

ENGLAND AND WALES / JUDGMENT

Four Marketing Ltd v Bradshaw

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Neutral Citation Number: [2016] EWHC 3292 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION Case No: HQ15X03168 Royal Courts of Justice Strand, London, WC2A 2LL Date: 20 December 2016 Before : MR AKHLAQ CHOUDHURY QC (sitting as a Judge of the High Court)

- ----- Between : FOUR MARKETING LIMITED
- and - DAVID FREDERICK BRADSHAW Claimant Defendant
- -----
- ----- Mr Peter Susman QC for the Claimant Mr James Stuart for the Defendant Hearing dates: 7 and 8 December 2016
- ----- Judgment Approved Akhlaq Choudhury QC :

Introduction

1. 2. 3. The Claimant, Four Marketing Limited (“FML”), seeks to enforce the terms of a personal guarantee (“PG”) dated 5 February 2014 against the Defendant, Mr David Bradshaw (“Mr Bradshaw”), in the sum of £302,980.11. Mr Bradshaw asserts that the PG does not extend to the sums claimed and that, in any event, the PG was discharged by or following an agreement reached on 9 June 2014. Evidence for the Claimant was given by Mr Charles Perez, CEO of FML. His evidence was subject to detailed cross-examination by Mr James Stuart, appearing for the Defendant. Oral evidence for the Defendant came from Mr Bradshaw, Mr Neville Newman and Mr Simon Powell. There was also a written statement for the Defendant from Mr Mark Loy who was not available to give evidence. The Defendant’s oral evidence was subject to very limited cross-examination by Mr Peter Susman QC appearing for the Claimant. This was said to be on the basis that the issues were mainly ones of law or objective interpretation of documents and that oral evidence of subjective motives, intentions or belief is largely irrelevant. Although the main issues are essentially ones of construction, the limited oral evidence which I heard was helpful in understanding the context in which the two key agreements were reached.

Background

Initial Relationship between FML and Urbohemia 4. 5. 6. FML is a provider of wholesale distribution and other services to the fashion industry. The Defendant, Mr Bradshaw, is a creative consultant in the fashion house, Versace. Mr Bradshaw is also the founder of Urbohemia Limited ("Urbohemia"), a supplier of men's fashion, which was incorporated in 2011 and trades in the name of "Hunter Gather" ("HG"). By 2012, Urbohemia had established a presence in the market having opened a store on Wigmore Street and acquired a concession in Selfridges. Relations between FML and Urbohemia commenced in late 2013. FML considered that there was great potential in the HG brand and it was interested in eventually becoming a partner in the business. However, the first agreement between FML and Urbohemia was a Distribution Agreement entered into on 31 October 2013. There were no formal discussions about FML acquiring any equity stake in Urbohemia at this stage. By mid to late 2013, Urbohemia was running very short on finance and there were difficulties in paying suppliers and other creditors. Urbohemia looked to FML to provide funding to meet some urgent debts. Urbohemia was at the time also looking to develop a commercial relationship with Spring Studios Limited ("SSL"), a media solutions group providing "strategic, creative and digital services" to clients in the fashion industry. A draft shareholding agreement between SSL, Mr Bradshaw and others was subsequently prepared but this was never completed. At any rate, it was Mr Perez's understanding that Urbohemia and SSL would at some point enter into a larger partnership thereby giving some stability to the Urbohemia venture. In order to ensure that, in the meantime, the brand and reputation of HG was not damaged by Urbohemia's inability to pay suppliers, Mr Perez agreed that FML would provide funding. From about September 2013 to the end of the year FML provided Urbohemia with sums totalling just over £23,000. There was no formal loan agreement in place for these loans. Personal Guarantee 7. 8. On 20 January 2014, Mr Perez wrote to Mr Bradshaw and Mr Chris Bailey (another founding participant in Urbohemia) stating that FML would need some security if it was to provide further financial support. Mr Perez mentioned that FML's current exposure was "circa £23K" and that FML would be "happy to increase [this] in the short term (say for 3-months) to £50K on the condition that we receive a personal guarantee from either you or David". It was agreed that a loan agreement should be drawn up on this basis and, on 30 January 2014, a draft loan agreement, prepared by FML's solicitors, was sent to Mr Bradshaw and Mr Bailey. This draft loan agreement referred to the loan "Facility" as being for an amount not exceeding £50,000 and including the £23,148 that had "already been drawn down" by Urbohemia. It also included Mr Bradshaw as a Guarantor. However, Mr Bradshaw considered the loan agreement to be complex and suggested a simpler arrangement instead whereby there was just a personal guarantee from him in respect of Urbohemia's borrowings. A draft PG was then drawn up by FML's Solicitors. The draft PG included a warning that Mr Bradshaw should seek independent legal advice before entering into the agreement. It seems that Mr Bradshaw did not take formal legal advice but did discuss the PG informally with a lawyer who did assist him in making some red-line amendments to the draft. At any rate, the final version of the PG was signed as a deed on or around 5 February 2014. It seems that Mr Bradshaw mistakenly signed the Termination Notice in respect of the PG at the same time. This necessitated the re-execution of the PG, which Mr Bradshaw willingly did on

