ORDR-6334830723-0988

Claim No. CFI 025/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

UNION BANK OF INDIA (DIFC BRANCH)

Claimant

and

(1) VELOCITY INDUSTRIES LLC

(2) VELOCITY VENTURES LTD

(3) UMAKU TRADE INVEST LIMITED

(4) VIJEY KAPOOR

(5) RAVI KUCHIMANCHI

(6) RAJENDER [RAJINDER] MAKHIJANI

(7) PARAG GUPTA

(8) DEVIKA [SWATI] MAKHIJANI

Defendants

JUDGMENT OF JUSTICE LORD ANGUS GLENNIE

Hearing: **30 May 2022 to 3 June 2022 and 12 September 2022 to 16 September 2022**

Counsel: Mr. Kunal Vajani, assisted by Ms. Nikhat Khan, instructed by Kochhar & Co. Legal Consultants for the Claimant

Mr. P.V Sheheen instructed by Bestwins Law Corporation for Legal Consultancy for the Second Defendant and Fifth Defendant

Mr. Vijey Kapoor a litigant in person for the Fourth Defendant

Ms. Zara McGlone, assisted by Ms. Tina Asgarian, instructed by KBH Limited for the Sixth, Seventh and Eighth Defendants

Judgment: **17 July 2023**

UPON the Claimant's Part 7 Claim form dated 17 March 2020 (the "Claim")

AND UPON the Trial held before me on 30 May 2022 to 3 June 2022 and 12 September 2022 to 16 September 2022 (the "Trial")

AND UPON hearing Counsel for the Claimant, Counsel for the Second and Fifth Defendants, the Fourth Defendant in person and Counsel for the Sixth, Seventh and Eighth Defendants at the Trial

AND UPON the Claimant and the Fourth to Eighth Defendants' closing submissions dated 21 November 2022 (the "Closing Submissions")

AND UPON the Claimant and the Fourth to Eighth Defendants' replies to the Closing Submissions dated 12 December 2022

AND UPON reviewing the submissions lodged in the case file

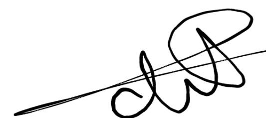
IT IS HEREBY ORDERED THAT:

1. The Claim against the First Defendant succeeds in full.

2. The First Defendant shall within 14 days from the date of this Order pay to the Claimant the sum of USD 2,403,037.16, together with interest thereon at the rate of USD 785 per day from 1 February 2020 until the date of this Order, and judgment debt interest thereon calculated at the rate of 9% per annum from the date of this Order until payment.

3. The Claimant's claims against the Fourth, Fifth, Sixth, Seventh and Eighth Defendants fail and are dismissed.

4. Costs shall be reserved.



Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 17 July 2023
At: 2pm

SCHEDULE OF REASONS

Introduction

1. The Claimant (the "Claimant" or "Bank") is an Indian bank. It provides credit, investment banking and other financial services to various industry sectors acting through its DIFC Branch office in Dubai.

2. In this action, the Claimant claims USD 2,403,037.16 inclusive of interest and contractual "penal interest" thereon calculated to 31 January 2002 from the First Defendant, Velocity Industries LLC ("D1" or the "Borrower"), in respect of loans or advances made to it under the terms of a Master Facility Agreement ("MFA") entered into between them and dated 25 November 2017. D1 is a limited liability company incorporated in 2013 under the laws of the UAE, with its registered office in Ras Al Khaimah FTZA, Dubai. D1 has not filed a defence or taken an active role in these proceedings. The Claimant has not entered default judgment against D1. Instead, it seeks to prove its case against it.

3. The Second and Third Defendants ("D2" and "D3") were established for the purpose of owning D1 as a joint venture. The details do not matter, but the driving force behind the joint venture were the Fourth, Fifth and Seventh Defendants. The joint venture started in 2013/2014. From 2014 on D1 entered into Facility Agreements with the Bank. So far as is relevant to this part of the claim, D2 and D3 each gave Corporate Guarantees dated 25 November 2017 guaranteeing payment by D1 of the sums due under the MFA. Since these proceedings were commenced, D3 has gone into liquidation and was dissolved on 27 November 2019; and D2 was struck off the Register of Companies on 11 February 2020. Neither D2 nor D3 has been restored to the Register. For obvious reasons, the case against D2 and D3 has not been pursued by the Claimant (though, somewhat curiously, counsel for the Fifth Defendant purported to act also for D2 at the Trial).

4. The Claimant also claims the same sums from the Fourth, Fifth, Sixth, Seventh and Eighth Defendants (respectively "D4", "D5", "D6", "D7" and "D8") under Personal Guarantees given by them in respect of the sums due under the Master Facility Agreement (the "Personal Guarantees" or "PGs"). The Personal Guarantees are all in substantially the same terms. Those given by D4, D5 and D7 were dated 25 November 2017. Those given by D6 and D8 were dated 5 December 2017. Nothing turns on that difference.

5. By way of explanation of the relationship to D1 of the Corporate and Personal Guarantors, D2 and D3 were at all material times shareholders in D1; D4 and D5 were directors of D1 and responsible for its day-to-day management; D6-D8 also became directors of D1. D4 and D5 were also directors of and (directly or indirectly) owners of D2; and D6, D7 and D8 were shareholders in D3. All had an interest in signing Guarantees without which the Claimant would not have been willing to enter into the MFA.

The proceedings in court

6. The Trial of this action lasted 10 days. It had originally been listed for 5 days. The first day was taken up with procedural arguments which ought to have been raised and resolved long before the action came on for Trial. The remainder of the time was occupied by hearing oral evidence from witnesses (see below). Each witness had made several statements on which they were examined and cross-examined. Witness statements in total ran to nearly 400 pages. Documents filed in the process ran to many thousands of pages. At the end of the evidence there was no time for oral submissions. Accordingly, parties lodged written Closing Submissions followed by written Submissions in Reply. Together with the written Skeleton Arguments lodged in advance of the Trial, written submissions of one sort or another themselves ran to several hundred pages. That is regrettable. In a common law system, it is useful to the judge, and often to the parties, to have some oral argument, allowing the judge to identify the real issues and the main arguments for and against a particular point. Ploughing through hundreds of pages of written submissions and cross-referencing points made in those submissions to the witness evidence and the relevant documents unaided by any such oral argument is like wading through treacle. There is a risk that points of importance get overlooked or not treated with the attention they deserve. While I cannot speak for others, I would urge parties when estimating the likely length of a Trial to have regard to the need to allow some time for oral closing submissions, even if such submissions are brief and are supplemented later by written closings.

The evidence

7. I heard evidence from three witnesses for the Claimant. They were Mr N Chezian, Mr Akhilesh Kumar and Mr Jithender Maniram. Mr Chezian was from February 2013 until May 2016 the Chief Financial Officer at the Bank's DIFC Branch. After spending a couple of years at other branches of the Bank, he worked as Deputy General Manager in the Dubai Branch from 2018 to 2021. Mr Kumar was the Senior Executive Officer

for the Bank's DIFC Branch from February 2015 until March 2018. Mr Maniram was the Senior Executive Officer for the Bank's DIFC Branch, in succession to Mr Kumar, from March 2018 until April 2021. Between them they covered the period with which this action is concerned. In giving their evidence they all, quite naturally, referred to the contemporaneous documents. I had no reason to doubt their honesty. However, it seemed to me that they had no independent recollection of the relevant events, relying on the contemporary documents when they could but resorting to speculation when there were no documents to assist. In the circumstances I was unable to place a great deal of reliance on their evidence where it was not supported by the documents.

8. D4 and D5 both gave evidence in person. Each had a particular line that he was wanting to push. Both were articulate and highly credible. Nonetheless I had difficulty in forming an overall assessment of their evidence. I preferred to deal with their evidence issue by issue but in the end, for reasons which will become apparent, I have not had to decide between their respective accounts.

9. Both D4 and D5 called expert evidence of an accounting nature.

10. D7 and D6 both gave evidence in person. I had no difficulty in accepting their evidence, which was consistent with the documents. D8 had been due to give oral evidence in person but at the last moment she was unable to appear for cross-examination before the court due to personal reasons, and by agreement of all parties her witness statements were considered as though they were hearsay witness statements for the purpose of these proceedings.

Four preliminary matters

11. First, however, it is convenient to deal with four preliminary matters, the first two of which were raised only on or soon before the first day of the Trial. These are (i) the VCF issue, (ii) conflict of interest, (iii) jurisdiction and (iv) limitation.

The VCF Issue

12. The Trial began on Monday 30 May 2022. It was set down to last 5 days. On the preceding Friday (27 May 2022), KBH, the lawyers acting for D6-D8, wrote to Kochhar & Co, lawyers acting for the Claimant, to the effect that, since all of the Claimant's witnesses lived in India, it was to be presumed that they would be giving evidence by video link from India. On that basis, they drew the Claimant's attention to the terms of para.4 of Schedule B to Part 23 of the Rules of the DIFC Courts (the "RDC"), as well

as to a Practice Note issued by the Chancellor of the High Court of England and Wales, and sought assurances from the Claimant that permission for those witnesses to give evidence in these proceedings by video link from India had been obtained from the relevant Indian authorities. No such assurances were given, the Claimant's position being that no permission was required.

13. D6-D8 formally raised the matter at the beginning of the Trial, their application (supported by a Supplementary Skeleton Argument) being that unless permission had been obtained from the Indian authorities those potential witnesses should not be allowed to give their evidence by video link from India. In effect, since it was not possible in practice for those witnesses to obtain visas and travel to Dubai in time for their evidence to be taken the next day or at any time which would enable the Trial to proceed without the necessity of an adjournment, and since the Claimant did not want to ask for an adjournment of the Trial on the ground that its witnesses were not presently available because of the likely adverse costs consequence of so doing, this would mean that the Claimant would not be able to call any evidence in support of its case, with obvious knock on consequences for the future course of the Trial. The Claimant's position, again, was that no permission was required from any Indian authority.

14. There being no application to adjourn the Trial, I took the view that I should hear the evidence of these witnesses (and any other witnesses in the same or a similar position) and allow them to give their evidence "subject to it being confirmed by the end of the week that there is no difficulty from the Indian law point of view. If there is, then their evidence will simply be discounted" (see Transcript Day 1 pp.26-27). I readily appreciate that such a course was not entirely satisfactory, but in the circumstances, it seemed the least bad option. The hope that matters would be clarified by the end of the week was somewhat optimistic, but no point has been taken on that.

