29] The *contra proferentem* principle of construction was amongst the "old intellectual baggage of 'legal' interpretation" which was described by Lord Hoffman in *Investors Compensation Scheme Limited* v *West Bromwich Building Society* [1998] 1 WLR 896 at 912G – H as having in modern times been discarded.

Decision

[30] Although the precise circumstances are disputed, it is common ground between the parties that a Termination Event in terms of the DPA occurred as a result of the breach by the Company of warranties given by it to the defender in terms of clauses 10.2(f) and/or 10.2(j)

of the latter's standard terms concerning the Company's performance of all obligations required for certain debts sold to the defender to be enforceable, and for them to be regarded as *bona fide* debts. The occurrence of a Termination Event allowed the defender, in accordance with Clause 14.2 of those standard terms, to elect to demand payment from the Company of all sums due to it in terms of the DPA, including the Current Account balance. No particular form or content that such a demand should take or have was stipulated in the standard terms.

[31] On 23 March 2023 the defender's solicitors, Addleshaw Goddard, sent a letter headed "URGENT – NOTICE OF TERMINATION AND DEMAND" to the Company which, it is contended, terminated the DPA. There is room for doubt as to whether in fact the letter did have that effect, but for present purposes that does not matter, since the right to demand payment of the Current Account balance upon the occurrence of a Termination Event is not contingent on the actual termination of the DPA. It is not suggested that that letter made a demand for repayment of the Current Account balance. However, a week later, the defender itself sent a further letter to the Company which is said to constitute such a demand. Its operative terms were as follows:

> "1. We refer to (without limitation):
>
> (a) the Stock Loan Agreement between Close Invoice Finance Limited (Close) and Bonar Yarns Limited (the Company) dated 11 and 24 August 2022 (the **SLA**); and
>
> (b) the Debt Purchase Agreement between Close and the Company incorporating the Standard Terms and Conditions with reference number 010720SCBRF (together, the **DPA**) dated 19 and 24 August 2022.
>
> The SLA and the DPA are together referred to as the **Facilities**. Terms used but not otherwise defined in this letter have the same meaning as in the DPA and / or the SLA.

> (c) Addleshaw Goddard's letter of termination to you dated 23 March 2023 (the Termination Letter).
>
> DEMAND FOR REPAYMENT
>
> 2. The Termination Letter terminated the SLA and the DPA, subject to the reservation of Close's rights contained in paragraph 5 of the Termination Letter.
>
> 3. As set out in the Termination Letter on or following a Termination Event, Close may (amongst other things and whether or not it elects to terminate the Facilities):
>
> (a) declare the Loan Account Balance and any other amounts due hereunder immediately due and payable (whereupon you will comply with such demand by immediately repaying the Loan Account Balance together with all outstanding interest and any other amounts due under this Agreement) (SLA 14.1(8)); and/or
>
> (b) declare that all or any part of the Loan Account Balance is henceforward payable upon demand (SLA 14.1(C)).
>
> 4. Accordingly, Close hereby makes demand for the immediate repayment of the sum of £1,337,281.19 being the Loan Account Balance due under the Facilities which are immediately due and payable."

[32] The "Loan Account Balance" is a concept which arises out of the SLA rather than the DPA, and may be regarded as the functional equivalent in the former of the Current Account Balance in the latter. The first question of law which falls to be decided is whether the terms of the letter of 30 March 2023 fall to be regarded as an effective demand for repayment by the Company of the Current Account balance. That resolves itself in the question of how a reasonable recipient of the letter, taking into account the relevant objective contextual scene, would have understood its terms: *Mannai*, per Lord Steyn at [1997] AC 768G – H, [1997] 2 WLR 961G – H. The standard of reference is an objective one; that of the reasonable man exercising his common sense in the context and in the circumstances of the particular case. No absolute clarity or absence of any possible ambiguity is required: *ibid*., per Lord Clyde at [1997] AC 782C – D, [1997] 2 WLR 975B – D. The reasonable recipient is treated as being