3 April 2014. The re-executed PG was backdated to 5 February 2014. There are thus two versions of the PG in the papers, but it is accepted that nothing turns on this. 9. 10. The PG sets out as Background that, “(A) The Lender has agreed to provide the Borrower with the On-demand Loan Facility...”. I do not set out all of the PG here, although I have considered it in its entirety. The principal terms of the PG for present purposes are as follows: “2.1 In consideration of the Lender providing the On-demand Loan Facility to the Borrower, the Guarantor guarantees to the Lender, whenever the Borrower does not pay any of the Guaranteed Obligations (all of which are repayable on demand), to pay on demand the Guaranteed Obligations. ... 3.1 This guarantee is and shall at all times be a continuing security and shall cover the ultimate balance from time to time owing to the Lender by the Borrower in respect of the Guaranteed Obligations. ... 3.3 The Lender shall not be obliged before taking steps to enforce any of its rights and remedies under this Guarantee: ... 3.3.3 to make demand, enforce or seek to enforce any claim, right or remedy against the Borrower or any other person. “Guaranteed Obligations” are defined as “all present and future payment obligations and liabilities of the Borrower due, owing or incurred under the On-demand Loan Facility to the Lender (including, without limitation, under an amendment, supplement or restatement of the On-demand Loan Facility, or in relation to any new or increased advances or utilisations)”. “On-demand Loan Facility” is defined as “the amounts, all being repayable on demand, made available by way of loan to the Borrower by the Lender from time to time.” 11. 12. It was understood by both parties that the PG was intended to provide short term finance only and that the liability was not expected at that stage to exceed £50,000. This is evident from an email from Ms Grace Bailey of Urbohemia who wrote to Mr Perez on 10 February 2014 requesting confirmation of “how much of the £50K we have used.” Mr Bradshaw believed that he was guaranteeing up to approximately £60,000 although he does not contend that the PG was subject to any specified limit. By 20 March 2014, it was clear that the expected £50,000 (or £60,000) liability was not going to suffice. Mr Perez therefore wrote to Mr Bradshaw asking whether he was content “that any additional monies during this ‘transitional’ period that we spend over and above the £50K guarantee, we can then increase the guarantee accordingly?” Mr Bradshaw did not respond to this email but it is clear from the continued injection of funds by FML thereafter that no express objection was raised to Mr Perez’s request. By 23 April 2014, the total amount advanced by FML to Urbohemia had reached £151,983.16. The Term Sheet and meeting on 9 June 2014 13. On 25 April 2014, there was a meeting between Mr Perez, Mr Neville Newman, Urbohemia’s (and Mr Bradshaw’s) accountant, and Mr Simon Powell of SSL, to discuss Urbohemia’s need for further funding and a potential future shareholding structure. Following the meeting, Mr Newman prepared a note of the points discussed and circulated it to Mr Powell and Mr Perez for their comments. The key points to emerge from that meeting relevant for present purposes are as follows: a. b. c. d. e. f. g. Interim funding requirements for Urbohemia were estimated to be “up to £150K each”, for each of SS, FML and Mr Bradshaw; Mr Bradshaw was not in a position to advance further funds in the short term but would be able to do so over a longer (two-year) period; That FML “has previously lent the business £160K which is being supported by a personal guarantee given by [Mr Bradshaw]. [Mr Perez] will speak to his colleagues at FM to confirm that this £160K will also be capitalised and will agree to invest a further £150K.” Mr Perez inserted a comment after Mr Newman’s note in the following terms:

“The actual amount is £150K lent so far (my mistake). This is the amount that we can turn into equity providing all agreed to proposed way forward.”; “Subject to the agreement by SS, FM and DB all of the funds invested by FM of £150K to date will be capitalised, the sum of £560K plus invested by SS will be capitalised and all the intercompany loans with DB’s companies will be capitalised”; It was suggested that the shareholding to be agreed would “possibly” be 30% for each of Mr Bradshaw, FML and SS with 8% going to Mr Bailey and 2% to Mr Powell; “If the above shareholdings were to be agreed, FM would be required to provide CP as chief executive [of] HG on an interim basis”. It was also suggested that FML should take control of the website and charge for certain services; A new company would be formed (with the same shareholding structure) into which Urbohemia’s intellectual property rights would be transferred. Any disputes as to IP would have to be resolved prior to the investment being made. 14. By 23 May 2014, there had been no firm commitment to the 25 April proposals from SSL and Mr Perez was becoming impatient. Mr Powell indicated that there were some inaccuracies in respect of the SS exposure which needed to be addressed. By this stage, Mr Bradshaw was doubtful as to whether SSL would in fact commit to the project at all. However, on 29 May 2014, SSL confirmed that it was in agreement “in principle” with the proposals discussed in April. 15. 16. 17. During this period (April to May 2014), Mr Perez became more involved in the day to day operations of Urbohemia by helping to prepare forecasts and meeting with creditors and suppliers. On 3 June 2014, Mr Newman prepared what was described as a “simple term sheet based on our previous discussions” and sent this to Mr Perez and Mr Powell asking them to review it and to let him know whether it was approved. Mr Bradshaw was not enthused about the proposed terms, which left him, according to an email sent on 5 June 2014, “feeling very undervalued”. A meeting to discuss the Term Sheet was fixed for 9 June 2014. Mr Perez sought to put some pressure on the other parties prior to the meeting by writing to them on 6 June 2014 stating that, “unless we can sign Heads that evening and shareholders and loan agreement by latest 12 June, we will have to withdraw from the process”. The meeting to discuss the Term Sheet went ahead on 9 June 2014 as planned. In attendance were Mr Bradshaw, Mr Bailey, Mr Perez, Mr Powell and Mr Newman. The Term Sheet was discussed and, after making one or two manuscript amendments, it was signed by all parties. The principal provisions of the Term Sheet relevant for present purposes are as follows: “This term sheet contains the key terms upon which the parties agree to enter into a transaction in respect of Urbohemia Limited. The parties intend the following key terms to be incorporated into the formal transaction documents to follow this term sheet:- ... Proposed Transaction FML, SS together with SP and DFB have agreed to lend Urbo the sum of £150,000 each (total £450,000). Urbo has agreed to issue new shares issued at par such that, following the transaction the shareholders will be as follows:- DFB 30% SS 30% SP 2% FML 30% CB 8% [Manuscript addition]DFB to have an option to increase his shareholding up to 50% subject to Urbo achieving a profit before tax in excess of £400k p.a. in any financial year of 2014/15, 2015/16, 2016/17 or 2017/18 ... Urbo has agreed to use the loan funding referred to above to meet the creditors of Urbo and to finance the working capital of the business. The loans advanced by DFB, FML, SS and SP will be on identical terms. Share Capital Structure The percentage ownership of each shareholder immediately following the transaction will be as described above. Transaction Documents The formal transaction documents will include:- (a) a subscription agreement for

