Neutral Citation Number: [2021] EWHC 232 (Comm)

Case No: CL-2019-000189

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 09/02/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

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Between :

ACTIVE MEDIA SERVICES INC	**Claimant**
- and –	
(1) BURMESTER, DUNCKER & JOLY GMBH & CO KG **(2) AXA VERSICHERUNG AG** **(3) EUROPEAN FILM BONDS A/S** **(4) DOUBLE DUTCH INTERNATIONAL INC**	**Defendants**

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Emily Wood and Mark Belshaw (instructed by **Mischon de Reya**) for the **Claimants**
Edmund Cullen QC and Ted Loveday (instructed by **Clintons**) for the **First and Second Defendants**
The Fourth Defendant as a Litigant in Person

Hearing dates: 7 – 10 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 9 February 2021 at 10:30 am

Mr Justice Calver :

INTRODUCTION

1. Appropriately for the time of year, this dispute concerns the financing, completion and delivery of an animated Christmas film entitled '*Elliot: the Littlest Reindeer*' (**the 'Film'**). Unfortunately, any Christmas Spirit between the parties is, however, in short supply.

2. This Film was intended to have a November 2017 release date, in time for the 2017 holiday season. Because of delays in its production, it was not released until Christmas 2018, which had serious financial consequences for all concerned. The issue is, essentially, who should bear those financial consequences. As will be seen, in my judgment none of the relevant players in the underlying dispute in this case have been entirely candid in their dealings with each other or, in some cases, the Court. I am satisfied that Ms Nina Crone formerly of European Film Bonds A/S ("**EFB**"), the Film Guarantors' agent, did not give an entirely candid account of events in correspondence at the relevant time and in her evidence to the Court, concerning the completion and delivery of the Film. I am satisfied that she saw her role as being to ensure that the Completion Guarantee given by the Guarantors was not called upon, despite the Film being significantly delayed and over-budget, such that the Delivery Date under the Completion Guarantee had passed without delivery of the essential elements of the Film.

3. Instead she preferred, with the assistance of Mr. Krech of Littlest Reindeer Productions ("**LRP**") (the Film's producer) and Mr. Jason and Mr. Ron Moring of Double Dutch International (**DDI**) (the Sales Agent for the Film), to devise a scheme whereby they pretended that delivery and completion of the film had taken place by *back-dating* a Delivery Notice by 3 weeks to 31 August 2017 so as to get the Guarantors "off the hook" (in fact, because of their oversight, even that date was beyond the contractually allowed long-stop date for completion and delivery of 28 August 2017). It was then subsequently pretended that all the work that was undertaken in respect of the incomplete Film thereafter, until the Film was (eventually) actually completed in around June 2018 (almost a year late) was in fact undertaken in order to produce an "enhanced film". In this way Ms Crone assisted LRP in obtaining the much needed additional finance to complete the unfinished Film not from the Guarantors (as should have happened) but from third parties instead.

4. In light of this behaviour, one might have had a good deal of sympathy for Active Media Services Inc ("**Active**") who invested in the Film and had the benefit of the Completion Guarantee, and in particular for Mr. Quinn, who was the main protagonist on its behalf throughout this dispute. Moreover, it might be supposed that this is a straightforward case of a breach of the Completion Guarantee, leading to the return of Active's investment made under it. However, I found Mr. Quinn, in giving evidence before me on behalf of Active to be evasive and defensive, frequently procrastinating and not answering the questions put to him. But more than that, just two days before this trial commenced, Mr. Quinn chose to "double delete" relevant emails about this dispute on his personal Gmail account, which he had previously told his solicitors, Mishcon de Reya ("**Mishcon**"), did not contain documents relevant to this dispute. This was a very serious misdeed and a very serious breach of Active's disclosure obligations. Mr. Quinn claims that this was a "*moment of madness*" on his part. I shall

address that suggestion in determining what the consequence of his actions should be: the real issue in this case being whether the court should infer that Active, through Mr. Quinn and/or its agents, knew that the Film had not been completed and delivered by 28 August 2017 and whether by its conduct Active is estopped from now bringing its claim under the Completion Guarantee, or waived its right to do so.

Contractual background

5. The case concerns the production of a feature film. The production of a feature film, such as the Film, typically follows a well-established process, as follows.

6. At the outset, the Producer - which in this case was LRP, a company which was incorporated by Awesometown Entertainment ("**Awesometown**") and run by Mr. Dan Krech - needs to obtain the necessary finance from lenders and investors, which in this case was provided by Ingenious Media Finance Limited ("**Ingenious**") and Active. The Producer will agree to produce the film in accordance with certain specifications and requirements as to content (running time, language, director etc.) and technical quality (it should be a commercially acceptable technical quality for theatrical release), and to complete and deliver it to a Sales Agent (in this case DDI) within a certain timescale (to allow for its timely release) and at an agreed cost or budget. This will be recorded in a sales agency agreement between the Producer and the Sales Agent.

7. The sales agent will then in turn deliver the completed film to distributors around the world under the terms of separate distribution agreements (which will have their own delivery timescales). The distributors will then exploit the film commercially as appropriate, which may take place through theatres/cinemas, television, online streaming (such as Netflix), airlines and DVD sales or rentals. The profits made by the exploitation of the film will then be collected and distributed down the *"waterfall"* of investors through a Collection Account Management Agreement (or **"CAMA"**).

Sales Agent Agreement

8. In this case, LRP entered into a "**Sales Agent Agreement"** with DDI on 31 May 2016. This granted DDI the right to act as the exclusive sales agent in connection with the Film, with exclusive distribution rights throughout the world (save for Canada). The Film was to run for not less than 85 minutes and would be directed by Jennifer Westcott. All material changes to the script, director and/or lead casting had to be approved by DDI. Clause 5 provided as follows:

> "*DELIVERY DATE / DELIVERY MATERIALS*
>
> *5.1 Producer shall deliver to DDI the Picture and all other delivery materials set out in Schedule A to this Agreement in the format and according to the specifications set out in Schedule A (the "Delivery Materials"), all of which shall be delivered at Producer's sole expense no later than the delivery date set out in Schedule A ("the Delivery Date"). In the event that Producer requires an extension or change to the Delivery Date, producer must secure DDI's prior written consent no later than 45 business days prior to the Delivery date.*

> *5.2 In the event that Producer has additional materials available that are not listed in Schedule A but that would assist DDI in its exploitation of the Picture, Producer shall provide DDI with a copy of the same.*
>
> *5.3 Producer represents, warrants and covenants that the Delivery Materials shall be of first-class technical quality and shall satisfy all international technical standards customary in the motion picture, video and television industry.*
>
> *5.4 In the event that all Delivery Materials are not delivered to DDI by the Delivery Date, DDI will have the option, at its sole discretion:*
>
> *(a) to terminate this Agreement …;*
>
> *(b) agree to extend the Delivery date as it deems reasonable."*

9. Further, by clause 5.5, if any material is found to be "*defective or unacceptable by industry standards*", the Producer shall replace it at its sole expense within 10 business days. If it does not do so, DDI "shall have the right, at its sole discretion" (among other things) to "agree to extend the Delivery Date as it deems reasonable".

10. By clause 6, DDI is entitled to a Sales Fee representing 10% of the Film's US receipts and 15% of its non-US receipts. (The Sales Fee under the DDI Canadian Agreement was 20% of Canadian receipts). DDI thus had a direct commercial incentive to ensure that the Film was released as soon as possible and was profitable.

11. By clause 14.1, upon *"complete delivery of the Delivery Materials"*, DDI must *"use its best commercially reasonable efforts to license the Picture throughout the Territory"*. DDI has complete control of the manner in which the Picture is marketed and sold and may execute licences as the agent of the Producer.

12. Alongside the Sales Agent Agreement, DDI also agreed to be the Canadian distributor (though it subsequently gave up those rights to assist in obtaining the Telefilm financing set out below) and it made its own equity investment in the Film, subscribing for shares in the Producer worth CAD 134,160 by a Share Subscription Agreement dated 13 July 2016. That agreement was not disclosed in these proceedings. This provided DDI with an additional commercial incentive to ensure that the Film was released and was profitable.

13. Schedule A to the Sales Agent Agreement provided that: "*Delivery Date shall be May 31, 2017. Any extension required is subject to the sole approval of DDI*." This was also attached as Schedule 3 to the Completion Guarantee as is explained below. Schedule A then set out the delivery materials required to be delivered to DDI, marking the essential (bonded) elements with an asterisk, which included the HD 1080p Video and Audio; the DCP cinematic film materials; certain publicity materials and legal and publicity documents.

14. It follows that:

(1) LRP was obliged to deliver to DDI the completed Film and all other delivery materials in the format specified in Schedule A, no later than 31 May 2017 (one year after the Sales Agent Agreement was entered into).

(2) DDI had the sole right between it and LRP to extend the stated Delivery Date of 31 May 2017 if LRP obtained its written consent no later than 45 business days prior to 31 May 2017.

(3) If the Delivery Materials in Schedule A were not delivered to DDI by the Delivery date, then DDI could in its discretion terminate the agreement or agree to extend the Delivery Date.

(4) LRP was obliged to provide DDI with additional materials if they assisted in DDI's exploitation of the Film. It follows that if LRP could produce an "*enhanced film*" with these additional materials, this did not give it any contractual entitlement to an extension of the Delivery Date. It still had to deliver by 31 May 2017, absent DDI's agreement to extend that date.

(5) Both the Producer and DDI had a commercial incentive to ensure that the Film was completed, released and was profitable.

Distribution Agreement

15. At the same time that the Sales Agent Agreement was entered into, LRP and DDI also entered into a **Distribution Agreement** for the Film, which contained an identical clause 5 concerning Delivery Date/Delivery Materials.

Financing Agreement

16. The next stage concerned the conclusion of a Financing Agreement between the Investors and the Producer. Thus, two weeks later, by an agreement dated 13 June 2016 (the "**Financing Agreement**"), Active agreed to provide a cash investment of US$2,400,000 to LRP ("the payment sum"). That agreement provided, amongst other things, that LRP would arrange for EFB, whose business was the provision and administration of completion guarantees, to provide a completion bond in connection with the production of the Film, the release date for which was stated to be between "Oct 1, 2017 and December 22, 2017." In other words, the Film was to have a Christmas 2017 release, with "*the minimum number of theaters in which the Film will be released on the Release Date [being] 1000 screens*."

17. This timescale fitted with the Delivery Date agreed between LRP and DDI in the Sales Agent Agreement of 31 May 2017.

18. Under the terms of the Financing Agreement LRP agreed "*to use [Active] as the exclusive agent for the planning, placement and purchase of the advertising media … for the theatrical release of the Picture and any chase Media in the US territory, designated in the P&A Fund Budget for such purpose. The portion of the P&A Fund Budget for the Picture designated for the purchase of Media is anticipated to be twelve million dollars (USD$12,000,000) net (the Media Buy")*." On 23 October 2015 Fleet Fairhaven had written to Jason Moring of DDI, stating that it was interested in providing $15m in print and advertising for the Film. This led the parties

to anticipate that $12m would be available for the purchase of media but (as will be seen) it ultimately transpired that Fleet Fairhaven was not good for the money and the marketing budget was very much smaller as a result.

19. In any event, Active agreed to invest $2.4m into the Film. Active's return on that investment was to come from two primary sources: (i) four quarterly interest payments of US$90,000 between the end of September 2016 and the end of September 2017; and (ii) through the 'media buy' in connection with the release of the Film in U.S. theatres between 1 October 2017 to 22 December 2017. The Financing Agreement also provided that Active would, if necessary, have a position in the waterfall of profit that it was hoped the Film would make: *"[t]he Parties acknowledge that [Active] will receive repayment of the principal amount of [its investment] through the direction by [LRP] to [Active] of the Media Buy. Should it be determined through the approved marketing plan and/or the release of the P&A funds that the actual Media Buy Amount is less than … USD$12,000,000, then [Active] shall be entitled to recoup from Tier (g) of the CAMA waterfall … of the Picture the total of the following calculation: ($12,000,000 less the Actual Media Buy) multiplied by 20%.*"

20. The Financing Agreement provided that the Budget for the Film would be approximately CAD 17,751,000.

21. It follows that the intention was that Active would benefit (financially) from being used as an exclusive agent in respect of advertising media for the theatrical release of the Film whenever that took place, although if that financial benefit were less than anticipated it would also benefit from the receipt of any non-theatrical syndication fees (streaming on Netflix, Amazon, paid TV and the like) in respect of its place in the waterfall.

Active's relationship with M3 and Jason Moring

22. It is apparent from a document described as *Active Theatrical Update June 2016* that Active had entered into an arrangement with the M3 LLC ("**M3**") (created by the three "Ms": Mike Sears, Michael Emerson and Jason Moring) whereby M3 would bring it the opportunity to invest in a slate of films (of which the Film was one), the media planning for which would be undertaken by Active, and which would then be sold globally by DDI, Mr. Moring's company. Both M3 and Active would have to give their approval to a particular film; in the case of *Elliot The Littlest Reindeer*, a 15% return on investment for Active was anticipated, with a film release in the Fall of 2017. It is apparent therefore that Jason Moring was, throughout this dispute, wearing (often indistinguishably) two hats: one as DDI and one as M3. It is apparent that he and Mr. Quinn frequently gave no thought to which hat Jason Moring was wearing.

23. Both Jason and Ron Moring chose not to give evidence about the relevant events, despite their central role in them. Mr. Ron Moring made brief submissions to the court, but played no other part in the trial.

M3 Deal Memo and Letter of Intent

24. The next stage in the contractual background to the dispute is that on 26 July 2016 Mike Sears of M3 sent Mr. Dennis Quinn of Active the **M3 Deal Memo**. That made

clear that Active had "*absolute, complete and unfettered discretion*" as to whether or not to make the initial decision to approve and invest in any particular film and that M3 could not give that approval on its behalf. But after Active had made an investment in respect of a particular film, M3 was to provide regular reports for it on the "*financial aspects of the development of the slate of feature films approved by Active*."

25. On the same date, Mr. Quinn sent M3 a **Slate Investment Letter of Intent**, confirming that it had up to $12m available as an equity investment in the slate of films to be pre-approved by Active.

Norsemen Consulting Agreement

26. Furthermore, on 10 August 2016 Mike Sears' company Norsemen Television Productions LLC ("**Norseman**"), entered into a **Consulting Agreement** with Active to act as consultant in connection with transactions between Active, M3, LRP and DDI concerning Active's investment in the film slate. By clause 5 of that agreement it was provided that in so acting Norsemen was not acting as an agent, joint venture partner or legal representative of Active for any purpose. The Consulting Agreement provided that "*to be covered by this Agreement and to receive the Consulting Fees specified in this Agreement, Active must pre-approve in writing Norsemen's role with respect to either [sic] soliciting a Specific Approved Project*." The Film was such a project, as clause 2 of the agreement stated. Norsemen's responsibilities included providing Active with such information about an Approved Project in the manner that Active may from time to time request. Active agreed to pay Norsemen 5% of the Divisible Profits (as defined) derived by Active from the Approved Project, plus a one off finder's fee. It was therefore in Norsemen (Mike Sears)'s interests that the Film was profitable for Active.

27. Active relied upon the Norsemen Consultancy Agreement in only one paragraph of its written closing submissions (paragraph 67), running together Mike Sears' role in acting for M3 and Norsemen. Throughout the relevant events and in all of the contemporaneous emails Mike Sears purported to be acting in his role as a partner in M3, and none of the parties suggested otherwise in the contemporaneous documents. I therefore proceed on the basis that M3 (acting through Mr. Sears and Jason Moring in particular) is the relevant entity said to have been acting on behalf of Active at all material times in respect of this particular dispute.

28. Active chose not to call Mr. Sears to give evidence about the relevant events, despite his central role in them. I have no doubt that Active could have done so and that this was therefore a tactical decision, as Mr. Quinn was in friendly contact with Mr. Sears at the time of the trial (as discussed below).

29. The arrangement between Active and M3 was informally described by Michael Emerson of M3 to Dan Krech in the following way in an email dated 17 October 2016:

> "*I am sure you can understand, M3 has a fiduciary responsibility to [Active] to safeguard their investment by periodically consulting with you as to the production's progress*."

30. The fact that M3 had a fiduciary relationship to Active naturally suggests an agency relationship. To this end, monthly calls had been set up beginning in September 2016 (on the first Tuesday of each month) between M3, Active and LRP to discuss the marketing opportunities for the Film. The main conduit of information from LRP/EFB to Active and vice-versa was Mike Sears and (to a lesser extent) Jason Moring. I shall return to M3's relationship with Active below.

31. Acceptance of the film by the sales agent (here, DDI) is a crucial step in the commercial exploitation of that film. The sales agent cannot exploit the film until it has accepted it. In order to accept it, the film must be completed and delivered by the producer to the sales agent in a form which is of commercially acceptable quality for release in cinemas and broadcast on television (hence clause 5.3 of the Sales Agent Agreement). The investors who have funded production of the film need the sales agent to accept the film in order for it to be commercially exploited, triggering the media buy and subsequently the gross receipts for the picture (i.e. the waterfall). They do not want to be exposed to the risk that the film might not be accepted by the sales agent and not exploited at all. In order to protect themselves against that risk, a completion guarantor will frequently be engaged (as happened in this case, using the Second Defendant ("**AXA**") and others through their agent the First Defendant ("**DFG**") to guarantee that the film *will* be completed and delivered to the sales agent by a certain date. A "*bond monitor*" (in this case EFB) will frequently also be engaged to provide and administer the completion guarantee on behalf of the Guarantors.

The Producer's Completion Agreement

32. The procuring of this completion guarantee in the present case therefore required the execution of two further agreements, namely the **Producer's Completion Agreement** ("the **PCA**") and the Completion Guarantee.

33. The PCA was entered into on 28 July 2016 (six weeks later) between the Producer (LRP) and the Guarantor Defendants (DFG and EFB) (acting as agents for the Guarantors) ["**the Guarantor Defendants**"]. This agreement "attaches" the Completion Guarantee at Schedule 5 (although at this date it had not yet been executed) and sets out the Producer's obligations to the Guarantor Defendants, providing the Guarantor Defendants with the rights they need to be able to fulfil their obligations under the Completion Guarantee for the guaranteed completion and delivery of the Film. The importance of the Completion Guarantee to the financing of the Film by Active is emphasised by the wording in clause 1.2 of the PCA as follows: "*Availability of financing is conditional upon execution and delivery of a Completion Guarantee for completion and delivery of the Film.*"

34. The PCA provides in particular for the following:

    a. The Guarantor approves the Screenplay. LRP agrees that it shall produce the Film on the basis of the Screenplay without making significant changes or otherwise departing from the Screenplay that adversely affects the budget and/or the production schedule except with the written consent of the Guarantor (clause 2.1);

    b. LRP agrees to take all actions necessary for completion and delivery of the Film within the approved Budget, approved Cash Flow Plan and approved

filming schedule. The Total Production costs are recorded as USD 14,035,972 or CAD 18,109,413. The production is recorded as being from January 2015 to June 2017 according to the Production Schedule approved by the Guarantor and attached in Schedule 7. Consistently with the other contractual documents, that provides for a "completion date" of 24 May 2017 and a Delivery date of 30 May 2017 (clause 2.2(b));

c. The Guarantor has approved the key elements of the Film in (b) above (which includes the Delivery Date) and any material changes shall be invalid unless made with the express written approval of the Guarantor (clause 2.3);

d. LRP covenanted to the Guarantor that it would produce the Film with the key elements defined in clauses 2.1 and 2.2, complete the Film by the completion date as defined in clause 2.2(c) and deliver the Film fully edited, with sound, and free of any defects in quality *allowing for the unrestricted, worldwide licensing of the Film in all media in accordance with, inter alia, the Sales Agent Agreement with DDI*. That meant that it should allow for the exploitation of the Film in theatres/cinemas worldwide. LRP warranted that it had reviewed and approved all parts of the project, including the budget and production schedule, and that there were no circumstances that might interfere with completion, delivery or unrestricted commercial exploitation of the Film (clause 2.5);

e. Provisions relating to 'completion and delivery of the Film', were materially similar to those in the Completion Guarantee (Clause 2.7 and Schedule 7B);

f. In consideration of the execution and delivery of the Completion guarantee, the Guarantor would be paid a Guarantee fee in the sum of USD$306,900 plus applicable VAT (clause 4.1);

g. LRP agreed that all financing would be used exclusively for the completion and delivery of the Film as provided in the Budget. Any use of such funds for production costs not included in the Budget would be subject to written approval by the Guarantor (clause 8.3);

h. LRP had an obligation to continuously report to the Guarantor regarding the completion of the Film and the delivery of the Delivery Materials, as well as monthly cost reports (Clause 10.2);

i. The Guarantor had a right to *take over completion and delivery of the Film and complete and deliver the Film independently or contract with third parties to do so* upon the happening of a 'Completion Bond Event' (essentially, unsatisfied concerns with the progress of the production, timely completion and delivery of the Film and compliance with the Budget) and to take any other measures which were necessary in its view for completion and delivery of the Film on the agreed delivery date (Clause 11.1);

j. The Guarantor was entitled to reimbursement from LRP of all sums that it had paid out in performance of its obligations under the Completion Guarantee and in the exercise of its rights under the PCA, including any costs and liabilities of third parties assumed by the Guarantor in connection with the completion of

the Film or the delivery of the Delivery Materials (clause 12.1). This right to reimbursement was contingent however upon the collection of net proceeds from the licensing of the film and the enforcement of its Security Interests under clause 13;

k. By clause 13.1, as security for the right to reimbursement, the Producer assigned to the Guarantor by way of security, essentially, all assets related to the Film. This included all intellectual property rights, all film materials and all rights to share in the proceeds of the worldwide licensing of the Film. These rights are expressed to be subordinate to any security interest of Ingenious, one of the Film's financiers (whose investment was largely to be recouped from Canadian tax credits), and Active. In fact, nothing in the Active Financing Agreement entitled Active to any security;

l. By clause 13.8, these security interests cease to be valid (a) when the Film is completed and delivered, and it is conclusively established that the Guarantor is not liable under the Completion Guarantee; (b) before completion and delivery, if all Beneficiaries waive their claims under the Completion Guarantee in writing; or (c) in relation to production financing, as soon as all amounts made available under the Completion Guarantee have been reimbursed;

m. By clause 18.4, any modifications or amendments to the agreement, including waiver of the requirement of written form, shall be invalid unless executed in writing and duly signed by all parties.

35. It follows that the Completion and Delivery Dates in this agreement correspond with the delivery dates in the earlier agreements. The Producer cannot depart from the approved Budget, approved Cash Flow Plan and approved Filming Schedule without the written approval of the Guarantor. And the Producer must (contingently) reimburse the Guarantor in respect of all sums that it has to pay in the performance of its obligations under the Completion Guarantee.

Completion Guarantee

36. Active's claim in this case arises under the completion bond, which was in turn entered into by an agreement dated 1 August 2016 (the '**Completion Guarantee**'). All of the parties to these proceedings are parties to the Completion Guarantee (although DDI's participation is limited as described below), which (by clause 11.3) is governed by English law and subject to the exclusive jurisdiction of the English Courts. In summary:

a. AXA and DFG, together with others who are not parties to these proceedings, are referred to as the "Guarantor". In accordance with the PCA, their obligation was to guarantee the completion and delivery of the Film and that it met certain technical requirements necessary for cinematic release by the Delivery Date of 30 May 2017 (which could be extended to a specified extent).

b. EFB, which arranged the Completion Guarantee, did not itself provide the guarantee, but had agency and monitoring functions on behalf of the Guarantor Defendants.

c. DDI is the "Sales Agent" in respect of the distribution of the Film.

d. Active is a "Beneficiary" under the Completion Guarantee.