15. The Claimant and D6-D8 thereafter filed evidence of Indian law relating to this matter and included submissions on it in their written Final Submissions at the end of the Trial. Other parties were broadly supportive of the arguments advanced by D6-D8.

16. Schedule B to RDC Part 23 contains a protocol for the use of video conferencing facilities ("VCF") in civil proceedings, based in part on a protocol adopted by the Federal Court of Australia. It states that it is intended "to provide a guide to all persons involved in the use of VCF", but it recognises that it does not attempt to cover all of the practical questions which might arise. Much of the protocol is concerned with practical

arrangements with no direct relevance to the present issue. However, paragraph 4 deals with the case of witnesses being examined remotely from a foreign jurisdiction. It provides as follows:

> "It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in the DIFC by means of VCF. If there is any doubt about this, enquiries should be directed to the Registry with a view to ensuring that the country from which the evidence is to be taken raises no objections to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8 below) will be required to make all necessary enquiries about this well in advance of the VCF and must be able to inform the Court what those enquiries were and of their outcome."

17. Such matters would be expected to be raised at the Case Management Conference ("CMC") or, at latest, at the Pre-Trial Review ("PTR"). The Claimant issued its Case Management Information Sheet on 27 June 2021, almost a year before the commencement of the Trial. In answer to the standard question "Do you wish any witness to give oral evidence by video link?" and "Please state the country and city from which the witness will be asked to give evidence by video link", the Claimant said simply: "The witnesses are currently based in India and will give oral evidence by Video Link". This gives rise to the inference that these witnesses would give oral evidence by video link from India, but the basis for that inference is somewhat diluted by the fact that, in light of the then current Covid precautions, the CMC would have contemplated a Trial conducted entirely by VCF, whether the witnesses were in the DIFC or elsewhere. There was no indication that enquiries had been made along the lines set out in paragraph 4 of Schedule B to RDC Part 23; but nor was any point taken by any of the Defendants that there had been no compliance with the guidance in that Schedule. The matter does not appear to have been mentioned either in the Case Management Order of 18 July 2021 nor in the revised Case Management Order of 31 August 2021, both of which were consent Orders, nor in the subsequent further revisals of that Order, nor in the order made at the PTR of 24 March 2022.

18. To put the matter in context, it should be noted that the protocol set out in Schedule B to RDC Part 23 was drawn up before the Covid pandemic made VCF evidence the norm rather than the exception. In this context paragraph 8 of the protocol is of interest, since it contemplates that VCF evidence will be the exception rather than the norm, and therefore has in mind a particular direction being given before Trial that the evidence of a particular witness or of particular witnesses should be taken by means of VCF; whereas under the current regime, applying to the period after the outbreak of Covid and still in effect to this day, the vast majority of cases are conducted entirely by

VCF, and a single general direction is given at an early stage that the Trial is to be conducted in this way.

19. The Practice Note issued by the Chancellor of the High Court of England and Wales (Sir Julian Flaux) on 11 May 2021 was, however, issued after the Covid pandemic shifted the balance and made the taking of evidence by videolink much more common than it had been previously. It is therefore worth setting it out in full. It reads as follows:

> "PRACTICE NOTE
>
> 1. In a number of cases in the recent past, the issue has come up in relation to witnesses giving evidence by videolink or other remote means from a foreign jurisdiction that permission may be required from the local court or other authority in the foreign jurisdiction for the witness to give such evidence remotely to a court in England and Wales. It is for the party calling the witness to ensure that such permission, if required, is obtained in good time for the Trial or hearing at which the witness is to give evidence and to inform the Court that such permission has been obtained. This is already made clear in Annex 3 to Practice Direction 32 dealing with video conferencing. Paragraph 4 [which is in similar terms to paragraph 4 of Schedule B to RDC Part 23 quoted above] deals specifically with the need to obtain permission from the relevant foreign court or authority.
> 2. In order to avoid unnecessary delays or disruption to Trials or hearings, it is directed that, in any case where there is a pre-Trial review ("PTR") a party calling a factual or expert witness remotely should have obtained any necessary permission by the date of the PTR and should inform the court accordingly at the PTR.
> 3. In cases where there is no PTR, a party calling a factual or expert witness remotely should have obtained any necessary permission by the time of filing the pre-Trial check list, and should record in the pre-Trial checklist that the permission has been obtained."

That Practice Direction has, of course, no direct application to the DIFC where the position remains as set out in the protocol quoted above.

20. The importance of taking steps to inform the court of such matters is explained in the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *Agbabiaka* [2021] UKUT 286 (IAC). In its judgment the UT explained that the UK – and the same is no doubt true of the UAE – has friendly diplomatic relations with the vast majority of countries and a judge should take care not to interfere inadvertently in those relations by failing to ensure that enquiries of this sort had been made and that the outcome of such enquiries was positive. More specifically, the UT gave the following guidance on the issue:

> "(1) There is an understanding among Nation States that one State should not seek to exercise the powers of its courts within the territory of another, without having the permission of that other

> State to do so. Any breach of that understanding by a court or tribunal in the United Kingdom risks damaging this country's relationship with other States with which it has diplomatic relations and is, thus, contrary to the public interest. The potential damage includes harm to the interests of justice.
>
> (2) The position of the Secretary of State for Foreign, Commonwealth and Development Affairs is that it is accordingly necessary for there to be permission from such a foreign State (whether on an individual or general basis) before oral evidence can be taken from that State by a court or tribunal in the United Kingdom. Such permission is not considered necessary in the case of written evidence or oral submissions.
>
> (3) Henceforth, it will be for the party to proceedings before the First-tier Tribunal who is seeking to have oral evidence given from abroad to make the necessary enquiries ... in order to ascertain whether the government of the foreign State has any objection to the giving of evidence to the Tribunal from its territory."

References to the position of the Secretary of State are, of course, not directly relevant here, and I was given no information about the position taken by the relevant authorities in the UAE.

21. The Upper Tribunal in *Agbabiaka* also referred to *Interdigital Technology Corp v Lenovo* [2021] EWHC 255 (Pat) in which the Judge gave permission for expert evidence to be given in English proceedings by video link from Germany provided that the competent authority in Germany first gave permission. The Judge considered it likely that the mere fact of a foreign (non-German) court taking evidence outside Germany by means of a video link from within Germany would raise an issue of German sovereignty, since the foreign court (and through it the foreign state) would be exercising power over an individual situated within the German state; and there was a real risk that if the UK court were to give permission for oral evidence to be obtained in this way without the permission of the German court, it would be a breach of German law.

22. Such reasoning is a powerful reminder to any court of the respect due to the law and relevant authorities of a foreign sovereign state. But ultimately the question of whether a witness can or cannot give evidence in proceedings in the courts of the DIFC is a question of capacity; and the question whether the evidence of such a witness can be accepted as evidence in such proceedings if it is given from abroad by means of a video link or some similar technology is a question of procedure. Such questions are questions for the *lex fori*. Even if, under Indian law, witnesses giving evidence remotely from India require permission from relevant Indian authorities, that does not affect their capacity to give evidence in DIFC or the weight to be attached to their evidence. Whether or not to allow their evidence to be given in a Trial in the DIFC by video link

from another jurisdiction is a matter of discretion for the DIFC, to be exercised in light of all the relevant circumstances. Were it otherwise, and were such evidence to be inadmissible in the DIFC in circumstances where permission from a foreign court or government was required but had not been given, one could imagine cases, admittedly far removed from the present, where a foreign government effectively had a veto on witnesses giving evidence against it in court proceedings to which it, or some associated entity, was a party. That cannot be right.

23. I was presented with evidence on the relevant Indian law in the form of affidavits, statements and opinions from Indian lawyers. There was no cross-examination on these matters. In support of their position that permission was not required, the Claimant put in a legal opinion by Mukti Chaudhry (Advocate-on-Record in the Supreme Court of India) and a legal opinion by the Hon. Mr. Justice Dipak Mishra (a former Chief Justice of the Supreme Court of India). D6-D8 countered this evidence with a legal opinion by Mr. Amar Gupta (Senior Partner at JSA Advocates and Solicitors).

24. There was no authority directly in point. My attention was drawn to the right of freedom of expression guaranteed, subject to certain exceptions, in the Constitution of India; and separately to section 118 of the Indian Evidence Act 1872 dealing with the competency of witnesses to testify; but neither of these references appeared to me to touch upon the question at issue here. I was referred to case law establishing that evidence could be given by means of video conferencing, but no case law dealt with the question of video conferencing in India live to proceedings in another jurisdiction. Of more relevance was a reference to the Mutual Legal Assistance Agreement concluded between India and the UAE in June 2022, but on balance I am satisfied that this dealt only with the case of obtaining evidence from a witness who was reluctant to testify, which again is not the issue before the court here.

25. On the evidence before me, I am not persuaded that there is any requirement under Indian law for permission to be obtained before a witness in India can voluntarily give evidence by video link for the purpose of live proceedings taking place within the UAE.

26. But even if I am wrong about that, I would nonetheless as a matter of discretion allow the evidence to be given by video link from India, refuse the motion on behalf of D6-D8 to exclude that evidence and treat the evidence already given to stand as the evidence of the relevant witnesses. My reasons can be expressed shortly. The position as to whether permission was required from the Indian authorities was unclear. There

had been no previous ruling on the point from this Court. The failure on the part of the Claimant and its legal advisers to appreciate that permission might be required was in those circumstances excusable – it would not justify a wholesale rejection of that evidence and, in consequence, the dismissal of its claim for want of any supporting evidence. Even if permission was required, none of the experts suggested that there would be any difficulty with obtaining it – the only problem might be delay. Further, I am satisfied that the Claimant and all parties must have proceeded since the time of the CMC, if not earlier, on the shared understanding that evidence of some of the witnesses would be taken by video link from India or elsewhere, yet no objection was raised by any party to the admissibility of evidence taken in this way until the Friday immediately before the Trial was due to start, by which time it would have been virtually impossible for the Claimant to take advice and, if so advised, to make arrangements for the witnesses to travel to Dubai in time to be examined and cross-examined within the allotted Trial dates which themselves had been fixed for a considerable time. In those circumstances the overriding objective (RDC Rule 1.6) is best satisfied by allowing the evidence. So I propose to allow the evidence of the Claimant's Indian witnesses, and that of others in a similar position, to be treated as evidence in the case.