new shares in Urbo

- (b) a shareholder's (sic) agreement between DFB, FML, SS, CJB and SP (c) shareholder loan documents for the Urbo loan received from DFB, FML, SS and SP Use of Funds The loan monies will be as described above. Any loan monies advanced by any of the parties from 25 April 2014 and subsequently will be treated as part or all satisfaction of the loan monies described above from that party. It is recognised that initially loan monies will be advanced by FML, SS and SP with DFB making up his £150K loan advance subsequently. The loan funding requirement totalling £450K will be drawn down over a two year period as required by the Board of Directors however each party will provide an irrevocable undertaking to advance their respective share of the loan advance monies. ... All existing shareholder loans, advances or debts will be capitalised in exchange for the shareholding structure referred to above. FML confirms that the monies it previously lent to Urbo supported by a personal guarantee given by DB will be capitalised as referred to above and the personal guarantee provided by DB will be extinguished. [Manuscript addition] FML not to charge any fees to Urbo in the first 12 m following signing of this agreement except in respect of the recharge of any independent third party costs. Board of Directors/Governance The Board will comprise a minimum of four Directors ... The role of Managing Director will initially be undertaken by Charles Perez of FML The day to day operational activities and the design and direction of the company's brand will be undertaken by DFB and CJB. ... 14 Non-Binding Term Sheet This term sheet is not intended to be binding on the parties Further Steps Each party must promptly do whatever any other party reasonably requires of it to give effect to this term sheet and perform its obligations under it. 19 Modification This term sheet may not be modified, amended, added to or otherwise varied except by a document in writing signed by each of the parties but this term sheet will immediately terminate and cease to have any effect once formal transaction documentation is signed. (Emphasis Added) Events after the signing of the Term Sheet 18. On 10 June 2014, the day after the Term Sheet had been signed, Mr Newman took steps to have the shares in Urbohemia transferred to the parties in the agreed proportions. Although the Annual Return filed on 20 June 2014 confirms that the shares were indeed issued to the other parties after the meeting, neither Mr Perez nor Mr Powell were made aware that any such transfer had taken place until some considerable time later, and no share certificates were issued. Mr Bradshaw cannot recall any conversations at the time in relation to the issuing or registering of shares. None of the formal transaction documentation mentioned in the Term Sheet had been drawn up or agreed before these share transfers took place.
19. Mr Perez was appointed a director of Urbohemia on 10 June 2014 and began to take on a more active role in the management of the company. On 11 June 2014, he sent out an agenda for the following day's operational meeting. The minutes of that meeting, which were taken by Mr Perez, describe him as setting out his role as a "facilitator" to try and enable the vision of HG to be realised. Mr Perez also indicated that over the next few weeks he would like to review all processes and exactly what each team was doing. A weekly action list prepared around that time indicates that one of Mr Perez's responsibilities (jointly with Mr Powell)

was to review the integrity of the accounts from December 2013. 20. On 8 July 2014, Mr Perez instructed his solicitor, Mr Simon Jones (“Mr Jones”) of Adams and Remers LLP, to review the draft shareholder documents previously prepared by another firm with a view to adapting these for use in the new structure. Mr Jones confirmed in an email sent to Mr Perez that day that his task would be to ensure that those drafts are updated to reflect the terms set out in the Term Sheet. As to the loans, Mr Jones noted that, “All sums actually advanced by the parties since 25 April 2014 will be treated as being advanced under the new loan agreements”; “All sums advanced by the parties prior to 25 April 2014 will be capitalised and treated as being part of the share subscriptions”; and Mr Bradshaw’s “personal guarantee is to be cancelled”. Mr Jones concluded his summary by stating that he understood that Mr Perez would “now seek to reach agreement in principle on the above with the other interested parties so that we can then proceed with the redrafting”. FM provided further advances to Urbohemia in the period after the Term Sheet was signed. Mr Perez also sought to ensure that the other parties made their contributions. However, the formal transaction documentation envisaged by the Term Sheet was never completed. By 14 July 2014, it was evident that there remained a number of outstanding issues in relation to the drafting of the final agreements. Mr Powell also raised an issue on that day as to what would happen in respect of the intellectual property rights connected with the transfer. On 1 August 2014, Mr Bailey indicated that he wanted out of the investment. The parties are not in agreement as to precise reasons for Mr Bailey’s withdrawal but it is not necessary for me to resolve that issue. Following Mr Bailey’s departure, Mr Perez sent a text message to Mr Bradshaw on the same day saying that he and his partners in FML were “finding it difficult to move forward” and that they “want to think about this over the w/e”. On 4 August 2014, Mr Perez gave notice in writing of FML’s withdrawal from the HG project. In the same letter, Mr Perez stated as follows: “We of course have a considerable debt outstanding (circa £296K) which is secured by way of personal guarantee. While it is important that this debt is paid back, we do not want to put additional pressures on the business or David; I am happy to sit down and discuss a payment solution that works for all parties...” It does not appear that there was any response to this email challenging the assertion in respect of the PG. In subsequent discussions about repayment proposals, Mr Bradshaw says that there was no mention made of the PG. That evidence was unchallenged. Mr Perez suggested in cross-examination that he did have conversations even after 9 June 2014 with Mr Bradshaw and Mr Powell which were on the basis that the PG was still in place. I accept, given that Mr Bradshaw’s evidence on this was not challenged, that the PG was not expressly mentioned in oral discussions in this period. The PG was, as mentioned above, expressly referred to in the email to Mr Bradshaw of 4 August 2014 to which there was no response. It was not until about November 2014 that Mr Perez found out that FML had an equity share in Urbohemia. Mr Powell was not aware until September 2014 that the shares had already been registered although he considered himself to be a shareholder as from the date of the Term Sheet. The discussions about repayment continued until the end of the year but were not successful, and FML eventually served a statutory demand on Mr Bradshaw (which was later set aside) before issuing proceedings in July 2015. 21. 22. 23. 24. 25. The Issues 26. The parties have helpfully