37. By clause 1.1 of the Completion Guarantee, consistently with the PCA, the total cash cost of the Film is estimated at USD 14,035,972. Importantly, by clause 1.12, it is stated that:

> *"[DDI] is a party to this Agreement solely for the purpose of agreeing to the provision of Clauses 1.10 and Schedules 3 and 4 (which it hereby agrees to) and it shall have no other right or benefit pursuant to this Agreement." (emphasis added)*

38. In other words, DDI is a party purely to agree delivery and completion dates and procedures for the Film.

39. The provisions of the Completion Guarantee which are central to the dispute between the parties as to its proper construction are contained in clauses 2.1 and 1.10:

> *"2.1 The Guarantor hereby agrees, for the benefit of the Beneficiaries that, subject to the guarantee conditions of Clauses 3 and 4 below, the Guarantor shall,*
>
> *(a) either ensure completion and delivery of the Film (for the benefit of the Beneficiaries) and, if necessary, make available to the Producer any funds in excess of the Total Production Cost that may be necessary to effect completion and delivery of the Film and/or take over production of the Film from the Producer and assume direct responsibility for completion and delivery of the Film or arrange for completion and delivery of the Film by third parties on the Guarantor's behalf;* [this is consistent with the PCA] *and*
>
> *(b) if the Guarantor fails to effect completion and delivery of the Film to Sales Agent or discontinues production of the Film the Guarantor shall reimburse to Active Media the Active Media Funding… plus all legal costs and interest (at the non-default rate) due to Active Media… under the Active Media Agreement… in each case actually by then advanced in accordance with the Financing Agreements and less in each case the aggregate of any amounts actually and non-refundable received by the relevant Beneficiary prior to the time such payment is to be made to the Guarantor from the Budget and/or the production insurances taken out in connection with the Film and/or from any Distributors (or any other licensee of the Producer) to whom completion and delivery of the Film has nevertheless been effected and*

> *which that Beneficiary is entitled indefeasibly to apply towards the repayment of its debt (such aggregate amount paid to the Beneficiaries being hereinafter the **"Payment Sum"**)."*

40. Clause 1.10 then defines '*completion and delivery of the Film'* as the following:

> *"(a) the Film is (i) in the English language (ii) based on the Screenplay (iii) has a running time of not less than 85 minutes in length including main and end titles (iv) is of commercially acceptable technical quality for release in cinemas and broadcast on television (v) is directed by Paul Griffin and Jennifer Westcott (the **"Director"**) and is produced by Lucas Lynette Krech and Victoria Westcott or such replacements for the Director producer and lead cast as may be agreed and approved by EFB); and*
>
> *(b) tender of delivery to Sales Agent by 30 May 2017 (the **"Delivery Date"**) in accordance with the delivery procedure attached hereto as Schedule 4 of the materials specified in the delivery schedule attached hereto as Schedule 3 and marked with an asterisk subject to an extension to that date equal to the duration of any delays caused by the occurrence of exigencies of production and / or the occurrence of Events of Force Majeure of up to 90 days."*

41. Schedule 3 to the Agreement is headed "The Sales Agent Delivery Schedule" and simply attaches what is Schedule A to the Sales Agent Agreement, which provides that: "*Delivery Date shall be May 31, 2017. Any extension required is subject to the sole approval of DDI*", followed by a list of the same asterisked (bonded) materials as are contained in that Schedule A.

42. Schedule 4 of the Agreement is also central to the dispute between the parties. It is headed "Delivery Procedure" and it provides in particular as follows:

> *"1. [DDI] and EFB and the Guarantor hereby agree that in the event any dispute arises between any of the parties hereto as to whether completion and delivery of the Film (as defined in the Completion Guarantee) has been effected they will agree to submit such dispute to binding arbitration in accordance with the provisions hereof, which arbitration shall result in a finding that such completion and delivery of the Film either has or has not been effected, and shall result in issue of a final award to such effect. In connection with any such arbitration, the following procedure shall apply and all notices to be sent by the Guarantor or EFB under this procedure shall be copied to the Beneficiaries:*
>
> *1.1 **Verification of completion and delivery of the Film.** Notwithstanding anything to contrary contained in the Sales Agency Agreement, [DDI] shall have thirty (30) days from and after its receipt of a written notice (the "**Delivery Notice**") from EFB or [LRP] confirming delivery to [DDI] of all those materials specified in Schedule [3] to the*

*Completion Guarantee and marked with an asterisk (the "**Delivery Materials**") within which to verify that the Delivery Materials have been delivered and to notify the [LRP], [Active], EFB and the Guarantor in writing that either:*

*1.1.1 completion and delivery of the Film has been effected (an "**Acceptance Notice**"); or*

*1.1.2 completion and delivery of the Film has not been effected (an "Objection Notice"), which Objection Notice shall specify (with particularity and in reasonable detail) (i) which Delivery Materials (if any) DDI contends are not of technical quality suitable for the making of commercially acceptable release prints or broadcast materials, as applicable … (ii) which Delivery Materials (if any) were not delivered to DDI as required in the Completion Guarantee; and (iii) which Delivery Materials (if any) are not in accordance with the specifications set forth in clause 1.10(a) of the Completion Guarantee (the "**Approved Picture Specifications**")…*

*2. **Failure to Respond; Acceptance Notice Deemed Given**. If (i) the Sales Agent fails to give either an Acceptance Notice or an Objection Notice within the time periods set forth in paragraph 1.1 above… then the Sales Agent shall be deemed to have given an Acceptance Notice for all purposes hereunder. EFB or the Guarantor shall thereupon give notice to the Beneficiaries that the Sales Agent shall have failed to give a Response, an Acceptance Notice, an Objection Notice … and that it accordingly shall be deemed to have given an Acceptance Notice, but failure to give such notice to the Beneficiaries by EFB or the Guarantor shall not affect the fact that the Acceptance Notice shall be deemed to have been given.*

*3. **Objection Notice.** If the Sales agent gives an Objection Notice and is not thereafter deemed to have given an Acceptance Notice, then EFB or the Guarantor shall either:*

3.1 deliver to the Sales Agent any Delivery Materials that were specified by the Sales Agent in the Objection Notice as not having been delivered, cure the defects in the Delivery Materials which are specified by the Sales Agent in the Objection Notice as not being of technical quality suitable for the making of commercially acceptable release prints or broadcast materials, and cure the defects in the Delivery Materials as appropriate which are specified by the Sales Agent in the Objection Notice as not meeting the Approved Picture Specifications … as soon as reasonably practicable but in no event later than … 30 days after the later of (i) receiving the Objection Notice or the Response, as applicable, or (ii) the return of any Delivery Materials as appropriate which the Producer or EFB or the Guarantor has requested be returned in order to cure any claimed defects (the "Cure Period"), and give notice thereof (a "Cure Notice") (such Cure Notice to be copied to the Beneficiaries); or

> *3.2 give the Sales Agent notice (an "Arbitration Notice") (which shall be copied to the Beneficiaries) within ten (10) days after receiving the Objection Notice or (if applicable) the Response, that completion and delivery of the Film has been effected to the sales Agent notwithstanding the Objection Notice and that the Guarantor has elected to submit the issue of whether completion and delivery of the film has been so effected (and such issue only) for expedited arbitration in accordance with paragraph 11 below.*
>
> *4. **Failure to Respond** – Arbitration Notice Deemed Given. If EFB or the Guarantor fails to deliver either a Cure Notice or Arbitration Notice within the time periods set forth in paragraphs 3.1 or 3.2 above, Guarantor shall be deemed to have given an Arbitration Notice for all purposes hereunder…*

43. Schedule 4 contains further provisions concerning the Sales Agent's response to the Cure Notice, the service of an Additional Objection Notice and of an Additional Cure Notice, leading down, at paragraph 11, to an Arbitration Procedure as follows:

> "***Arbitration Procedure***. *If either EFB or the Guarantor or the Sales Agent (or any Beneficiary on behalf of the sales Agent… elects to submit the issue whether completion and delivery of the Film has been effected to expedited binding arbitration, the following procedure shall apply…*
>
> *11.1 The arbitration shall be submitted to one (1) arbitrator (the "Arbitrator")…*
>
> *11.2 The arbitration shall commence at a location in London … the Arbitrator shall use all reasonable efforts to conclude the arbitration within ten (10) Business days after the commencement thereof…*
>
> *11.3.1 The only issues that may be determined in the arbitration proceeding are (i) whether the Delivery Materials were originally tendered to the sales Agent prior to the expiration of the applicable Cure Period; (ii) whether all of the Delivery Materials are of a technical quality suitable for the making of commercially acceptable release prints or broadcast materials; (iii) whether the Delivery Materials are in accordance with the Approved Picture Specifications … The arbitration must result in a finding that completion and delivery of the Film either has been effected or that completion and delivery of the Film has not been effected and the Arbitrator shall promptly notify the sales Agent, the Producer, the Guarantor and EFB in writing of the finding made… The Arbitrator shall issue a final award in accordance with the provisions hereof not later than one (1) day after the conclusion of the arbitration, which award shall be non-appealable. If the Arbitrator finds that completion and delivery of the Film has been effected, the arbitrator shall issue a final award to that effect. If, on the other hand, the Arbitrator finds that completion and delivery of the Film has not been effected, the Arbitrator shall issue a final award against the Guarantor which award shall direct the Guarantor to make payment in full to the Beneficiaries in accordance with and subject to the terms and*

> *provisions of the Completion Guarantee, which payments shall be made within five (5) Business days after the date of issuance of the award. Upon the Guarantor making such payment, any and all rights of the sales Agent in connection with the Film … shall automatically and immediately terminate and the sales Agent shall promptly return to EFB or the Guarantor all Delivery materials as appropriate previously delivered to the sales Agent*."

44. Returning to the body of the Completion Guarantee, clause 2.2 records the fact that the Beneficiaries expressly acknowledge and agree that the Guarantor and/or EFB has the right to take over production of the Film pursuant to the PCA, and EFB and/or the Guarantor agrees to consult the beneficiaries in good faith prior to exercising such right although a failure to consult the Beneficiaries will not be a breach by the Guarantor or EFB of the Agreement.

45. Clause 2.3 provides that, concurrently with payment of the Payment Sum, EFB and the Guarantor shall be subrogated to all rights and claims of the applicable Beneficiaries against third parties in connection with the financing and production of the Film (in addition to EFB's and the Guarantor's rights under the Producer's Completion Agreement).

46. Clause 2.4 provides that the Guarantor's obligations to the Beneficiaries shall terminate immediately upon completion and delivery of the Film without further act or formality.

47. Clause 3.1 provides that the Guarantor's fee (payable to EFB on its behalf) is USD 306,900 plus applicable VAT, which shall be paid by the Producer under the PCA, but which may be paid by the Beneficiaries directly to EFB.

48. Clause 4.2 provides that the Guarantor assumes no liability and makes no guarantee in respect of a number of matters, including (c) the availability of financing or delivery of materials other than those required to effect completion or delivery of the Film, or at an earlier date than required; and (d) any artistic quality of the Film.

49. Clause 5.1 provides, similarly, that the Guarantors are not required to fund a number of unbudgeted costs, including (at 5.4) any costs arising after completion and delivery from *"any new or revised cut… new recordings or any other changes or adaptations of the Film or any other delivery materials, unless such changes are made by the director in accordance with the Production Schedule as approved by EFB and/or the Guarantor"* and (at 5.9) any costs in connection with retakes, re-cutting or re-editing other than by the director during the ordinary course of production and post-production in accordance with the Production Schedule and Financing Agreements.

50. By clause 6.1, Active agrees that it will not agree to any modification of the Financing Agreement or take any other action that would adversely affect the priority of the Guarantor's right to use film proceeds to recoup any costs or expenses that the Guarantor is entitled to recoup pursuant to the Completion Guarantee, the PCA and/or the CAMA.

51. By clause 11.2 it is provided that:

> *"Any modifications or amendments to this Agreement, including any waiver of the requirement of written form, shall be invalid unless executed in writing and duly signed by all parties…"*

Production Services Agreement

52. Finally, there is the **Production Services Agreement** dated 29 September 2016 and amended on 30 March 2017 between LRP and a third-party service provider called Rainmaker Entertainment Inc. ("**Rainmaker**"). This was the agreement pursuant to which Rainmaker was to perform the majority of the animation work required for completion and delivery of the Film. In overview, the Producer was required to deliver certain "assets" to Rainmaker, upon which Rainmaker was required to work within an agreed budget and submit materials to the Producer for review. The Producer would then have a narrow window of time within which to require 'fixes' to be performed in order to produce a final product.

Summary of opposing parties' contentions

53. The Guarantor Defendants say that this suite of agreements is entirely representative of how films are normally financed:

    a. *First,* once a film is completed, it is typically delivered to a sales agent (i.e. DDI) for acceptance. The sales agent will then deliver the film to distributors around the world. The profits from those distributions will be collected in a 'waterfall' of investors through a CAMA. It is therefore in everyone's interest that the film is accepted.
    b. *Second,* investors in a film take the risk that the film might be a commercial failure. The role of the guarantor (also referred to in the film industry as the "bond") is limited to ensuring that certain materials are delivered to and accepted by the sales agent.
    c. *Third,* while the guarantor is paid a fee for undertaking responsibility for a certain production quality of film, it may be that the producer and/or the sales agent may decide at a later date that it would be commercially beneficial to bring the film to a higher quality.
    d. *Fourth,* given these practicalities, it is not uncommon for parties to extend and vary production timetables. Indeed, a sales agent may accept a film for exploitation even if it has *not* been delivered in line with the original timetable and specification. This is relevant to the Guarantor Defendant's case that delays were due to the delivery of an enhanced version of the Film (the 'Enhanced Film').

54. The Guarantor Defendants submit that:

    a. The Film was completed and delivered in accordance with the Completion Agreement in August or September 2017.

    b. In any event, it is not open to Active to make the claim that it makes in these proceedings. There is a mechanism in Schedule 4 of the Completion Guarantee for resolving such disputes and (Active having failed to do so under that mechanism), the opportunity has now passed.

55. In summary, Active submits that:

a. The Guarantor Defendants (i) were to "*ensure completion and delivery of the Film"*, including by making funds available for this purpose (Clause 2.1(a)); and (ii) if they fail to effect *"completion and delivery of the Film"* then they shall make a cash payment to Active defined as the "**Payment Sum**" (Clause 2.1(b)).

b. The meaning of completion and delivery is defined in Clause 1.10:

i. The Film must be completed and be of *"commercially acceptable technical quality for release in cinemas and broadcast on television",* the video and audio criteria for which were specified in Schedule 3 to the Completion Guarantee.

ii. Delivery of certain materials (as specified in Schedule 3 and defined as the "**Delivery Materials**") must be made to DDI in accordance with Schedule 4. Schedule 4 required service of a "**Delivery Notice**" by EFB or the Producer (who is not party to these proceedings) on DDI, *"confirming delivery to the Sales Agent of all the… Delivery Materials"*. Following the service of the Delivery Notice, DDI was required to respond, either by an Acceptance Notice confirming that the Film had been completed and delivered; or by an Objection Notice objecting that completion and delivery of the Film had not been achieved.

iii. Completion and delivery must be effected by the "**Delivery Date**" in Clause 1.10(b), which was 30 May 2017, *"subject to an extension to that date equal to the duration of any delays caused by the occurrence of exigencies of production and / or the occurrence of Events of Force Majeure of up to 90 days"*. 90 days after 30 May 2017 would have been 28 August 2017.

c. The film was neither completed nor delivered as it was not *"of commercially acceptable technical quality for release in cinemas and broadcast on television"* as required by Clause 1.10 (and thus not completed) nor were the Delivery Materials specified in Schedule 3 tendered for delivery by the Delivery Date (or by any date in 2017) in accordance with the Schedule 4 procedure (or at all) (and thus not delivered).

Proper construction of the Completion Guarantee

56. The proper approach to construing particular provisions in an agreement such as the Completion Guarantee is now well established. The relevant Supreme Court cases are *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [15] - [23], and *Wood v Capita Insurance Services Limited* [2017] UKSC 244, [2017] AC 1173 [8] - [15], *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571.

57. At paragraph 15 of his judgment in *Arnold*, Lord Neuberger summarised the principles as follows:

> *" [the meaning of a clause] 'has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement] (iii) the overall purpose of the clause and the [agreement] (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 …"*

58. More recently, the following principles were identified by the Chancellor in *Deutsche Trustee v Duchess & Others* [2019] EWHC 778 (Ch) at [29] - [30]. They were subsequently approved by the Court of Appeal ([2020] EWCA Civ 521) as an accurate summary of legal principles which can be derived from the Supreme Court cases:

a. 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*" (per Lord Neuberger in *Arnold* at para. 15 quoting from Lord Hoffmann in *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] 1 AC 1101 at [14]).

b. The Court should focus on the meaning of the relevant words 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 [agreement] (iii) the overall purpose of the clause and the [agreement] (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 (*Arnold* at [15])

c. Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. (*Arnold* at [19])

d. While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. … Accordingly, when interpreting a contract, a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party (*Arnold* at [19]).

e. The court is required to undertake an iterative approach. This involves checking each of the rival suggested interpretations against other provisions of the document and investigating its commercial consequences (*Wood* per Lord

Hodge at [12] *Sigma* per Lord Mance at [12] and Lord Collins at [37], and *Rainy Sky* per Lord Clarke [28])

59. The Completion Guarantee must, in particular, be construed in the context of the suite of the other contractual documents entered into by the parties immediately preceding it and of which it formed a part. In my judgment, applying the principles set out above, the proper construction of this agreement is as follows:

(1) Consistently with the PCA, by clause 2.1, the Guarantor agrees, for the benefit of Active, that it shall ensure completion and delivery of the Film, which means, if necessary, making available excess funds to the Producer so that the Film can be completed and delivered and/or taking over production of the Film and arranging for it to be completed and delivered.

(2) In order for the film to be "completed" it must be, in particular, of a commercially acceptable technical quality for release in cinemas and broadcast on television. The required video and audio criteria are set out in Schedule 3 to the Completion Guarantee and are asterisked.

(3) In order for the Film to be delivered, the asterisked materials in Schedule 3 had to be tendered for delivery to DDI by 30 May 2017 *in accordance with the delivery procedure in Schedule 4*. The way in which delivery is to be "tendered" by 30 May 2017 (or any extended period up of to 90 days) is therefore by (i) the tender for delivery to DDI of all of the Schedule 3 asterisked materials by 30 May 2017 (or by the specified extended period) together with (ii) service of a written Delivery Notice by EFB or LRP to DDI confirming that all of the asterisked materials are being tendered for delivery.

(4) It is not open to DDI to accept that delivery has been made for the purposes of the Completion Guarantee notwithstanding that (i) it has not received the asterisked delivery materials in Schedule 3; (ii) there is no film which satisfied clause 1.10(a)(iv); and (iii) it has not received a Delivery Notice as required by Schedule 4.

(5) As will be seen below, this is certainly the way in which it was understood at the time by each of EFB, LRP and DDI, which is why the Delivery Notice was backdated to the (supposedly extended) delivery date by them. DDI then had 30 days from the date of receipt of that written notice within which to verify that the Delivery Materials had been delivered and to provide an Acceptance Notice or an Objection Notice.

(6) The 30 May 2017 deadline could be extended by up to a total of 90 days in respect of any delays caused by the occurrence of exigencies of production and/or events of force majeure. In other words, there was an absolute long stop Delivery Date of 28 August 2017. I therefore reject the Guarantor Defendants' submission that the 90 day limit only applies to events of force majeure and not exigencies of production.

(7) Any extension to the Delivery date of 30 May 2017 (mistakenly referred to as 31 May in Schedule 3) is subject to the sole approval of DDI. However, DDI has no power to agree to an extension of the Delivery Date beyond the 28 August

2017. DDI is not able unilaterally to alter or amend the terms of clause 1.10(b); if confirmation of that fact were needed, clause 1.12 of the agreement makes that clear. Its discretion to extend exists only within the period of 30 May 2017 and 28 August 2017, certainly so far as the Completion Guarantee is concerned, otherwise clause 1.10(b) would be denuded of its meaning and effect. If the Guarantor Defendants' argument were correct, it would be open to DDI to continually grant extensions of time well beyond the 90 days' extension, thereby depriving the beneficiaries of the protection under clause 2.1 altogether.

(8) The parties all knew that the marketing and release of the Film was time sensitive. The Film was intended to be released between 1 October and 22 December 2017 and it would therefore be necessary for Active to be able to market the film several months earlier than that. It follows that this construction is also consistent with 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. Of course, it would always be open to all parties to agree to an extension of the time period afforded by clause 1.10(b); but in that case Active's protection against unreasonable extensions was provided by clause 11.2: its written consent was required.

(9) It follows that I agree with Active's submission that under clause 1.10(b), by no later than 28 August 2017 (had DDI granted the extension to that long-stop date): (i) the asterisked Delivery Materials in Schedule 3 must have been tendered to DDI and (ii) tender must be accompanied by the service of a Delivery Notice confirming that all of the Delivery Materials are being tendered for delivery.

60. Consistently with this construction, Ms Crone of EFB, who gave evidence for the Guarantor Defendants and who has many years' experience in this industry, stated in paragraphs 8 and 9 of her first witness statement that the purpose of a completion guarantee is "*to make sure that the producer will complete and deliver the film in which they have invested, with the agreed content and of the agreed technical quality so that it can be exploited*" and guarantees that the specified Delivery Materials "*will be delivered to the sales agent in a specific manner by a specific date*." (emphasis added)

61. Assuming that completion and delivery of the Film does not occur by 28 August 2017 at the latest, then clause 2.1(b) takes effect. That provides, on its proper construction, that the Guarantor is then contractually obliged to reimburse to Active its funding of $2.4m (which it had already advanced) less any non-refundable amounts received by Active prior to the time such payment is to be made by the Guarantor (i) from the Budget; and/or (ii) from production insurances and/or (iii) from any Distributors to whom completion and delivery of the Film has nevertheless been effected.

62. Mr. Cullen QC, who appeared with Mr Loveday, for the Guarantor Defendants submits that clause 2.1(b) does not state when the Guarantor becomes liable for failing to effect completion and delivery and that the only route to trigger liability for the Payment Sum is an arbitration award under clause 11.3.1 of Schedule 4. He submits that until the Delivery Procedure in Schedule 4 is undertaken and concluded no liability can arise. I reject that submission which is overly generalised. The arbitration proceedings to which the Delivery Procedure in Schedule 4 gives rise are

limited in scope. They only arise where the sales agent has given an Objection Notice (or an Additional Objection Notice): see clauses 3, 4, 6 and 8 of Schedule 4. That is what triggers the procedure and the reference to "*any dispute*" in clause 1 of Schedule 4 must obviously be read subject to this fact. This is also why clause 11.3.1 of Schedule 4 refers to the fact that the only issues that may be determined in the arbitration proceedings are (i) whether the Delivery Materials were originally tendered to the Sales Agent *prior to the expiration of the applicable cure period:* (ii) whether all of the Delivery Materials are of a technical quality suitable for the making of commercially acceptable release prints or broadcast materials; (iii) whether the Delivery Materials are in accordance with the Approved Picture Specifications.

63. If, however, the sales agent does not serve an Objection Notice and purports to accept delivery despite the fact that the Delivery Date has expired, such that completion and delivery of the film has not been effected in accordance with clause 2.1 and 1.10 (b), then the Guarantor's liability to Active arises pursuant to clause 2.1(b), namely upon the failure to effect delivery by the Delivery Date.

64. This construction of the Completion Guarantee is reinforced by the fact that, as Mr. Cullen QC himself says in paragraph 39 of his skeleton argument, the arbitration agreement contained within Schedule 4 is not an agreement to which Active is party; it is an agreement between DDI, EFB and the Guarantor which arises in circumstances where the Sales Agent issues an Objection Notice and a dispute follows. If however the Sales Agent issues, falsely, an acceptance notice despite the fact that completion and delivery has not occurred within the terms of clause 1.10(b) of the Completion Guarantee, that is not something which will fall within the scope of the arbitration process between DDI, EFB and the Guarantor Defendants at all and the Guarantor is not, therefore, deprived of any rights as suggested by Mr. Cullen QC in paragraph 39.5 of his written closing submissions. Rather, it is simply a case of the Guarantor failing to effect completion and delivery of the Film in breach of clauses 2.1(b) and 1.10(b) of the Completion Guarantee, to which DDI is not a party other than for the purposes of agreeing to clause 1.10 and schedule 3 and 4.

65. Of course, if all Schedule 3 asterisked materials have been delivered and a Delivery Notice is served confirming that fact, and then the Sales Agent fails to serve within 30 days an Acceptance Notice or an Objection Notice, then the Sales Agent is deemed to have given an Acceptance Notice for all purposes: clause 2 of Schedule 4. But as shall be seen below, that is not this case.

66. If DDI chooses physically to "accept" the Film (and indeed, exploit it) despite the fact that it has not been "completed and delivered" in accordance with clause 2.1(b) and 1.10(b) of the Completion Guarantee, that cannot "cure" the breach of contract by the Guarantor Defendants, vis-à-vis Active.