Conflict of interest

27. At the commencement of the Trial on 30 May 2022 D4 moved his application, filed the previous Friday, for an order in effect preventing the Bank's lawyers, Kochhar & Co ("Kochhar"), from continuing to act for the Bank in this action on the ground, put short, that Kochhar had previously acted for the Velocity Group and for D4 in connection with the subject matter of this action and was privy to confidential information. D4 had made this complaint before then but had not previously made a formal application requiring a decision by the Court. It was submitted that an injunction should be granted to prevent the misuse of that confidential information. I heard arguments on the matter. The matter was argued before me briefly, with submissions by all parties, essentially on the ground that an injunction to prevent Kochhar continuing to act for the Bank was necessary to prevent the danger of confidential information being misused: *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222. My initial reaction was to suggest that what had happened in that regard had already happened; any relevant confidential information would already have been made available to the Bank and produced by the Ban for this litigation – any horse in the stable would already have bolted and there

was no point now in shutting the stable door. I was not persuaded at that stage that there was further information relevant to these proceedings which required protection.

28. Having regard to that initial view, the late stage at which the application was made, and the serious consequences of granting the application at this stage in terms of the future conduct of the Trial, I ordered that the Trial should proceed but that if it turned out during the course of the Trial that there was in fact a real risk of misuse of confidential information, or if it were shown that confidential information had been misused, then I would reconsider the position and, if necessary, grant appropriate relief, which might go as far as dismissing the action. In effect, therefore, I adopted a "wait and see" approach to the issue. That seemed the only fair thing to do in the particular circumstances of the case, having regard in particular to the lateness of the application and the desire of all parties to avoid adjourning the Trial (with all the consequent difficulties of fixing a new date for a Trial involving so any parties).

29. The matter was canvassed in great detail in parties' written Closing Submissions. In addition to pressing the case based on the principles established in *Prince Jefri Bolkiah v KPMG* – i.e. the necessity of taking action to prevent the misuse of confidential information – it was submitted on behalf of D6-D8 that I should apply the "fair minded observer" test: namely whether a fair-minded, reasonably informed member of the public would conclude that the need to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice, requires that the legal practitioner should be prevented from acting: see Hollander and Salzedo, Conflicts of Interest, 6th Ed., at para 5-002. This test does not appear to have been applied in the DIFC yet, nor yet in England, but it has been approved and applied in Australia, New Zealand, Scotland and other common law jurisdictions: see e.g. *Spincode Pty Ltd v Look Software Pty* [2001] VSCA 248, *Kallinicos v Hunt* [2005] NSWSC 1181 at para [76]; *Raats v Gascoigne Wicks* [2006] NZHC 598 and *Ecclesiastical Insurance Office v Lady Whitehouse-Grant-Christ* 2017 SC 684 at para [11]. I have no difficulty in accepting that the "fair minded observer" test is an appropriate test to apply, depending, obviously, on all the relevant circumstances.

30. In his written Closing Submissions D4, who initially raised this point, set out the relevant circumstances giving rise to the perceived conflict of interest arising out of the role of Kochhar having acted for the Velocity Group, including D1 and effectively all the other Defendants, while at the same time and subsequently acting on behalf of the Bank. D4's submissions on this point were taken up by D5 and developed in terms of analysis by D6-D8. I have read with care the submissions made on behalf of the Bank

on this issue. I do not propose to make detailed findings of fact on this issue. Suffice it to say that I accept the broad tenor of the Defendants' submissions. In particular, I accept the evidence that Kochhar was for a considerable period engaged by the Velocity Group, and not just by D4. I also accept the analysis by D6-D8 in para 50 of Schedule 2 to their written Closing Submissions which is to the following effect:

> "50. There can be no question that in December 2019 when Kochhar was representing the Bank and the Velocity Group it was in position of information that was or might have been relevant to the current proceedings. It knew everything about the operation of the Velocity Group, including D1 [i.e. D1], it knew the pressure points and it knew that the current directors of D1 and its current shareholders wanted to keep the company going, and critically it knew that the formalities to release D6-D8 had not been completed. Instead of acting for D1 to see if the current situation was capable of remedy and helping it to reach a settlement with the Bank, without so much as properly terminating the retainer, Kochhar switched sides and proceedings were commenced against the Velocity Group."

31. The grant of an injunction to bar a firm of solicitors from acting for another party to the litigation – whether on grounds that it is necessary in order to prevent the misuse of confidential information or on the basis that a fair minded and reasonably informed member of the public would consider that the grant of an injunction was necessary to protect the integrity of the judicial process and the due administration of justice – is ultimately a matter of discretion. All relevant factors must be taken into account. In the present case that includes in particular the fact that the application was made so late in the day and the real risk that if on the first day of the Trial the court were to require the Claimant to change its lawyers then the Claimant would be forced either to abandon its claim or to seek an adjournment which would lead to the Trial being put off to a date which, because of the number of parties involved, would be many months in the future.

32. The injunction sought in all such cases is prospective in its effect. Applying the approach in *Bolkiah*, it is designed to prevent a misuse of confidential information in the future, not to punish the other party of the lawyer in question for having got themselves into that situation. As I have said, my initial reaction on the first day of the Trial was to question whether there was any risk of misuse of confidential information in the future – what had happened had happened, but was there anything more to protect? Having heard and read the relevant evidence and submissions that remains my view. I am not persuaded that there was anything left to protect. The application comes too late to achieve anything of value.

33. The same factor is relevant in applying the fair minded observer test. In my judgment, a fair minded observer being informed of the apparent conflict would start from the position that it was unsatisfactory that Kochhar should continue to act for the Bank in this case and would expect the Court to intervene to prevent it. But if that fair minded observer was also told that the application to prevent Kochhar from acting for the Bank had only been made at the beginning of the Trial, that the consequence would be the loss of the Trial date and possibly worse, that the costs consequences would be significant and that, however regrettable that things had reached this stage, the fact was that there was no present or future risk of confidential information being misused, then I am satisfied that in the particular circumstances of the case he would not think that Kochhar should be required to step aside.

34. For those reasons I reject D4's application for an injunction preventing Kochhar from continuing to act for the Claimant Bank in this case.

Jurisdiction

35. All Defendants assert that this court has no jurisdiction to hear disputes under the Personal Guarantees. No doubt a similar objection could have been made in respect of the Corporate Guarantees, but given the status of D2 and D3 it is unnecessary to consider that point. It is convenient also to look at the jurisdiction provisions of the MFA, if only because the Claimant seeks a judgment against D1 under the MFA and the court must be satisfied that it has jurisdiction to make the appropriate Order.

36. Clause 32 of the MFA provides that the MFA is governed by the laws of the DIFC. That is repeated in clause 33.1. Clause 33.2 is headed "Jurisdiction of DIFC courts" and provides as follows:

> "33.2 Jurisdiction of DIFC courts
>
> (a) The courts of DIFC have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including any dispute relating to any non-contractual obligation arising from or in connection with this Agreement and any dispute regarding the existence, validity or termination of this Agreement) (a "**Dispute**").
>
> (b) The Parties agree that courts of DIFC are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
>
> (c) This Clause 33.2 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions."

On this basis there can be no doubt that this court has jurisdiction over D1 in respect the claims made against it in this action, which are all founded on its borrowings and liabilities under the MFA.

37. The jurisdictional position under the Personal Guarantees is slightly different, but only slightly. Clause 20.1 provides that "This Guarantee is governed and construed in accordance with the laws of the UAE." Clause 20.2 is headed "Jurisdiction" and provides as follows:

> "20.2 Jurisdiction
>
> 20.2.1 The courts of the UAE will have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Guarantee (including a dispute regarding the existence, validity or termination of this Guarantee) (a **Dispute**).
>
> 20.2.2 This Clause 20.2 is for the benefit of the Bank only. As a result, the Banks shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Bank may take concurrent proceedings in any number of jurisdictions."

38. It has long been established that the Courts of the DIFC are Courts of the UAE for constitutional and jurisdictional purposes and that, therefore, the expression "courts of the UAE" is apt to include the DIFC courts: see *IGPL v Standard Chartered Bank* [2015] DIFC CA 004 at paras 143-144, *Goel v Credit Suisse (Switzerland) Limited* [2021] DIFC CA 002. There are no contra-indicators to suggest that the parties intended to exclude the DIFC from the expression "courts of the UAE". On the contrary, given that the MFA specifically refers to the courts of the DIFC, and it was always likely, though not inevitable, that the Bank would wish to bring an action against the Borrower and the Personal Guarantors in the same proceedings, a reference to the UAE Courts which includes those of the DIFC makes good sense. On that basis, the parties having agreed in writing to submit disputes to the DIFC, the case falls within Article 5(A)(2) of Law No.12 of 2004 (the "Judicial Authority Law" or "JAL")

39. For good measure, the DIFC Courts have jurisdiction under Article 5(A)(1) of the JAL since the Claimant, an Indian Bank, is a Licensed DIFC Establishment.

40. For these reasons the challenge to jurisdiction fails.

41. It may be that the Defendants' real objection to the matter being litigated in the DIFC Courts was a concern that they would thereby lose the ability to rely on points which would be available to them in the onshore Dubai Courts. I was told that under the

relevant provisions of UAE law, a lender seeking to enforce a guarantee is required to have first notified the guarantor of the default by serving a legal notice, and only once a legal notice has been filed may the lender commence substantive legal proceedings against the guarantor before the Dubai Court of First Instance. At no time did the bank serve the Defendants with a legal notice as per the requirements of UAE law and in fact no notice was served on the Defendants, or at least on D6-D8, prior to the commencement on these proceedings. I note these concerns. But they do not go to the question of jurisdiction. Rather they confirm, which would in any event be the case, that the fact that this claim has been brought in the DIFC Courts does not deprive the Defendants of their right to raise any defences available to them under the law of the UAE. As it turns out I am not aware of any complaint that a Trial in the DIFC was in fact prejudicial on that account.

Time Bar

42. A time bar issue was raised by one of the Defendants. It is not clear whether it was persisted in. I deal with it briefly in case in is thought to be relevant.

43. Article 123 of DIFC Law No. 6 of 2004 (the “Contract Law”) provides that the period of limitation for an action for breach of contract is six years from the date when the cause of action accrues. The Claim Form in this action was filed on 17 March 2017 and Particulars of claim on 3 May 2020. The claims against D4-D8 arise under Personal Guarantees executed by them on 25 November 2017 (D4, D5 and D7) and 5 December 2017 (D6 and D8). That is the earliest that the cause of action under the PGs could have arisen. The action was commenced within six years from that date.