identified five key issues to be determined. These are: a. Whether the PG covered the loans made by FML prior to 5 February 2014; b. c. d. e. Whether the PG covered loans made after 25 April 2014; Whether the PG was discharged by agreement between the parties on 9 June 2014; If not, whether the PG was subsequently discharged by Agreement or Waiver or whether an Estoppel operated so as to prevent its enforcement; and Whether it was a condition precedent to any liability arising under the PG that a valid demand for repayment of borrowed sums be made of Urbohemia and if so whether such demand was made? 27. I shall deal with each issue in turn. Issue 1: Whether the PG covered the loans made by FML prior to 5 February 2014. 28. This is a question of construction. The parties are agreed as to the approach to be taken by the Court to interpretation. The principles were re-stated by the Court of Appeal recently in *Globe Motors Inc. (and others) v TRW Lucas Varity Electric Steering Limited* [2016] EWCA Civ 396 at [56] to [60], where Beatson LJ, giving the lead judgment, said as follows: “(a) The approach to interpretation 56 The professed object of a common law court in interpreting or construing a written contract is to discover the mutual intention of the parties. It is now generally accepted that this is not to be done by a purely literal approach. The formulations by appellate judges have differed, but the differences have primarily been ones of emphasis rather than of principle. They relate to the extent to which the approach to construction should be contextual, the role of background material, and the relationship between the approach to construction and the approach to the implication of a term. The wealth of authority on the topic and the differences of formulation suggest that, as Sir Anthony Clarke MR stated in *Pratt v Aigaion Insurance Company SA* [2008] EWCA Civ. 1314, [2009] 1 Lloyd's Rep 225 at [9], care must be taken to avoid over-elaboration. 57 Since 1997, the starting point has generally been the five principles distilled from the authorities by Lord Hoffmann in his seminal judgment in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912–913 (“the ICS case”). ... 59 I consider that in the present case two statements of the general approach suffice. The first is the elegant, concise and unelaborate pre- ICS statement by Sir Thomas Bingham MR in *Arbuthnot v Fagan* [1995] CLC 1396, at 1400: “Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis.” The second is the summary of the current position by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15]. He stated: “When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the

background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. ...” (Emphasis added). This analysis was approved by the Court of Appeal in *MWB Business Exchange Ltd v Rock Advertising Ltd* [2016] 3 WLR 1519 at [22] to [24].

29. Mr Stuart submits that as the PG is a contract of surety it must be strictly construed so that no liability is imposed on the surety which is not clearly and distinctly covered by the terms of the PG. I have been referred to a passage in the *Law of Guarantees* (7th ed), Andrews & Millet at 4-002, which provides that there are numerous cases at the highest level which support such a rule, but that there is also a substantial body of authority indicating that contracts of surety are to be construed in the same way as any other contract. The writers go on to say: “Indeed there are many judicial dicta which go so far as to suggest that guarantees are to be construed in favour of the surety: ... However this is probably not an independent rule of construction but merely a reflection of the effect usually produced by the strict construction approach coupled with the application of the *contra proferentum* rule in cases of ambiguity...” 30. The PG here was drafted by FML’s solicitors and it is right that if and to the extent that there is any ambiguity, the Court should in those circumstances adopt the construction more favourable to the surety. In my judgment, however, there is no ambiguity in respect of the key provisions of the PG that calls for the application of the *contra proferentum* rule. 31. The question is whether the PG is effectively an “all monies guarantee” or whether it is limited only to specific advances. Mr Stuart submits that the PG does not apply to sums advanced to Urbohemia prior to the date of the PG. He relies upon the following matters: a. b. The words of the preamble which refer to FML having agreed “to provide” (i.e. as at the date of the PG) Urbohemia with the On-demand Loan Facility (“the ODLF”); The fact that the ODLF did not exist prior to 5 February 2014 and the sums lent to Urbohemia before that date do not fall within the scope of the PG. 32. In my judgment, the wording of the preamble does not assist Mr Stuart. The words, “has agreed to provide”, could just as easily refer to an ODLF that FML had previously agreed to provide to Urbohemia as it could to one that only comes into existence with the PG. In any case, the wording used in the preamble would not qualify the meaning of the operative parts of the PG if the meaning of those is clear: *Lewison on The Interpretation of Contracts* (6th ed.) at 10.12. 33. I turn then to the operative provisions of the PG. Applying the principles of interpretation re-stated in the *Globe Motors* case, the analysis is as follows: a. b. c. Natural and Ordinary Meaning: The definition of “Guaranteed Obligations” refers to “all present and future payment obligations

and liabilities of [Urbohemia] due, owing or incurred”. Had the intention been that the PG should cover only loans yet to be made then there would be no need to refer to “present” liabilities or sums. In my judgment the natural and ordinary meaning of that term puts it beyond any real doubt that the PG was intended to cover liabilities extant as at the date of the agreement. The words used in the preamble cannot qualify that clear meaning; Other clauses and overall purpose: The definition of the ODLF does not exclude pre-existing advances. It simply refers to “the amounts, all being repayable on demand, made available by way of loan to [U] by [FML] from time to time”. There is nothing to suggest that the advances made prior to the PG were not “repayable on demand”. Those sums were advanced without any stipulation as to the time of repayment. It is well-established that, “Where money is lent without any stipulation as to the time of repayment, a present debt is created which is generally repayable at once without any previous demand”: See Chitty on Contracts (32nd ed) at 39-267. In other words, the sums advanced prior to 5 February 2014 were also repayable on demand. Knowledge of the parties: Furthermore, the facts and circumstances known to the parties at the time tend to suggest that as at the date of the PG, the expectation was that it would include the loans already made. In particular, Mr Perez’s email of 20 January 2014 indicates that FML’s current exposure was “circa £23K” and that FML would be happy to increase this to £50K if there was a personal guarantee in place. There is nothing there to indicate that the PG was intended to exclude the first £23K. d. Commercial common sense: Finally, commercial common sense dictates that the PG would include the sums already advanced. There was no loan agreement in respect of those sums. If they were to be excluded from the scope of the PG then that would produce the uncommercial and unlikely result that the parties did not take the opportunity of the PG to sort out the liability for those sums. 34. For all of these reasons, I find that the PG did cover the advances made prior to 5 February 2014. Issue 2: Whether the PG covered loans made after 25 April 2014