67. Similarly, if the Guarantor chooses to discontinue production of the Film, then it becomes liable to reimburse Active the Payment Sum, and Schedule 4 has no role to play in any dispute as to whether production has or has not been discontinued.

68. So far as any deductions from the Payment Sum are concerned, it is fair to say that in that respect clause 2.1(b) is not particularly felicitously worded; but it envisages that although the Guarantor has failed to effect completion and delivery of the Film in accordance with clause 1.10 of the Completion Guarantee, the Film may nonetheless

be completed and delivered by DDI (or the Producer) under the terms of distribution contracts which it has entered into with Distributors. Any sums received under such contracts by Active prior to the time payment is made by the Guarantor must be offset against the USD$2.4m.

The contemporaneous documents concerning the delays in production of the Film

69. In the present case there is a documentary record as to the reasons for the delays in the completion and delivery of the film. It is accordingly important to keep firmly in mind the approach of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), which was approved by Lord Kerr (in a dissenting judgment) in *R (on the application of Bancoult No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 at [103] as follows:

> "*Although said in relation to commercial litigation, I consider that the observations of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), paras 15-22 have much to commend them. In particular, his statement at para 22 appears to me to be especially apt:*
>
> > *"… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

70. This is subject to one important proviso however as to the state of the documentary record which needs to be borne in mind at the outset: Mr. Quinn deliberately destroyed documents in his own personal Gmail account just prior to the commencement of the trial. The Court is therefore entitled to draw inferences as to what those documents would have shown had they been disclosed. I address this issue below. Of course, I have also taken into account in reaching my judgment the witness evidence of both Mr. Quinn and Ms Crone, and I have formed a view as to their credibility when tested against the contemporaneous documents, which has led me to my conclusions set out below. I did not consider either of them to be reliable witnesses and their recollection of the relevant events was also poor. Where their recollections conflict with the contemporaneous documents, I prefer to rely upon the contemporaneous documents.

71. There is one other important point to clarify at the outset, which is that nobody suggested that Mr. Quinn did *not* have authority to issue instructions, receive information and take all relevant decisions on behalf of Active throughout this dispute and I accordingly proceed on the basis that he did.

72. I pick up the relevant events in January 2017, when the Film was already behind schedule. On 28 January 2017, Nina Crone of EFB, who was called as a witness by the Guarantor Defendants, sent an email to Dan Krech of LRP, in which she asked him to obtain written agreement from DDI to a 30 June 2017 delivery date, being an extension to the contractual delivery date of 30 May 2017:

> *"Then we do not have to send out a Notice. (We do have a 90 day FM period, so it's not critical – but would be nice to have)".*

73. An email dated 6 February 2017 from Mike Sears of M3 to Dan Krech suggests that this delay was as a result of an increase in the rendering time required by Rainmaker (there was a dispute as to whether this was the fault of LRP or Rainmaker). Mr. Sears said that he was not convinced that an update to the production schedule which he had previously shared with Active was necessary. This shows how M3 controlled the flow of information to Active. Mr. Sears recognised that "*this schedule change can [a]ffect your budget.*"

74. The Guarantor Defendants suggest that the reason for the delay is in fact set out in an email in February 2017 from Dan Krech of LRP to M3. They say that LRP had decided to raise the animation quality and produce the Enhanced Film:

> *"We have raised the quality bar in terms of animation and render quality. Animation will be going an additional 3 weeks and the render process has been developing at a slower pace than expected between Rainmaker and Awesometown. The budget overage range is between $200,000 and $700,000. We are looking at various options to make up the difference including additional tax credits as a direct result of the increased labour, additional pre-sales, potential Telefilm involvement and potential private equity. We are running the numbers now but will not have an accurate picture of the overage until such time that the render pipeline is completely fleshed out, which we believe will be the end of February. By early next week you will have access to about 25 fully completed shots, over 40 minutes of approved animation lighting keys for 80 of the movie, and full character turnarounds, Key frames etc. You will also have access to a presentation piece we are preparing for Berlin which will include various aspects of all of this material. Feel free to share all of this with Active."*

75. The Guarantor Defendants say that the plan, at this stage, was for those enhancements to the Film to be funded by Telefilm Canada (a Canadian government-funded film financier) and additional tax credits. These additional tax credits would necessitate an increase in the Film's budget, as tax credits are calculated as a proportion of a film's

budget. They say that this is a not uncommon feature of animated film production; in a bid to keep pace with increasing technological standards, the parties will often agree to produce an enhanced version of a film. I do not accept that this is what happened in this case; nor do I accept that this extract from one email supports the suggestion that LRP decided to produce an enhanced film and that was the cause of the delay. I address this further below.

76. However, by 8 March 2017, Mike Sears was emailing Dan Krech to tell him that completion of the trailer by the end of April was "*far too late*" for sales purposes and that "*for many territories, marketing would need to start in May for a November release*".

77. On 21 March 2017 Nina Crone emailed Awesometown. She wondered if the intention to postpone delivery of the Film until the end of June was still realistic: "*Looking at the progress reports it's still looking as if you could need more time… please let me have your thoughts.*" She also asked for "*the written acceptance from DDI*" to the end of June extension (as any extension was subject to approval by DDI).

78. At the same time in March 2017, because of the delayed delivery of materials to Rainmaker, LRP agreed a revised budget with Rainmaker for completion of its work to the end of June; however, Rainmaker was warning at this time that it was difficult to find many artists available for short term contracts in order to complete the work and so a further budget to the end of July was being prepared. Rainmaker also emphasised the need to be provided with the necessary materials (including licences) by LRP to complete its work. This led to the amendment to their Production Service Agreement; amendments were made in particular to the schedule for delivery by Rainmaker under their Production Services Contract (the delivery by Rainmaker being extended from 33 weeks to 38 weeks).

79. Ms Crone gave evidence to the Court that she learned about the plans for an enhanced film in a Skype conversation with Dan Krech on 11 April 2017, in which she said that he indicated plans *"to elevate the quality of the Film (beyond what was required under the [CGA]) in terms of detail, scenery, background and so on"*. However, it was only in August 2018 that Ms Crone began to refer in the correspondence to LRP producing an "enhanced film", and this account is contradicted by her response to Active's letter before action, in which she stated that she found out about these enhancements at the end of 2017/beginning of 2018. I reject her evidence that the Film was completed and delivered on time and then everyone set about producing an enhanced film which did not fall within clause 2 of the Completion Guarantee. Rather, as the contemporaneous documents show, the delays were caused by the film running over budget as early as March 2017 which led to Rainmaker not being paid and in consequence a dispute between LRP and Rainmaker, with Rainmaker then failing or refusing to complete its rendering work on the Film on time.

80. Moreover, as is mentioned in paragraph 14(4) above, LRP had a contractual obligation to provide DDI with additional materials if they assisted in its exploitation of the Film in any event.

81. In order to accommodate the delay caused by the dispute with Rainmaker, on 13 April 2017 Dan Krech sent Jason Moring of DDI a draft Notice of Extension for DDI to sign pursuant to clause 5.1 of the Sales Agent Agreement. The extended delivery date

was stated to be "*no later than 14 July 2017*". DDI signed it and returned it on 19 April 2017. So far as the Completion Guarantee is concerned, this written consent was valid, as the extended Delivery Date (as a result of exigencies in production) was still within the long-stop date of 28 August 2017. The Notice also provided that "*Producer agrees that marketing materials shall be delivered by mid-June 2017 and remaining materials will be delivered in accordance with "Schedule A" set out in the agreement*" (which is the equivalent of Schedule 3 to the Completion Guarantee). This was in compliance with the terms of the Completion Guarantee.

82. It is apparent from the email dated 27 April 2017 sent by Dan Krech to personnel at Rainmaker updating them on the "*delivery status*" that Awesometown/LRP still had a considerable amount of materials and licences to deliver to Rainmaker by that date. Between 17-19 May 2017 Rainmaker provided Dan Krech with a revised budget for a July delivery schedule. They asked for his approval which he gave (subject to one point). Rainmaker also sent their invoice and asked for 3 outstanding payments for April and May work, to be paid "*next Thursday*". Mr Krech replied, rather vaguely, "*We are working toward that date as well*".

83. It is apparent that internally, in May 2017 Active were still preparing for a 3 November 2017 release date for the Film and had prepared at that time a Media Brief. However, by mid-May, production of the Film remained in difficulty. Discussions were still ongoing with Telefilm to secure additional funding in order to pay Rainmaker and get production back on track; Mr. Krech appears to have been reluctant to call upon the Guarantor Defendants for funding for fear of losing control of the production (and of course, it would have to reimburse the Guarantors pursuant to clause 12 of the PCA).

84. So far as the delays caused by the dispute with Rainmaker are concerned, it should be noted that LRP admitted in its email to EFB dated 21 October 2017 that "*there were material breaches of contract on both sides*". It seems that Rainmaker were complaining about not being paid on time; failures of LRP to make timely deliveries; and not having sufficient render power because LRP had not provided them with sufficient machines so as to mitigate the delays; whereas LRP complained that Rainmaker lit and rendered the wrong files on a consistent basis and delayed in setting up the render. At one point the possibility of adding Rainmaker as a beneficiary to the Completion Guarantee or EFB acting as an escrow holder in relation to the additional funding as and when it became available was mooted. Nothing came of that but by 24 May 2017 the Producer had received a verbal commitment from Telefilm to advance CAD $1.4 million so that Rainmaker could be paid to complete their work.

85. LRP and DDI having agreed to extend the Delivery Date to 14 July 2017, on 6 June 2017 EFB wrote to Active as follows:

> *"Reference is made to our completion guarantee dated 1 August 2016.*
>
> *This letter shall serve as a notice of extension.*
>
> *We hereby inform you that the delivery date as per agreement with the Sales Agent for the Film has moved till July 14, 2017."*

86. There is no dispute that this was a valid extension of the Delivery Date.

87. On 12 June 2017 Jason Moring of DDI sent Active and M3 a "teaser" and a full work-in-progress feature of the Film. This was a 720p version of the Film rather than the 1080p required by Schedule 3 to the Completion Guarantee. Furthermore, there was only 25 minutes of fully rendered animation.

88. By 20 June 2017, when Mr. Krech emailed Jason and Ron Moring of DDI, it was apparent that the Film was becoming seriously delayed. Mr. Krech informed them that "*after speaking to Rainmaker last evening it looks like the delivery will be pushed to mid-August. It is still possible to deliver by end of July with overtime and additional render capacity. Can you make sure that we have at least until mid-August to deliver final picture?*"

89. On 22 June 2017 there was an important exchange of internal emails between Ms Barossi (who was Active's media buyer for the Film) and Mr. Quinn of Active in which Mr. Quinn informed her that "*we may shift [the Film] to 2018*." Active would need to shift the Film to 2018 for its media planning.

    This suggests that Mr. Quinn was kept informed (likely by *Jason Moring* in this case) of the delays in production of the Film and that he did not raise any objection to the same.

90. On 5 July 2017 Lise-Lotte Døcker of EFB sent an email to Dan Krech, cc Nina Crone, headed "Extension of delivery date – again". In it she stated as follows:

> *"…I think we need to send out extension letters again. Could you please provide us with another extension letter from the Sales Agent to extend the delivery date till August 30? Then I can send out new extension letters to the beneficiaries to the bond."* (emphasis added)

    In so requesting, it may be that Ms Døcker had miscalculated the long-stop date under the Completion Guarantee (which was 28 August).

91. At this stage the additional funding had still not been secured from Telefilm. However, Telefilm wrote to LRP on 10 July 2017 confirming that it was prepared to provide up to CAD 1.39 million in finance for the Film.

92. As Ms Døcker had requested, on 14th July (being the current extended deadline for completion and delivery) DDI, LRP and EFB purported to extend the Delivery Date further to 31 August 2017 (rather than 30 August), as can be seen from the email of that date from DDI to EFB and Dan Krech, which attached to it a letter from DDI to EFB in the following terms:

> *"[DDI] has been made aware that "completion and delivery" of [the Film] ... has been extended from May 30, 2017, as initially noted and agreed by all parties in clause 1.10(b) of the Completion Guarantee… due to production exigencies.*

> *DDI accepts the new "completion and delivery" date of August 31 2017.*
>
> *Please advise whether an addendum acknowledging this change will be issued to the Completion Guarantee or whether this letter will serve as notice to this revision."*

93. It is clear therefore that DDI recognised that an addendum to the Completion Guarantee might be necessary in view of the extension beyond 28 August 2017 (presumably by reason of clause 11.2 thereof). DDI asked EFB if it could send a notice of the extension to the beneficiaries itself. Ms Crone of EFB replied on the same date, Friday 14 July 2017, and said:

> "*In principle, you can do that. It's a timing issue though – we have to send notices to the beneficiaries latest on Monday since we have earlier sent notice to them with the date July 15* [as the Delivery Date]."

94. Accordingly, on Monday 17 July 2017 EFB sent its second purported extension notice to Active (in her evidence Ms Crone described this as a "*courtesy notice*" as curiously there is no obligation to notify the beneficiaries under the Completion Guarantee), expressly referring to the Completion Guarantee and its earlier extension letter of 6 June 2017, and stating that:

> *"This letter shall serve as a notice of extension. We hereby kindly inform you that the delivery date as per agreement with the Sales Agent for the Film [ie. DDI] has moved till August 30, 2017. Please do not hesitate to contact us for further information".*

Ms Crone says (and the Guarantor Defendants say) that the date in this notice is an error. The extension was in fact to 31st August 2017.

95. Active contends that this Notice was ineffective, although it is notable that Active (and Mr. Quinn) did not complain about it at the time. On their construction of the Completion Guarantee (and upon what I find to be its proper construction), any extension beyond 28 August 2017 (30 May 2017 plus 90 days for exigencies of production or force majeure) would have required an amendment to the Completion Guarantee in writing signed by all the parties thereto in accordance with Clause 11.2, which provides in relevant part: *"Any modifications to this Agreement, including any waiver of the requirement of written form, shall be invalid unless executed in signed writing and duly signed by all Parties."* I should add that Active submits, and I accept, that this "no oral variation" clause is valid and binding: see *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119.

96. It appears that Active's own lawyer, Mr. Terry Trantina, also failed carefully to check the terms of the Completion Guarantee in this respect, as he too informed Mr. Quinn and others at Active in an email on the same day, 17 July 2017 that:

> "*The completion date was further extended for this film until August 30, 2017. The original completion date was May 30,*

> *2017. The completion guarantee permits an extension of up to 90 days, which means no further extensions without triggering guarantee payout."* (emphasis added)

It can be seen that he did at least recognise, on the mistaken understanding that the Completion Guarantee's long-stop date was 30 August instead of 28 August, that no further extensions could be agreed without triggering the pay-out under the Completion Guarantee (at least without (amongst others) Active's written consent). It is important to appreciate that *Mr. Quinn was therefore aware of this crucial fact.* Mr. Quinn accepted in cross examination that he would have been "very keen to know" whether the Film had been delivered by 30 August. Despite his informing Mr. Quinn of this fact on 17 July, it shall be seen that as further extensions took place, Active did not demand their "guarantee pay-out".

97. On the contrary, it is significant that instead Mr. Quinn responded to Mr. Trantina's email on the same date, 17 July, as follows:

> *"Terry,*
>
> *My recommendation is that we move this release to 2018 to derive the most value with this asset."*

98. Mr. Quinn said nothing about calling upon the guarantee. Rather, I find as a fact that he considered that Active's interests were best served by moving the Film's release and therefore the media buy into 2018, giving LRP more time to complete the Film and Active the best prospect of deriving value for itself from the exploitation of the Film. This was consistent with the fact that the US Distributor of the Film was pushing to move the release date to 2018, as Jason Moring's email to Ron Moring of 14 July 2017 (and the email of 21 July referred to next) makes clear. Mr. Quinn's oral evidence concerning the clear terms of this email was evasive and incoherent.

99. On 21 July 2017, DDI sent emails to each of its distributors, informing them as follows:

> *"We have been advised by the Producer of [the Film] that the film will be ready for delivery to DDI on August 31, 2017. DDI or the completion bonder will issue Notice of Delivery shortly thereafter. Subsequently the US distributor has advised that they will be shifting the US theatrical release to Q4-2018. Please adjust your release dates accordingly." (emphasis added)*

This demonstrates that the plan at that time was that whilst the Film was still intended to be delivered by 31 August 2017, it was not intended to release it until Q4 2018. This was also known to Active as can be seen from the exchange between Mr. Sears and Mr. Quinn below.

100. At the same time, LRP's financial difficulties meant that it was unable to make a final interest payment to Active as it was contractually obliged to do. Dan Krech told Mike Sears of M3 that "*it is possible that it could be delayed up to a full month while we complete the contract with Telefilm*." This drew a stinging response from Mike Sears

who told Mr. Krech that whilst "*we drifted over budget and behind schedule without any seeming consequences … these payments are a contractual obligation. These delays and budgetary concerns are causing us major issues with our client and are not as a result of M3, but Awesome Town*."

101. This again suggests that M3 were keeping Active informed of the delays and budgetary concerns and acting on their behalf in doing so, as does the fact that on 10 August 2017 Mike Sears emailed Mr. Quinn as follows:

> "*Dennis*
>
> *Just a heads up. Gary just called, returning my call from last week about ELLIOT payment. He was fine with that –* ***he did ask about final delivery. I told him in two to three weeks for final delivery and looking at a 2018 release****.*
>
> *Just FYI.*
>
> *Mike"* (emphasis added)

102. "Gary" is a reference to Gary Steinbeck of Active (its Chief Finance Officer). Mr. Cullen QC put to Mr. Quinn in cross examination that there was no reason to believe that Mr. Sears would have concealed anything from Mr. Steinbeck as to the state of play with the Film and although Mr. Quinn was reluctant to accept that, that must surely be correct. Active chose not to call Mr. Steinbeck as a witness, despite Mr. Quinn accepting in cross-examination that Mr. Steinbeck was in regular contact with M3 regarding issues around funding and payment, as this email indeed suggests (although this email suggests that he and Mr. Quinn did not always keep *each other* informed as to the state of events). Active also failed to search Mr. Steinbeck's email account for relevant disclosure, opposing his inclusion as a custodian at earlier disclosure hearings in this action. In consequence any exchanges between M3 and Mr. Steinbeck concerning, for example, the delay in the delivery of the Film and pay-out under the guarantee have not been disclosed. I return to this below.

103. Mr. Quinn responded by email half an hour later with just one word: "*Thanks*".

104. He seemed remarkably unconcerned about the delays which had caused the Film's release to move into 2018. It is clear therefore that at this stage – 10 August 2017 – Mr. Quinn *knew* that final delivery of the Film was not scheduled until the end of August and that everyone was looking at a 2018 release date for the Film.

105. Because of that shift into 2018, Mr. Quinn appeared unconcerned about slippages in the (30 August 2017) delivery timetable. There is no documentary evidence to suggest that Active thereafter opposed the delayed release of the Film nor the extensions to the Delivery Date of which it must have become aware in the light of that which follows, nor that it demanded that the Guarantor Defendants should step in and complete the Film.

106. On 14 August 2017 Barbara Zelinski of Rainmaker emailed Dan Krech and told him that "*we are still aiming to get a 1st pass of the movie to you end of this month, our team goes Aug 25th. That said, we will still have 2nd pass to complete on approx. 900*

shots and would need to extend contracts to achieve this." It follows that what Rainmaker intended to deliver by the end of August was not the completed film but a "first pass" of the Film.

107. After Mr. Krech responded, urging that "*We have to deliver a form of the film by the end of the month*" (emphasis added), Ms Zelinksi responded: "*We will deliver everything we can for first pass Aug 25th and fixes the following week without extending contracts. I'm not sure we will get to all fixes… we are working on 1st pass as priority*."

108. I consider it to be clear that the delay in the schedule was caused by the dispute between LRP and Rainmaker, which in turn led to the need to increase the budget for the Film so as to ensure that Rainmaker had the equipment and staff in particular to complete the rendering. Ms Crone had referred to the approved updated budget of CAD 19,116,169 in her email to Michelle Horn of Ingenious, cc Dan Krech, on 19 July 2017. An increased budget was required to pay Rainmaker.

Events in the Run Up to the Delivery Date

109. With the 30 August 2017 deadline rapidly approaching, on Friday 25 August 2017, Ms Crone sought an update from Mr. Krech and he responded by email on the same date as follows:

> *"We are in the final mix this week. Rainmaker are finishing the first pass lighting today. We will receive the first pass picture next week and will be assembling the movie by the end of the week for first delivery to DDI. 2nd pass will be the QC portion of the film and I anticipate it will fall within the 30 day remedy period. Let's discuss if first pass delivery is sufficient for your purposes".*

He referred to the fact that the Telefilm funding was close to realisation "*so that we can pay Rainmaker next week*."

110. Mr. Krech wanted to discuss with Ms Crone whether this unfinished film (what he was calling a "first pass") was sufficient to satisfy clause 1.10 of the Completion Guarantee. His idea was to deliver this incomplete "first pass" of the Film and then to use the 30 day cure period in schedule 4 to the Completion Guarantee to complete it. He wished to discuss with Ms Crone, as a result, whether this "first pass delivery" would be sufficient for the purposes of meeting the completion and delivery obligation under that contract.

111. Following this, Ms Crone and Mr Krech spoke on the Saturday 26th August with the aim of ensuring that the completion and delivery obligation under the Completion Guarantee was met. That is apparent from the fact that later that day Mr. Krech emailed Jason Moring of DDI and stated:

> *"I am also sending you a draft of the delivery notice that EFB would like to receive. I spoke to them today and provided that we deliver an initial version of the film to you by target date of August 30, 2017, they are okay with a 30 day period for remedy*

> *on any QC callouts. If you feel comfortable signing this it would be helpful. Another extension would result in a lot of unnecessary work as you know."*

112. In other words, if DDI accepted that the completed Film had been delivered (even though it had not been), they could then agree an extended period for what would be termed "QC issues". This was, it appears, designed to avoid having to seek all parties' agreement to an extension to the delivery date under clause 11.2 of the Completion Guarantee (which might not be forthcoming) and to prevent Active from calling on the Completion Guarantors by reason of a breach of clauses 2.1(b) and 1.10(b).

113. DDI recognised as much in Jason Moring's email to Dan Krech dated 28 August 2017. He attached a draft "Notice of Delivery" letter and said:

> *"In terms of the Bond/delivery acceptance letter, I think we need to discuss further what is required and what the implications [are] of allowing the bond off-the-hook."*

Jason Moring recognised that the scheme devised by Mr. Krech and Ms Crone would let the Guarantor off the hook; that is, absolve it from a liability which it would otherwise have had. If there was then a discussion between Jason Moring and Mr. Krech as seems likely, its outcome is unknown.

114. What we do know is that a draft Notice of Delivery Letter was then drawn up by DDI and dated 30 August 2017. It was addressed to EFB, and read:

> "*Dear Nina [Crone] and Lise,*
>
> *Double Dutch International has accepted "delivery" of the film: Elliot: The Littlest Reindeer.*
>
> *Double Dutch International have submitted the film for QC and will extend the normal remedy period for any abnormalities cited during the QC process.*
>
> *Please advise that this letter will suffice as a notice of acceptance."*

115. Mr. Jason Moring was asking whether the letter would suffice as Notice of Acceptance under clause 1.1.1 of Schedule 4 because as he, Mr. Krech and Ms Crone all knew, all of the asterisked Schedule 3 Delivery Materials had *not* been delivered to DDI.

116. On 30 August 2017 Ms Crone asked Mr. Krech if this letter was being sent that day (because everyone believed this was the last day of the extended delivery period) and Mr. Krech then discussed it with DDI.

117. Nina Crone advised as to what EFB wanted the letter to say, as is apparent from an email dated 31 August 2017 from Mr. Krech to Ron and Jason Moring:

> *"She [Nina Crone] would like the letter to state that DDI have accepted delivery of the film and that the film is proceeding to*

> *QC and that DDI will inform EFB when the QC has been completed and the issues if any are cured.*
>
> *This is urgent because they are concerned that Active will have the right to back out of the deal in the event EFB does not receive that letter."*

118. By "backing out of the deal" Ms Crone meant, of course, that Active could call on the Completion Guarantee and demand the return of its investment. Mr. Krech reiterated this point in an email to Jason Moring on 31 August 2017, in which he stated that "*EFB confirmed that they are still on the hook until the QC period is over. They just want the letter that says delivery so that Active won't come back and ask for their money back. If you could sign that letter or something close to it … it would be very helpful to us*". He said the same thing to Ron Moring in an email of the same date.