44. There is no arguable case that the Bank’s claims are time-barred.

Outline of events relevant to the dispute

45. There is no real dispute about the course of events prior to 2017. I summarise it below in broad terms, leaving the detailed provisions of relevant Agreements and Guarantees to be considered later.

46. In January 2014, not long after its incorporation, D1 approached the Bank for financial assistance to purchase plant, machinery, and equipment for the purpose of commencing business. D1 also requested a working capital facility to assist with day-to-day running expenses. This request was granted by the Bank. It issued a Sanction Letter (the “2014 SL”) approving a credit facility in the sum of USD 3.1m, split between

a term loan of USD 1.6m and a woD5ing capital facility of USD 1.5m. The 2014 SL was signed for the Bank by Mr Mehrotra and for D1 by D4. This was followed in March 2014 by a Facilities Agreement (the “2014 FA”) between the Bank as lender, D1 as borrower and D4-D8 as personal guarantors.

47. In March 2014, pursuant to the terms of Schedule 1B to the 2014 FA, D1 entered into an account pledge agreement with the Bank (the “2014 Pledge”). The 2014 Pledge was governed by the law of the DIFC; and it extended to all amounts credited in D1’s account held with the Bank to the value of all sums due and owing to the Bank under the 2014 Facilities Agreement (as amended from time to time) up to an amount of USD 3.1m. [In fact, when the Bank sought to perfect its security on 7 July 2014 by registering and filing a Financing Statement pursuant to DIFC Law of Security No. 8 of 2005, it stated that the 2014 Pledge was limited to the sum of USD 1.6m, namely the amount of the term loan offered under the 2014 Facilities Agreement – but nothing turns on this for present purposes.]

48. In January 2015, further security documents were created as between D1, the Bank, and National Bank of Oman S.A.O.G. (“NBO”) for the purpose of creating a pledge over D1’s assets held outside the DIFC. Because the nature of the security was intended to be non-possessory, it could only be granted to a financial institution licensed with the UAE Central Bank. Since the Bank was not licenced with the UAE Central Bank, on 21 January 2015 the Bank and D1 entered into a Security Agency Agreement with NBO (which was a licenced entity) and in turn NBO entered into an Asset Pledge Agreement with D1 (the “2015 Pledge”). The total value of the pledged assets under the 2015 Pledge was in excess of AED 8.5m, approximately USD 2.3m.

49. It should also be noted that on 25 January 2015 D1 entered into an Assignment of its Warehouse Lease with NBO – the warehouse was located in Dubai Industrial City (DIC).

50. Pursuant to clause 2.1 thereof, the 2014 Facilities Agreement terminated on 18 March 2015, unless otherwise extended.

51. In July 2015 a new Sanction Letter was drawn up (the “2015 SL”), offering credit facilities to D1 until 26 June 2016. It was signed by Mr Kumar on behalf of the Bank, but it was not signed by any of the personal guarantors (D4-D8) or by any of the directors of D1. The 2015 SL made the offer of credit conditional upon (among other

things) a new Facility Agreement being entered into, but no new Facility Agreement was entered into at this time.

52. Despite the absence of a new Facility Agreement, between 18 March 2015 and 19 April 2016 the Bank continued to extend credit facilities to D1.

53. On or about 21 March 2016, another Sanction Letter was drawn up (the "2016 SL"). It was signed by Mr Kumar on behalf of the Bank and by each of the personal guarantors. D4 also signed on behalf of D1.

54. On 19 April 2016, approximately one month after the terms of the 2016 Sanction Letter had been accepted, D1 and the Bank agreed an Amendment of the 2014 FA (the "2016 FA"). The 2016 FA was designated a Finance Document (see clause 1.4). The 2016 FA incorporated and amended the provisions of the 2014 FA which were stated to continue in full force and effect except to the extent of the amendment. The amount of the credit facility made available to D1 was increased to USD 5.3m, of which approximately USD 2.2m represented a term loan.

55. On 19 April 2016 new Personal Guarantees were provided by D4 and D5 and (for the first time) Corporate Guarantees were provided by D2 and D3. On 30 April 2016 D6-D8 provided Personal Guarantees (the "2016 PGs"), replacing the guarantees contained in the 2014 FA.

56. The 2016 PGs were not designated as a Finance Document either within the definitions clause of the 2016 FA or anywhere within the PGs. This meant that any amendment to the 2016 FA would not be covered under the terms of the 2016 PGs.

57. The 2016 Facilities Agreement terminated on or about 19 April 2017.

58. Most, if not all, of the above is unlikely to be contentious. After 2016 matters become more disputed, both between the Bank and the Defendants and among the Defendants themselves. As in the previous narrative, my summary of events relies heavily on the narrative provided by D6-D8 in their written submissions. In so far as any part of the narrative is contentious, it represents my findings of fact on the basis of the evidence and the submissions made at, before and after the hearing.

59. In November 2017, D4 contacted D6-D8 to advise that a fund called the Adiuvat Investment Fund ("Adiuvat") were interested in acquiring D1. D6-D8 were keen to accept the offer. On 19 November 2017 by an Agreement for the Sale of Shares (the

"Share Sale Agreement") the shareholders of D2 and D3 recorded their intention to sell their shareholding in D1 to Adiuvat.

60. Whilst discussions were taking place for the sale and transfer of ownership of D1, the Bank was pressing D1 to enter into new facility agreement and was demanding new personal guarantees from the personal guarantors. Having agreed to sell their interest in D1 to Adiuvat, D6-D8 were reluctant to sign any documents or provide new personal guarantees. There was no financial incentive for them to guarantee D1's liabilities; and as they would no longer be involved in the running of D1, they did not wish to sign any documents that suggested they would be involved in the management of D1 going forward.

61. D6-D8 were assured by D4 that all liability which they had undertaken to the Bank would be discharged and replaced by guarantees to be provided by Adiuvat. D4 confirmed this in the Share Sale Agreement, which provided as follows (see clause 2a):

> "All the liabilities including the bank loans standing in the name of [VIL] shall be taken over by the Adiuvat Fund. Personal guarantees given by the existing directors/investors from D3 and [D2] shall be replaced by appropriate documents to be provided by the Adiuvat Fund. This process will be completed within 60 days of the drawdown of enhanced facilities."

62. Against this background, a further Sanction Letter was issued by the Bank (the 2017 SL) on 12 June 2017 for an "enhanced credit facility" of USD 10.44m. This new 2017 SL was followed by a new 2017 Master Facility Agreement (the "MFA" or the "2017 MFA") dated 25 November 2017 and further Corporate and Personal Guarantees (the "2017 PGs"). These documents are dealt with in more detail below.

63. On one analysis – on the hypothesis that previous borrowing still outstanding was treated as covered by the terms of the 2017 MFA – the drawdown of the facilities under the 2017 FA commenced on 25 November 2017, when the MFA was signed. On that basis the 60-day period mentioned in the Share Sale Agreement expired on 24 January 2018 and D4 should by then have procured the release of D6-D8 from all outstanding obligations to the Bank.

64. Payment for D3's shareholding in D1 was received promptly. The relevant paperwork changing ownership took longer to finalise. It was not until 25 September 2018 that D1's Memorandum of Association was amended by a Share Sale Agreement, Withdrawal of a Partner, Insertion of a New Partner and Addendum to the

Memorandum of Association (the "SSWP Agreement") which recorded the transfer of shares from D2 and D3 to D1's new owners: viz. (a) Mr Ahmed Ebrahim Abdulla Ebrahim Alahmed, who took over as D1's new local sponsor and now held 51% of D1's issued share capital; (b) Elements International FZC ("Elements") who acquired 39% of D1's issued share capital – Elements is a company registered in the Fujairah Free Zone Authority and is owned and managed by D4 and D5; (c) Velocity Ventures FZC ("VVF"), a company registered in the Fujairah Free Zone Authority, who acquired the remaining 10% of D1's issued share capital – VVF is owned by Elements, D4 and D5 in almost equal proportions and is jointly managed by D4 and D5.

65. The SSWP Agreement also amended D1's Memorandum of Association to record that D4 and D5 were the managing directors of D1, and fully authorised to undertake the business of D1, including but not limited to all financial transactions relating to D1 such as borrowing on behalf of D1 and arranging loans and credit facilities. It was duly signed before a public notary and registered with the Dubai Courts. But it was never filed with the Department of Economic Development ("DED").

66. The fact that D1 had been acquired by D4 and D5 was first made know to D6-D8 sometime between 10 to 15 September 2018, when D4 circulated the SSWP Agreement for review, prior to the parties meeting with the Notary Public on 25 September 2018. At all material times prior to 10 to 15 September 2018, D6-D8 had understood and had been repeatedly assured by D4 that D1 had been acquired by Adiuvat, that Adiuvat was overseeing and/or running D1 and that it had stepped into the shoes of D6-D8 as guarantors of D1 and more importantly was holding itself out to the Bank as the new owner of D1.

67. Owing to the assurances made by D4 that the Bank was aware of the change of ownership of D1, D6-D8 assumed that correspondence from the Bank (which was being sent to them by D4) had been addressed to them in error. It was not until mid-summer 2019 that the true state of affairs emerged. Whilst the Bank maintains that it was not aware of the change of legal ownership, during the course of disclosure it has come to light that the Bank had in fact been provided with a D1 shareholder resolution recording the share transfer and sale of D1 to Adiuvat in November 2017.

68. If the Bank had not taken note of the change of legal ownership in 2017, it certainly was aware of this prior to the commencement of these proceedings. In or about October 2019, the Bank's legal advisors in these proceedings advised D4 on the removal of D5 as a director of D1, and in the memorandum of advice provided by the

Bank's legal advisors, it was noted that the ownership of D1 had changed. This followed an email sent on or about 30 July 2019 requesting the assistance of the Bank's legal representative to record and formally document the change of ownership and ensure that D6-D8 were released from their personal guarantees.

69. As noted above, on or about 12 June 2017, a new Sanction Letter was drawn up by the Bank (the "2017 SL") offering to provide credit facilities to D1 until 30 May 2018 in the sum of USD 10.44m.

70. The 2017 SL was signed by Mr Kumar on behalf of the Bank, and each of D4, D5 and D7 in their capacity as the directors of D1; in their personal capacities to signify their agreement to entering into a new personal guarantee, upon D1 entering into a new facility agreement; and in their capacity as shareholders of D3 and D2.

71. By a board resolution dated 14 November 2017, the directors of D1 resolved to agree to the terms of the 2017 SL and enter into a new facility agreement with the Bank. Shortly thereafter, by a shareholders' resolution dated 19 November 2017 it was resolved that D1 be sold (through the transfer of the entirety of D3 and D2's shareholding in D1) to Adiuvat.