35. Mr Stuart submits that the PG does not apply to sums advanced after 25 April 2014 because:
 - a. b. These sums were not advanced pursuant to the ODLF referred to in the PG; and Instead, such sums were advanced pursuant to the ‘revolving loan’ arrangement agreed on 25 April 2014, as Mr Perez accepted in evidence.
36. Mr Susman QC contends that the used of the words “from time to time” in the definition for the ODLF mean that one cannot impose any temporal limit on the scope of the PG and that one would have to disregard those words in order for the Defendant to succeed in his argument. I disagree. I do not consider that the words “from time to time” are necessarily inconsistent with the Defendant’s argument that the PG did not apply to advances made after 25 April 2014. The real question is whether the advances fall within the definition of the Guaranteed Obligations and the ODLF. That question is answered by considering whether the advances are “amounts, all being repayable on demand, made available by way of loan to [U] by [FML]...” If the answer is “yes” then it does not matter when loans were made or how often since any such loan made from time to time would be included. 37. 38. If there is a new agreement pursuant to which sums are advanced by way of a loan, or an advance made on terms that it was not repayable on demand but repayable over a specified period or on some

other basis, then it might be said that such loans were not advanced pursuant to the ODLF. The difficulty for the Defendant is that there is no evidence of any such agreement reached on or about 25 April 2014. The note produced by Mr Newman of the meeting on 25 April 2014 referred to the PG and lending from FML up to that date. At that stage, this was just a note of a discussion of proposed terms for a future agreement. The proposal was that such lending would be capitalised and FM “would agree to invest a further £150K”. However, there was nothing to suggest that any concluded agreement was reached on that date about the terms on which any such further advances would be made or as to the extinguishing of the PG. In particular, there was no agreement or stipulation as to the terms of repayment of such advances. As mentioned above, it is well-established that such sums would be repayable on demand. That would mean that the sums advanced would fall within the ambit of the ODLF as defined in the PG.

39. Mr Stuart did not submit that the terms of the PG were amended or varied by anything that occurred on 25 April 2014. He was right not to do so. Clause 11.1 of the PG requires that any amendment to the PG must be in writing and signed by or on behalf of each party. Whilst the Court of Appeal did say (obiter) in *Globe Motors* (at [109],

[116] and [117]) that a restriction on amendment such as that imposed by Clause 11.1 would not preclude the parties from agreeing a variation whether orally or by conduct, the existence of such a clause would mean that there would be evidential difficulties in establishing that there was such agreement. Here there is no evidence at all of any agreement on or about 25 April 2014 to vary the terms of the PG so as to exclude advances made after that date. Mr Newman himself refers to the outcome of the meeting as no more than a “proposal” as to the way forward. Whilst Mr Perez did accept in cross-examination that the sums advanced by FML since 25 April 2014 were advanced under the new loan agreements, that can mean no more than that it was intended that the advances would be treated as such once the loan agreements were in place. The fact is that there were no loan agreements in place either on or after 25 April 2014. Thus the intended treatment of the further loans never took effect. There were references in communications between the parties to a ‘revolving loan’ arrangement. However, there were no agreed stipulations as to repayment under those arrangements. In those circumstances, the loans remained repayable on demand and therefore within the scope of the PG. 40. It is also relevant to note that Clause 3.1 of the PG provides that the “guarantee is and shall at all times be a continuing security and shall cover the ultimate balance from time to time owing to the Lender by the Borrower in respect of the Guaranteed Obligations”. The natural and ordinary reading of that Clause in conjunction with the definition of Guaranteed Obligations is that the PG covered all sums advanced to Urbohemia which were repayable on demand. As such, it is perhaps not quite correct to describe the PG as an “all monies guarantee” as the Claimant seeks to do because it applies only to sums repayable on demand and not to all indebtedness howsoever arising. However, given my finding that all of the sums advanced to Urbohemia were repayable on demand the distinction between the guarantee in this case and an all monies guarantee is rendered academic. 41. Accordingly, it is my judgment that the sums advanced after 25

April 2014 also fall within the scope of the PG. In coming to this conclusion I have had regard to the following matters: a. b. The reference in the Term Sheet to the loan monies advanced after 25 April 2014 being “treated as part or all satisfaction of the loan monies described above from that party”. However, the Term Sheet also refers to a “shareholder loan” document. That loan agreement was not completed. In the absence of such agreement, and in particular, in the absence of any stipulated time for repayment, the position is that such sums remain repayable on demand; The reference in Mr Jones’ letter of 8 July 2014 to all sums actually advanced since 25 April 2014 being “treated as advanced under the new loan agreements” which would be for a fixed term of two years. However, as set out above, no such loan agreements were completed. Pending such agreement as to their treatment, it seems to me that the sums advanced remain repayable on demand. Issue 3: Whether the PG was discharged by agreement between the parties on 9 June 2014. 42. The Defendant’s case here is that: a. a fully binding agreement was made orally or by conduct between the parties on 9 June 2014 (which had the effect, amongst other things, of extinguishing the PG upon the loans being capitalised by the issuing of shares); and b. the terms of that agreement were merely evidenced by the Term Sheet. 43. 44. The Claimant accepts that there was an agreement on 9 June 2014 but submits that the discharge of the PG (referred to in paragraph 6 of the Term Sheet) was conditional upon the completion of formal transaction documentation. It is not uncommon that parties agree Heads of Terms, which are subject to the formal execution of documents, but begin performing certain of the matters set out in the Heads of Terms prior to execution. The question is whether any legally enforceable rights or obligations under a binding contract arise prior to the formal execution of documents. The principles governing such situations were set out by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2010] 1 WLR 753 at [45] to [50]: “The principles 45 The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement. ... 47 We agree with [Counsel’s] submission that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances... ... 49 In his judgment in the Court of Appeal in *Pagnan* Lloyd LJ (with whom O’Connor LJ and Stocker LJ agreed) summarised the relevant principles in this way, at p 619: “(1) In order to determine whether a contract has been concluded in the course of correspondence, one

must first look to the correspondence as a whole ... (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed ... (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled ... (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. ... It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge [at p 611] 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'." The same principles apply where, as here, one is considering whether a contract was concluded in correspondence as well as by oral communications and conduct..."

