Neutral Citation Number: [2023] EWHC 174 (Comm)

Case No: LM- 2020-000138

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2023

Before :

MS CLARE AMBROSE
Sitting as a Deputy Judge of the High Court

- -

Between :

JBR CAPITAL LIMITED	**Claimant**
- and -	
(1) JM INVESTMENTS/TRADING LTD	
(2) MR KARAN ABBOTT	**Defendants**

- -
- -

Mark Wraith (instructed by **Asserson Law Offices**) for the **Claimant**
Piers Hill (instructed by **Geoffrey Leaver LLP**) for the **Defendants**

Hearing dates: 17-18 January 2023
Judgment supplied to the parties in draft on 23 January 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MS CLARE AMBROSE

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 03 February 2023 at 10:30am.

Ms Clare Ambrose :

Introduction

1. This was a trial relating to finance provided to the First Defendant under four hire purchase agreements relating to the acquisition of four high-end vehicles, namely two Lamborghinis, a Ferrari Daytona GT de Competition ("the Daytona") and a Bentley.

2. The Claimant was the finance company and it terminated the hire purchase agreements for arrears in May 2020. It now claims the total outstanding balance across all the agreements in the principal sum of £954,231.13 plus interest up to 18 January 2023 in the sum of £331,763.28. The largest component of the claim (the principal sum of £687,779.18) fell under the fourth hire purchase agreement relating to the Daytona. The Claimant also makes claims in the same sum against the Second Defendant under personal guarantees said to have been provided in relation to the hire purchase agreements.

Factual Background

3. The parties helpfully agreed a chronology and also a cast list. They also agreed the non-contentious factual background as follows.

4. The Claimant [C] is a finance company specialising in high-end vehicles, and was founded by Mr Darren Selig.

5. The First Defendant [D1] is a company the business of which is leasing high-end vehicles to customers as well as trading such vehicles. The Second Defendant [D2] is its sole director.

6. The parties had a relatively long-standing trading relationship. Mr Abbott was introduced to Mr Selig in around May 2014 and over the years the First Defendant concluded around 26 deals for hire purchase of a vehicles with the Claimant.

7. Claims had originally been made under six hire purchase agreements ("the Agreements") and guarantees but those under the first and sixth agreements (relating to a used BMW and a Mercedes Benz) were not pursued at trial. All six Agreements are included below as they formed part of the context and affected the agreed terminology used):

    7.1. An Agreement numbered A00015 (the "First Agreement") dated 6 April 2015, for the hire with an option to purchase of a used BMW 118d M Sport 5dr (the "BMW"), with a total amount payable of £23,406.20.

    7.2. An Agreement numbered A00968 (the "Second Agreement"), for the hire with the option to purchase of a used Lamborghini Aventador (the "Aventador"), with a total amount payable of £475,490.68 comprised of an initial payment of £5,194.91 on 5 February 2017, 46 monthly payments of £4899.91 on the 5th of each month, and a final balloon payment in the sum of £244,899.91 on 5 January 2021.

    7.3. An Agreement numbered A01011 (the "Third Agreement") for the hire with the option to purchase of a used Bentley Mulsanne V8 Mulliner (the "Bentley"), with a total amount payable of £208,366.52 comprised of an initial payment of £2,858.99 on 27 February 2017, 46 monthly payments of £2,563.99 on the 27th of each month, and a final balloon payment in the sum of £87,563.99 on 27 January 2021.

7.4. An Agreement numbered A01695 (the "Fourth Agreement") for the hire with the option to purchase of the Daytona, with a total amount payable of £1,788,496.90 comprised of an initial payment of £18,473.26 on 26 October 2017, 58 monthly payments of £18,173.36 on the 26th of each month, and a final balloon payment in the sum of £715,678.36 on 26 September 2022.

7.5. An Agreement numbered A03514 (the "Fifth Agreement") for the hire with the option to purchase of a new Lamborghini Huracan (the "Huracan"), with a total amount payable of £200,984.20 comprised of an initial payment of £3,293.96 on 23 December 2018, 46 monthly payments of £2,998.96 on the 23rd of each month, and a final balloon payment in the sum of £132,998.96 on 23 November 2022.