72. Upon receipt of the signed 2017 SL and the resolutions referred to above on 25 November 2017 D1 and the Bank entered into a Master Facility Agreement (the "MFA" or the "2017 MFA").

73. The terms of the MFA and the issues arising thereunder will be dealt with in detail in due course. Suffice it for present purposes to say that although the MFA (at clause 2.4) contemplated that the parties (i.e. the Bank and D1) would carry out an Annual Review of their relationship, and such review would or might have an impact on their continued relationship, no such review was undertaken either by the Bank or by D1 until, at the earliest, November 2018. Despite this the Bank continued to advance sums to D1 pursuant to requests which bore to be made under the 2017 MFA.

74. On 5 January 2019, a new Sanction Letter was drawn up by the Bank (the "2019 January SL") offering to provide credit facilities to D1 until 5 December 2019. The facilities being offered in the 2019 January SL were (a) subject to a number of conditions, each of which had to be completed to the satisfaction of the Bank; (b) subject to the 2019 January SL being signed and returned to the Bank; and (c) expressed to be subject to the terms and conditions stipulated in previous Sanction

Letters but not the terms and conditions of the 2017 MFA. In fact, the 2019 January SL made no reference to the 2017 MFA.

75. Neither D1, nor the Corporate Guarantors nor the Personal Guarantors signed the 2019 January SL. There was no evidence to suggest that any or all of the numerous preconditions were met.

76. On 16 April 2019 a new Sanction Letter was drawn up (the "2019 April SL"), this time requesting 10 conditions to be met before any further advances would be made. As before the terms of the 2019 April SL were not met, and the letter remained unsigned.

77. Between 12 June 2018 and 19 May 2019, the Bank continued to allow D1 to borrow money (presumably from its overdraft facility as the Term Loans had expired). That money was transmitted variously to companies associated with or controlled by D4 and/or D5. There is a dispute between D4 and D5 about the legitimacy of these transactions.

78. On 3 September 2019 the Bank issued Recall Notices against D1 and each of the Personal and Corporate Guarantors (the "Recall Notices"). Not one of the Recall Notices referred to the 2017 MFA or that D1's non-payment was deemed to be an event of default pursuant to clause 21 of the 2017 MFA. The Recall Notices simply referred to the fact that four of D1's bank accounts held with the Bank had been turned into NPAs (i.e. Non-Performing Assets") on 31 August 2019 and that D1 was called on to remit these sums to the Bank.

79. Six months later, on 17 March 2020, the Bank commenced these proceedings.

The Bank's claims against D1

80. There is no real dispute about the sums due from D1 to the Bank. Whether on a proper analysis the sums were drawn down by D1 under the 2017 MFA or under some other implied or ad hoc arrangement does not matter for this purpose. The sums were advanced to D1 on the instructions of D4 and/or D5, and the dispute between D4 and D5 as to the purpose of such drawdowns does not impact on the legitimacy of the Bank's claim for re-payment of the outstanding sums. As a result of that, I do not propose to go through that matter in any detail.

The Bank's claims under the Personal Guarantees

81. Specific and discrete defences are raised by D4, D5 and D6-D8 to the Bank's claims against them under the Personal Guarantees. I shall deal with these generically, topic by topic, on the basis that if the point is a good one it can be relied on by all of the Defendants to whom the particular reasoning applies, even if one or other of them did not focus the point on his submissions.

The relationship between the Claimant and D1

82. It is sensible to recap slightly on the relationship between the Bank, D1 and the Personal Guarantors, stripped on distractions about the change of ownership of D1 and the disputes between the individual Defendants.

83. The formal relationship between the Bank and D1 dates back to February 2014 when the Claimant issued a Sanction Letter (the "2014 SL") addressed to D1 referring to D1's request for a credit facility and offering certain banking facilities for general working capital and trade finance requirements up to an amount of USD 3.1m (made up of Trust Receipt (90 days) in the sum of USD 1.5m and Term Loan 1.6m). That was followed by a Facility Agreement dated 18 March 2014 (the "2014 FA") entered into between the Claimant (as Lender), D1 (as Borrower), and D4-D8 (signing the 2014 FA as Personal Guarantors). The bank also took security in the form of an asset pledge, an assignment of a lease, and other things. The 2014 SL was due for renewal on 1 March 2015, while the 2014 FA was valid for 12 months from the date of signing (i.e. until 18 March 2015). So, the 2014 SL and the 2014 FA were broadly in step as regards timing and duration.

84. On 13 July 2015 a new Sanction Letter was issued (the "2015 SL") increasing the amount available under the 2014 FA to USD 3.62m (made up of Term Loan I in the amount of USD 1.52m, Term Loan II in the amount of USD 0.60m and Trust Receipt in the amount of USD 1.5m. No new Facility Agreement was drawn up at this time.

85. A further Sanction Letter (the "2016 SL") was issued on 21 March 2016, again increasing the amount available to the Borrower, this time to USD 5.23m (made up of Term Loan I in the amount of USD 1.36m, Term Loan III in the amount of USD 0.87m and Trust Receipt in the amount of USD 3m). This new Sanction Letter was accompanied by an amended FA (the "2016 FA") dated 19 April 2016, valid for 12 months, signed by D2-D3 as Corporate Guarantors and again signed by the D4-D8 as Personal Guarantors.

86. On this occasion the Guarantors (both Corporate and Personal) individually signed separate Guarantees. The Personal Guarantees, which were all in the same terms, provided in clause 1.1 that in consideration of the Bank entering into or agreeing to enter into the Facility Agreement (by which is meant the Amended and Restated Facility Agreement, i.e. the 2016 FA) "the Guarantor hereby irrevocably and unconditionally guarantees and promises to pay on demand to the Bank any and all sums of money that the Borrower is obligated to pay to the Bank under the Facility Agreement ...". This is important when considering the overall scheme of the arrangements so far as relevant to the Bank's claims in this action against the Personal Guarantors (D4-D8), since it confirms (what might in any event be thought obvious) that the drawdowns by the Borrower are drawdowns under the Facility Agreement and the Guarantees given by each of D4-D8 are guarantees of the sums drawn down under that Facility.

87. A further Sanction Letter was issued by the Bank (the 2017 SL) on 12 June 2017 for an "enhanced credit facility" of USD 10.44m (made up of Term Loan I in the amount of USD 0.96, Term Loan III in the amount of USD 0.77m, Trust Receipt in the amount of USD 6m and FDBP/ FUDBP against 90-day L/C in the amount of USD 1.5m). This new 2017 SL was followed by a new 2017 Master Facility Agreement (the "MFA" or the "2017 MFA") dated 25 November 2017 and further Corporate and Personal Guarantees (the "2017 PGs"). These documents are at the heart of this action and will be explained in more detail below.

The 2017 Sanction Letter

88. The 2017 SL is addressed to D1 and dated 12 June 2017. It is headed "Enhancement of Credit facility from USD 5.23 Mn to USD 10.44 Mn". It states that the Bank has renewed the credit facilities available to D1 in the enhanced sum of USD 10.44m. Details of the facilities making up this sum are then given in a Table. The following two paragraphs are worth noting:

> "The facility will be due for renewal on or before 30.5.2018 and subject to our overriding right of suspension, withdrawal and repayment of demand ...
>
> This credit sanction is valid and open for your acceptance up to 30.6.2017 and limit should be utilized on/before 30.08.2017 (unless withdrawn sooner by the bank at bank's absolute discretion). Thereafter it will be deemed to have lapsed and requires revalidation by sanctioning authority of the bank. For revalidation you have to submit a request letter to the branch furnishing the reasons for non-availment of credit facilities."

The 2017 SL then sets out the usual terms and conditions which will form part of the agreement. At the end it is signed on behalf of the Borrower and by the Corporate and Personal Guarantors.

The Master Facility Agreement

89. The 2017 MFA is dated 25 November 2017. Unlike the 2016 FA, it is not in the form of an amendment to the previous FA. Both in form and substance it is a new document.

90. Under clause 2.1 of the MFA, the Claimant (the "Lender") agreed to make available to D1 the Facility (defined in the Agreement as the Fund Based Facilities made available thereunder, i.e. the Term Loan Facility, the TR Facility, the Overdraft Facility, the Invoice Facility and the Bill Discounting Facility) in an aggregate amount equal to the Facility Amount and the respective Facility Limits. The Facility Amount was USD 10.44m. The parties acknowledged that a certain portion of the Facilities had already been utilised by the Borrower under prior Sanction Letters and facility agreements (i.e. those dating back to 2014) and recorded their agreement that all those "Utilised Outstanding Facilities" should now be governed by the MFA.

91. Clauses 2.1 and 2.4 are relevant to determining the period of time for which the MFA was to be available to the Borrower for drawdown. These provisions are set out in full (below), with interposed notes and explanations taken from the definition section (clause 1.1) of the MFA.

> "2. THE FACILITY
>
> 2.1 Subject to the terms of this Agreement, the Lender agrees to make available to the Borrower the Facility during the Availability Period in an aggregate amount equal to the Facility Amount. Any amounts remaining unutilised at the end of the Availability Period shall automatically lapse, unless extended by the Lender at its discretion. The Parties hereby acknowledge that certain portion of the Facilities (TR Facility, Invoice, Facility, Overdraft Facility, Term Loan I and Term Loan III Facility) have already been utilised by the Borrower from the Lender under prior Sanction Letters and facility agreements. The terms of all the aforesaid Utilised Outstanding Facilities shall now be governed by this Agreement.
>
> [NOTE: The expression "Availability Period" is defined in clause 1.1. It means that the Facility will be available for drawdown for a period of one (1) year from the date of first Utilisation. "Utilisation" is also defined. It means a utilisation of the Facility consisting of the drawdown of an Advance.

First Utilisation therefore means the first drawdown under the Facility; and the "Availability Period", the period for which the Facility is made available to the Borrower, is a period of 12 months from first drawdown under the Facility. Nothing is said about whether the earlier drawdowns under previous facilities, which are now to be governed by the MFA, are to be treated as the first drawdowns under the MFA for the purpose of calculating the beginning and end of the Availability Period or are to be disregarded for these purposes. It seems logical to treat them as the first drawdowns under the 2017 MFA.]