45. Mr Stuart submits that it is clear in this case that the parties did agree to be bound forthwith and that the further formal documentation mentioned in the Term Sheet did not preclude that. 46. The Term Sheet is the only record of what was agreed on 9 June 2014. Accordingly it is to that document that one must turn first: a. b. c. The preamble refers to the Term Sheet containing the "key terms upon which the parties agree to enter into a transaction...". The reference to key terms suggests that there are other terms yet to be agreed. The preamble continues that the parties intend the key terms "to be incorporated into the formal transaction documents to follow this term sheet." The natural and ordinary meaning of this preamble is that the Term Sheet contains an 'agreement to agree' and that the principal aim is to set out the key terms for a formal transaction. That would militate against any suggestion that the terms reflected in the Term Sheet were intended to be binding; Paragraph 2 of the Term Sheet is headed, "Proposed Transaction". It goes on to set out the agreed lending levels and that "following the transaction the shareholders will be as follows..." It certainly does not appear from these provisions that the intention was that shares would be issued immediately. Had that been the intention then there would not have been any reference to the words "following the transaction". The importance given to "the transaction" in this paragraph is consistent with the overall impression one gains from the Term Sheet that it is intended to be no more than an agreement to enter into a formal transaction; Paragraph 3 defines the Share Capital Structure as the percentage ownership of each shareholder "immediately following the transaction". Once again, the significance of the formal transaction is made clear; d. e. f. g. h. i. Paragraph 5 identifies the formal

transaction documents as being the subscription agreement for new shares in Urbohemia, the shareholder agreement and shareholder loan documents. None of these were ever executed; Paragraph 6 refers to the extinguishing of the PG. It provides that all existing “shareholder loans, advances or debts will be capitalised in exchange for the shareholding structure referred to above.” Although the parties are referred to here as “shareholders” it is clear that that is merely shorthand for the parties that will become shareholders following the transaction and does not indicate that they are so already. Paragraph 6 goes on to say that FML's loans to Urbohemia “will be capitalised as referred to above and the personal guarantee provided by DB will be extinguished”. There are two points to note here: Firstly, the words “will be capitalised” denote the future tense. Secondly, and more importantly in my judgment, the PG will be extinguished if the capitalisation is “as referred to above”. The preceding paragraphs 2, 3 and 5 of the Term Sheet and the Preamble all refer to the transaction and/or formal transaction documents. In my judgment it is not enough for the PG to be extinguished that the shares are issued without reference to any such formal transaction. To do so would be to disregard the clear words of paragraph 6; Paragraph 14 states that “This term sheet is not intended to be binding on the parties.” In my judgment, there is no ambiguity in this paragraph. The natural and ordinary meaning is that none of the provisions set out in the Term Sheet are intended to have binding effect. I shall return to the effect of this paragraph below; Paragraph 16 refers specifically to the costs of and incidental to the “preparation, negotiation and execution of this term sheet and the ensuing transaction documents”. This once again highlights the importance of the transaction documents. Paragraph 18 provides that the parties must promptly do whatever any other party reasonably requires of it to give effect to the Term Sheet and perform its obligations under it. Mr Stuart submits that this is indicative of there being binding obligations under or reflected in the Term Sheet itself. However, it seems to me that in light of the non-binding nature of the Term Sheet, such obligations as are referred to here would not give rise to any actionable breach should a party not comply; Finally, paragraph 19 precludes any modification, amendment addition or variation except by a document in writing signed by each of the parties, “but this term sheet will immediately terminate and cease to have any effect one formal transaction document is signed”. Mr Stuart submits that the reference to the Term Sheet ceasing to have effect in due course means that it must have some effect now. I do not believe that the Claimant is contending otherwise. However, that is not the same as the Term Sheet having any binding effect such that, e.g. the PG is extinguished upon the issuing of shares to FML. In my judgment, the cessation of effect referred to here merely confirms that once the formal transaction documents are signed, it would not be open to any party to resurrect the Term Sheet in order to argue that the formal documentation ought to have contained other or different terms. 47. I have said above that I consider paragraph 14 to mean what it says, namely that the Term Sheet is not intended to be binding. Mr Stuart submits that that cannot be its effect given that: a. b. c. d. There was unchallenged evidence from 3 of the individuals at the meeting on 9 June 2014 indicating that they believed that there was a binding agreement with immediate effect; The Term Sheet clearly contains obligations intended to be complied with; Paragraph 14 means no more than that when the

parties draw up the formal shareholder documentation they will not be bound to the specific words used in the Term Sheet; and The parties (including FML) acted in accordance with the terms of the Term Sheet. 48. Although these points were attractively and skilfully developed by Mr Stuart, I do not accept them: a. b. c. The unchallenged evidence as to the subjective belief of the 3 individuals that there was a binding agreement cannot be determinative. Whether or not there was a binding agreement “depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations”: RTS at [45]. As set out above, what was communicated between the parties is reflected in the Term Sheet. Both Mr Bradshaw and Mr Powell accepted in evidence that they signed the Term Sheet as an accurate record of what was agreed that day. In other words, the evidence does not support the existence of any separate agreement reached by words or by conduct on terms that did not include paragraph 14 of the Term Sheet or on terms that the PG would be extinguished immediately upon the issuing of shares without transaction documents. As Mr Powell accepted, his understanding was that the Term Sheet was non-binding but that the “sentiment and spirit when we shook hands was that we would fulfil the Heads of Terms immediately thereafter”. As to the submission that the Term Sheet contains obligations, I have considered this already – see paragraph 46(h) above. Such obligations were not legally enforceable; If paragraph 14 was intended to be as limited as Mr Stuart submits, it could readily have so provided. I see no reason to depart from the natural and ordinary meaning of the words used. Mr Stuart submitted that paragraph 14 was not as clear as non-binding clauses referred to in other cases where the absence of any commitment or obligation was more extensively articulated: See e.g. *Rose & Frank v Crompton and Brothers Ltd* [1925] AC 445 at 451 and *Allied Irish Banks v Moloney & McCarthy* [2016] IEHC 346 at [15]. However, the fact that a simpler form of words is used does not mean that it is any less effective in communicating the same intent, i.e. that the Term Sheet should not be binding. Indeed, it is difficult to see how that intention could have been expressed any more clearly than it was in paragraph 14; d. It is correct that the parties acted in a manner that could suggest they were giving effect to the Term Sheet even in the absence of the formal documentation. I have set out above Mr Perez’s immediate appointment as director and his commencement of some managerial tasks, the investment of funds (including by Mr Bradshaw) and the immediate transfer of shares, amongst other matters. I bear in mind the Supreme Court’s observation in RTS that “[t]he fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty”: RTS at [50]. However, in the present case, as I have indicated, the fundamental importance of the formal transaction documents is reflected throughout the Term Sheet. This is not a case where it can be said that as at 9 June 2014 or immediately thereafter, the parties considered the transaction documents to be without purpose, and it is clear that Mr Perez continued to pursue the transaction documents for some time afterwards. Furthermore, the parties’ conduct is not necessarily