7.6. An Agreement numbered A03809 (the "Sixth Agreement") for the hire with the option to purchase of a Mercedes Benz (the "Mercedes") dated 8 February 2019, with a total amount payable of £40,598.04.

8. The terms and conditions applicable to each of the Agreements were largely identical, and included the following:

"*2 PAYMENTS*

2.2 The Customer [D1] agrees to pay [C]:

(a) the Basic Rentals (including the Final Basic Rental) on the due dates;

(b) Any Document Fee shown overleaf of the date of the Agreement;

(c) All other amounts within 7 days of the Claimant's written demand;

2.6 If [D1] fails to pay any sum due under this Agreement on the due dates for payment then [D1] shall pay daily interest, from the due date until actual payment on all such unpaid amounts at 8% above Finance House Base Rate, such interest to be payable both before and after any court Judgment [C] may obtained against [D1]. [D1] shall also pay to [C] any costs incurred by it in enforcing or servicing this Agreement including but not limited to [C's] administration costs, costs of recovery of the Vehicles, bank charges and all legal costs on a full indemnity basis. This clause will survive and apply after termination of this Agreement.

7 TERMINATION EVENTS

7.1 The customer may terminate this agreement at any time by giving JBR Capital notice in writing and the Customer shall immediately return the Vehicle to JBR Capital at such a place in the United Kingdom as JBR Capital may require and pay JBR the sums set out in clause 8.2.

7.2 [C] may terminate this Agreement immediately if any of the following events occurs:
(a) [D1] breaches any term of this Agreement;
…
(m) if JBR Capital has reasonable grounds to believe the Vehicle or JBR Capital's interest in them is at risk;
(n)….

8 CONSEQUENCES OF TERMINATION

8.1 On termination of this Agreement for any reason, [D1] shall:
(a) Return the Vehicle to [C]… in the same condition as at the date of this Agreement (fair wear and tear excepted)…
(b) pay to [C]:
(i) all payments and sums due up to the date of termination including any interest due on unpaid amounts in accordance with the terms of clause 2.6; and
(ii) a sum equal to all Basic Rentals plus the Final Basic Rental which but for the termination of the hiring of the Vehicle would have become due and payable during the remainder of the Hire Period, each discounted at a rate of 2% per annum from the date of termination to the date the Basic Rental or Final Basic Rental (as applicable) would have been due;
(c) in addition to the termination figure calculated above, [D1] will also pay to [C] any costs incurred by it in repossessing, repairing, storing, insuring and selling the Vehicle, delivering it to a buyer and any sales commission paid by JBR Capital upon demand.

8.2 After termination of this Agreement [C] will, if it is in possession of the Vehicle, try to sell it and provided [D1] pays all sums due to [C] (and whether arising under (i) this Agreement or (ii) any other Agreement with [C])… [C] will pay to [D1] the net proceeds of sale of the Vehicle (excluding VAT and [C's] cost of repossession, insurance, storage, and sale). For the purposes of this clause net proceeds of sale will be the net proceeds of sale of the Vehicle (excluding VAT and [C's] cost of repossession, insurance, storage and sale) received by [C], or if it has not sold the Vehicle within 28 days after repossessing it the trade value of the Vehicle (excluding VAT and [C's] remarketing expenses) established as soon as practicable after the 28 days by a dealer selected by [C] in vehicles of the same kind as the Vehicle. The Customer's obligations under this clause will be treated as if they had arisen immediately before termination.

…

10 GENERAL

…

10.8 Waiver: [C's] rights under this Agreement will not be affected by any forbearance or concession made by [C] to [D1]. [C] will only grant a waiver for breach by [D1] in limited circumstances and any such waiver will only be effective if given in writing by [C] and it refers to the breach to be waived.

…

10.10 Entire Agreement: This Agreement and documents referred to herein contain all the terms agreed between [C] and [D1] in respect of the subject matter of this Agreement and may not be varied other than by a document duly signed by [C] and [D1].

…

10.13 Notices: Each communication shall be in writing and addressed to the recipient at the address stated above or such other address in Great Britain as it may for this purpose notify to the other and shall be deemed to have been given upon delivery [if by hand] or when received [if by fax] or two days after posting (if sent by first class mail)."