119. In cross-examination Ms Crone suggested that in fact she wanted to receive this letter not so as to prevent Active from asking for its money back, but rather because this was the procedure for commencing the cure period under the Completion Guarantee. I reject that evidence which I consider to be untruthful and inconsistent with the contemporaneous correspondence: it is clear that the reason that this letter was required was because any extension beyond 28 (or, mistakenly, 30) August 2017 would have required an amendment to the Completion Guarantee which Active may not have been willing to give and thus would have exposed the Guarantors to a demand for payment by Active under the Completion Guarantee. The very fact that the "delivery acceptance letter" was backdated from 21 September 2017 to 30 August 2017 (as described below) itself demonstrates that this was intended to ensure that Active did not ask for its money back (the Film was already over-budget) and in order to secure the funding from Telefilm. Ms Crone knew that no delivery had in fact been made by 30 August 2017, as she accepted in cross-examination.

120. I find that the need to ensure that Active did not ask for its money back also led to the creation of the false suggestion by LRP/the Guarantor Defendants that the parties (including Active) had agreed that an 'enhanced version' of the Film was to be produced with the benefit of funding from a third party, Telefilm, and that it would have been a waste of money to deliver the Delivery Materials to DDI as required by the express terms of the Completion Guarantee (para. 31.3 of the Re-Amended Defence). As Active submitted, this is a "*construct designed to obscure the simple fact that the Guarantors had failed in their obligation to ensure that the Film was completed and delivered by the Delivery Date, including by failing to step in to pay Rainmaker as they were required to do under clause 2.1(a).*"

121. Indeed, Jason Moring clearly felt uncomfortable about this plan of action. He knew that under the Completion Guarantee DDI should be supplied by the Delivery Date with the materials referred to in Schedule 3 (which included the paperwork – the legal and publicity documents) and that the Film should be of a commercially acceptable technical quality for release in cinemas and broadcast on television, and that it was not truthful to pretend that these criteria were satisfied when they were not. This led him to respond on the same day by email as follows:

> *"In terms of EFB – we can't consciously sign something when we have nothing. No link to the film. No paper. We have been*

> *and will continue to be more than team players, but this is an unrealistic request.*
>
> *When will we actually get the full film to start our QC process. What about the paperwork?"*

122. Ron Moring then weighed in with his "two cents". He emailed Dan Krech and Jason Moring and added:

> *"Why is this attention focused on DDI. Should all concerned parties not be on Rain Maker to deliver what I presume is contractually obligated work? If they need to be paid, someone should pay them.*
>
> *Can we get a link to the drive with all the paperwork?"*

123. It is apparent from Mr. Krech's response by email dated 31 August 2017 that LRP could not pay Rainmaker for its work until it received the Telefilm money. He then stated once again:

> *"The pressure is on DDI from EFB because today is actually the last day of Force Majeure [i.e, the last day of any permitted extension for delivery of the Film under clause 1.10(b) of the Completion guarantee]. They are concerned that Active International calls in the bond and backs out of the deal. If DDI signs the letter that is not possible. According to the bond you are the only group requiring delivery, and there is a 30 day cure period."*

124. Meanwhile, on 28 August Mike Sears of M3 emailed Dan Krech and stated:

> *"I understand we are going to have a fully rendered copy of the film on Wednesday [30 August] (not at full resolution) but a quality version.*
>
> *Please let me know if this is still on track. I know Active is anxious for us to explore the OTT options and we will soon be getting tight for these options as well.*
>
> *I look forward to seeing the finished product."*

125. This suggests a number of things. First, that Mike Sears was keeping Active in the picture and acting on its behalf in these discussions with LRP. Second, I find that it is likely that he informed Active that a fully rendered copy of the film would not be available by the long-stop delivery date. Third, that Active was nonetheless interested in exploring the OTT options (e.g. Netflix and the like) and was not apparently threatening to call upon the guarantee (although the 30 August deadline had not yet passed).

126. On 29 August Mr Krech responded to Mr Sears' email of 28 August as follows:

> "*Yes you are right by Wednesday* [30 August] *we expect to have all the shots rendered. (There were 25 shots left to render this morning. The final mix is occurring on Wednesday. We are assembling all the shots and putting the credits on for end of day on Wednesday. I anticipate that we should have the non-colour corrected version up on a site by Thursday* [31 August]".

127. So far as Jason Moring's enquiry about when the paper materials would be delivered is concerned, Mr. Krech sent a separate email to him dated 31 August 2017 in which he stated "*I think Viktoria sent it to Lisa. If not I will get you the link!*" It is apparent from Ron Moring's email to Dan Krech dated 1 September that he did receive the link to the paperwork but that "*several documents [were] still missing including Composer agreement and other music related documents; short form of assignment of rights etc.; however as you and I discussed they will be forthcoming.*"

The missing paper materials to which Ron Moring refers were not, however, bonded (asterisked) materials.

128. However, what then happened was that the 30 August deadline passed and on 1 September 2017 Rainmaker informed LRP that it could not "*complete the requirements of this job*". It did not have the resources available. It agreed to get out as much of the unfinished Film as it could that day.

129. On 1 September 2017 Dan Krech emailed Ron Moring to say that LRP would put up a smaller version of the Film via a link and then a high resolution version of the Film later that day when the rest of the shots arrived from Rainmaker. He asked if Mr. Moring would prefer to wait until the end of the day for the high resolution version of the Film. Mr. Ron Moring replied:

> *"End of day is fine. I will prepare the delivery acceptance letter and back date for august 30th and forward when we receive the link."*

130. This was despite the fact that he knew that DDI had not received the Delivery Materials by 30 August 2017.

131. At 10.56pm on 1 September 2017, Dan Krech emailed DDI and Nina Crone to say that "*the complete first pass render of the film is currently uploading onto the server. It is a very large file so there is a 2 hour estimate for it to be uploaded… Once uploaded we will circulate FTP credentials for you to download the high res version*."

132. At 1.52am on the morning of 2 September, Mr. Krech sent a further email to DDI and Nina Crone, as well as Mike Sears of M3, in which he stated that "*We are still in the process of uploading the 720P version onto the vimeo site. That information will come to you in the next hour*." Schedule 3 to the Completion guarantee required, of course, a 1080P version of the Film.

133. However, Mike Sears responded later that morning by saying "*I am unable to load the FTP link. Is there a Vimeo version up yet*?", and Mr. Krech replied by saying that

he would send out another link. The Vimeo did not work, "*so we are going to place a file on google drive this morning*."

134. Again, Mr. Sears was kept in the picture as to what was transpiring with respect to the progress of the Film.

135. Later that day Mr. Krech sent a link to Vimeo. He said there was no colour correction and the first shot was being re-rendered.

136. It is unclear whether a high-resolution (1080p) version of the incomplete Film was in fact uploaded. It seems that it may well have been as there is a reference to it in an email dated 4 September 2017 from Mr. Krech to Mr. Moring, to which the latter did not respond.

137. Ms Crone accepted in cross-examination that in order for a film to be released in cinemas, it must have been produced in DCP form. Moreover, she said, the film had to be "locked" before the DCP could be prepared and that this was not done for the Film in 2017. She knew that the "first pass" of the Film (as Mr. Krech called it) which was uploaded by LRP on 1 September 2017 was not the completed Film within the meaning of the Completion Guarantee.

Factual position as at 30/31 August 2017: Completion Guarantee triggered

138. In short, it is plain that by 30/31 August there was no delivery of the 12 bonded Delivery Materials listed in Schedule 3, including the audio visual files which had to be physically delivered on hard drives in accordance with the Schedule 3 delivery procedure, as DDI confirmed to LRP in April 2018 when it *was* preparing to make delivery. Further, the screening versions of the Film circulated in September 2017 were not complete.

139. Moreover, this was clearly known by both Mr. Krech of LRP, who was in ongoing discussions with Rainmaker about completing the work, and DDI (Jason and Ron Moring) who knew that a final version would only be made available after Rainmaker had been paid its outstanding fees. This was confirmed by Dan Krech on 4 September 2017 when he informed DDI that the *"final files",* necessary for cinematic release, would be released by Rainmaker once it was paid for the work it had done. I therefore reject the Guarantor Defendants' submission that the Court cannot and should not infer that there was anything sub-standard about the Film. The Film was plainly (and indeed admittedly) not of commercial acceptable technical quality for release in cinemas by 31 August 2017; nor were the bonded delivery materials delivered to DDI by that date. This therefore triggered clause 2.1(b) of the Completion Guarantee.

Events in September 2017: the drawing up of the false Delivery Notice, Delivery Acceptance Letter and EFB confirmation email

140. On 3 September Mike Sears emailed Jason Moring. He said that he had watched the Film and he considered it to be more of an "OTT play" rather than a theatrical release (in other words, it was not of commercially acceptable technical quality for release in cinemas as required by clause 1.10(a) of the Completion Guarantee). He then stated:

> *"I know it is paramount that we get real offers for the film for this year. I cannot emphasise enough how difficult it was for me and Dennis [Quinn] to push Active into this deal. Dennis pushed extremely hard internally to make this happen … We have subsequently let Active down with Fleet and then by being late in delivery, over budget and failed to make our contracted payments on time…"*

141. Thus, Mr. Sears knew that the Film was late and over budget. He knew it was more of an OTT play. They both knew that 30 August was the final deadline for the delivery and completion of the Film. And yet neither he nor Mr. Quinn were asking to see a Delivery Acceptance letter from DDI or a Delivery Notice from EFB. There are no email exchanges disclosed between him and Mr. Quinn during this key period of time; however, they were clearly in contact and this may be explained by Mr. Quinn's deletion of his personal emails (see further below).

142. By 4 September 2017, Nina Crone realised that in the rush to get a first pass of the Film out by the end of August, DDI had never issued the Delivery Acceptance letter by 30 August 2017. She therefore emailed Dan Krech on that date and stated: "*Did you not get the delivery acceptance letter from DDI?*". On the same date, Mr Krech in turn emailed DDI and asked for the delivery acceptance letter "*if you are comfortable putting together that letter*", stating that it should be *back-dated* 30 August 2017 and should include "*the QC period right in the letter*". However, still no Acceptance Notice from DDI was forthcoming.

143. This apparently lead to some concern on Telefilm's part. Ron Moring discussed this with Dan Krech and he then reported to Jason Moring that Telefilm would not release their second tranche of funds, which were needed to pay Rainmaker, unless they were made a "*party to the bond agreement or sales agent acceptance of materials … Our letter of acceptance would still be based on an October 31 ending QC period*."

144. Still no Acceptance Notice was issued by DDI. And so on 19th September 2017 Telefilm wrote to Dan Krech asking '*With respect to the bond, can you please tell me if bonded delivery has occurred? If so, has [EFB] issued confirmation of the delivery? If delivery hasn't occurred yet, please tell me when that is scheduled to happen. If delivery hasn't not occurred, Telefilm will need to be added as a beneficiary to the Bond*." If bonded delivery had not occurred, the Guarantor would have continuing security over the Film which would prejudice Telefilm's interests as an investor.

145. There were some follow-on discussions on the 20 and 21 September concerning the possibility of adding Telefilm as a beneficiary to the Completion Guarantee. This option was naturally more complicated. It would have required an updated finance plan for the additional work and a new Delivery Date. Faced with these two options, namely falsely declaring (by way of back-dated acceptance letter) that delivery had occurred by 30 August 2017 (when in fact it had not) or adding Telefilm to the Completion Guarantee, Mr Krech began further discussions with Mr Ron Moring and produced a draft Delivery Notice dated 31 August 2017 for DDI's comments. This was more detailed than the draft Delivery Acceptance letter which had been in discussion since 26 August 2017 and more clearly intended to have legal effect. This draft was, I find, designed to ensure that the Telefilm funding was not jeopardised.

146. The new Delivery Notice provided to DDI stipulated that the Film was delivered '*for the purposes of the* [Completion Guarantee]', and that acceptance by DDI would discharge the Guarantor's liability.

147. On 21 September 2017 Ron Moring responded by proposing two draft notices (coping in Jason Moring): an amended form of the Delivery Notice together with a Delivery Acceptance letter which had already existed in draft for several weeks.

148. Those notices were executed by Ron Moring on behalf of DDI and by Dan Krech on behalf of LRP later that evening on 21 September 2017. The two notices were as follows:

a. The "Delivery Acceptance" letter back-dated to 30 August 2017, on DDI's stationery, signed by Ron Moring on behalf of DDI and addressed to EFB, and confirming:

"*Dear Nina [Crone] and Lise,*

Double Dutch International has received "delivery" of the film: Elliot: The Littlest Reindeer.

DDI will submit the film for QC next week; (Sept 25th) and require a forty-five (45) business day remedy period for any abnormalities cited during the QC process. The remedy period to begin September 28, 2017.

Please advise that this letter will suffice as a notice of delivery acceptance."

This would mean that the QC process for the Film would end on 12 November 2017. Nina Crone responded on the same date, 21 September, and confirmed that the letter was sufficient as a notice of delivery acceptance;

and

b. The "Delivery Notice" *backdated* to 31 August 2017, on LRP's letterhead, addressed to DDI and signed on behalf of LRP and DDI, stating:

> *"… we would like to inform you that [the Film] and the associated "Delivery Materials" as outlined in the Delivery Schedule and bonded by [EFB] under the [CGA] are now available.*
>
> *In DDI issuing its acceptance of "Delivery Materials" for the Production, it is acknowledged by [the Producer] and the Sales Agent that [EFB] will no longer have any further responsibility or obligation to provide DDI with any "Delivery Materials" henceforth. Any further quality control reports and corrections or fixes… will be the responsibility of [the Producer] and will be completed at the Producer's expense…"*
>
> *Agreed to this 21st Day of September 2017"*

149. That evening, Dan Krech sent the Delivery Acceptance (but not the Delivery Notice) to EFB and stated in an earlier email that same day that "*we will require EFB to send*

us a notice that the delivery has been accepted for the purposes of Telefilm". He repeated that request in an email to EFB dated 25 September 2017.

150. Accordingly on 25 September 2017 EFB provided a letter addressed to Awesometown - *which Dan Krech sent on to Jason Moring on the same day* - confirming as follows:

> *"EFB and DFG have issued a completion guarantee on the Film on August 1, 2016. According to the Completion Guarantee the Film should be delivered to [DDI], the Sales Agent. We can confirm that we have received a notice of delivery of acceptance from the Sales Agent".*

151. Mr. Krech then promptly forwarded this to Telefilm. Within hours Telefilm released the second tranche of funding (CAD550,931.50); and it released the third tranche (CAD 314,818.00) the next day. Had Active through M3 or itself objected to this course, namely the funding of the Film by Telefilm and the Guarantor dropping out of the picture, then it could and ought to have said so at or shortly after this time. But it did not.

Events from October 2017: Active's auditors question why the Bond was not called upon; Active must choose whether to enforce clause 2.1 or not

152. There were continuing issues with regard to Rainmaker and payment for the Additional Work. In October 2017 Rainmaker refused to release the DPX files (the basic frames of an animation film) until it was paid. As Ms Crone put it in her oral evidence, there was a dispute about payment and "*Rainmaker [was] taking the DPX files in hostage*". This meant that LRP could not have high resolution frames for viewing on a large screen and so the Film could not be shown at the American Film Market ("AFM") as planned. Rainmaker also required security for further work. This was not because Rainmaker was working on an enhanced version of the Film; rather it was simply that it refused to continue its work unless it was paid. Indeed, in his email to Nina Crone dated 21 October 2017, Mr. Krech said of Rainmaker's work:

> *"For the most part the work they did provide was of a fairly high quality, however we know that they modified material that we had sent them to make it easier and faster for them to render. The result of these changes is a clear compromise in the quality of the film…. They also lit and rendered the wrong files on a consistent basis … I believe that they were attempting to work so fast that they had no one checking the work at all. Even though we said that we would accept a first pass as final delivery, they cannot claim that they delivered a first pass until all the blatant technical mistakes had been fixed…*
>
> *It has come to our attention that the QC process that was to be conducted weeks ago has not yet begun… I have reviewed the contract and amended contract between [LRP] and Rainmaker. We have determined that there were material breaches in the contract from both sides."*

It follows that even the "first pass" of the Film was of unacceptable quality. So far as LRP's breaches are concerned, this included late deliveries to Rainmaker and delays in making payments. As a result:

> *"Since the stoppage of work on September 1, there has been no new activity on the project."*

153. Mr. Krech had also informed Ms Crone by email dated 17 October 2017 that the work received from Rainmaker was not complete. There were render layers missing, broken renders and broken comp shots. He had identified 850 shots with technical issues. As a result:

> *"Unfortunately we are in the position that we must turn to the bond company to help us complete the film… Our request [to] the bond company is to help us retrieve and complete our film."*

154. The problem with that, of course, was that LRP had accepted that the Film had been completed and delivered under the Completion Guarantee by the sending of a false notice to DDI and DDI had in turn given a false acceptance notice, which would mean that the obligations of the Guarantors had terminated under clause 2.4.

155. Instead what happened was that Ms Crone worked with Mr. Krech to secure the financing of Rainmaker so that it could complete its work without the Guarantor Defendants having to step in. Meanwhile, Mr. Krech began to instruct lawyers and assemble evidence to bring a claim against Rainmaker, who continued to say that it had no plans to finish the film.

156. On 2 November 2017, Mike Sears of M3 emailed Jason Moring of M3 and DDI and Michael Emerson of M3. He said:

> "*I just got off the phone with Dennis [Quinn]. The ELLIOT issue is coming to a head. The auditors are questioning the contract. Dennis [Quinn] and Terry [Trantina] are having to go through the contract and when the delivery was expected, the bond company agreement, whether this is now a distressed asset. In short, it is now moving over to legal and there will need to be a conversation about where the project is, if it is going to be released next year, what is Active's compensation for the delay, why the bond company didn't step in on the picture – etc.*
>
> *Dennis pointed out that this could not be coming at a worse time…" (emphasis added)*

157. This is an important email. It again shows Mr. Sears looking after the interests of Active and his keeping it informed as to the Film's progress (or lack thereof). Indeed, after this date the documents reveal Mr. Sears taking a much more active involvement in relaying to Active the discussions which he was having with DDI, LRP and EFB. But this email is especially noteworthy because Mr. Sears does not suggest that it was Mr. Quinn or Mr. Trantina who were questioning the contract as to when delivery was expected and the bond company agreement, but rather Active's auditors. Mr. Quinn's

reaction was, according to Mr. Sears, apparently one of irritation or frustration: that the auditors' intervention could not be coming at a worse time. It also shows that *Active knew* that the bond company *had not* stepped in as it could have done after the delay in completion and delivery and the auditors were questioning why that had not occurred.

158. I reject Mr. Quinn's evidence that this was the first time that he became aware that the Film had not been completed in August 2017. The email refers to "*The Elliot issue … coming to a head… there will need to be a conversation about … why the bond company didn't step in on the picture*". That suggests that Mr. Sears and indeed Mr. Quinn were fully aware of the issue, namely that the Film had not been completed but the Guarantee had not been called upon. I find as a fact that Mr. Quinn was made aware of this fact by Mr. Jason Moring or Mr. Mike Sears earlier than 2 November 2017. In any event, the fact that having discovered this by this date, Mr. Quinn did not then suggest that the Completion Guarantee *should* be called upon demonstrates that he was content not to do so but rather to join in with the plan of LRP continuing to work on completing the Film and then to look to exploit it (with its valuable media buy in particular) in 2018. Moreover, as I have already observed, Mr. Quinn was planning for a 2018 release of the Film as early as 17 July 2017.

159. Consistently with the suggestion that Active should be compensated for the delays, Jason Moring and Mike Sears now began work on a compensation package for Active in terms of its share of the waterfall.

160. However, on 13 November 2017 Mr. Krech sent Jason Moring a final finance plan, recoupment schedule and cost report which had Active recouping nothing from the waterfall. Jason Moring in turn sent a waterfall outline to Mike Sears and Michael Emerson which had Active "*sharing with the other equity*".

161. On the same date Jason Moring sent Ron Moring an email headed "*Elliot – reject delivery*", in which he stated "*This needs to happen immediately please. Let's not go over the date which I believe is very close*". This was presumably a reference to the end date of the (supposed) 45 day QC period which was in fact 12 November 2017. It appears therefore that DDI were on the verge of purporting to reject delivery of the Film at this time so as to try to keep the Guarantor in the frame for reimbursement of Active's losses. However, later in the day Jason Moring sent Ron Moring a further email headed "Elliot – delivery notice" in which he stated "*DON'T send yet. Need to discuss with Mike Sears.*" He was having second thoughts about rejecting delivery, presumably upon Mike Sears' intervention.

162. Matters were now coming to a head. Mike Sears of M3 emailed Jason Moring on the same day and stated "*If Dan does not have a solution that is acceptable to Active, then the bond company needs to figure it out.*" Mr. Sears sent this after a series of exchanges with Dan Krech concerning the final finance plan. However, the precise nature of the discussions or exchanges of emails between Jason Moring, Mike Sears and Dennis Quinn is unknown as none of Jason Moring, Ron Moring or Mike Sears gave evidence and there are no documents in existence to fill the gap. But crucially the *outcome* of those discussions or exchanges was that delivery was not rejected and the bond company (Guarantor) was not called upon and so a solution that was acceptable to Active appears to have been agreed.

163. Some light is cast on this issue by Dan Krech's email to Nina Crone at this time (14 November 2017). It suggests that DDI (presumably Jason Moring) and Active (either Mr. Quinn, Mr. Steinbeck or both of them) were in discussion, although no documents as to these discussions have been disclosed. Active appears to have been persuaded that it was in their interests not to assert their rights under the Completion Guarantee but to agree to the completion of the Film with the Telefilm funding. Mr. Krech said:

> *"DDI are getting pressure from Active International and questioned why we did not call in the bond. I told them that if we called in the bond, the first thing that would have happened is that EFB would have taken over the project and stopped production. Then they would have found other production people to finish the work and likely paid up to $1,000,000 more to finish the film, and it would have taken months to complete.*
>
> *Then the shareholders would have to sit behind the overages from the bond company to recoup, putting the investors even further behind in the waterfall.*
>
> *In short I told them that by not calling in the bond we protected the shareholders and gave them a chance to recoup on the project.*
>
> *They are trying to pressure me to help them with Active ... to move them up on the waterfall. I cannot do that …" (emphasis added)*

164. Once again, this refers to Active questioning why the bond had not been called in. This was the moment when it had to choose – either to enforce clause 2.1 of the Completion Guarantee or not. If not, then (as happened) Active could support the stance taken by LRP/EFB and DDI and instead look to finish the film in 2018 and exploit it in time for the Holiday season 2018.

165. On 15 November 2017 Nina Crone emailed Dan Krech. She told him that she had spoken to *Jason Moring and the M3 personnel* (Mike Sears and Michael Emerson) and that they wanted to speak to Dan Krech, because they wanted to approve the additional funding from Telefilm and the recoupment (presumably to protect Active's position in the revised waterfall). They also told her that they were "concerned that the files [the Rainmaker DPX files for the AFM] were not yet delivered, and she said "*it was in process*." It appears therefore that Jason Moring and M3 both (i) knew that delivery of the Rainmaker files which were necessary for completion of the Film had not taken place and (ii) wanted to approve the additional funding and recoupment. It is clear from the context of the email – it is a response to Dan Kretch's email – that Jason Moring and M3 were acting on behalf of Active.

166. The documentary trail then goes cold until 29 November 2017, when a further version of the film was sent to DDI and to a third-party quality control service provider, Capsule Media. Everybody was, it seems, continuing therefore to work towards the belated completion of the film with third party funding. That version of the Film contained a disclaimer which proclaimed that it was a *"screening copy of the film"*

and that the *"final DCP master will be sharper and more defined and the colors could be more consistent"*. DCP stands for "Digital Cinema Package", which is the format required for cinematic release, and is an item specifically listed as a Delivery Material in Schedule 3 to the Completion Guarantee. Capsule Media noted this fact and also questioned even this version stating: "*Are you sure this is the final master we should be using? It also only has 5.1 audio. No Stereo Full Mix or Stereo M+E. IT appears to be a file just created for a DCP screening. Ideally we would like a final finished master …*"

167. On 7 December 2017, Ron Moring emailed Dan Krech, cc Jason Moring, attaching a letter from him to AwesomeTown dated 4 December 2017 in which he stated that "*Further to inspection/QC of the Elliot master from Capsule Media; master has failed quality control inspection.*" The letter catalogued a number of deficiencies in the materials provided to it at the end of November 2017. This included a failure to deliver a number of the Delivery Materials set out in Schedule 3 to the Completion Guarantee (such as the *"full mix stereo track"* and *"a version of the film with all the high-resolution images"*) and noted that the materials that had been provided did not pass even a 'soft' quality control process conducted by Capsule Media. DDI's letter concluded by stating that "*…it is evident that we cannot accept this version of the film master as it is not technically sound. Master delivery materials as provided have failed quality control inspection."*

168. DDI subsequently suggested, once litigation was in prospect, that this letter was a letter of Non-Acceptance of Delivery by DDI. It was not. Moreover, it was well outside even the purported 45 day cure period which it had agreed with EFB, as Nina Crone noted on her copy of DDI's letter dated 16 July 2018.