explicable only by the intention to enter into immediately binding obligations. They had already been engaging in some respects in conduct similar to that expected under the Term Sheet even before 9 June 2014. Thus, for example: i. ii. The parties had already been putting substantial funds into the business; and Mr Perez had already become quite involved with the running of the business in terms of preparing forecasts and meeting with creditors. 49. 50. Of course, the issuing of the shares was new. However, this was not done in accordance with the Term Sheet, the terms of which were clear that shares would be issued “following the transaction”. Accordingly, even though the parties, including FML, did acquire their respective shareholdings by 10 June 2014 (albeit without their knowledge, at least in FML’s and Mr Powell’s case), such acquisition was not on terms that would trigger the extinguishing of the PG in accordance with paragraph 6 of the Term Sheet. It seems to me that the Claimant is correct in its submission that the execution of the formal transaction documents as set out in paragraph 5 of the Term Sheet was a condition that had to be satisfied in order for the PG to be extinguished. It must be said that the issuing of shares in this manner, which was done almost surreptitiously, was very odd and somewhat uncommercial. Mr Stuart has made much of the fact that the shares were transferred and are still retained by FML. However, that fact does not overcome the difficulty that the share transfer did not take place as required by the Term Sheet. Had the Term Sheet been expressed differently such that, e.g. the parties agreed to an immediate share transfer without any formal documentation being drawn up, or the evidence was such as to suggest that the parties had clearly agreed to proceed without such documentation, then the position might have been different. In those circumstances, it might at least have been arguable that it did not matter that FML was not made expressly aware of the transfer at the time. However, the Term Sheet provided for something considerably more and it was not nearly enough, in my judgment, for there to be a simple transfer in order to trigger the extinguishing provision. That is so notwithstanding the unchallenged evidence as to the subjective belief of Mr Bradshaw, Mr Powell and Mr Newman that the PG had been extinguished with immediate effect. That subjective belief (which Mr Perez does not share) is wholly at odds with the Term Sheet, which was accepted by Mr Bradshaw and Mr Powell as reflecting the agreement reached that day. In coming to this view I have taken into account the fact that in one email dated 18 July 2014, Mr Perez refers to the fact that the “payment from the revolving loans needs to come from the other shareholders...” Mr Perez said in evidence that he should have said “potential shareholders”. I accept that one cannot treat this single reference to shareholders as conclusive evidence that Mr Perez regarded himself as such. The evidence overall points the other way and I find that he was not aware that he was a shareholder until several months later. 51. For these reasons, it is my judgment that the PG was not discharged by agreement between the parties on 9 June 2014. Issue 4: If not discharged on 9 June 2014, whether the PG was subsequently discharged by Agreement, Waiver or Estoppel. 52. 53. It is common ground that the PG could subsequently be discharged in this way. The question is whether there was any such agreement, waiver or estoppel. The first point to note is that there is no written agreement to discharge or waive the PG. This is significant given the requirement in Clause 11.2 of the PG that any waiver “is

only effective if it is in writing and signed by the waiving or consenting party.” Paragraph 19 of the Term Sheet contains a similar requirement that variations be in writing. It is now conclusively established that such clauses do not preclude parties from agreeing to the waiver otherwise than in writing: See *MWB Business Exchange Ltd v Rock Advertising Ltd* [2016] 3 WLR 1519 at [22] to [24] (approving the analysis of Beatson LJ in the *Globe* case [2016] EWCA Civ 396). However, the evidence would have to be such that it established on the balance of probabilities that a waiver or agreement to discharge was concluded. It is also to be noted that for there to be a waiver, it would have to be shown that there was an unequivocal agreement to that effect: see the *RTS* case at [67]. 54. In the present case, there is little or no evidence of any such agreement: a. b. c. It is not clear when the Defendant says such agreement was concluded. No precise date or range of dates was stated in the Defendant’s pleaded case. That would militate against there being any clear agreement; There was no express indication from Mr Perez that the PG was treated as having been discharged at any point. Given that FML was not even aware that shares had been issued - that being the prerequisite, at least in part, for the extinguishing of the PG - it is hardly surprising that no such indication was given; In the circumstances, there is no evidence of any common intention as regards the discharge of the PG that could begin to give rise to a finding that there was an agreement to that effect. 55. I was referred to the case of *Whitehead Mann Ltd v Cheverny Consulting Ltd* [2006] EWCA Civ 1303 in relation to what would be required to show that a binding obligation arose in respect of the discharge of the PG notwithstanding the non- execution of the formal documentation: “Thus whether one considers the matter prospectively or in retrospect the result is the same, namely, the contractual obligations are not binding unless and until either (1) the contractual documents have been executed by all parties, (2) it can be objectively ascertained that the continuing intention of the parties changed or (3) subsequent events have occurred whereby the non-executing party is estopped from relying on his non-execution.”

56. Mr Stuart submits that here it can be objectively ascertained that the continuing intention of the parties had changed insofar as the requirement for formal transaction documentation is concerned. He relies on all the matters demonstrating that the parties were acting in accordance with the terms of the Term Sheet as mentioned above. The difficulty with this submission is that, on any objective analysis, Mr Perez had not eschewed the requirement for such documentation: a. b. c. d. He sent an email on 11 June 2014 inquiring about the “time line on shareholders and loan agreement” and expressed his keenness to get everything in order as soon as possible; On 8 July 2014, there is a summary from FML’s Solicitor, Mr Jones, setting out detailed points to be taken into account in drafting the “legal documentation”. The documentation would provide that the PG “is to be cancelled”; By 11 July 2014, Mr Jones sent an email to Mr Perez indicating that he was still working on the documents and that he would “hold fire” until he had had heard from Mr Perez in relation to “outstanding issues on the principal agreements”. Mr Stuart submits that this is indicative of a change of intention. However, merely indicating that matters be put on hold pending further information is hardly evidence that Mr Perez had unequivocally changed his mind