…

2.4 On or before the end of each Annual Review, the Lender will confirm to the Borrower whether or not the Facility is to be made available to the Borrower following such Annual Review. If, the Lender does not confirm to the Borrower that the Facility is to be made available after the Annual Review, the Borrower may no longer make any Utilisation remaining under the Facility and all outstanding balances under the Facility are to be paid on the respective due dates. The Borrower shall submit a detailed proposal in advance at least three (3) months prior to the expiry of the Facility and the Lender shall send its recommendations at least 45 days before the expiry of the Facility."

[NOTE: "Annual Review" in the MFA means a period of 12 months from the Date of Sanction and each subsequent period falling at twelve (12) monthly periods thereafter or such other periods as may be determined by the Lender: see clause 1.1. The "Date of Sanction" is specified in clause 1.1 to be 12 June 2017, which is the date of the 2017 Sanction Letter in terms of which the 2017 Facility Agreement was sanctioned (or authorised). Accordingly, absent some communication from the Lender that it had chosen some other period – and there was no such notification here – the Annual Review means a period of 12 months from 12 June 2017 through to 12 June 2018.]

92. It is of some interest to compare these provisions with the earlier 2014 FA. The 2014 FA did not have any provision for "Annual Review" – the term "Annual Review" did not feature in the 2014 FA (or in the 2016 Amendment) at all. In terms of clause 2.1 of the 2014 FA, the Lender agreed to make the Facilities available to the Borrower "during

the Availability Period", the Availability Period being defined as the period beginning on the signing of the Facility Agreement and terminating on the Final Maturity Date (defined as 12 months from the date of signing) unless otherwise extended by the Lender. In effect, therefore, the 2014 FA was for a period of 12 months from the date of signing unless extended by the Lender. That is all relatively straightforward. The 2017 MFA, however, was a much more complex instrument, ostensibly for a period of 12 months from first drawdown (the Availability Period) but, critically, all subject to the Borrower's entitlement to draw on the Facility coming to an end automatically on 12 June 2018 (that date being the end of the then current Annual Review, a date well within that 12 month Availability Period) unless, by that date (12 June 2018), the Lender had confirmed to the Borrower that the Facility was to be made available to it following the Annual Review. I was not given any explanation for this change.

93. There is an issue between the parties as to whether such confirmation was given by the Bank to the Borrower by that date and, if not, what were the consequences of that omission. I shall come to that shortly.

94. Other terms of the MFA which are of interest are the following:

(a) Clauses 8, 9 and 10, which provide for Interest and (in 8.3) Default Interest and for Interest Periods;

(b) Clause 21, which lists exhaustively the various Events of Default and (in 21.17) the rights of the Lender in the event of an Event of Default; and

(c) Clauses 32 and 33, which deal with Governing Law and Enforcement (including questions of Jurisdiction) – these have already been quoted in relation to the Defendants' argument (above) that this court had no jurisdiction.

The Personal Guarantees

95. It is unnecessary to set out the terms of the Corporate Guarantees signed by D2 and D3. The Personal Guarantees ("PG" or "PGs" as appropriate) are critical to the case against D4-D8. They are all identical. I set out below the relevant terms:

> "Recitals
>
> A The Lender has agreed credit facilities up to an aggregate amount of USD 10,440,000 available to the Borrower on the terms and conditions of the Facility Agreement {i.e. the MFA].
>
> B The Guarantor has agreed to give this Guarantee to the Bank to guarantee the Guaranteed Liabilities

[NOTE: "Guaranteed Liabilities" is defined in clause 1.1 as meaning "all amounts owed by the Borrower to the Lender under the Facility Agreement and these amounts shall include: (a) all amounts of principal, interest, default interest, fees, commissions or any other amounts arising under or in connection with the Facility; and (b) all present and future obligations and liabilities (whether actual or contingent and whether owed solely, jointly or severally or in any other capacity whatsoever) arising under or in connection with the Facility (including interest) on the amount of all such liabilities from the date of execution of the Facility Agreement till due repayment of the Facility". The term "Liability" is also defined to mean "any present or future liability (actual or contingent) with respect to financial indebtedness, together with ..." a number of matters of no direct relevance here.]

...

3. Guarantee and indemnity

The Guarantor hereby irrevocable and unconditionally:

(a) guarantees to the Bank punctual performance by the Borrower of the Guaranteed Liabilities;

(b) undertakes to the Bank that whenever the Borrower does not pay any amount when due under or in connection with the Finance Documents, he shall immediately pay that amount as if it were the principal debtor;"

...

[NOTE: As to the meaning of "Guaranteed Liabilities" see above. The term "Finance Documents" is not defined in clause 1.1 or elsewhere in the PG. It is, however, defined in the MFA as meaning "this Agreement, the Sanction Letter, the Security Documents, and Utilisation Request and any other agreement, deed, notice, document or certificate entered into by the Borrower or any other person pursuant thereto or otherwise in connection therewith or otherwise designated as such by the Lender and the Borrower."]

96. Other provisions of the PGs will be mentioned in due course. Clause 20 of the PG sets out the position as regards Governing Law, Enforcement and Jurisdiction. The relevant

parts have already been set out (above) when dealing with D4-D8's challenge to the jurisdiction.

Drawdowns under the various FAs

97. Requests for a drawdown or advance was made using a Utilisation Notice or Utilisation Request (the precise terminology varies). The different. forms of the Utilisation Notice or Request to be used (depending on the Facility being used) were set out in a Schedule to each FA. According to the requirements of the 2014 and 2016 FAs the Utilisation Notice was to be addressed by D1, as Borrower, to the Bank, as Lender, referring to the Facilities Agreement and giving irrevocable notice that, pursuant to the FA, D1 wished to draw down an Advance under one of the various Facilities identified in the FA. The form of the Utilisation Notice prescribed in Schedule 3 to the MFA differed slightly in its wording, but again referred to the MFA and described itself as a Utilisation Request as defined in the MFA. I have no reason to doubt that this was done routinely whenever D1 requested a drawdown against the relevant FA or MFA. The purpose of emphasising this point is to make it clear that all drawings by D1 from the Bank during this period were drawings explicitly under the relevant FA and not, in some amorphous way, simply drawings under the auspices of the relevant Sanction Letter.

98. It is not in dispute that sums were drawn down by D1 under the 2014 and 2016 FAs and the 2017 MPA using the prescribed forms of Utilisation Notice or Request. The sums advanced are not in dispute. Relevant documents were filed in the court process. The drawdowns referable to the 2014 and 2016 FAs are summarised by the Claimant in its written Closing Submissions at paras 18-22. No issue arises in respect of these drawdowns. Utilisation Requests and drawdowns were also made under the 2017 MFA. In para 26 of its Closing Submissions the Bank says that "various utilization requests were made by D1 between the periods starting from 20 December 2017 and 02 August 2018" (the Submissions in fact say "02 August 2017" but the references given show that it ought to have said "02 August 2018").

99. The position after that can be taken from paras 27-30 of the Bank's Closing Submissions. I quote those paragraphs in full:

> "27. Since, D1 had not completely utilized its term loan of USD 1.21m and in order to keep the borrower company running as a going concern, the Claimant sent renewal of the facility reminders to D159 on 09 October 2018 and then again on 14 October 2018. Exercising its discretion and on the basis of documents provided by D1, the Claimant renewed the facility on 15 November 2018. For the purposes of formal

> documentation, a request for renewal of facility was made by D4 on behalf of D1 on 10 December 2018.
>
> 28. The relationship between the Claimant and D1 continued in the year 2018, and consequently, an Asset Pledge Agreement dated 30 December 2018 for the security creation of plant and machinery was entered into between them and the same was also registered with the Emirates Movable Collateral Registry on 31 December 2018.
>
> 29. Meanwhile, D1's repayments started becoming overdue, but D4 and D5 continued to make Utilization requests on behalf of D1.
>
> 30. Final Sanction Letter and further renewal reminders were sent by the Claimant on 5 January 2019, 6 January 2019, 14 January 2019 and 16 April 2019, however, the renewal was not accepted by D1 because there was no enhancement in the facilities which the Defendants were expecting. Repayments of the Term Loan continued to become overdue, however, utilization requests were being made by D4 and D5 [for instance on 13 March 2019 and 18 April 2019] which were cleared by the Claimant but the same eventually also became overdue. After multiple overdue reminders the Claimant was constrained to declare the accounts of D1 as NPA on 31 August 2019 and issued Recall Notices to D1 – D8 on 3 September 2019."

This summary is referenced to the evidence given by the witnesses called by the Bank, which on these matters I accept, together with the relevant documentation and for present purposes can be taken as accurate. But while it goes to show that D1 (acting through D4 and/or D5) drew down the amounts claimed, and therefore that D1 had no defence to the claim presented by the Bank – and would have had no defence to the Bank's claim even if it had taken part in the Trial – it raises more complex issues so far as concerns the liability of D4-D8 under their respective PGs.

Overview of the case – arguable defences to the Bank's claims

100. In addition to the preliminary defences already dealt with, viz. the VCR issue, conflict of interest, jurisdiction and limitation, D4-D8 advance a number of defences to the claims against them by the Bank under the Personal Guarantees ("PGs"). Different Defendants focussed on different points. I propose to treat their submissions compendiously, and refer to the Defendants rather than identify the particular points made by them individually.

101. The main arguments for the Defendants in resisting liability under the PGs were as follows:

(i) "Expiry" of the MFA (and its consequences for claims under the PGs)

(ii) The validity of a personal guarantee for future debts – UAE Civil Code Art 1061

(iii) Quantum and mitigation – DIFC Law No.6 (Contract Law) Article 117

(iv) The Loan Recall Notices – validity, timing, etc

(v) No "cure period" afforded by the Bank – MFA clause 21.17

Defence (i): "Expiry" of the MFA (and its consequences)

102. The Defendants argue that the MFA "expired", to use their terminology, on 12 or 13 June 2018 and that any advances made by the Bank to D1 after that date, however described or perceived by the Bank or D1, cannot have been made under the MFA and therefore do not give rise to any liabilities under the PGs which only cover defaults by D1 under the MFA.

103. I have already set out the relevant terms of the MFA and remaD5ed upon the changes introduced by comparison with the 2014 and 2016 FAs, in particular the introduction of the concept of the "Annual Review" and its impact on the duration of the MFA.