169. On 18 January 2018 Mike Sears told Dan Krech and Jason Moring that he was meeting Active the next day. Again, this demonstrates that Active were being kept in the picture via Mr. Sears as to the discussions with Telefilm and the plans for the production of the Film. Mr. Sears requested a detailed report and schedule on the *final delivery* of the Film. He referred to his disappointment that they would "*discuss things at length and then no follow through seems to occur*". Mr. Krech responded by saying "*I am estimating that we will have the materials by the middle of February and the final delivery by the end of April*." Mr. Sears responded by saying "*we are past the date of informal emails*" and he said he needed "*definitive information on costs to complete, firm dates and back up documentation on agreements. We are a full year behind schedule and over budget… I hope to keep this out of a legal mess, but you need to step up and start delivering on a cost and schedule that can and will be met.*" This makes clear that Mr. Sears was fully aware of the delays in delivery of the Film, that he was pressing for the Film's final delivery in 2018, and again there was no suggestion that the Completion Guarantee could or should be called upon.

170. On 19 January 2018 Dan Krech sent Mike Sears, cc Jason and Ron Moring, an email attaching a one page brief of the production status of the Film. In that brief, Mr. Krech said "*The [Film] has all the creative aspects of the film including editing, animation, lighting, visual effects and render completed*". He went on to say, however, that Rainmaker were holding onto LRP's material under a financial dispute worth some CAD 150,000 CAD and again he stated that "…*delivery will be no earlier than the beginning of April and not later than the end of April*."

171. Mr. Krech then sent an email to Mike Sears on 23 January 2018. He said:

> *"Sorry for the delay in response.*
>
> *While I don't have an exact release date yet, we are getting closer to having the data released to us and I am hoping to have a better idea by the end of the week."*

172. Mike Sears replied by email to Dan Krech and Jason Moring dated 24 January 2018. He said:

> "*I am now getting emails from Active on ELLIOT and questions regarding the interest payment for this year and prospective sales. We must move this forward."*

173. These critical emails/questions have not been disclosed by Active; they may have been some of those emails deleted by Mr. Quinn just prior to the start of the trial, as discussed below. (Mr. Quinn suggested that they may have come from Mr. Steinbeck (or Stephanie Noble, a member of his department) but of course that will never be known because Active opposed Mr. Steinbeck being a custodian for the purposes of disclosure.) In any event, it is notable that Active's reaction to the delay is not "why hadn't the guarantor stepped in?", but rather to question *interest payments and prospective sales* of the Film for 2018, because that is the course which Active (through Mr. Quinn) has chosen to adopt (rather than calling in the bond).

174. There was then a call between the three of them, but it is not known what was discussed or agreed as again no documents have been disclosed in this respect.

175. What has been disclosed is an internal Active email dated 29 January 2018 between Cecilia Barossi and Mr. Quinn with the heading: "*What is going on to [sic] the Littlest Reindeer?*" in which she asks him "*I know we got paid interest on the money loaned last year, but what is going on with this year? Are you ok if I call Mike to get an update if you don't have one?*" Mr. Quinn's response to that email is unknown, but this email shows that it was understood within Active that Mike Sears was acting on its behalf in updating it as to relevant events. Indeed these were exactly the questions which Mr. Sears asked of Dan Krech. Ms Barossi also apparently had no expectation that the guarantee would be called in.

176. This appears to have led Mike Sears to email Dan Krech again on 30 January 2018 in which he asked for an update on "*where we are this morning regarding Rainmaker*". In the same email chain he told Dan Krech to "*let me know either way and if there is push back we can discuss our options*."

177. On 2 February 2018 Mike Sears emailed Jason Moring, cc Michael Emerson. He stated:

> "*Just tried you on the cell – can you give Michael and I the latest on Eliot. We are still waiting to hear:*
>
> 1. *Has Ingenious released the necessary documents for Dan to obtain the footage from Rainmaker.*

2. *Have you locked down the meeting with Byron Allen [a funder]?*

3. *Have you determined if Netflix will revisit the project?*

4. *Any other domestic sales opportunities for Eliot?*

We are now roughly ten months from release on Elliot and we still do not have the finished film nor any credible leads for domestic release. We will need to follow up with Active shortly to let them know our progress and what the options are for them to be compensated for the extra year on their capital and their position in the waterfall should your sales efforts not succeed." (emphasis added)

Once again, this email makes clear that Active was not suggesting that the guarantee should be called upon. Rather Active, through Mr. Sears, is choosing to look for compensation for the fact that Active's capital had been tied up an extra year and seeking to have Active compensated by being moved up the waterfall. As a result, the Film continued to be progressed, albeit much delayed, and certainly by now (if not earlier) the Guarantor Defendants could not be criticised for believing that they were discharged under clause 2.4 of the Completion Guarantee.

178. By an email dated 5 February, Jason Moring updated Mike Sears and Michael Emerson regarding a discussion which he had about Ingenious providing further funding to enable the Film to be completed. Again, Mr. Sears knows that the funding is not being sought under the Completion Guarantee. Ingenious insisted on an internal audit of LRP before it would lend more. Mr. Moring lined up a further call with Mike Sears, himself and Ingenious.

179. Mr. Krech then gave Mr. Sears and Mr. Jason Moring an update on the same day by email. He explained that Rainmaker would release the files once they had a guarantee that the funding was coming from Ingenious (or other sources) and that Ingenious wanted a "closing audit on the show" before it would assist. The ball was now in LRP's court to provide the accountants with the audit information. Ingenious would provide the funding once it had proof of spend and verified that against the cost report.

180. On 13 February 2018 Dan Krech emailed Mike Sears and Jason Moring. He told them that he had sent the material documents to his auditor. He had sent the Film to a company in LA to see if they could complete it and whilst he could not give a definitive delivery date, it would be April if the LA company could complete the Film or mid-May if Rainmaker released the material.

181. Mike Sears responded by email on the same date. He said:

> *"My understanding from Jason is that a May delivery is the absolute latest you can make for a 2018 release. We simply cannot be in a position of not delivering for a 2018 release.*
>
> *I believe we will need a discussion with all parties shortly to understand what the plan is going forward. We must make delivery."*

182. Once again, it is perfectly plain that Mike Sears, no doubt on Active's instructions, was insisting on a May 2018 delivery of the Film for a 2018 release. They are well beyond suggesting that the Completion Guarantors should take over production of the Film under clause 2.1(a) and repay Active its investment under 2.1(b). Active is still seeking to make money out of the exploitation of the Film in 2018.

183. On the same day Mike Sears separately emailed Jason Moring. He said that he wanted to call Rainmaker and discuss their thoughts on completing the picture as he did not believe that Mr. Krech could get the job done. He concluded by saying: "*This is a disaster*".

184. There was also an exchange of emails between Dan Krech and Jason Moring on the same day in which Dan Krech expressed his own concern about a May delivery (which presumably Rainmaker had confirmed). Mr. Moring said

> *"Distributors need at least 6 months from delivery… So May delivery to DDI = November release...*
>
> *Getting to June could cause problems and a general misunderstanding and extreme concern from clients that we pushed a year and still can't deliver 12 months later."*

185. As the problems with Rainmaker continued into February 2018, by an email dated 13 February 2018 Mike Sears asked Jason Moring to speak to EFB at the Berlin film festival (where he currently was): "*if there is a way to call in the bond and finish through Rainmaker*" – "*I am beginning to think it is our only play to get Eliot done. Dan simply says anything he wants and then changes it the next day – I do not trust he can even hit a May target*."

Significantly, he further stated: "*Dennis can use any good news to help the larger play at the moment. My understanding is that he is taking quite a bit of heat at this company meeting."*

186. That was presumably because, as Mr. Quinn agreed in cross-examination, he was responsible for Active entering into this deal in the first place, it being his idea; and he had chosen not to call in the bond but rather had allowed the delivery of the Film to move into 2018 and now even that was in jeopardy. Hence, in desperation, Mr. Sears went back to considering whether there was any way still to call in the bond as all other anticipated methods of financing the completed film were proving problematic and too slow.

187. It is significant that in his email of 16 February 2018 to Ingenious and DDI, Mr. Krech referred to the fact that in the case of some of the Film's distributors, LRP did not give Notice of Delivery of the Film in Q4-2017 because he received "push back" in circumstances where the Film would not be released until 2018. Presumably those distributors questioned how the Film could be completed and delivered in 2017 if it could not be released until some unspecified date in 2018.

188. There was then a meeting at the Berlin film festival between Nina Crone, Awesometown (presumably Dan Krech), DDI (presumably Jason Moring) and Mike Sears of M3. The notes of that meeting refer to the fact that:

> *"Nina made it very clear that it was not necessary to call the bond company in to finish the film, as the roadblock to completing and delivering the film is Rainmaker refusing to release the files. We presented the plan we made with Nina to the whole group to bring in a bridge financier to pay Rainmaker…Ali presented the timeline for remaining work, and with 8 weeks of work still to be done internally at Atown, there is still a month buffer before the May 31st delivery deadline. Mike expressed his concerns that he wanted supervision to ensure that this remaining work would get done on time, but Nina stated that this is not necessary."*

189. This shows that Mike Sears knew that a new deadline of 31 May 2018 for delivery of the Film had (for some time) been agreed and he did not apparently dissent. I find that he must have relayed this fact to Active with whom he was in constant contact. It is again clear from this email that Mike Sears was put clearly in the picture as to the plan to complete the Film and he did not dissent from it (in particular the agreement not to call the bond company to finish the Film).

190. On 18 February 2018 Awesometown sent an updated production schedule, showing an 8 week timeline for the remaining work to DDI, Ingenious and M3. Dan Krech sent an email on the same date to M3 and DDI in which he stated that: "*While at Berlinale, Awesometown, Ingenious, [DDI], EFB and M3 (representing Active International) convened for a meeting to discuss a solution to the impasse regarding the footage for [the Film]. A plan has been put in place which will provide $250,000 Cdn to be sent directly to Rainmaker from an account controlled by EFB*" (this was the bridging finance to be obtained by Nina Crone from a third party). It can be seen that unsurprisingly, Mr. Krech understood that M3 were representing Active and they were kept fully informed of developments. I reject Mr. Quinn's evidence that M3 were not acting on behalf of Active at this time.

191. On 19 February 2018 Michael Emerson emailed Mr. Krech, Jason Moring and others to say that he thought Rainmaker should be told immediately of the bridging loan and that a detailed post-production schedule should be provided by LRP. In response, Mr. Krech said LRP would be updating the production schedule on a weekly basis.

192. There were further discussions in March 2018 with Rainmaker about the release of the files required to complete and deliver the Film. It is clear that until LRP saw them, it could not tell how much work remained to be completed on the Film. Once the bridging finance was obtained on 5 March and Rainmaker was paid, Rainmaker began releasing the DPX files.

193. Nina Crone attended regular calls between March and May 2018 about delivery of the files and became the driving force in making the delivery happen so that the Film could be completed on schedule for a Christmas 2018 release. For example, she procured LRP to purchase physical hard drives to be sent to Rainmaker, which she said LRP should purchase on credit. She specifically requested that EFB was copied in on the shipment of those hard drives and stated *"It is important that we are now kept in the loop for progress reports and all other info"*.

194. On 2 May 2018 Ron Moring informed the distributors (cc Michael Emerson, Jason Moring and Mr. Krech) that the Film was finally "*completed*" and DDI was "*ready to deliver*."

195. On 4 May there was a call between Dennis Quinn, Jason Moring, Mike Sears and Michael Emerson, as is apparent from the latter's email of 3 May 2018. No note of this call or any emails referring to it have been disclosed by Active. It is likely to have been an important call, but it is not known what was discussed.

196. On 8 May 2018 Mike Sears of M3 emailed Jason Moring, cc Michael Emerson and Dennis Quinn of Active and referred to the "disconcerting" news that Entertainment Studios, which was looking at an offer to distribute in the US and all remaining territories, had a restrictive deal with a third party to do all their media placement. Thus, the recoupment schedule became central to the possibility of Active recovering its funding, and so Mr. Sears stated:

> *"Based on your current recoupment schedule … what is the minimum guarantee they would have to hit for Active to be made whole?"*

197. Mr. Sears sent a schedule showing Active "TBD" in the third tier of the waterfall.

198. Meanwhile Mike Sears also emailed Jason Moring between 22-24 May 2018, *copying in Dennis Quinn of Active*, asking for an update on the Film and in which he asked for a new recoupment document and current sales projection because "*I am trying to allow Active to see where exactly Elliot needs to be for Active to be made whole (ie recover its investment) based on real numbers and not projections."*

199. These emails demonstrate that in looking after Active's interests, Mr Sears (with Active's knowledge and consent) was still seeking to obtain reimbursement of Active's investment in the Film by a 2018 exploitation of the Film via the recoupment schedule (rather than under the Completion Guarantee). Mr. Quinn had relayed this desire to Mike Sears and Jason Moring and they had in turn relayed it to LRP and EFB. A 2018 release would obviously also allow extra time to seek P&A funding and arrangements for US distribution (despite Mr. Quinn's denial of that fact in his oral evidence). However, the problem was that LRP was not willing to allow Active to recoup as much of the collection monies so as to be "made whole".

200. Jason Moring replied to Mike Sears on 25 May 2018, copying in Dennis Quinn. He said that he did not have complete insight into the waterfall placements for the different investors; he said that they all believed that Active should be in the same waterfall grouping as Telefilm. He also tried to estimate P&A funding that could be placed with Active.

201. Further screening versions of the Film were provided to DDI in May and June 2018 but even then the Film failed QC tests.

202. On 25 May 2018 Ingenious sent an amended proposal for a CAD 131,000 loan to enable the Film to be completed.

203. On 30 May 2018 Awesometown told Jason Moring that it had uploaded the latest version of the Film, after some fixes had been made to Vimeo, and that it could therefore be viewed by him.

204. DDI expected EFB to issue a Delivery Notice once the final version had been produced and Jason Moring emphasised to personnel within DDI in an email dated 31 May 2018 that "*Under no circumstances should any communication be had regarding Elliot delivery without my sign-off please, and most specifically acknowledgment and acceptance of any materials.*"

Events from June 2018 leading to the claim under the Completion Guarantee

205. On 1 June 2018 Jason Moring informed Ingenious that "*we have not received an official [Notice of Delivery] from the bond at any point*." This was disingenuous: What he did not say was that he did receive Delivery Notice from LRP dated 21 September 2017 which DDI itself drafted, backdated to 31 August 2017. That was done to ensure that the Telefilm funding was forthcoming; he was now telling Ingenious this to ensure that their funding came though.

206. On the same day, 1 June, Jason Moring asked to line up a conference call with Mike Sears and Dennis Quinn. He said in an email to them that he thought the likely domestic distributor would use Active for its P&A spend; in addition Ingenious was "*looking to speak with Active about the insurance bond*."

207. On 4 June 2018 Mike Sears emailed Jason Moring and Dan Krech. He said that he was attempting to understand the financial position of Elliot. M3 wanted to know how the waterfall was working; and how the budget overage would be dealt with as between investors.

208. On 6 June 2018 Mike Sears chased up Jason Moring for a call with Dennis Quinn about this.

209. However, on 8 June 2018, Ingenious told Jason Moring that Ingenious were "*preparing a notice of claim for the completion bond*". Jason Moring immediately emailed Mr. Quinn, Mr. Sears and Mr. Emerson and suggested that Active should be on a call with Ingenious to hear its explanation in greater detail.

210. After this call, on 13 June 2018 Ingenious asked Terry Trantina of Active for a copy of the PCA, which he sent on to it (Jason Moring, Gary Steinbeck, Dennis Quinn and M3 were all copied in to this exchange).

211. On the same date, 13 June 2018, Mr. Trantina wrote to EFB and DFG/BDJ. This letter appears to have been provoked by the stance taken by Ingenious. Mr. Trantina alleged that after being given written notice that the delivery date of the Film had been moved to 30 August 2017:

> *"Active received no further notice from EFB or from the Guarantor with respect to the completion and delivery of the Film. Active did not receive notice that the completion and delivery of the Film did not occur on 30 August 2017 or that the failure of completion and delivery of the Film would*

> *prevent the planned Christmas holiday release of the Film in November-December 2017. Active is given to understand that, as of the date of this Notice, completion and delivery of the Film has not yet occurred."*

212. This was wrong and it is apparent that Mr. Quinn had failed to put Mr. Trantina in the picture about any of the relevant events. Active knew, through Mr. Quinn, that completion and delivery of the Film had not occurred on 30 August 2017, and certainly Mr. Jason Moring and Mr. Sears both knew. Furthermore, Mr. Quinn knew by 10 August 2017 that everyone was looking at a 2018 release for the Film. It appears that Ingenious knew much less as to what had happened, and its decision to threaten to call in the bond is more readily understandable (whether it did or not is not apparent, although it certainly supported Active's stance).

213. Mr. Trantina went on to allege that the production budget for the Film was significantly exceeded by LRP without notice to Active and this had caused Active's investment position in the Film to be compromised. He complained that the Guarantor had failed to ensure completion and delivery of the Film on time, and demanded full information relating to the production of the Film, the costs of production and the efforts to complete and deliver the Film in 2018. It is to be noted that even at this stage Active wanted information about the efforts to complete and deliver the Film in 2018 (and not 2017) and it still did not specifically call upon the Guarantor to reimburse it under the Completion Guarantee.

214. EFB and the Guarantor's agent responded to this letter by letter dated 14 June 2018. They stated that:

> *"The Film is completed and delivered in accordance with the [Completion Guarantee]… we sent out extension notices on the 6th June 2017 and again on 17th July 2017 and informed you that the Delivery Date was extended till the 30th August 2017.*
>
> *The Sales agent sent us their notice of acceptance of the delivery on August 30, 2017.*
>
> *The Completion Guarantee says (clause 2.4) that*
>
> > *"The obligations of the Guarantor to the Beneficiaries under this Agreement shall terminate immediately upon completion and delivery of this Film without further act or formality."*
> >
> > *After receipt of the acceptance notice from the Sales agent we have no further obligations according to the Completion Guarantee…"*

215. On 13 June 2018 a CAMA was circulated. Neither Active nor Telefilm were shown on it. Jason Moring said that Active should be a party to it and Ingenious also were unhappy with it.

216. On the same date Dan Krech emailed Nina Crone to say that "*TLR has been delivered to DDI. The DCP and the digital version are both ready to go*."

217. On 14 June 2018 Terry Trantina emailed Mike Sears, Michael Emerson and Jason Moring and, referring to EFB's response to his letter, asked them "*What did DDI do on August 30, 2017 that leads them to the conclusion stated?*" He followed this up with a further email of the same date explaining how Active ought to have received a notice from the Sales Agent stating that delivery had been made. Active, he said, had not received a notice from anyone. Meanwhile, Jason and Ron Moring started, just between each other, to locate the emails in 2017 which concerned the purported delivery. Jason Moring told Active that he was preparing all the background documentation based upon the bond's position.

218. On 14 June 2018 Jason Moring sent an important email to Terry Trantina, setting out his/DDI's position. He stated as follows:

> *"To Answer the points:*
>
> *A. <u>The Film has not been fully delivered and accepted by DDI at any point. What was delivered in August was low-resolution (under required 2k resolution) that immediately failed QC which DDI had advised Awesometown.</u>*
>
> *B. DDI provided a Notice of Acceptance on August 30, 2017 that included an EFB approved 45 day QC and inspection period. Within the 45 day period DDI advised Awesometown of Non-Acceptance and failure of the master elements.*
>
> *In February 2018 EFB was involved in an in-person meeting during the Berlin film festival and subsequent telephone calls in which they took the lead to negotiate a loan for production in March 2018 to pay outstanding invoices to Rainmaker …in order to receive the high resolution DPX files necessary for production to finalise the film and complete delivery. This illustrates that EFB was (a) aware in August 2017 that the Producer did not have the necessary files to deliver properly (as rainmaker was holding back the materials prior to August 2017) and (b) EFB was actively involved in the project beyond August 2017. I do not believe the EFB statement would remove any liability of EFB to notify beneficiaries of delivery, delay or any over budget amounts etc."* (emphasis added)

219. This again was not the whole truth. The Delivery Notice of 21 September 2017, drafted by DDI, stated that the Delivery Materials having been accepted, any further quality control reports or corrections were the responsibility not of the Guarantor Defendants but of LRP.

220. In the light of this email from Jason Moring, on 14 June 2018 Terry Trantina then emailed Ingenious, Jason Moring, Mike Sears and Michael Emerson. He had difficulty correlating the terms of Schedule 4 of the Completion Guarantee with what Jason Moring was saying. He said that Jason Moring, as the sales agent, "*needs to*

prepare and send to the Guarantor and EFB a response to their letter that contradicts their absolute statement, that the sales agent accepted delivery." He said that they needed to see exactly what EFB sent DDI in terms of materials and a notice in August 2017. He encouraged the thoughts of Ingenious. Once again, it is apparent that Mr. Quinn had failed to put Mr. Trantina in the picture as to the relevant events, possibly because he was embarrassed to do so as he was "feeling the heat" internally at Active.

221. On 18 June 2018 Mike Sears emailed Jason Moring and asked him for the correspondence between DDI and EFB. He asked him to provide anything before 30 August relating to budget overruns and late delivery; the correspondence regarding delivery of materials that DDI sent out on 30 August 2017. He said that he had spoken to Dan Krech who said (surprisingly) that he had written notice to EFB that DDI had rejected the delivery that he would send along.

222. At the same time on 18 June 2018, Mike Sears emailed Dennis Quinn to say that he was still "*pushing with Dan Krech on the Netflix deal*". Mr. Krech was trying to get the offer in writing that day.

223. Meanwhile on 18 June 2018, the QC issues with the Film were finally fixed and on the same date the contract was entered into between LRP and Telefilm for the provision of further funds.

224. On 20 June 2018 one of the Distributors (Vertical Distribution) terminated its distribution agreement with DDI by reason of the failure to issue a delivery notice by 30 May 2017. It demanded back that part of the guarantee which it had paid. However on 22 June 2018 DDI gave Notice of Initial Delivery of the Film to certain other distributors (whom they had kept in the picture) and requested payment from them.

225. Meanwhile, on 21 June 2018 Jason Moring responded to Ingenious' request for documentation. He said that DDI had "*never received a … Notice of Delivery from Awesometown or EFB*". He must have known that to be untrue: it had received the Notice back-dated to 31 August 2017. He also sent DDI's letter of 4 December 2017 (referred to above) and suggested that that was a non-acceptance letter. DDI was now backtracking and seeking to protect its own position. Mr. Moring did, however, send DDI's Delivery Acceptance Letter to EFB.

226. However, on 26 June 2018 Ingenious requested that DDI provide it with the Delivery Notice sent by EFB in view of the fact that DDI had acknowledged delivery. It also asked DDI to provide a copy of its Objection Notice which it was obliged to issue under Schedule 4 to the Completion Guarantee (but which, of course, it had not done). Mr. Moring responded on 28 June and again stated, falsely, that "*we never received a Delivery Notice from EFB*". He then suggested that DDI had rejected the Film within the agreed 45 day QC period.

227. On 29 June 2018 Jason Moring of DDI sent a letter to Mr. Trantina dated 28 June 2018 (he also sent a copy of the letter to Ingenious) concerning the various documents that he wanted to see *"to assist the parties in coming to a swift and amicable resolution"*. Mr. Moring referred to DDI's Delivery Acceptance letter of 30 August 2017 and said that "*this letter acknowledges that the Sales Agent received delivery of the materials but acceptance was conditional on the film passing Quality Control*." That was not true: the Delivery Acceptance did not purport to be conditional as he

well knew. It acknowledged that DDI had received delivery and asked EFB to advise that it sufficed as a notice of delivery acceptance, as it did on the same day that it was issued (21 September) and in which response it stated that any corrections or fixes were now for LRP's account. As was discussed by DDI, EFB and LRP at the time, the letter was so worded to ensure that clause 1.10 and 2.1 were triggered, so that Active did not ask for its money back. Mr. Moring did, however, finally supply the Delivery Notice that DDI (and LRP) issued on 21 September 2017, back-dated to 31 August 2017.