9. On or around the same date as signing the hire purchase agreements Mr Abbott also signed as a deed six guarantee agreements ("the Guarantees"). He signed each agreement

and the signature was witnessed. Each of the Guarantees was on the Claimant's standard terms and are materially identical. They each provided that the Claimant was described as "*Lender"* and Mr Abbott was described as "*the Guarantor".* The Guarantees also provided as follows:

"DEFINITIONS

In this Deed the following words shall have the following meanings:

Customer: JM Investments/ Trading Limited…
Agreement: means an agreement dated on or about the date hereof between the Lender and the Customer bearing agreement number _____ as amended, restated, and supplemented from time to time.
Guaranteed Obligations: means all obligations and other liabilities from time to time due, owing or incurred by the Customer to the Lender under the Agreement.

AGREED TERMS
1. Guarantee and Indemnity
1.1 The Guarantor, unconditionally and irrevocably guarantees to the Lender whenever the Customer does not pay or perform the Guaranteed Obligations when due, to pay or perform, on demand, the Guaranteed Obligations.
1.2 The Guarantor as principal obligor and as a separate and independent obligation and liability from its obligation and liabilities under clause 1.1 agrees to indemnify and keep indemnified the Lender in full and on demand from and against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Lender arising out, or in connection with, any failure of the Customer to perform or discharge any of its obligations or liabilities in respect of the Guaranteed Obligations."

10. In the case of the First, Second, Fifth and Sixth Guarantee, the agreement number of the corresponding Agreement has been written or typed into the blank space in the definitions section of the document. Each of these Guarantees was also dated with the same date as the agreement referred to.

11. In the case of the Third and Fourth Guarantee the agreement number was left blank. The Third Guarantee was dated on the same date as the Third Agreement and the Fourth Guarantee was also dated on the same date as the Fourth Agreement. There is an issue as to the enforceability of the Third and Fourth guarantees.

12. It was common ground that D1 did not always make payments under the Agreements when due, and that various payments were late or paid in instalments. No monthly payments were made in respect of the Third, Fourth and Fifth Agreements after February 2020, and no payments were made under the Second Agreement after March 2020. The outstanding balance was around £115,000 at the end of March 2020 as evidenced by a Email from the Claimant to Mr Abbott on 29 March 2020.

13. Mr Selig explains in his witness statement that he spoke to D2 on a number of occasions throughout March, April, and May 2020 in an attempt to find a solution, without success. By May 2020, all of the Agreements were in arrears.

14. Letters giving notice of the termination of the First to Sixth Agreements were sent to D2 by email on 22 May 2020. Demands under the Guarantees were also sent to D2 by email.

A letter giving notice of the termination of the Second Agreement was sent to D1 at its registered office, 19 Seymour Place, on 22 May 2020.

15. The vehicles to which the First to Sixth Agreements related ("The Vehicles") (other than the BMW which had been stolen some time earlier) were repossessed on 22 May 2020.

16. On 30 May 2020 letters giving notice of the termination of the First, and Third to Sixth Agreements were sent to D1 at its registered office.

17. Each of the Vehicles were sold. In summary, for all Vehicles other than the Daytona, C obtained "CAP ID" prices (which are based on software commonly used for valuing vehicles) based on their condition and mileages. Different CAP ID prices are given for any model based on whether it is in clean, average or below average condition. The Claimant solicited bids for the Vehicles and sold them to the highest bidder.

18. The Bentley was sold by the Claimant on 25 September 2020 for £51,000 and credit is given for that amount. The Lamborghinis were sold on 13 August 2021 for £145,000 and £195,000.

19. In respect of the Daytona, the Claimant obtained a specialist valuation in December 2021 (for between £600,000 and £650,000), and a second valuation (for between £400,000 and £600,000) was obtained out in around January 2022 by the RM Sotheby's valuer nominated by Mr Abbott. The Claimant has given credit in the sum of £600,000 against the sums due under the Fourth Agreement as at 14 May 2022. The Daytona was sold on 14 May 2022 for EURO 567,500 (i.e. significantly less than the valuation of £600,000 for which credit was given) at an auction held by RM Sotheby's.