104. The effect of those provisions, the Defendants say, was that, although the MFA was to be available to the Borrower (D1) for drawdown during the whole of the Availability Period, i.e. for a period of one year from the first drawdown, this was on the assumption that the MFA remained in force and could be drawn down against during the whole of that period. However, if, for whatever reason, the Bank did not confirm, on or before the end of the Annual Review (i.e. on or before 12 June 2018), that the Facility was to continue to be available after that date (i.e. after the end of the then current Annual Review period), then the 2017 MFA would automatically "expire". In other words, the 2017 MFA would not be available for further drawdowns; and any further borrowings, however titled or described as between the Bank and D1, would in fact be the made under a *de facto* new agreement to like effect made expressly or by implication from conduct.

105. The focus of this submission is not, of course, based on a concern as to the regularity of D1's borrowings from the Bank. Nor is it concerned with whether the Bank and D1 were proceeding, rightly or wrongly, on the basis that the MFA continued to be in force and available for further drawdowns after 12 June 2018. None of that matters to D4-D8, whose only concern is whether they are liable to the Bank under the PGs signed by each of them, and that depends upon whether drawdowns by D1 after that date were in fact, and as a matter of contract, drawdowns under the MFA or under some

other arrangement express or implied between the Bank and D1 – because each of the PGs only guaranteed performance by D1 of its liabilities and obligations under the MFA and not under some other arrangement.

106. As a matter of construction of the MFA and the PGs I consider that this submission is correct. The introduction of the Annual Review in clause 2.4 of the of the MFA fundamentally altered the position as regards the duration of the MFA, the period during which it would be available for further drawdowns. If the Bank did not confirm to D1 that the Facility was to be made available after the Annual Review, then certain consequences happened, namely that D1 was not entitled to make any further utilisation or drawdown against the MFA. It is clear that the Bank's confirmation had to be given on or before the end of the Annual Review period, since that is what clause 2.4 says, and the consequence of not giving that confirmation happened automatically on the end of that period. Any other construction would lead to uncertainty.

107. On the evidence before me, and I do not think that this was seriously disputed, the Bank did not give such confirmation by the required time. Nor, for that matter, did the Bank ever give any notification extending the period of the Annual Review. The documentary evidence shows that the Bank wrote to the Borrower regarding the renewal of the Facility only in mid-October 2018 (not as early as May 2018) and that the internal credit review within the Bank took place in mid-November 2018 and not earlier. I reject the evidence given by the Bank's witnesses, and particularly Mr Maniram, which sought to suggest that a credit review procedure was carried out earlier than this. I also reject any suggestion that confirmation in terms of clause 2.4 was given before then. In the absence of such confirmation, it follows from the terms of clause 2.4 that the MFA was not available for any further drawdowns after 12/13 June 2018. Any sums advanced by the Bank to D1 thereafter, whether purportedly made under the MFA or not, were not in fact made under the MFA and therefore are not covered by the PGs.

108. It is worth noting that after the internal review within the Bank in mid-November 2018 the Bank sent out further Sanction Letters to the Borrower and the Guarantors in January and April 2019. Neither Sanction Letter was signed. The 2017 Sanction Letter issued on 12 June 2017 was due for renewal on or before 30 May 2018, and provided that the limit allowed by that letter should be utilised by 30 August 2017 after which time it would lapse and require re-validation by a new sanction from the Bank. The internal review in November 2018 and the issue of Sanction Letters in January and April 2019 were, no doubt, a response to that situation. Mr Chezian gave evidence that

a Sanction Letter was a necessary precursor to a facility agreement. I accept that evidence, which is consistent with the terms of the 2017 Sanction Letter, and I reject Mr Chezian's later attempt to qualify this by suggesting that a Sanction Letter was not necessary when there was no proposed enhancement to the amount of credit on offer.

109. I was not provided with a breakdown of what sums presently due from D1 to the Bank were advanced by the Bank or drawn down by D1 after 12/13 June 2018. I infer from that that the whole of the amount claimed in the Claim Form falls into that category. On that basis the claim against D4-D8 under the PGs would fail entirely. However, had this been the critical point, rather than dismiss the whole claim on the basis of this inference, I would have given parties the opportunity to consider the position, discuss it with their opposite numbers to see whether agreement could be reached and, if necessary, convene a short hearing at which the matter could be resolved. However, since in my judgment the Bank's claims against D4-D8 under the personal guarantees fails for other reasons, it is unnecessary to do this.

110. A number of points arise in respect of this conclusion. I deal with them in no particular order in the following paragraphs.

111. First, I understood it to be suggested, albeit faintly, that it does not matter whether the sums drawn down by the Bank after 12 June 2018 were drawn down under the MFA, because in clause 3B of the PGs, D4-D8 agreed to guarantee performance by the Borrower (D1) of his obligations under the "Finance Documents", a term which includes the Sanction Letter, and the advances made by the Bank can sensibly be regarded as having been made under the Sanction Letter. That submission does not help the Bank, for two reasons: first, because the advances or drawdowns were made expressly pursuant to Utilisation Requests showing that they were advances or drawdowns which were purportedly made under the MFA and not under the Sanction Letter; and second, because the Sanction Letter itself had a limited lifespan, lapsing if not used by 30 August 2017 and requiring renewal at latest on or before 30 May 2018, a fortnight before the end of the Annual Review period, and therefore was not available as authority for drawdown after that date.

112. Second, it appears that the period allowed in the MFA for the Annual Review was not in the event used for that purpose. The requirement in the last sentence of clause 2.4 of the MFA that the Borrower should submit a "detailed proposal" at least three months before the expiry of the Facility and that the Bank respond with its recommendations some 45 days before the expiry date appears to have been largely ignored. But so

what? Clause 2.4 requires the Bank's confirmation to be given, if it is to be given, "on or before the end of each Annual Review", which is defined as a period of 12 months from the date of Sanction, which leads to a date of 12 June 2018. If one or both parties fail to avail themselves of the opportunity to engage in dialogue, so be it. The Annual Review is a period of time, not an activity, and still ends on that date in June 2018 even if there is no dialogue between the parties; and the Bank's confirmation, if it is to be given, must be given by that date if the availability of the MFA for future drawdowns is not to lapse automatically.

113. Third, it was argued by the Bank that it had a discretion to extend the period covered by the MFA, which discretion could be exercised after the end of the relevant Annual Review and notwithstanding the failure on or before the end of that period to confirm to the Borrower that the Facility is to be made available immediately following the end of that period. Reliance was placed on clause 2.1 of the MFA, in which it is stated that the Facility will be made available to the Bank during the Availability Period but that "[Any] amounts remaining unutilised at the end of the Availability Period shall automatically lapse, unless extended by the Lender at its discretion." (emphasis added). The argument was that this confirmed that the Bank had a discretion under the MFA to extend the period for which it was available and, presumably, that this took precedence over the automatic expiry of the Facility under the provisions of clause 2.4. I cannot accept this argument. The discretion to extend the Availability of the Facility beyond the end of the Availability Period assumes that the Facility has remained live, i.e. capable of being used by the Bank, up until that time. But clause 2.4 shows that in certain circumstances the Facility will automatically expire, i.e. will no longer be available for further drawdowns by the Bank, well before the end of the Availability Period. That is what happened here. Clause 2.4 makes it clear that in such circumstances there is no scope for the exercise of a discretion to extend the Facility beyond the end of the Availability Period. But even if the Bank did have a discretion to extend the period covered by the MFA, it did not take any steps to do so. No internal review was carried out until mid-November 2018 and new Sanction Letters were only issued in January and April 2019; and those Sanction Letters were in anticipation of a new Facility and not an extension of the old.

114. Again, for the avoidance of doubt I should re-emphasise the point made earlier. Nothing in this analysis precludes the Bank from advancing sums to the Bank under a new Facility, express or implied by conduct, or even an *ad hoc* extension of the MFA. The only question is as to the liability of D4-D8 as personal guarantors under the PGs

signed by each of them. Those PGs covered the liability of D1 under the MFA, including any extension granted by the Bank in accordance with the terms of the MFA by which the personal guarantors were bound. But the MFA provided, in the event, that it remained live for further advances only until 12 June 2018. There was no contractual provision allowing for an extension; it was not therefore something to which the personal guarantors had signed up. The Bank and D1 were perfectly at liberty to agree between themselves an extension of the period for which the (or a) Facility was available, indeed they were perfectly at liberty to agree further advances from the Bank during the period after 12 June 2018; but they could not hold the personal guarantors liable as guarantors for such further advances after that date.

115. Fourth, it was argued for the Defendants that if, contrary to my decision set out above, the Bank had in fact made a decision to make the Facility available to the Borrower after 12 June 2018, and had it communicated that decision to the Borrower by that date, that was a decision taken in the exercise of a discretion given to it in terms of clause 2.4 of the MFA. It was, so it was submitted, an implied term of the MFA that such a discretion had to be exercised "rationally and reasonably so as to prevent the right to exercise a discretion in such circumstances from being exercised oppressively or abusively": the so-called *Braganza* duty, *Braganza v BP Shipping Limited* [2015] UKSC 17, [2015] 1 WLR 1661. Standing the terms of clause 2.4, the Bank could not properly have exercised its discretion in favour of making the Facility available to the Borrower without having carried out, or participated in carrying out, the Annual Review in the manner contemplated by the last sentence of that clause. A decision in the absence of a review was, it was argued, irrational.

116. I reject this argument. One can readily see that such a term may be implied into a decision making process in some circumstances. But in a case, such as the present the decision whether to continue to make the Facility available to the Borrower after the Annual Review period is one to be taken by the Bank in its own interests. I see no reason why, in making that decision, the Bank should be constrained by a concern as to whether making that facility available to the Borrower is or is not in the Borrower's best interests. Nor need the Bank take account of whether that decision would prejudice the Guarantors of the Borrower's obligations under the MFA. The Guarantors have signed up to guarantee the Borrower's obligations under the MFA, and included within that package of obligations is the possibility that the Bank will make a particular decision one way or the other as to whether to make the Facility available to the

Borrower following the Annual Review. They cannot anticipate that the Bank will act otherwise than in its own interests in making that decision.

117. Fifth, and last, the Defendants presented an argument based on Article 1099(c) of the UAE Civil Code. This provides that "Surety shall terminate ... (c) by the cessation of the contract by virtue of which the right against the principal obligor arose" (translation taken from James Whelan, "UAE Civil Code and Ministry of Justice Commentary"). The argument is that on 12/13 June 2018 the MFA came to an end and thereafter all outstanding indebtedness of D1 to the Bank was governed not by the terms of the MFA but by the general banking contract relationship between the parties. In consequence, so it is said, the personal guarantors were also released from their obligations under the PGs. I do not propose to go into this point in any detail. It seems to me that it is founded on an incorrect premise, that premise being that the MFA "expired" (to use the language of the Closing Submissions by D6-D8) on 12/13 June 2018. In fact, the MFA did not expire of that date – it simply ceased to be available for new advances or drawdowns. The sums outstanding from D1 to the Bank remained due and owing under the terms of the MFA. So, this point fails.