228. In response to his letter of 28 June 2018, by email dated 5 July 2018, Anders Erden of Ingenious emailed Jason Moring. Mr. Erden said that Ingenious was not currently in dispute with EFB but rather seeking to establish what had happened. He said that DDI's role in the relevant events, as the agent who accepted the Film, was central. He further stated that Ingenious' support of the Film was in jeopardy unless the dispute with Active was resolved to its satisfaction. It wanted to know whether completion and delivery of the Film had occurred in accordance with the Completion Guarantee. Mr. Anders said:

> *"… we need DDI to address and refute EFB's assertion that its obligation to effect completion and delivery under the Completion Guarantee has been satisfied. DDI should prepare a letter to EFB to highlight in detail the defects in completion and delivery and clear up any confusion surrounding the "delivery acceptance" issued by DDI in 30 August 2017 ie. explain that the "acceptance" was of receipt of the notice, not delivery.*
>
> *In the letter you should identify EFB's failure to comply with the delivery process (it appears EFB did not serve a Delivery Notice) and specify any Delivery Materials (as defined in the Completion Guarantee) DDI did not receive and/or non-compliance with the specifications listed in paragraph 1.10(a) …"*

229. Ingenious had been misled, as a Delivery Notice had of course been sent on 21 September 2017, albeit out of time. This email put DDI in an uncomfortable position as it had accepted delivery of the Delivery Materials as described in Schedule 3 to the Completion Guarantee, despite the fact that they had not in fact been delivered, in order to prevent Active from calling on the guarantee. Jason Moring agreed to provide an appropriate letter to EFB.

230. On 11 July 2018 Jason Moring of DDI sent the requested letter to EFB. It sought to argue that its back-dated Delivery Acceptance letter of 30 August 2017 was not an acceptance of the delivery materials referred to in Schedule 3 to the Completion Guarantee but rather "*acknowledgment of receipt of the materials available for quality control (QC) testing*." It further stated that its Acceptance Letter was "*completely conditional on the Film passing QC which would begin on 28 September 2017 for a minimum of 45 days which EFB acknowledged in a letter dated 21 September 2017… Sales Agent subsequently advised … Producer that the film file it delivered for QC testing was not in an acceptable form*." DDI went on:

> *"… the film file included an opening card stating:*
>
> *"This screening copy of the film is the final cut. The master version is currently in QC …*
>
> *It is clear from the opening card that the film file was not in a fully completed state or of commercially acceptable quality for release in cinemas (as defined in section 1.10(a) of the Completion Guarantee) and it was the sales agent's understanding that EFB was not only aware of this but that EFB and producer were working on the solutions to retrieve the necessary full resolution files ("Completion Files") from a third party services provider [Rainmaker] who was holding the files pending payment in order for the film files to meet the required technical threshold. Producer assured sales Agent that the completion files would be produced within the QC period and when they were not, sales Agent issued a notice of rejection dated December 4, 2017.*
>
> *It is our position that EFB's obligations as completion guarantor are ongoing and EFB has not met its obligations under the Completion Guarantee for the following reasons:*
>
> - *Sales Agent has never received a Delivery Notice from EFB confirming delivery and available materials;*
> - *The film is not directed by Paul Griffin*
> - *The sales agent has not received a valid E&O policy*
> - *The Delivery Date as defined in the Completion Guarantee was never met*
> - *Sales Agent has never delivered a Notice of Acceptance for the delivered film."*

231. This was a complete re-writing of history by DDI as it took every point it could think of, no matter how meritorious, in order to save its own skin. Whilst it is true that a valid Delivery Notice was not given under the Completion Guarantee, that was not what Jason Moring thought he had achieved when he was in cahoots with Ms Crone and Mr. Krech at the time.

232. Mr. Moring passed his letter by Ingenious before it was sent out and subsequently some changes were made to the final draft to tighten it up which was sent out on 16 July 2018. In particular the letter now ended as follows:

> *"It is our position that EFB's obligations as completion guarantor are ongoing and EFB has not met its obligations under the Completion Guarantee for the following reasons:*
>
> *(a) Completion and delivery of the film was not effected by EFB as they failed to issue Sales agent a delivery notice by the Delivery Date;*

> *(b) Sales Agent has never delivered a Notice of Acceptance for the delivered film."*
>
> *(c) Even if the film was delivered, many key bonded Delivery Materials were still missing as of the Delivery Date and the film did not comply with the bonded specifications, in particular it was not of commercial acceptable quality due to the low resolution issues; Delivery Item 2 DCP was missing; Delivery Item 3(i) Digital Photographs were missing; Delivery Item 4(ii) Time Coded Feature Dialogue and Spotted List … were missing; Delivery Item 4(vii) Billing Block was missing; Delivery Item 4(x) Music Cue Sheet was missing; Delivery Item 4(xiii) Producers' Errors and Omissions Insurance was missing."*

233. On 12 July 2018, the distributor, Vertical Distribution, sent a chasing letter to Ron and Jason Moring of DDI referring to its termination of its distribution agreement with DDI by reason of the failure to issue a delivery notice by 30 May 2017, and repeating its demand for repayment of that part of the guarantee which it had paid.

234. On 25 July 2018 Sheppard Mullin, attorneys on behalf of Active, finally sent a letter to EFB and BDJ demanding the return of Active's investment of $2.4m. In that letter they asserted that "… *the Guarantor failed to assume control of the completion process and to provide funds to ensure this. Instead it procured or participated in arrangements with third parties, <u>without Active Media's knowledge</u>, to have others pay for that effort and to complete the film <u>after</u> the [long-stop] Delivery Date on a timetable that was not in the financial interests of the beneficiaries, including Active*…" (emphasis added).

235. EFB responded to this letter on 27 July 2018. It reiterated its position that the Film was completed and delivered in accordance with the Completion Guarantee and that DDI confirmed receipt of the Film in its letter of 30 August 2017. No Objection Notice was received from DDI and any notice sent on 4 December 2017 was in any event out of time. EFB sent a letter in similar terms to Active on 1 August 2018. This was certainly consistent with the way in which EFB, DDI and LRP had all behaved at the time.

236. Sheppard Mullin responded on behalf of Active on 2 August 2018. It rejected EFB's explanation and said that EFB knew by May-July 2017 that the reason that the Film was incomplete was because it was significantly over budget and that the Film could not be completed without the significant cash injection that the Completion Guarantee required.

237. By 7 August 2018 the gross receipts for the Film were extremely disappointing. On that date, Nina Crone drafted a response to DDI's letter of complaint which she did not send. In it she stated that the Film was completed and delivered; that DDI accepted delivery by sending its Delivery Acceptance; and that DDI at no stage sent an Objection Notice in which it specified the bonded items which were missing or not accepted by it.

238. On 8 August 2018 Nina Crone emailed Dan Krech, requesting him to confirm that certain deliverables were made to DDI and the dates when they were delivered, as well as confirmation that all of the asterisked elements in the delivery schedule had been delivered. In a separate email she asked that the delivery dates given should be the dates when the various materials were delivered for the first time, not the details of any follow up or corrected or changed items. Dan Krech said that everything had been delivered and he would get his assistant Viktoria to send her the details.

239. Viktoria Hynynen of Awesometown duly replied on 9 August 2018, giving various delivery dates for the relevant materials between 30 August 2017 and 8 August 2018. In particular, she said that the DCP formats were sent in June 2018 because the original DCP sent in September did not pass the QC. 8 August 2018 was said to be the date when the final paper material, an E&O insurance policy, was finally provided without music exclusions. This email confirms that the Delivery Materials were categorically not delivered by the Delivery Date.

240. Indeed, quality control issues persisted even after that date, with purchasers complaining to DDI and requiring fixes well into September 2018.

241. In her draft letter to Active of 13 August 2018 in which she responds to its complaints, Ms Crone stated:

> *"After the completion and delivery, we were informed that the parties decided to enlarge the budget to make some additional work on the film. Even if we were off risk we were prepared to assist and we introduced the Producer to a Danish bridge loan financier."*

242. This is, presumably, the beginning of the enhanced film argument.

243. On 17 August 2018 EFB responded to Active's letter of complaint. It reiterated that DDI accepted the film and did not issue any notice of objection. However, it also stated "*We are not clear why you think the sales agent's letter of 30 August 2017 was backdated but even if it was and the 30 day period commenced … on 21 September 2017 that period has long since expired by 4 December 2017" and so DDI is deemed to have accepted the Film*."

244. Of course, this was disingenuous: EFB – and Ms Crone in particular - knew full well that the Sales Agent's letter of 30 August 2017 was backdated by 3 weeks.

245. On the same date EFB also responded to DDI's letter setting out its position. EFB again asserted that DDI had sent its Acceptance Letter accepting delivery of the materials and in any event it did not issue an Objection Notice within 30 days, meaning that it accepted the materials. In addition, EFB stated:

> *"We should add that it is our understanding that late last year or early this the producers made enhancements to the film and we did introduce the producers to the Danish [finance] company…"*

This suggests that the decision to make some enhancements to the film occurred much later, once further funds were forthcoming for the production and that the delay beyond 28 August 2017 was not caused by an earlier decision to produce an enhanced film.

246. The Film was eventually sold to the US distributor, Screen Media, and was theatrically released in the autumn of 2018 in various territories. By December 2018, the receipts from distributors totalled only some USD 1.77 million.[1] The investors then negotiated the terms of a CAMA. This was done largely at the urging of Mr. Robb Klein of Sheppard Mullin, Active's US attorney. Mr Klein's amendments of the draft CAMA involved the deletion of the Guarantor and EFB as parties to it.

247. Although for a time EFB had been on the circulation list for these negotiations, it subsequently ceased to be involved. In particular, by 30 November 2018, EFB had ceased to be involved when, following discussions between various parties including Active, a new proposed waterfall was produced, which deleted the Guarantor entirely.

248. This then led on 4 December 2018 to interim distributions being made to DDI (as the Sales Agent), Ingenious and others from the Film's receipts.

249. Finally after disappointing recoveries for Active under the waterfall agreement, on 21 March 2019 it issued these proceedings against the Guarantor Defendants.

Is Active entitled to reimbursement under clause 2.1(b) of the Completion Guarantee?

250. In my judgment, but for the Guarantor Defendants' arguments of election, waiver and estoppel, Active would have been entitled to reimbursement under clause 2.1(b) of the Completion Guarantee.

251. The short point is this. The Delivery Notice was given and received on 21 September 2017 and it stated that the Film and the associated "Delivery Materials" as outlined in the Delivery Schedule and bonded by EFB under the CGA "are now available". I do not consider that this was true even on 21 September 2017; but in any event I find as a fact that there was no tender of delivery to DDI of the bonded (asterisked) materials in Schedule 3 of the Completion Guarantee by the end of the extended Delivery Date under clause 1.10(b) (28 August 2017). Issuing a Delivery Notice after that date and back-dating it cannot alter that simple fact.

252. In fact, as Viktoria Hynynen of Awesometown confirmed at the time on 9 August 2018, with Mr. Krech's approval, the (asterisked) bonded materials were only delivered at various times between 30 August 2017 and 8 August 2018. Mr. Cullen QC submits that the Court cannot safely draw any conclusion from this email because it was prepared after Active had threatened litigation and Awesometown had every reason to give an account which would encourage the Guarantor to pay Active since that would take the heat off Awesometown. I reject that submission in light of the contemporaneous correspondence referred to above which supports the suggestion that there was no delivery of the bonded materials until much later, and consider that this email is reliable contemporaneous documentary material which is strongly supportive of Active's case.

[1] This figure does not take into account tax credits which will have been received and used to pay off most of the Ingenious financing.

253. I find as a fact that Awesometown/LRP was in fact keen not to call upon the Guarantee and to lose control of the Film; and they were supported in that approach by EFB (who did not want the guarantee to be called upon) and DDI (who was presumably keen to exploit the film as soon as possible in order to benefit itself financially) .

254. I also find as a fact in the light of the foregoing that nor was the Film of commercially acceptable technical quality for release in cinemas as at that date, not least because (i) Rainmaker had not even supplied a first pass of the Film to LRP, having downed-tools on 1 September and not having resumed work thereafter; and (ii) Rainmaker had refused to release the DPX files (a topic to which I turn next in the chronology). Indeed, even as late as 29 November 2017, a further version of the Film which was sent to the third-party quality control service provider, Capsule Media, was clearly also not in a completed form for cinematic release and Capsule Media even wondered if they had been sent the wrong version. As late as December 2017, DDI agreed with Capsule Media on this point.

255. I do not accept Mr. Cullen QC's submission that this point is not a matter for the court to determine without expert evidence and that it would be difficult at this juncture to recreate the state of development of the Film at the different points in time throughout 2017 and 2018. The contemporaneous documents afford indisputable evidence, and I find as a fact in the light of it, that the Film was not of commercially acceptable technical quality for release in cinemas until around mid-2018.

256. Indeed, the conclusion that (as LRP, EFB and DDI all knew) there had in truth been no completion and delivery of the Film is underscored by the fact that at one stage - as late as 17 October 2017 - Dan Krech emailed Nina Crone to say:

> *"Unfortunately we are in the position that we must turn to the bond company to help us complete the film."*

257. Had there been genuine completion and delivery of the film by 31 August as alleged, there would have been no basis for LRP seeking to turn to the bond company to help it to complete the Film: the Guarantor Defendants would be "off the hook". Dan Krech's email to Nina Crone dated 14 November 2017 is to like effect.

258. Moreover, DDI belatedly confessed to the fact that there had been no completion and delivery of the Film under the terms of the Completion Guarantee, once it became apparent to Mr. Jason Moring that DDI's neck was on the line for wrongfully issuing an acceptance notice.

Mr. Quinn's knowledge

259. However, I find as a fact that Mr. Quinn himself knew on 17 July 2017 that LRP was not allowed any further extensions beyond 30 August 2017 without triggering the payout under the Completion Guarantee, as he had been told that by Mr. Trantina and in so far as he sought to suggest to the contrary in his oral evidence, I reject his evidence. Mr. Quinn accepted in cross examination that he would have been "*very keen to know*" whether the Film had been delivered by 30 August and I am sure that he did know that it had not been. I also find as a fact that Mr. Quinn agreed to the Film's release moving into 2018 and that he was unconcerned about slippages in the

(30 August 2017) delivery timetable. He knew, certainly by November 2017, that the Film had not been completed and delivered by 30/31 August 2017. I reject his evidence that he assumed the Film had been completed at around the end of August 2017. His desire was to exploit the Film in 2018 and accordingly he decided not to call upon the Completion Guarantee, despite knowing that Active could do so. Instead of calling on the guarantee Active chose to support the exploitation of the Film in 2018 and to ask for compensation by way of Active being moved up the waterfall and a payment by reason of its capital being tied up for an extra year.

260. In November 2017 Mr. Quinn knew that Active's auditors were "*questioning the contract as to when delivery was expected*" and "*why the bond company didn't step in on the picture*". Yet even then, when he had the chance, Mr. Quinn did not demand that the Guarantor Defendants should step in or pay Active the Payment Sum under clause 2.1(b) the Completion Guarantee. Indeed, Mr. Quinn accepted in cross examination that nobody within Active so demanded. Instead Active decided not to call in the bond but rather, to use Mr. Quinn's memorable phrase, "*to make lemonade out of lemons*". I find as a fact, therefore, that at this point, if not before, Mr. Quinn himself knew (and Active knew) that the Film had not been completed and delivered and yet he (and it) continued to support the steps taken thereafter to exploit the Film in 2018 (together with a request for interest payments for 2018 and a higher place in the waterfall), rather than rejecting delivery and insisting that it be paid the Payment Sum under the Completion Guarantee. I reject his explanation in paragraph 51 of his witness statement as to why he did not at the very least reserve Active's rights under the Completion Guarantee at this time. I also reject his evidence in paragraph 57 of his witness statement where he suggests that he was shocked when in 2018 he saw the Delivery Notice and the Delivery Acceptance documents.

261. It follows that by this date at the latest – November 2017 - Active had a choice: either to call upon the Guarantor Defendants to comply with clause 2.1 of the Completion Guarantee or to continue to press for the Film to be completed, delivered and exploited in 2018. It chose the latter course.

M3 acted as Active's agent; should its knowledge be imputed to Active?

262. In my judgment, the contemporaneous documentary material discussed above is consistent with Ms Crone's understanding, which she repeatedly stated in her witness statement (see Crone 1, paragraph 27) and oral evidence, that M3 (particularly through Mr. Sears and Mr. Jason Moring) were acting as agent for Active in safeguarding its interests in relation to the Film. As described above, the M3 Deal Memo provided that M3 was to provide regular reports for Active on the "*financial aspects of the development of the slate of feature films approved by Active*". Thus, in an email dated 17 October 2016 Mr. Emerson of M3 expressly referred to M3 having "*a fiduciary responsibility to [Active] to safeguard their investment*". Active – through Mr. Quinn – knew that M3 was acting in this role.

263. Furthermore, Active was aware that LRP was told to direct its contact through M3 and Active allowed that to happen. Thus, on 18 August 2017 Mike Sears sent Dan Krech an email, cc Ron Moring, in which he complained about Mr. Krech sending emails directly to Active. He stated:

> *"Jason and I have tried to make clear that there the relationship [sic] with Active is an ongoing conversation with M3 and Active and if you would simply reach out to us first, we can eliminate confusion and make sure requests are getting to the correct people, that we are not duplicating discussion that have already been had and most importantly, not confusing the client."*

264. In another email of the same date, Mike Sears said this to Dan Krech regarding payment of Active's invoices:

> *"I have asked repeatedly that you not reach out to Active directly without speaking with Jason and I first. I have been on calls with Gary and the rest of the Active team repeatedly this last week and these emails will just confuse the issue."*

265. It is of course well established that where an agent has authority to receive communications on behalf of a principal, "*communication to the agent is communication to the principal*": *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 703 (Hoffmann LJ).

266. Moreover, even if M3 did not in fact pass everything to Active, that makes no difference, since imputation "*can occur even though it is clear beyond doubt that the principal was personally unaware of the relevant fact, and that therefore there has not been any communication by the agen*t": *Bowstead & Reynolds on Agency (22nd Edn)*, 8-210. This will apply equally where a person in the position of agent is also acting for another party in relation to the transaction (as I find that Jason Moring was, since he acted both for DDI and for M3 without distinguishing his roles): "*the knowledge of an agent who is acting for more than one party to the same transaction is not generally compartmentalised, and is likely to be imputed to both (or more) principals*": *Bowstead & Reynolds*, 8-211.

267. Mr. Cullen QC accordingly submits in paragraph 28 of his closing submissions, and I accept in the light of the documentary evidence discussed above, that the evidence shows that M3 represented Active's interests at large, and certainly for the purpose of giving and receiving information on behalf of Active in respect of the progress (or lack thereof) of the Film. Indeed, in August 2017 Mr. Sears of M3 expressly told Mr. Krech (by email) that Active wanted all information about the Film channelled through M3. Mr. Quinn himself, in cross-examination, referred to Mr. Sears of M3 when in meetings with LRP, DDI and EFB as "*scouting the situation, giving us feedback*" before hastily adding "*but not as our agent*". I consider that M3 was indeed acting as Active's agent and, moreover, I infer that M3 did in fact pass all the key details to Active about the completion and delivery of the Film, either orally (the documentary evidence discussed above shows that Mr Sears in particular was in constant contact with Mr. Quinn throughout the relevant events and at all critical moments); or in the emails with M3 which were admittedly destroyed by Mr. Quinn; or in emails which have not been disclosed because Mr. Steinbeck was not made a custodian (I address the latter two points below).

268. In particular, I find on the evidence that M3 (through Mr. Sears and Mr. Jason Moring) was acting as Active's agent both in terms of:

(1) the receipt by it of information (from LRP, DDI and EFB) regarding:

(a) the extension/variation of the delivery date;

(b) the deemed acceptance by DDI and deemed delivery by EFB of the completed and delivered Film;

(c) the decision not to call upon the bond but instead to seek to recover Active's investment by interest payments for 2018 on the sum advanced, together with sales from exploiting the Film in 2018, after funding had been obtained from Telefilm and/or by way of bridging finance; and

(2) the communication by it to LRP, EFB and DDI of Active's position in relation to each of those matters.

269. Thus, M3's knowledge in respect of these matters is the knowledge of Active. I find that Active knew through M3 in particular therefore (I find that Mr. Quinn likely knew each of these matters personally in any event):

(1) that, by June 2017, the Film's release was to be delayed to 2018;

(2) that the Film had not been delivered and completed in accordance with the Completion Guarantee;

(3) that all parties were working instead towards a release of the Film for the 2018 holiday season, with it being completed and delivered around May/June 2018; and

(4) that by November 2017 (if not before) Active had a choice between calling in the bond and pressing ahead with the completion and delivery of the Film in 2018 and that it chose the latter.

The destruction of documentary evidence by Mr. Quinn

270. It is appropriate at this stage to refer to the destruction of documentary evidence by Mr. Quinn, Active's only witness who gave evidence at trial. I emphasise here that my findings below are based upon the evidence given by Mr. Quinn when cross-examined about this topic and the view that I formed as to his candour in answering those questions, as well as upon the documentary record.

Events of 2-3 December 2020

271. It is important at the outset to make clear that Mr. Quinn fully understood Active's disclosure obligations. In cross – examination he said this in an exchange with Mr. Cullen QC (day 1/p. 89):

"Q. Are you aware of the disclosure obligations that arise in English court proceedings?

A. I think I am overall ––not as in depth as you are, obviously, but I think I understand the premise.

> Q. You understand in particular the obligation to preserve
>
> documents?
>
> A. Yes, I do.
>
> Q. And you understand also the obligation to act honestly in the process of giving disclosure?
>
> A. I do.
>
> Q. You were aware that those were obligations you were under?
>
> A. Yes, sir .
>
> Q. Did Mishcon de Reya inform you of those?
>
> A. Excuse me? What did you say?
>
> Q. Did Mishcon de Reya, Active's solicitors , inform you of those obligations?
>
> A. Yes, they did."

272. The trial commenced on 7 December 2020, with the Court's reading day on Thursday 3 December. By an emailed letter dated 2 December 2020, the Guarantor Defendants, through their solicitors, Clintons, drew Mishcon's attention to two emails in the trial bundle sent by Jason Moring to Mr Quinn's *personal* Gmail account, and disclosed by DDI (but not by Active). Clintons stated "*It goes without saying that Mr. Quinn's additional email address should have been revealed by your client long ago, searched, and all disclosable documents disclosed. Please confirm that this has not occurred*."

273. The emails are at {D5/85} and {D5/180}. {D5/85} is an email dated 6 June 2018 in which Jason Moring lines up a telephone discussion with Mr. Quinn, M3 and Ron Moring to discuss ongoing delivery with Awesometown. {D5/180} is an email sent by Jason Moring to M3, Ron Moring, Terry Trantina and Mr. Quinn which directly concerns late delivery of the Film and EFB's responsibility for it.

274. In his second witness statement which he signed on Sunday 6 December 2020, Mr. Quinn states that Mishcon informed him of this fact by email timed at 2.20pm (EST) on 3 December. Mishcon asked him to confirm whether he had ever used his Gmail account for business purposes including in his communications with Jason Moring and Mike Sears in relation to the Film. He does not say what his answer was to that question but he says that he was puzzled because he could not recall ever having received (or sent) emails from Mr. Moring to his Gmail account, and he did not know why Mr. Moring would have sent emails to his personal address. He asked his personal assistant if she had given Mr. Moring his Gmail address but she did not recall ever having done so.

275. He says that he then called Mr. Sears later on 3 December to ask him whether he had ever sent emails to his Gmail account and whether he had given Mr. Moring Mr. Quinn's personal email address. Mr. Sears, whom it is to be noted was very willing to assist Mr. Quinn, said that he had sent emails to both Mr. Quinn's personal email account and his business email account because his Gmail address pops up as an autofill address on Mr. Sears' computer.