aware of at least the principal features of the background circumstances against which the communication in question was sent. Applying the test to the facts of the present case, the reasonable recipient of the letter of 30 March 2023 would have been aware from paragraph 1 that when it mentioned the "Facilities", it was referring to both the SLA and the DPA. It would have been aware from paragraph 3 that the defender was claiming that the occurrence of a Termination Event entitled it to require repayment of the Loan Account Balance due under the SLA, "amongst other things". It would have been aware from its knowledge of the terms of the SLA and DPA that that claim was correct, and that amongst the other things which the defender was entitled to do in such circumstances was to require repayment of the Current Account balance due under the DPA. It would have known from its background knowledge of the operation of the SLA and DPA that the sum of £1,337,281.19 demanded in paragraph 4 of the letter exceeded the amount due under the SLA's Loan Account Balance alone. Armed with that knowledge, it would, when confronted with the letter's demand "for the immediate repayment of the sum of £1,337,281.19 being the Loan Account Balance due under the Facilities which are immediately due and payable" have appreciated that what was being demanded was the total amount due under both facilities and that the reference to the Loan Account Balance alone was a mere error in description as to the nature of the sum of which payment was clearly required. This is an example of the unambiguous conveyance of a particular meaning despite the use of the wrong words, with the reasonable reader adjusting his interpretation of the words used in order to make sense of the utterance and make it fit the factual background known to him; a situation described by Lord Hoffmann in *Mannai* at [1997] AC 774D – E, [1997] 2 WLR 967G - H as being a "matter of constant experience". If and to the extent that a demand for repayment of the DPA Current Account balance was a pre-condition to that balance

potentially falling under the scope of the indemnity, that condition was satisfied by the letter of 30 March 2023.

[33] It is thus necessary to turn to the question of the proper construction of the indemnity, and in particular Clause 2 thereof. That provides that those things which are to be covered by the indemnity are "Losses" – a defined term to be treated as comprehending losses, costs, damages, claims, interest and expenses – with the additional stipulations (i) that the claims from which relevant losses may flow may be prospective or actual claims and that the defender may be the claimant or defendant in them; and (ii) that "for the avoidance of doubt", any Discount Charge and/or Administration Charge is also to be regarded as a relevant loss. Those provisions of Clause 2 may be regarded as answering the question of what kinds of detriment (to select a neutral word covering the various elements comprehended within the defined term "Losses") are capable of being covered by the indemnity. However, Clause 2 also stipulates how those detriments must have occurred if they are to be recoverable – they must be suffered or incurred by the defender by reason of a breach by the Company of any of clauses 10.1(a)(iii), 10.2(c), 10.2(d), 10.2(f) and 10.2(j) of the standard terms, or the Company's failure to comply with the terms of clauses 7.1(d)(ii) and 7.1(d)(iv) thereof. The particular clauses said to have been breached by the Company in the present case were clauses 10.2(f) and 10.2(j), the terms of which have already been set out and summarised. The remaining selected sub-clauses of Clause 10 are, in very general terms, concerned with warranties that material facts influencing the defender's decision to buy a debt from the Company were correct, that no debt had already been sold to the defender, and that no debt sold to it had already been sold to or burdened for the benefit of someone else. The selected sub-clauses of Clause 7, again in basic summary, require any sum received by the Company in respect of a debt which had been sold by it to the defender

to be paid over to the defender and meantime to be held in trust for it. It is worth observing that there are many other potential matters capable of constituting Termination Events in terms of the DPA (and thus entitling the defender to demand immediate repayment of the Current Account balance from the Company) which were not selected as potential triggers for the indemnity obligation.

[34] A substantial problem for the defender's favoured construction of the indemnity is that it is very difficult to understand how the whole debit balance of the Current Account may properly be understood to have come to represent a detriment suffered or incurred by the defender by reason of a breach of any of the obligations of the Company selected for inclusion in the indemnity. While the DPA was operating as contemplated, that balance was a sum brought out on a running account operated in consequence of the arrangements set out therein. It could only become a detriment to the defender if it were to become immediately due and payable to it and the Company was unable to pay it. The defender's argument is that it did become immediately due and payable, as the result of its own choice to demand such payment in consequence of the breach by the Company of one or more of the obligations set out in the indemnity and the status of such breach as a Termination Event. It is possible, notwithstanding the interposition of the defender's own election (sanctioned by the DPA) as part of that sequence of events, to regard the Company's obligation immediately to repay the Current Account balance as having arisen by reason of its breach of an obligation selected and set out in the indemnity. What is much more difficult to follow is how the Company's inability to pay the whole of the Current Account balance may be said to arise "by reason of" any such breach. The defender makes no attempt to establish that it was the breach of the warranty relied on by it which was the operative cause of the Company being unable to repay that balance as opposed, for example,

to the general state of its cash flow which presumably caused it to seek invoice financing in the first place. The mechanism by which "Losses" must come to pass if they are to be covered by the indemnity does not obviously apply to the whole of the Current Account balance.