about the need for documentation; On 14 July 2014, there was an exchange between Mr Powell, Mr Jones and Mr Perez in which outstanding issues in respect of the documentation were considered. In my judgment all of these matters demonstrate that there was no change of intention as regards the formal documentation, certainly as far as Mr Perez was concerned. It follows that there is nothing to show that there was any unequivocal agreement to waive the requirement for formal documentation. The Defendant also relies on estoppel. Mr Stuart submits that Mr Bradshaw clearly acted to his detriment in putting more of his own money into Urbohemia and that the unchallenged evidence is that he “absolutely would not have done if [he] had even an inkling of the Personal Guarantee still being in place” (Emphasis in original). However, that detriment (if that is what it is) cannot give rise to an estoppel on its own. The question is whether there was anything in Mr Perez’s or FML’s conduct that could unequivocally be construed as suggesting that the requirement for transaction documentation would not be insisted upon so that the PG was discharged without it. It seems to me that the evidence that there was any such estoppel is as weak as it is for the existence of an agreement or waiver. Mr Bradshaw’s evidence is that Mr Perez had “led [him] to believe that [the PG] had fallen away and on that basis he got me to spend more and more of [Mr Bradshaw’s] funds supporting a business which 4M (and Spring) now had a 30% equity stake in each”. That evidence was unchallenged but it does not suffice to establish the estoppel now relied upon: a. b. First, it is not said how Mr Perez led Mr Bradshaw to believe that the PG had fallen away and it was not put to Mr Perez (correctly given that there is no evidence about it) that he had said anything to that effect; Second, whilst Mr Bradshaw appeared to be aware that the share transfer had taken place, Mr Perez was not aware of it until much later. Thus whatever it 57. 58. was that Mr Perez was persuading Mr Bradshaw to do, it was not on the basis that he (or FML) now had a 30% stake in the company; c. Third, Mr Perez’s first communication on 4 August 2014 giving notice of FML’s withdrawal expressly referred to the PG as still being effective. It does not appear from the evidence that that notification reflected a sudden change of position on Mr Perez’s part. 59. I find therefore that the PG was not discharged after 9 June 2014 by agreement or waiver and FML is not estopped from seeking to rely upon it. Issue 5: Whether it was a condition precedent to any liability arising under the PG that a valid demand for repayment of borrowed sums be made of Urbohemia and if so whether such demand was made? 60. I have been provided with passages from Chitty on Contracts and Goode on Consumer Credit Law dealing with the question of whether the making of a valid demand is a precondition of the debt becoming due. It suffices to refer to Chitty (cited by the Defendant) as the definition of demand therein has been approved by the Court of Appeal. It provides as follows at 39-267: “Where money is lent without any stipulation as to the time for repayment, a present debt is created which is generally repayable at once without any previous demand. But it is, of course open to the parties to fix the time for repayment or to agree that the loan will only be repayable on demand. ... Where the loan is repayable on demand, the making of a valid demand is a precondition of the debt becoming due. In order to constitute a valid demand: “... there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word ‘demand’ need not be used; neither is the validity of

a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect.” 61. 62. This last passage was approved by the Court of Appeal in *BCCI v Blattner*, Unreported, 20 November 1986. The question therefore is whether there has been a clear intimation that payment was required. The evidence relating to this includes the following: a. On 4 August 2014, Mr Perez wrote to say that, “we of course have a considerable debt outstanding (circa £296K) which is secured by way of personal guarantee. While it is important that this debt is paid back, we do not want to put additional pressures on the business or David; I am happy to sit down and discuss a payment solution that works for all parties.” Mr Stuart submits that this amounted to no more than a statement that FML was owed money which was not sufficient to constitute a demand. However, it seems to me that this email is a clear intimation that the sum is to be repaid. It is couched in conciliatory terms but that is no bar to it being a valid demand. The references to there being an outstanding debt and the need for a “payment solution” are sufficiently clear, in my judgment to indicate that payment was required; b. c. d. Mr Powell confirms in a section of his statement headed “August 2014 – 4M Perez renege on the agreement”, that Mr Perez stated to him that FML “wanted all its money back”. Mr Powell, who appears at this stage to be speaking on behalf of Urbohemia, states that he did not agree to that approach and tried to propose a different resolution. Mr Perez’s statements in these discussions also constituted a sufficient demand; In an email dated 17 September 2014 to Mr Powell, Mr Perez refers to the outstanding amount of £302,980.11 (the sums loaned having further increased by this stage) and requests options as to repayment; In a further email to Mr Powell dated 2 October 2014 and headed “Urbohemia o/standing £302,980.11”, Mr Perez acknowledges that Mr Powell is trying to put some options to FML in respect of repayment. Mr Perez suggests an alternative repayment plan and concludes the email by saying, “To be clear, we are just interested in the capital sum of £302,980.11 being paid back and do not require anything else”. 63. 64. I have not set out every example in the papers or statements where reference is made to repayment. The above examples suffice, in my judgment, to demonstrate that the requisite demand was made of Urbohemia. Repayment was not made by Urbohemia pursuant to that demand and thus FML’s rights and Mr Bradshaw’s obligations under Clause 2.1 of the PG were triggered. I should make it clear that had I reached the conclusion that there was no demand, I do not consider that Clause 3.3.3 of the PG would nevertheless have entitled the Claimant to enforce the PG. That clause, which provides that FML is not obliged to make a demand against Urbohemia before taking steps to enforce its rights under the PG, is predicated on FML having a “right” to enforce. Until there is an unmet demand for repayment made to Urbohemia no such right would arise.

Conclusion

65. For the reasons set out above, my conclusions in respect of the five issues identified at paragraph 26 above are as follows: a. b. c. d. e. Did the PG cover the loans made by FML prior to 5 February 2014? Yes; Did the PG cover loans made after 25 April 2014? Yes; Was the

PG discharged by agreement between the parties on 9 June 2014? No; If not, was the PG subsequently discharged by agreement or waiver or was an estoppel created so as to prevent its enforcement? No; Was a valid demand for repayment of borrowed sums made of Urbohemia? Yes. 66. It follows that there should be judgment for the Claimant in the sum of £302,980.11.

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