276. After that conversation, Mr. Quinn said he became very concerned because he knew that he had "previously confirmed" that he did not use his Gmail account for business purposes. That is a reference to a conversation which he had with Mishcon on 15 October 2020 to which I refer below. He says that he believed, incorrectly, that he may have confirmed this in the witness statement which he had given in the case (he had not).

277. He then stated in paragraph 8 of his second witness statement that "*without thinking through things and in a state of panic*" he went into his Gmail account and typed "Mike Sears" into the Gmail search bar. He says that a list of around 10-20 emails came up, some of which he says he could see were unread. Without opening any of them, he selected and deleted them all. He then went into the trash folder and deliberately deleted its contents. He says that because he did not read the emails, he could not see whether any of them related to the Film. He cannot be sure how many emails he deleted. Mishcon state in their letter dated 5 December 2020 to Clintons (in response to Clintons' letter of 2 December) that he did this at around 6.30pm (EST) on 3 December.

278. Mr. Quinn then says that having thought about his actions overnight he realised the seriousness of what he had done and he told Mishcon about it in a call at 9am the following day. He says that Active's IT department was unable to recover the deleted files but no attempt was made to engage any independent forensic recovery experts to retrieve the deleted files, despite the seriousness of this conduct. He also says that at his request Mr. Sears searched *his* email accounts and certain back up discs but he had only been able to "recover" three email chains which were sent to Mr. Quinn's email address but which were not relevant. It appears that Mr. Sears was saying that he had also deleted his emails.

279. If matters ended there, Mr. Quinn might perhaps have been forgiven for his actions, serious as they are. However, matters do not end there.

The earlier events of 15 October 2020

280. Towards the end of the trial, Active disclosed through Counsel (acting properly) that Mr Quinn had, in fact, been informed about his use of his personal Gmail account for the Film some 7 weeks earlier on *15 October 2020* when Mishcon itself drew to his attention one of the 2 emails from Mr Moring sent to his personal account, {D5/85}. That is why Mr. Quinn obliquely referred in paragraph 3 of his second witness statement to "*previous correspondence*" with Mishcon in which he had confirmed to them that he did not use his Gmail account for business. But it is regrettable that what he did <u>not</u> say in that second witness statement was that that correspondence came about because Mishcon had a copy of {D5/85} and had specifically asked him why that email would have been sent to his personal Gmail address. In response, Mr. Quinn apparently said that he did not use the address for business and Mishcon simply

left it there without asking Mr. Quinn to check his personal Gmail account; nor, apparently, did they search the disclosed documents to see if there were other emails sent to Mr. Quinn's Gmail address as they ought to have done.

281. I say "apparently" because this correspondence between Active and Mishcon has not been disclosed by Active. Regardless of issues of privilege, if Mr. Quinn and Active wanted to avoid the court drawing very serious inferences against Active, as a result of these events Active was required to disclose it.

282. Nor does Mr. Quinn say whether he then looked through his emails in his Gmail account as anyone in his situation would surely do. Mr. Quinn says in his second witness statement that he has 55,000 unread emails in his Gmail account. If that is so, how he could possibly be sure that there were no other emails relevant to this dispute in that account is impossible to fathom. Despite this, he appears to suggest that he did not in fact look to see if there were any other relevant emails in his Gmail account on or around 15 October 2020. In fact, I consider that the fact that he *did* do so on 2nd December 2020 when he was alerted to {D5/85} and {D5/180} makes it likely that he also would have done so on 15 October 2020 when he was alerted to {D5/85} and he would have seen at that stage that there were emails concerning the Film. Indeed, I find it difficult to accept Mr. Quinn's evidence that he would not have read emails from Mr. Sears at the time that they were sent to him, when, as he explained in cross-examination, he received pop up notifications on his mobile phone. It is also surprising that "*on the basis of the confirmation provided by Mr. Quinn [Mishcon] did not consider it necessary or proportionate to collect and search the contents of Mr. Quinn's Gmail account*", according to Ms Bridge, the partner at Mishcon who dealt with Mr. Quinn (Bridge 2, paragraph 8, made on 11 December 2020). As officers of the Court Mishcon should, at the very least, have disclosed that email and asked Mr. Quinn to check the account and ensure that his recollection was correct.

283. Furthermore, as I put to Mr. Quinn during the course of his evidence on this topic, what about the emails from *Jason Moring* which we know were sent to Mr. Quinn's personal Gmail account? In cross-examination he said that he did not delete them, and yet when Mishcon searched his personal account they were no longer there. He speculated that these might have been deleted when he searched for and deleted emails which had Mike Sears as a sender or recipient. However, he also said in cross-examination that he could not explain why he did not search for Jason Moring emails at all in his Gmail, which is extraordinary in circumstances where his attention was drawn to a Jason Moring email on 15 October and to another one on 2 December.

284. I agree with Mr. Cullen QC that the only reasonable conclusion which follows from this disclosure is that Mr Quinn waited to destroy the electronic documents in his personal Gmail account *until he knew that the Guarantor Defendants had become aware of them*, and that this supports the inference that the destruction was calculated. It is unknown how many documents were destroyed in this way by Mr. Quinn, and I do not accept at face value his vague assertion that only 10-20 such documents were destroyed. I consider it implausible that Mr. Quinn did not look at or read the destroyed documents; I consider that he would have read them and had the documents been irrelevant there would have been no reason to destroy them.

285. Moreover, in his second statement he told the Court that, when he was asked by Mishcon on 2 December 2020 about this, he could not recall ever having sent or

received emails from Mr Moring to his Gmail account. Under cross-examination he told the Court that Mishcon's communication to him on 2 December 2020 came as a *"shock"* and *"took the wind out"* of him; and that *"I didn't know that I had them"*. This would appear to be untrue, because in fact he had known just 7 weeks earlier (if not before) that he had one of these two Jason Moring emails when Mishcon specifically drew it to his attention, and he must surely have recalled such a "shocking" fact when Mishcon wrote to him about it again 7 weeks later.

286. As Mr. Cullen QC submits, it is likely to have been the case that what panicked Mr. Quinn was that Clintons, solicitors for the Guarantor Defendants, had *discovered* what he had known (but not disclosed) since at least 15 October 2020, namely that he had used his personal Gmail account for the sending of emails concerning the Film. It was no longer something known only to him (and Mishcon). He therefore double deleted the emails and with the trial upon the parties he must have known that it would be very difficult for the Guarantor Defendants to do much about it at that stage. Of course, had this occurred back in October, it would have been possible for the Guarantor Defendants to seek to interrogate the hard drive of Mr. Quinn's computer and take other measures to seek to retrieve the documents.

287. It is not an answer to this point for Active to say (as it does in its written closing, paragraph 97(iii)) that "*there was nothing whatsoever to stop Mr. Quinn deleting emails that he did not want to produce and remaining quiet about it. The Court and the Defendant would have been none the wiser. The absence of the two [emails] would have been readily explicable on the basis that these must have been deleted at some earlier date*." Once Clintons had spotted the use of his personal email address for documents concerning the Film, the cat was out of the bag. They demanded a full response. Until that point Mr. Quinn appears to have assumed that he had successfully avoided anybody looking at the documents on his personal Gmail account concerning the Film: if anyone spotted {D5/85} he could say that that was a one-off email wrongly sent to his personal account. It is true that he *might* have adopted the dishonest course of pretending that he had deleted them at an earlier stage (whether that lie would have successfully avoided detection is unknown), but instead he chose to adopt the dishonest course of double-deleting relevant emails and coming up with the implausible story that he was panicked into doing so in the mistaken belief that he had previously made a witness statement ("**Quinn 1**") saying that he did not use his Gmail account for business purposes.

288. Moreover, had Mr. Quinn or Mishcon told Clintons back in October 2020 that {D5/85} had been found in Mr. Quinn's Gmail inbox, that would have given Clintons time to seek specific disclosure from Active; to conduct a forensic analysis of Mr. Quinn's computer; and to seek disclosure from in particular Mr. Sears, Mr. Jason Moring and Mr Steinbeck (whom Mr. Quinn said in evidence he met regularly during the relevant period and that "*we had conversations throughout and throughout*"). Mr. Quinn was "a primary contact" of Mr. Sears according to Mr. Quinn's own evidence. Indeed, I find that he was *the* primary contact. It was incumbent upon Active then to call Mr. Sears (with whom it had an ongoing professional and friendly relationship) and Mr. Steinbeck to give evidence, if it did not wish the Court to draw adverse inferences from their absence as witnesses. However, because Mr. Quinn (and Mishcon) did not reveal to Clintons in October 2020 or at all the discovery of {D5/85}and the fact that Mr. Quinn had a personal Gmail account to which emails

concerning the Film were sent, Active avoided all of these consequences. I emphasise that I do not of course suggest that Mishcon, rather than Mr. Quinn, did so deliberately.

289. Moreover, it cannot be true that Mr. Quinn was concerned about having said something in Quinn 1 about his personal email account not being used for business purposes, and that deletion would allow him to mislead everyone into believing he had given proper disclosure (even if that were somehow a good excuse). He had known about at least one email being sent to his personal account on 15 October 2020, and he finalised Quinn 1 on 29 October 2020. So, if Quinn 1 had said that his personal account did not receive work emails, he would already have known at that time that that was not truthful.

290. Furthermore, as foreshadowed above, no written exchanges between Mr Quinn, Mishcon and Mr Sears have been disclosed by Active, even though Mr Quinn deployed those communications in his second witness statement in a bid to excuse his behaviour. In view of the seriousness of the situation they ought to have been. There have been two supporting statements from Ms Bridge (the second the day after the trial concluded at the Court's prompting) but none from Mr Sears (who it appears has *also* deleted the key emails). The Court only has brief hearsay evidence about Mr Sears' searches for copies of the emails, from the very person who destroyed them. That is as Mr. Cullen QC rightly states, most unsatisfactory.

291. Despite Mishcon knowing from 15 October 2020 that Mr Quinn had at least one disclosable email in his personal account, (a) it apparently took Mr Quinn's word for it (from his memory alone) that there was only one such email; (b) it did not arrange any searches at all, even though the Guarantor Defendants were already concerned about its limited disclosure (and had obtained an order for further disclosure just days earlier, on 9 October 2020); (c) it did not ensure that Active disclosed the one email that it knew existed in Mr Quinn's control, as it should have done; (d) it did not search the documents on its disclosure platform for Mr Quinn's Gmail address, which would have revealed the second email from Mr Moring and raised doubts about Mr. Quinn's assurance; and (e) no efforts appear to have been made to retrieve relevant documents from Mr. Sears. This is all highly regrettable.

292. Given the seriousness of these events, once Clintons alerted Active and Mishcon to the existence of the two emails, Active should have made every possible effort to recover the emails and Mishcon should have done its best to ensure that it did so. But all that has occurred is that there has apparently been (a) a fruitless search of the *non-deleted* emails by Mishcon; (b) informal enquiries of Google by Active's own IT staff; and (c) informal enquiries of Mr Sears who (according to Mr Quinn's hearsay evidence) had also apparently deleted the emails, with no reason given. Mr. Quinn did not ask Mr. Sears to see if he could retrieve his deleted emails. This is wholly insufficient. Furthermore, the second and third of these steps seem to have been conducted by Mr Quinn personally rather than by Mishcon, as ought to have occurred in all the circumstances.

293. The unsatisfactory circumstances in which these documents came to be destroyed are compounded by the following facts:

(1) The Court has heard no evidence from anyone directly involved in the dealings between DDI, M3 and Active, other than Mr. Quinn himself. It heard no evidence from Ron and Jason Moring, despite Mr. Moring appearing before the Court throughout the trial and even making very brief submissions. I recognise that in the case of Jason and Ron Moring that may have been because they were seeking to avoid the spotlight falling upon their questionable behaviour throughout this dispute.

(2) However, the Court also heard no evidence from Mike Sears or Michael Emerson of M3. This is despite the fact that, as Mr. Quinn accepted in cross examination, Active still has a professional relationship with M3 and he is clearly on friendly terms with Mike Sears. Again, if they had helpful evidence to give on behalf of Active, it seems there was no reason why they should not have been called, and particularly Mr. Sears whom Active knew to be intimately involved in the critical events with which this action is concerned.

(3) Furthermore, in view of Mr. Quinn's deletion of emails, as I have explained above, it was incumbent upon Active to call Mr. Sears and seek disclosure of his documents if it did not wish adverse inferences to be drawn by the Court. Mr. Sears played an absolutely central role in the relevant events for Active; Active knew that it was being alleged that he acted as its Agent; and Active knew that an estoppel/waiver/election case ("the estoppel case") was being advanced against it, which meant that Active was required to be open and transparent as to the state of its knowledge as to the delays in completion and delivery of the Film, which would no doubt be laid bare by the knowledge of, and internal communications between, Mr. Quinn, Mr. Sears, Mr. Moring and Mr Steinbeck. But it chose to remain silent about these matters, not to call any of these witnesses (apart from Mr. Quinn) to meet the estoppel case, and to destroy relevant emails.

(4) This is particularly significant in circumstances where, as I have explained above, there appear to be critical gaps in Active's disclosed documents at key moments in the chronology of events, in particular in relation to communications between Mr. Quinn, Gary Steinbeck, Mike Sears and Jason Moring.

(5) In paragraphs 85-89 of her witness statement on behalf of Active dated 2 October 2020, Ms Eleanor Dixie of Mishcon denied that Active had a right to possession or to inspect or take copies of documents held by Mr. Sears or M3 for the purposes of disclosure. This was, no doubt, on Active's instructions. However, contrary to the impression thereby given, it is apparent from Mr. Quinn's second witness statement that Mr. Sears was only a phone call away and very willing to assist Active. He was asked to check his emails by Mr. Quinn (which he had sent to Mr. Quinn's personal account) and he did so immediately. There was no reason why Mr. Quinn could not have asked Mr. Sears to send Active relevant emails sent to and from him from his business account but it chose not to do so. Had it done so, there is every reason to believe that Mr. Sears would have complied with that request.

(6) Active vigorously resisted Mr. Gary Steinbeck being added as a custodian for the purposes of its disclosure, informing the Court that he was unlikely to have sent or received emails that were not copied to other custodians. His email account was therefore not searched. Active also chose not to call him as a

witness, despite Mr. Quinn accepting in cross-examination that he was in regular contact with M3 regarding issues around funding and payment, as the email referred to in paragraph 101 above suggests. In consequence any exchanges between M3 and Mr. Steinbeck concerning matters such as Active's knowledge of delays in the delivery of the Film have not been disclosed.

(7) Indeed, in cross examination Mr. Quinn revealed that Mike Sears had separately been "*reaching out to finance and to legal*". "Finance" was Gary Steinbeck and his team; "Legal" was Terry Trantina and his team. Despite this, and despite the fact that, as can be seen from the foregoing, Mr. Trantina was centrally involved in Active's decision-making concerning what it should do about the delays in the production of the Film and its rights under the Completion Guarantee, Active chose not to call him as a witness. He could have given evidence; he signed Active's disclosure statements and was present (virtually) throughout the trial. Of course, some issues of privilege would have arisen with Mr. Trantina giving evidence; but they ought not to have prevented him from giving evidence on certain critical points, particularly if Active wished to dispel any adverse inferences which the Court was likely to draw from the destruction of documents and the failure to call key witnesses.

What are the consequences of Mr. Quinn's deliberate destruction of the documents and Active's failure to call relevant witnesses?

294. I find that the destruction of the documents was deliberate, and accordingly the Court needs next to consider the consequences of Mr. Quinn's deliberate destruction of the documents and Active's failure to call relevant witnesses.

295. The Guarantor Defendants say that had the scale of Active's manipulation of the Court process come to light earlier, the Guarantor Defendants would have applied to strike out the claim. They argue that a litigant who has pursued proceedings with the object of preventing a fair trial *"has forfeited his right to take part in a trial"*, citing *Hollander on Documentary Evidence*, (13th Ed), at 11-15 and 11-16. As it happens, the misconduct was only laid bare moments from the end of the trial, after the Court had heard the evidence and closing submissions and so the Guarantor Defendants suggest that the Court proceeds to a substantive determination of the dispute but draws adverse inferences against Active.

296. That means, they say, that the Court should draw the strongest possible inferences about the contents of the destroyed evidence. As stated in *The Ophelia* [1916] 2 AC 206, PC at 229-230, *"the strongest possible presumption arises that if it had been produced [the documents] would have told against [the destroyer]"*. Deliberate destruction, creating an evidential void, is *"wholly inexcusable"*; the Court should refuse to give the destroyer the benefit of any doubt or draw any inference in its favour: *Hollander on Documentary Evidence* (13th ed.), 11-23 to 11-27.

297. In his impressive closing submissions, Mr. Cullen QC argues that the justification for denying Active the benefit of the doubt has special force in this case, given that (1) Active's case is itself based on the existence of gaps in the documentation (namely the absence of documents in which Active approved of the delayed delivery); (2) the destroyed documents should have been disclosed earlier, and were not disclosed (apparently because Active misled its solicitors about the use of Mr Quinn's Gmail

account, despite having been presented with an email on 15 October 2020 proving that Mr Moring had emailed it); (3) Mr Quinn was aware of Active's duty to preserve documents; (4) the destruction was cynical, deliberate and on the eve of trial, and only when Active learned that the Guarantor Defendants were aware of the emails; and (5) Active was not forthcoming about the misconduct, even when it gave two witness statements (Quinn 2 and Bridge 1) purporting to come clean; it concealed the detail until the day after the trial finished (in Bridge 2).

298. He invites the Court to draw the following inferences, namely that the deleted documents included (a) emails in which Mr Quinn agreed to the manner in which delivery was given in August and September 2017; (b) emails in which Mr Quinn endorsed DDI's acceptance of the Film, in full knowledge that this would discharge the Guarantor Defendants' liability; and (c) emails in which Active communicated with M3, gave instructions to M3, and treated M3 as its agent in all respects. He submits that those inferences are consistent with the totality of the non-destroyed evidence.

Legal principles

Active's failure to call relevant witnesses

299. In *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R P324, Brooke LJ set out the principles as follows:

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

300. However, in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882, Sir Ernest Ryder SPT cautioned that:

> *"Wisniewski is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. "the court is <u>entitled</u> [emphasis added] to draw adverse inferences"*

301. In paragraph 154 of her judgment in *Magdeev v Tsvetkov* [2020]EWHC 887, Cockerill J further explained that:

(i) This evidential "rule" is a fairly narrow one. As the Judge had noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken;

ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:

a) the overriding objective; and

b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial.

Deliberate destruction of documents

302. This is, however, not merely a case about inferences to be drawn from the absence of relevant witnesses. It is a case where the Claimant is guilty of the deliberate destruction of relevant documents, knowing that it was under a legal duty at the time to preserve them.

303. The starting point in a case of deliberate destruction of documents is that if a fair trial of the action cannot then take place, the destroying party's case should be struck out. And of course, the later that the destruction take place, the worse the position; it may make a fair trial of the action less likely. The very late destruction of the documents by Mr. Quinn in this case meant that the Guarantor Defendants had little or no time properly to investigate the position.

304. As the Vice-Chancellor stated in *Douglas v Hello!* [2003] EWHC 55 at [90]:

> *"The issues are whether the rules have been transgressed, if so whether a fair trial is achievable and if not what to do about it. See Logicrose Ltd v Southend United Football Club Ltd (The Times 5th March 1988) and Arrow Nominees Inc v Blackledge [2001] BCC 591 para 54 where Chadwick LJ, with whom Roch LJ agreed, said: "I adopt, as a general principle, the observations of Mr. Justice Millett in Logicrose Ltd v Southend United football Club Limited (The Times, 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts to contempt for or defiance of the court – if that object is ultimately secured by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the*

> *trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."*

305. As is stated in *Hollander, Documentary Evidence* (13th Edn), there are only a limited number of cases where applications have been made to strike out proceedings for concealment or destruction of documents. In *Logicrose v Southend United Football Club* [1988] 132 S.J. 1591, the responsible director of the claimants was alleged to have deliberately suppressed a crucial document and for a time successfully concealed its existence from the court. Millett J did not find the allegation proved, but said that if it had been, it might have given rise to a contempt sanction but should not lead to the action being struck out unless the failure rendered it impossible to conduct a fair trial.

306. In *Dadourian Group v Simms* [2009] EWCA Civ 169 Arden LJ stated at [233]:

> *" ...[A] litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial is [not] to be taken to have forfeited his right to a fair trial in every case. ...[if] the litigant's conduct ha[s] put the fairness of the trial in jeopardy ... the court's power to strike out the proceedings was not a penalty for disobedience with the rules."*

307. The Court must always consider, therefore, whether a fair trial is possible and to this end have regard to the defaulting party's ECHR art.6 rights of access to the Court, and whether the remedy of a strike out would be proportionate and fair in all the circumstances of the case (which is much less likely in a case where the trial has concluded and the Court is in a position to assess the effect of the destruction of the documents and/or failure to call relevant witnesses), or whether some other remedy will safeguard the position of the innocent party.

308. *Hollander* suggests in paragraph 11-16 that "*where the defaulting party has been less than candid about the destruction exercise, the court may consider it cannot be sure exactly how widespread the destruction has been, and what its effect will be, and thus may find it more difficult to reach a conclusion that a fair trial is still possible.*" I respectfully agree with that general sentiment but in a case where the trial has concluded the position is, as I explain above, somewhat different. Indeed, it is for this reason no doubt that as Hollander goes on to state: "*it would be a very rare case in*

which, at the end of a trial, it would be appropriate for a judge to strike out a case rather than dismiss it in a judgment on the merits in the usual way". I agree.

309. If a fair trial is still possible, or if (as here) the trial has concluded, the next question is how should the Court approach the issue of the deliberate destruction of documents and a deliberate void of evidence. I agree with the approach adopted in *Earles v Barclays Bank* [2009] EWHC 2500, which also deals with the failure to call relevant witnesses, where HHJ Simon Brown QC stated that:

> *"28… in this jurisdiction as in Australia, there is no duty to preserve documents prior to the commencement of proceedings: British American Tobacco Australia Services Limited v. Cowell [2002] V.S.C.A. 197, a decision approved in this country by Morritt V.C. in Douglas v. Hello [2003] EWHC 55 at [86] …*
>
> *29. After the commencement of proceedings the situation is radically different. In Woods v. Martins Bank Ltd [1959] 1 Q.B. 55 at 60, Salmon J. said "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court to make sure, as far as possible, that no relevant documents have been omitted from their client's list".*
>
> *30. In the case of documents not preserved after the commencement of proceedings then the defaulting party risk "adverse inferences" being drawn for such "spoliation": Infabricks Ltd v. Jaytex Ltd [1985] FSR 75.*
>
> *31. In cases where there is a deliberate void of evidence, such negativity can be used as a weapon in adversarial litigation to fill the evidential gap and so establish a positive case. In British Railways Board v. Herrington [1972] 1 AER 786, Lord Diplock stated:*
>
> > *"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."*

310. It follows that if there is no evidence on a particular point, the Court could rely on the inferences drawn from the destruction of documents or the failure to call relevant witnesses to provide evidence which is otherwise absent.

311. Indeed, in my judgment, the fact that in the present case both (i) documents have been deliberately destroyed and (ii) witnesses have not been called by the guilty party whose evidence would likely bear upon the (presumed) contents of the destroyed documents, takes this case a step further forward than in the case of drawing inferences from the mere absence of witnesses. Although it might rarely arise in practice (and it does not arise in this case as there is other material to support the adverse inferences to be drawn), I consider that the court is entitled in such a case, depending upon the particular facts, to draw adverse inferences as to (i) what the destroyed documents are likely to have shown on the issue on question, and (ii) the evidence that the witnesses are likely to have given on the issue in question but which was withheld, *without* the need for some other supporting evidence being adduced by the innocent party on that issue. The two factors combined make the case for the drawing of an adverse inference without other supporting evidence an extremely strong one, at least so far as establishing a defence to a claim is concerned.

Analysis

312. I consider that the Court should draw inferences adverse to Active from the combined effect of (a) the deliberate destruction of documents by Mr. Quinn immediately before the trial began (and on the Court's reading day); (b) the absence of documentation passing between Active, Mike Sears and Jason Moring, and (c) Active's failure (i) to call any of the M3 witnesses, and in particular Mr. Sears and Mr Jason Moring; (ii) to obtain and disclose the emails/documents of any of the M3 witnesses; (iii) to call Mr. Steinbeck or search his emails/documents; (iv) to call Mr. Trantina.