118. However, for the reasons set out above, I hold that the personal guarantors, D4-D8, are not liable under the PGs for any sums advanced by the Bank or drawn down by D1, whether purportedly under the MFA or otherwise, after 12 June 2018. As indicated above, if the point had been decisive of D4-D8's liability to the Bank, I would have allowed parties an opportunity to confirm whether this decision covers the whole of the outstanding indebtedness or only a part of it (and, if so, how much).

Defence (ii) – The validity of a personal guarantee for future debts (Article 1061 of the Civil Code)

119. Clause 20.1 of the PGs provides that the PGs are governed by the law of the UAE. The relevant provisions of UAE law are to be found in Federal Law No.5 of 1985 on the Civil Transactions Law of the United Arab Emirate State (the "Civil Code"). Article 1061 of Book 2, Title 5 (Personal Guarantee Contracts), Chapter 1 (Suretyship) of the Civil Code (in translation) is in the following terms:

> "Article 1061
>
> The validity of a suretyship is conditioned upon its object being warranted by the principal as a known debt, kind or person and being deliverable by the surety."

120. Comment in "Issues Relating to Bank Guarantees in the UAE" published by LexisNexis interprets this as stating that "[a] Bank Guarantee under UAE law cannot be for an undefined amount and should contain the fixed amount for which the Bank Guarantee is being provided". In "Legal Framework of Guarantees under UAE Law", Lexology, 19 May 2017, it is stated:

> "Specific Guarantee
>
> To establish whether a Guarantee is valid and legally enforceable, it is important to establish the nature of the Guarantee. In an 'all monies' guarantee, a guarantor guarantees any and all obligations of the principal debtor to the creditor, whether existing at the time of the guarantee or arising in the future. However, such guarantees may not be enforceable in the UAE.
>
> Article 1061 of the Civil Code requires the issuance of guarantees subject to specified 'debt' or a thing that is certain in amount, and must, therefore, refer to the amount or facility guaranteed by the Guarantor. Further, the Dubai Court of Cassation has held that the guarantee contract shall be void unless it determines the guaranteed amount; or includes the basis on which the amount guaranteed should be calculated; or refers to the credit facility granted to the principal debtor."

While these passages cannot, for want of attribution, be regarded as necessarily authoritative as to the meaning of Article 1061, they appear to confirm the interpretation placed on it by D6-D8, namely that personal guarantees must be for a fixed amount or an amount capable of being ascertained from the terms of the facility and cannot extend beyond the four corners of the facility being guaranteed.

121. The Defendants argue that the terms of the personal guarantees in the present case purport to go much wider than is permissible under Article 1061. They point to the definition of Guaranteed Liabilities and Guarantor Debt in clause 1.1 of the PGs. Guaranteed Liabilities includes:

(b) all present <u>and future</u> obligations and liabilities (whether actual <u>or contingent</u> and whether owed solely, jointly or severally or in any other capacity whatsoever) arising under or in connection with the Facility (including interest) on the amount of all such liabilities from the date of execution of the Facility Agreement till due repayment of the Facility.

Guarantor Debt is defined to mean "all Liabilities payable or owed by the Borrower <u>at any time</u> to the Guarantor." Liability is defined as meaning "<u>any</u> present <u>or future</u> liability (actual <u>or contingent</u>) with respect to financial indebtedness ..." and includes:

> "(b) any further advance which may be made under any agreement expressed to be supplemental to any document in respect of that liability, together with all related interest, fees and costs."

It is also worth noting the definition of "liabilities" in clause 1.2.1 of the PGs which includes (f) in the following terms:

> "(f) Liabilities include any obligation whether incurred as principal or as surety, whether or not in respect of indebtedness, whether present or future, actual or contingent and whether owed jointly or severally or in some other capacity."

(Emphasis added to identify the passages relied on by D6-D8)

122. It was submitted on behalf of D6-D8 that the effect of Article 1061 of the Civil Code, as applied to the present case, is that the PGs, which are governed by UAE law, cannot extend beyond the four corners of the MFA. That seems to me to be correct. And I am satisfied that the terms of the PGs do go further. They purport to cover not only future and contingent liabilities but also liabilities arising under any agreement, not just the MFA. But the next question that arises is this: what happens if the PGs by their terms do extend beyond the four corners of the MFA? There are, so it seems to me, two possibilities. One possibility is that this renders the entire guarantee void and unenforceable. The other possibility is that any liability under the guarantees should be restricted to liability for D1's indebtedness incurred under the MFA up to 12 June 2018, that being the date on which further borrowing under the MFA ceased to be available to D1. D6-D8's primary case was that the PGs were rendered void in their entirety. I was not addressed on this point by the Bank either in its Closing Submissions or in its Reply. Article 1061 was mentioned by the Bank in its oral opening submissions, but in terms which made it clear that it had misunderstood the point. For my part I am persuaded that the Defendants' argument is correct. It is conducive to legal certainty that a guarantee which contravenes Article 1061 should be void and unenforceable. Article 1061 talks in terms of the "validity" of the guarantee depending on the enumerated matters.

123. Accordingly, I hold that for this reason too the Bank's claim against the personal guarantors – and this applies to its claim against all of D4-D8 – fails and must be dismissed.

Defence (iii) – Quantum and mitigation

124. Article 117 of the Contract Law is in the following terms:

> "117. Mitigation of harm
>
> (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
>
> (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm."

The critical words in both parts are the words "reasonable" and "reasonably". The aggrieved party must act reasonable to reduce the harm suffered, and is entitled to recover expenses reasonably incurred in doing that. It is no more complicated than that.

125. I make this point because the Bank, in its written submissions, cited an English case from 1944 (*Jewelowski v Propp* [1944] KB 510) for the proposition that a person claiming damages cannot be called on to spend money to enable him to minimise the damages. Stated in such absolute terms, that proposition does not reflect the current state of the law. All depends on the circumstances. To take two extreme but contrasting examples, a person claiming damages of, say, USD 5 million might well be expected to spend a few thousand dollars if, by doing so, he could reduce his loss very substantially and at no real risk to himself of pouring good money after bad; whereas the position might be very different if he was expected to pay hundreds of thousands of dollars to try to reduce his loss and the chances were against that expenditure achieving any benefit. All depends on what is reasonable in the circumstances.

126. At various times the Bank appeared to accept that it owed a duty to mitigate its loss. I am not clear from its Closing Submissions whether that remains the case. But it matters not, since the Bank's witnesses appeared to recognise such a duty.

127. I did not find the evidence on this matter easy to follow in some respects, but on one aspect I am satisfied that the Bank ought reasonably to have acted to reduce its loss. That relates to the two pledges held by the Bank over D1's plant and machinery. That plant and machinery was valued in D1's Financial Statements for 30 June 2017 and 30 June 2018 at something in excess of AED 14m (i.e. in excess of USD 3.8m). That is a sum significantly in excess of D1's indebtedness to the Bank. I understand that the plant and machinery was sold and fetched about 25% of that value. That would be just under USD 1m. The Bank has, apparently, received nothing from that sale. No explanation has been put forward for the Bank's failure to get involved, despite the Bank's witnesses being pressed on this issue in cross-examination. On the face of it, and in the absence of any reason being proffered as to why the Bank could not itself have arranged the sale of the pledged plant and machinery, I have come to the view

that the Bank failed to act reasonably to reduce the harm which it suffered. I assess that at 25%, in other words I find that if the Bank had taken reasonable steps to reduce its loss it would have reduced it by 25%. Had I found that the Bank was entitled to succeed on its claim, I would have reduced the amount claimed by this factor.

128. On other matters I am not prepared to find that the Bank failed to act reasonably to reduce the harm suffered. In particular, I am not satisfied that the Bank ought reasonably to have become involved in trying to realise some recovery from the Assignment it held over the Warehouse Lease. Taking action there might have resulted in some net recovery, but it is quite possible that money would have been spent by the Bank with nothing gained from that expenditure.

Defences (iv) and (v) – the Loan Recall notices and the Bank's failure to afford a "cure period"

129. These are both points raised by D4. There is nothing in either of them.

130. First, D4 contends that the Loan Recall Notices were issued by the Bank prematurely. I do not see why. The Notices were served on 3 September 2019. That was a year and a half after the end of D1's ability to draw down under the MFA. It was also more than a year after the life of the MFA even in the absence of the "confirmation" point under clause 2.4 discussed in detail above. The Bank had sent out several demand notices without any response. I see no reason why it should not have issued Loan Recall Notices when it did.

131. Second, D4 raises the issue of the "cure period. He referred to clause 21.17 of the MFA. Clause 21 is headed "Events of Default". Each of the events or circumstances set out in the clause is an Event of Default. Except for clause 21.17. That sets out the options open to the Bank in the event that the Borrower defaults. It may do certain things "on and at any time after the occurrence of an Event of Default and after giving of a cure period, if applicable, at the discretion of the Lender, which is continuing, the Lender may by notice to the Borrower [do various things]". The clause makes it clear that the Lender, the Bank, has a discretion as to whether or not to give a cure period. That discretion is unfettered. I reject this argument.

Disputes between the Defendants

132. These disputes are only relevant if, contrary to my judgment, the Bank is entitled to succeed against the personal guarantors on the PGs. On that basis:

(a) D6-D8 claim against D4 and D5 on the basis that it was their responsibility to have them released from their personal guarantees once the sale of D1 went through; and

(b) D4 and D5 claim against each other, in outline, for being instrumental in siphoning off funds from D1 and leaving it, and themselves as personal guarantors, liable to the Bank under the MFA and the PGs.

133. These, and particularly the dispute between D4 and D5, raise serious issues of fraud and malpractice. It does not seem to me to be appropriate to tack on these issues at the tail end of a lengthy judgment in the course of which I have dismissed the Bank's claims against all the personal guarantors, including D4 and D5. The issues do not presently arise for decision. They can be re-visited if my decision on the Bank's claims is reversed.

Disposal

134. For all of the above reasons I shall make an Order giving judgment for the Claimant Bank against D1 under the 2017 Master Facility Agreement in the sums claimed; and I shall dismiss the Bank's claims against D4-D8 under the Personal Guarantees.

135. I shall reserve all questions of costs.