[35] The defender's principal argument in support of its favoured construction of the indemnity is built on the specific inclusion, "for the avoidance of doubt" of Discount Charge and Administration Charge within the concept of "Losses". The argument suggests that the inclusion of those charges (which undoubtedly form part of the Current Account balance) as "Losses" demonstrates that the Current Account balance as a whole is included within that concept, and the "avoidance of doubt" phraseology indicates that those elements of that balance are not to be excluded from that whole. However, it is again difficult to see why, if the Current Account balance as a whole is indeed included within the concept of "Losses", any doubt would arise, and require to be avoided, that those charges would be included as integral parts of that balance.

[36] The difficulties inherent in the defender's preferred construction of Clause 2 of the indemnity do not arise if "Losses" are regarded, entirely consistently with the natural meaning of the words used in the clause, as detriments suffered by the defender in consequence of debts in respect of which the DPA clauses identified in the indemnity were breached not being recoverable in whole or in part, or being more difficult or expensive to recover than would have been the case had those clauses not been breached. On that reading, if a breach resulted in a purchased debt not being recoverable from the putative debtor, Clause 2 would operate to make the pursuer liable for the amount of that debt and "for the avoidance of doubt", also liable for the profit element which the defender had expected to make from its purchase of that debt, in the form of the Discount Charge and the

Administration Charge pertaining to it. If a breach of one of the DPA clauses identified in the indemnity involved the defender in legal dispute or ultimately litigation, either in an attempt to enforce a doubtful debt, or to attempt to rebut a claim that it was not enforceable, then it might incur irrecoverable cost in the course of those activities (whether as claimant or defender), which accounts for the inclusion within the concept of "Losses" of "claims (whether prospective or actual and whether as claimant or defendant)". That approach to the construction of Clause 2 gives effect to the natural and ordinary meaning of the words used in the clause, avoids entirely the difficulties posed by the defender's preferred construction, and produces no absurd result from a commercial point of view. It makes the pursuer and his fellow director liable for the consequences of the warranties given by the Company under their control being false (Clause 10) or for the diversion of monies truly belonging to the defender (Clause 7) but does not make them, in effect, guarantors for its whole liabilities to the defender. It is the construction which falls to be preferred. Although the defender's construction may make some leonine commercial sense, at least from its own point of view, it is simply not a viable one given the language used.

[37] None of the other points raised by counsel for either party appeared to me to be capable of bearing any sufficient weight to affect the outcome of the construction exercise which required to be undertaken. It is unnecessary given the decision I have made on the proper construction of Clause 2 to go on to consider the pursuer's arguments based on the "onerous or unusual" or *contra proferentem* principles, but the following brief observations may be made. So far as the former principle is concerned, I regard the law as concisely and accurately stated by Hale LJ in *O'Brien* v *MGN Ltd* [2001] EWCA Civ 1279; [2002] CLC 33 at [23]:

> "… the words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are to be bound by it and that more is required in relation to certain terms than to others depending on their effect."

[38] It would be difficult to regard those observations as applicable to the facts of the present case.

[39] I do not regard the *contra proferentem* principle as having been entirely jettisoned in the ongoing exercise of modernisation of the principles of contractual construction; it has, rather (outside the sphere of consumer contracts, where it continues to perform its traditional function), subtly metamorphosed into the notion that, the more contractual terms are said to take away from one party to the contract valuable rights and remedies which he would otherwise enjoy in law, the clearer such terms must be: see *Triple Point Technology Inc* v *PTT Public Co Ltd* [2021] UKSC 29, [2021] AC 1148, per Lord Leggatt JSC at [111] and the authorities cited therein.

Conclusion

[40] I shall dismiss the counterclaim by way of repelling the defender's pleas there and sustaining the pursuer's first and second pleas-in-law in the answers thereto. I do not consider it appropriate to keep the counterclaim on foot while the defender formulates and expresses such claim as it may have against the pursuer and Mr Denyer on the basis of the proper construction of the indemnity; it has had ample opportunity to do so before now, and may proceed in that regard by separate action if it so sees fit. I do not consider it appropriate to grant interdict against the defender in terms of the principal action, on the basis that there can be no reasonable apprehension on the part of the pursuer that the defender will unlawfully do diligence against him now that the proper import of the

indemnity has been judicially clarified. I will accordingly also dismiss the principal action; such dismissal in no way infers that the institution and maintenance of that action to this point was unreasonable, and should it prove necessary to deal with any question of expenses in relation to the proceedings as a whole, due regard will be had to that consideration.