313. The inferences which I consider it is appropriate for the Court to draw are that the destroyed documents are likely to have shown, and/or the witnesses are likely to have said:

(1) That Active made clear to M3 (Mr. Sears and/or Mr. Moring) that it was content for M3 to act as its agent in dealing with LRP, EFB and DDI in all relevant respects, and in particular in receiving and passing on, on its behalf, all relevant information about the Film;

(2) That Mr. Quinn made clear to M3 (Mr. Sears and/or Mr. Moring) that he was content to agree to a delayed release of the Film into 2018 and M3 could deal with LRP and EFB on that basis;

(3) That Mr. Quinn knew by November 2017 (if not before) that the asterisked Delivery Materials had not in fact been delivered by 31 August 2017;

(4) That Mr. Quinn made clear to M3 (Mr. Sears and/or Mr. Moring) that he was content to agree to (or did not object to) the manner in which delivery was said to have been made to DDI by 31 August 2017 and to DDI's acceptance of the same and M3 could deal with LRP and EFB on that basis;

(5) That Active chose not to call on the bond after the date of 30 August passed, but rather supported the exploitation of the Film

into 2018 with additional funding from Telefilm and/or a bridging loan, and M3 could deal with LRP and EFB on that basis;

(6) That M3 did pass on to Active all material information about the completion and delivery of the Film in both 2017 and 2018.

314. I also consider that those inferences are consistent with, and supported by, the non-destroyed documentary evidence discussed above. Mr. Quinn knew (by November 2017 at the latest) and M3 knew (in September 2017) that the 30/31 August 2017 deadline for completion and delivery of the Film had been passed and they knew that the Film had not been completed and delivered by that date. They nonetheless chose to support the continued work on the delayed Film with a view to it being released and exploited in 2018 (by going along with the deemed delivery of the Film). It was only once it became apparent that Active was not going to be compensated for the delay in the manner that it desired that it belatedly decided to call upon the guarantee.

Estoppel and waiver arguments of the Guarantor Defendants

315. Since I find that Active made known to LRP, EFB and the Guarantor Defendants that it had chosen to proceed on the basis that the Film would be released in 2018 and the Completion Guarantee would not be called upon despite the extended delivery date having been passed, the question arises as to whether Active can now go back on that stance which it adopted up until 13 June 2018. In my judgment it cannot.

316. The Guarantor Defendants plead:

(1) In paragraphs 31.9-31.12 and 32 of their Re-Amended Defence that Active is barred by the doctrine of election from contending that the completion and delivery of the Film has not been effected;

(2) In paragraphs 31, 32 and 36.4 of their Re-Amended Defence that Active is barred by election, estoppel, acquiescence and waiver from asserting that completion and delivery of the Film has not been effected;

(3) In paragraphs 31, 32 and 42 of their Re-Amended Defence that Active is barred by election, estoppel, acquiescence and waiver from asserting that completion and delivery of the Film has not been effected;

(4) By paragraph 54.4 of their Re-Amended Defence that Active has waived any right to insist on compliance with clause 11.2 of the Completion Guarantee and are estopped from doing so.

317. I shall take these various defences in turn.

Waiver by election

318. Waiver by election has been described as *"the exercise of a right to choose between inconsistent remedies"*.[2] In order to make out a defence of waiver by election, the

[2] *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] 2 All ER (Comm) 14 (CA), at [38]; relying on two earlier House of Lords authorities (at [36] and [37]): Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep 391 and Lord Diplock in *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850.

burden rests on the Guarantor Defendants to prove that: (i) Active faced a choice between inconsistent rights; (ii) Active was aware of the facts giving rise to such a choice; and (iii) after having made its choice, Active communicated that choice to the Guarantor Defendants in clear and unequivocal terms by words or conduct.[3]

319. As a matter of law, two things are required for an election, see *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corpn* [2020] UKPC 23 at [18]-[21]:

(i) First, there must be two mutually exclusive courses of action *i.e.* where a party elects choice A under a contract meaning that alternative choice B is forever lost.

(ii) Second, there must be a clear and unequivocal communication of the choice to pursue one inconsistent right over another.

320. In her submissions which were impressive and persuasive throughout, Ms Wood, counsel for Active, contended that neither of these features are present in this case.

321. As to the first, the Guarantor Defendants contend that Active had a choice: either to demand payment of the payment sum under the Completion Guarantee because the Film had not been completed and delivered by 28 August 2017 or not to demand payment and instead to deem completion and delivery as having taken place and to continue to exploit the completion of the Film into 2018. That was, if not before, especially so by November 2017 when Active undoubtedly knew that the Film had not been completed and delivered.

322. Ms Wood submits that there was no inconsistency between Active claiming the Payment Sum now and exploiting the Film in 2018 because clause 2.1(b) gives the Guarantor credit for amounts received from exploitation. I disagree. I consider that to be irrelevant. That clause simply provides that Active should not be able to benefit from the Guarantor's failure to complete and deliver the Film by recovering its investment *as well as* any sums which have been made by reason of the exploitation of the Film. It is the steps that Active took after 30 August 2017 and/or November 2017 to continue to encourage the exploitation of the Film by means of third party funding that demonstrate that it had chosen not to hold the Guarantor Defendants to clause 2.1 of the Completion Guarantee.

323. Moreover, Clause 2.1(b) provides no basis for concluding that DDI can, at the same time, exploit the Film and reject it. If the Payment Sum is paid, DDI's right to exploit the Film under the Sales Agent Agreement must terminate[4] and the Guarantor keeps all the rights over the Film, which have been assigned to it by the Producer and distributors.[5] In effect, the Film becomes the Guarantor's: it can enforce its rights of security, including over the Film and the related assets, including the benefit of the various distribution agreements, and it (and not DDI) can exploit the Film.

[3] See e.g. *The Kanchenjunga* at 398.
[4] Schedule 4, para 11.3.1 suggests that that is how the contractual provisions are supposed to inter-relate.
[5] PCA, clause 13.1 and the Notices of Assignment.

324. I should add that I agree with Mr. Cullen QC's submission in any event, that clause 2.1(b) in fact refers to *"any amounts actually and non-refundabl[y] received by the relevant Beneficiary prior to the time such payment is to be made by the Guarantor… from any Distributors… to whom completion and delivery of the Film has nevertheless been effected…"* I agree that this must relate to the possibility that, even though *DDI* rejects the Film, the Producer nevertheless delivers it under separate arrangements not bonded by the Completion Guarantee, either directly to distributors, or to another sales agent who has been appointed in respect of different territories. It provides no basis for concluding that DDI can, at the same time, exploit the Film and reject it.

325. Second, Ms Wood submitted that Active did not communicate its election unequivocally. I do not accept that submission. Election does not require a formal document stating *"we choose X instead of Y"*. More often, it is communicated by a course of conduct which can only be consistent with one course of action, or by allowing something to happen in circumstances where an effluxion of time indicates an election: *Delta Petroleum*, [18]-[21]. Everybody knew by November 2017, if not before, that the Film had not been completed and delivered and by continuing to press for the Film's completion and exploitation well into 2018 Active was unequivocally communicating to the Guarantor Defendants that it had chosen not to call upon the guarantee. If Active disputed that the Film had been completed and delivered, the Guarantor would need to know so it could take steps to enforce its security. Instead Active allowed DDI to retain the Film, engaged M3 to press for the Film to be finished in 2018, and allowed DDI to deliver the Film *"with great excitement"* to distributors in May 2018; indeed, on 24 October 2018 its own US attorneys deleted the Guarantor from the CAMA, thereby frustrating the Guarantor's right to recover from the Film's waterfall. I consider Active's conduct, communicated to the Guarantor Defendants, to have been unequivocal: it is only compatible with Active treating the Guarantor Defendants as discharged.

326. Consequently I find that Active is barred by the doctrine of election from contending that completion and delivery of the Film has not been effected, and from contending that it is entitled to be paid the payment sum under the Completion Guarantee.

Estoppel

327. The Guarantor Defendants rely upon two species of estoppel: waiver by estoppel and estoppel by convention. I consider that they have made out their case on the facts for both.

328. Waiver by estoppel applies where (i) A unequivocally represents to B that it will not exercise a contractual right; and (ii) B relies on that promise; (iii) in a way that makes it inequitable for A to exercise the right: *Delta Petroleum*, [29].

329. As to estoppel by convention, the relevant requirements have recently been summarised by the Court of Appeal in *Tinkler v HMRC* [2019] EWCA Civ 1392 at [54], as follows:

> *"(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the*

> *line in a manner sufficient to manifest an assent to the assumption.*
>
> *(2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.*
>
> *(3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.*
>
> *(4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.*
>
> *(5) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

330. I consider that each of these ingredients is established by the Guarantor Defendants in this case. By its conduct which I have already described, Active unequivocally represented to the Guarantor Defendants that it would not exercise its contractual right under clause 2.1 of the Completion Guarantee once the deadline of 28 August (or 30/31 August) passed; the Guarantor Defendants relied upon that representation; and it would be inequitable for Active to go back on it and now seek to exercise the right. There was also a common assumption (which I have already described) that Active would not exercise its contractual right under clause 2.1 of the Completion Guarantee once the deadline of 28 August (or 30/31 August) passed, which crossed the line and for which Active assumed responsibility. Thereafter the Guarantor Defendants relied upon that common assumption, suffered detriment as a result and it would be inequitable to allow Active belatedly to resile from it.

331. On the question of estoppel, on behalf of Active Ms Wood made essentially six submissions as follows:

332. First, neither Active (nor Mike Sears) knew of any plan in respect of an alleged enhanced film and they did not know about any agreement between DDI and the Producer to accept as delivery anything less than the Delivery Materials. There is no evidence to the contrary and it is important to remember that the documents show that Mike Sears' involvement in relation to the Film in 2017 was significantly less than his involvement in 2018.

333. I reject this submission on the evidence. I consider that both Mr. Sears and Mr. Jason Moring, acting as agent for Active, knew that the Delivery Materials had not been delivered by 30 August 2017 (Jason Moring actually received the materials), and I also find as a fact that Mike Sears or Jason Moring would have communicated that fact to Mr. Quinn.

334. Second, Active submits that there is no evidence anywhere to suggest that Active (or Mike Sears) knew anything of the production of the purported notices on 21 September to be passed to Telefilm and upon which the Guarantor Defendants now rely as having rendered them "off risk". Indeed, Active says it would be surprising if Active knew anything about the scheme to defeat its contractual entitlements but did nothing.

335. I reject this submission. It may be true that neither Active nor Mr. Sears actually received a copy of the purported notices; however, I find as a fact that Mr. Quinn and Mr. Sears both knew that the Completion Guarantee was not called upon after 30 August 2017 and that the Film was being treated as completed and delivered.

336. Third, Active refers to the fact that the Completion Guarantee contains a requirement of signed writing of all parties for any changes to it – Clause 11.2. Active submits that Ms Crone was well aware of that requirement and she was well aware that Active never gave any such signed writing. As Lord Sumption stated in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24 at [16], something more than an informal promise is required for an estoppel in those circumstances.

337. I reject this submission.

338. In *Rock Advertising v MWB* Lord Sumption said as follows at [16]:

> *"The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from Page 9 relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering In Gl En SpA [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker)."*

339. The unequivocal conduct in this case was not something such as a one-off telephone call, as in *Rock Advertising* (which, as was common ground before the Supreme Court, was not clear enough to create any estoppel). I find as a matter of fact that it consisted of an extensive course of conduct, over many months, whereby Active by Mr. Quinn, as well as acting through Mr. Sears and Mr. Jason Moring, endorsed (a) the extension of the Delivery Date; (b) the consequent postponement of the release of the Film into 2018; (c) the purported acceptance of the bonded delivery materials by DDI on 21 September 2017; (d) fundraising from Telefilm on the footing that the CGA was discharged; (f) exploitation of the Film in 2018 through DDI; (g) changes to the waterfall; and (h) payments out of the Collection Account.

340. Active accordingly itself indicated through its agents (by words and conduct over many months) that it considered the Film to be completed and delivered, or at least that it would not suggest that there had *not* been completion and delivery of the Film under the Completion Guarantee, and that it would therefore treat the Guarantor Defendants as being discharged from liability under the Completion Guarantee. Active led the Guarantor Defendants to believe that it would instead join in the exploitation of the Film in 2018 with the benefit of third party funding. That amply satisfies the *"something more"* required by Lord Sumption in *Rock Advertising*.

341. Fourth, Active argues that the Guarantor Defendants accept that each of the doctrines upon which they rely require unequivocal communication *crossing the line* that Active would not rely on its legal rights. They therefore must show, Active says, on their own evidence and their own documents that it was unequivocally communicated to them that Active was not going to rely on its right to call in the bond company. Active submits that they have failed to do that, and that the documents in fact show that EFB was aware of repeated calls (not just by Active but by various other parties) that the bond company should step in to complete the Film and that Active was relying on its rights under the Completion Guarantee e.g. {D3/359}. In the event, Active did make its claim on 13 June 2018 {D5/122}.

342. I reject this submission. {D3/359} is the email dated 14 November 2017 from Dan Krech to Nina Crone referred to above. That email refers to the fact that Active's auditors (not Mr. Quinn) were questioning the contract and why the bond had not been called in. And as I state above, Active was persuaded that it was in its interests not to assert its rights under the Completion Guarantee but to agree to the completion of the Film with the Telefilm funding, because after that date Active failed to make any demand under the Completion Guarantee but rather continued to encourage the Film to be worked upon in time for a Christmas 2018 release so that it could participate in the exploitation of the Film in 2018.

343. As Mr. Cullen QC rightly submits, there were unbroken lines of communication (a) from Active to M3 (Mike Sears/Jason Moring) in very frequent emails and telephone calls throughout this period and (b) from M3 (as Active's agents) onwards to LRP, EFB and DDI. I have no doubt that the relevant communications crossed the line.

344. Further, Active contends that the Guarantor Defendants cannot make good their claim on the basis of any internal communications between Active and Mike Sears which it is suggested show that Active was insisting on its rights under the Completion Guarantee. Either they can show that Active or its agent unequivocally communicated something to them, or they cannot. It is contended that no amount of

adverse inference as to what deleted emails might have contained could help them in this regard.

345. I reject this submission. The contemporaneous documents discussed above in fact demonstrate that Active was not insisting on its rights under the Completion Guarantee. Moreover, I have set out above what I consider the deleted internal communications between M3 and Mr. Quinn would have shown. Active only began insisting on its rights very belatedly in mid-2018, once the auditors and then Mr. Trantina starting looking into matters. But Mr. Quinn knew all along that he had chosen not to call upon the Completion Guarantee despite Active having a right to do so. He chose instead to "*make lemons out of lemonade*". That was no doubt why, once others in positions of responsibility within Active did very belatedly start to question matters, Mr. Quinn was "feeling the heat" internally.

346. Fifth, Active submits that the alleged representation or common assumption on which the Guarantor Defendants build their estoppel case is said to be that Active did not object to this so-called process by which the Film came to be delivered and accepted in September 2017 or suggest that the Film had not been completed and delivered for the purposes of the Completion Guarantee. But Active was not aware of what was going on and had no *"duty to speak"*.

347. As to this, I have already explained that Active's conduct and that of its agents went well beyond a failure to speak and consisted of positive representations, through M3, crossing the line. Active was, through Mr. Quinn and M3, fully aware of what was going on and this is a case where Active could reasonably have been expected to speak up. Acceptance by DDI had wide-ranging effects on Active's rights, the Guarantor Defendants' rights and the rights of others such as distributors, licensors and other investors (such as Ingenious). In these circumstances Active *did* have a duty to raise its concerns promptly if it considered DDI's acceptance of the Film was contractually invalid and that the guarantee should be called upon. It actively chose not to do so, because it supported the course adopted.

348. Active submits that it was up to the Guarantor Defendants whether they stepped in to get the Film finished, or sat back and let the Producer cast around for a third party financer. They knowingly took the risk that in so doing, Active would seek its money back, which, when the Film still had not been finished in June 2018, it did. Active was under no duty to step in and tell the Guarantor Defendants to comply with their contractual obligations. But this ignores the fact that by its conduct Active led the Guarantor Defendants to believe that Active was treating the Film as having been completed and delivered, and so there was no need for the Guarantors to step in and get the Film finished: everyone was *treating it* as having been finished for the purposes of the Completion Guarantee, and in consequence the further funding that was required was not sought from the Guarantors, as Active knew, but rather from third parties.

349. Sixth, and finally, Active submits that there was no reliance in this case by the party alleging the estoppel such as would make it unconscionable for the party estopped to resile from its communication. This is related to the previous point.

350. Active submits that, in particular, Ms Crone accepted in evidence that EFB reached its own, independent view that it was "off risk" as a result of the document of 21

September 2017 produced for Telefilm (Crone 1 at para 65). That was also accepted in the course of cross examination and Ms Crone specifically accepted in relation to this issue that *"I don't think I had any correspondence with Active"*. Active submits that anything that the Guarantor Defendants might claim is a detriment was therefore not as a result of Active or anyone on behalf of Active unequivocally communicating that it would not rely on the Completion Guarantee or that completion and delivery had been duly made. Instead, it was taken because it was the Guarantor Defendants' own view that completion and delivery had been validly effected.

351. I reject this submission. LRP, EFB and DDI all knew that they were back-dating the Delivery Date to 31 August 2017 and thereby deeming that delivery had taken place when in reality it had not. I have found as a fact that Active (and M3) knew that this approach had been taken by them. It was open to Active to take issue with this approach and insist upon the application of clause 2.1 of the Completion Guarantee. It chose not to do so. As a result the Guarantor Defendants proceeded on that basis. If Active had sent its letter of claim in September 2017 or November 2017, the Guarantor Defendants would obviously not have proceeded on the assumption that nothing was amiss. They could then have taken steps to protect their security in case Active's claim was well-founded.

352. By clause 13.1 of the PCA, to secure the Guarantor Defendants' claims against LRP for reimbursement of financing by it under the Completion Guarantee, LRP assigns by way of security all of its present or future rights, claims and interests in and to the Film. By clause 13.8, those Security Interests of the Guarantor cease to be valid as soon as the Film has been completed and delivered. Likewise, under clause 2.4 of the Completion Agreement, the obligations of the guarantor to the Beneficiaries under that agreement terminate immediately upon completion and delivery of the Film.

353. Active (through Mr. Quinn and M3) led the Guarantor Defendants to believe either that it had agreed that the Film had been completed and delivered for the purposes of the Completion Guarantee in September/November 2017, or that it would not exercise its right to insist upon the Guarantor Defendants' compliance with clause 2.1 of the Completion Guarantee and instead acquiesced in the re-scheduling of the Film into 2018 with third party funding and an extended delivery date into 2018. The Guarantor Defendants relied upon that conduct in taking no steps to enforce its Security Interests or take any other steps to ensure reimbursement from LRP. As a result, they had no control over what took place after that time; instead Mr. Krech had full control. It may have been with third party assistance that they could have made a success of the Film. That will never be known.

354. Were Active to succeed in its claim, then it contends that it can recover the Payment Sum plus costs and interest, less credit for its cut of the small media spend that it was able to secure for the Film's US release. But because Active allowed the Guarantor Defendants to be misled into believing that they were discharged under the Completion Guarantee, they will not then have any security over the Film of any value: the Film itself has already been widely released and exploited. Furthermore, most (or possibly all) of the receipts from that exploitation have already been distributed to entities (such as Awesometown and DDI) over whom the Guarantor Defendants should have had priority (see the payment schedule to which Active agreed).

355. Active also submits that the Guarantor Defendants' preferential position in the waterfall is only in respect of sums expended to complete and deliver the Film in accordance with the Guarantor Defendants' obligation in Clause 2.1(a) of the Completion Guarantee. I do not accept that submission. Clause 13.1 of the PCA gives security *"for reimbursement… and to secure performance of Producer's other obligations under this Agreement"*. Those obligations include an obligation to reimburse the Payment Sum: see clause 12.1.

356. In the circumstances, the Guarantor Defendants' estoppel argument succeeds.

Acquiescence

357. Finally, I also find that the Guarantor Defendants' defence of acquiescence is made out on the facts for the same reasons.

358. The requisite elements required to prove acquiescence are set out in *Snell's Equity* (34th ed) at para. 12-034:

> *"It applies where B adopts a particular course of conduct in reliance on a mistaken belief as to B's current rights and A, knowing both of B's belief and of the existence of A's own, inconsistent right, fails to assert that right against B. If B would then suffer a detriment if A were free to enforce A's right, the principle applies. It therefore operates in a situation in which it would be unconscionable for A, as against B, to enjoy the benefit of a specific right."*

359. As the Court of Appeal explained in *Ted Baker Plc v Axa Insurance UK Plc* [2017] EWCA Civ 4097, the doctrine arises where *"a reasonable person in the position of the person seeking to set up the estoppel…would expect the other party…acting honestly and responsibly to take steps to make his position plain"* (at [82]).

360. This is just such a case. I find as a fact that Active, through Mr. Quinn and M3, led the Guarantor Defendants to believe either that it agreed that the Film had been completed and delivered by the end of August 2017 for the purposes of the Completion Guarantee, or that it would not exercise its right to insist upon the Guarantor Defendants' compliance with clause 2.1 of the Completion Guarantee and instead acquiesced in the re-scheduling of the Film into 2018 with third party funding and an extended delivery date into 2018. The Guarantor Defendants relied upon that in taking no steps to enforce their Security Interests or take any other steps to ensure reimbursement from LRP; and if Active could now enforce its right to payment under clause 2.1(b) of the Completion Guarantee the Guarantor Defendants would suffer detriment in that respect, as I have described above. It would be unconscionable to allow Active to now derive the benefit under clause 2.1(b).

361. In the light of all of the foregoing, it follows that Active's claim against the Guarantor Defendants is dismissed.

Active's claim against DDI

362. Finally, I should mention that in the event that Active's claim against the Guarantor Defendants does not succeed, Active advances an alternative case against *DDI* (paras. 38 and 39 of its Particulars of Claim). This case was barely mentioned in the course of the trial but it was maintained in Active's closing submissions, albeit very briefly (by reference to paragraphs 114-117 of its written opening). Mr. Ron Moring, appearing in person on behalf of DDI, said very little about this claim other than to deny that DDI did anything wrong.

363. Active refers to the fact that DDI was a party to the Completion Guarantee solely for the purpose of agreeing to the Clauses relating to completion and delivery of the Film (see Clause 1.12 of the Completion Guarantee). In accordance with the delivery procedure in Schedule 4, DDI had a discretion to determine whether to issue an Acceptance Notice/Objection Notice.

364. Active alleges that DDI owed an express (alternatively implied) duty to the Beneficiaries (including Active) to exercise that discretion *"in good faith and not arbitrarily or capriciously…*[which]*…will normally mean that it must be exercised consistently with its contractual purpose"* (see Lord Sumption in *Telefonica O2 UK Ltd v British Telecommunications Plc* [2014] UKSC 42).[6] It owed a further express (alternatively implied) duty to issue an Objection Notice where completion and delivery had not been effected.

365. However, this breach of duty by DDI is relied upon by Active as a further reason why neither the Delivery Notice nor the Acceptance Notice had any contractual effect. It is then pleaded that if the Delivery Notice and Acceptance Notice *did* somehow have contractual effect so that clause 1.10 was satisfied and clause 2.1(b) was *not* triggered, then DDI was in breach of contract and liable in damages to Active.

366. Since I have found that clause 1.10 was *not* satisfied and clause 2.1(b) *was* triggered (despite the issuing of a false Delivery Notice and Acceptance Notice) but that Active elected not to enforce clause 2.1(b), the claim against DDI does not arise.

367. But even assuming that DDI had acted in breach of a duty that it owed to Active in this respect, Active would in any event have been unable to establish that it had suffered any loss as a result of such breach of duty. Since I have found that Active chose not to bring a claim in 2017 under clause 2.1 of the Completion Guarantee when it could have done, the likelihood must be (and I find that it would have been the case) that had DDI refused to issue an Acceptance Notice or had it issued an Objection Notice in 2017 then all parties – including Active - would have behaved in precisely the same way, namely that they would have sought to find a way not to call upon the Completion Guarantee but instead to continue to work on completing, delivering and exploiting the Film in 2018. They certainly would not have proceeded to an arbitration under Schedule 4. All of the evidence points that way; and certainly, Active have adduced no evidence to the contrary.

[6] See also more generally *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; and see Fraser J in *Bates v Post Office Ltd* [2019] EWHC 606 (QB) at [755] – [761].

368. Accordingly Active's (alternative) claim against DDI also fails and is accordingly dismissed.