The Evidence

20. The court heard oral evidence from:

    a) Mr Darren Selig who is the founder and chief commercial officer of the Claimant. He was the primary person within the Claimant who dealt with the Defendants.

    b) Mr Mohsen Naemi-Pour who is the Claimant's head of collections and recoveries, and who dealt with the process by which the vehicles were sold following the termination of the Agreements.

    c) the Second Defendant, Mr Karen Abbott who is the sole director of the defendant, JM Investments.

21. The factual issues were relatively limited but each of the witnesses gave their evidence on such matters fairly and honestly.

The Issues

22. Proceedings were issued in July 2020 and a number of issues that had initially been pleaded fell away. Some issues only clearly emerged at trial. For example, the Defendants only made clear that they were relying on the Statute of Frauds to dispute liability under the Third and Fourth Agreements in their skeleton argument, and the matters relied upon in alleging an equitable estoppel were also developed in opening. The Defendants had also not made a positive case challenging the validity of service of the notices of termination. I allowed this point to be taken on the basis that the Claimant could also rely on later notices that were in evidence. Counsel took a constructive approach on identifying issues. At trial there were four main issues that can be summarised as follows:

a) The Termination Issue – had the Claimant validly terminated the Agreements so as to justify recovery of the Termination Balance under the Agreements?

b) The Guarantee Issue – were the Third and Fourth Agreement enforceable under the Statute of Frauds?

c) The Credit Issue - What sum should be credited for the Bentley?

d) Interest – for the calculation of interest when should sums be credited in respect of the value of the Vehicles? The Defendants' calculation was around £125,000 lower than the Claimant's.

Termination issue

23. There were two issues going to the validity of the Claimant's termination of the Agreements. First, the Defendants denied that the Claimant was entitled to terminate on grounds of the First Defendant's breach in failing to make due payments because it had either waived that right or was estopped from exercising it. A separate issue was raised by the Defendants alleging that notice of termination was not validly served pursuant to clause 10.13 of the Agreements.

Forbearance and estoppel

24. The Defendants maintained that the Claimant was not entitled to treat the First Defendant's arrears as a breach of the agreements giving rise to a right to terminate under clause 7.2 (or otherwise) since:

a) By a history of regularly accepting late payments the claimant had waived the right to treat late payment as being a breach without giving sufficient notice that any such payments would in future be treated as being in breach.

b) Alternatively, the Claimant was estopped from treating such late payments as being in breach of the agreements in absence of such notice because the First Defendant had reasonably relied on the Claimant's acceptance of late payments in its organisation of its financial affairs in such a way as to rely on that acceptance.

25. Although the Defendants put forward this defence on the basis of waiver or estoppel, their counsel explained that it was based on the single equitable doctrine of forbearance as laid down in *Hughes v Metropolitan Railway* (1877) 2 App. Cas. 439, also known as equitable or promissory estoppel. The Defendants relied on the following evidence as supporting their case.

a) The First Defendant brought down its arrears following a warning of potential termination given by Mr Selig in WhatsApp exchanges in September 2019. This did not mean that Mr Abbott was on notice. The warning had been made in the specific context of a dispute as to whether Mr Abbott had adequate access to the Daytona, and that dispute had evaporated because arrears were paid.

b) In communications in February and March 2020 the Claimant had also made threats to terminate but these were intended to put pressure on the Defendants to negotiate a restructuring of the existing indebtedness. They did not inform Mr Abbott that the negotiations had come to an end or suggest that a full termination balance would be payable if the Defendants were unable to refinance the existing arrears. Indeed, the Claimant had not acted on threats but instead allowed the negotiations to continue, in

an attempt to find a way for the First Defendant to pay off arrears in a manner which was satisfactory to the Claiamnt and its financial backers.

c) There had been regular communications with Stephen Halstead (the Claimant's Chief Operating Officer) from late March 2020 up to 14 May 2020 regarding restructuring of the borrowing. The Claimant had proposed to repackage all six loans between March and April. This would have required potential borrowing from third parties or provision of alternative security and the implication was that this was how arrears would be paid. The context in which Mr Abbott was negotiating alternative finance was on the assumption that the First Defendant's indebtedness would not be suddenly increased by purported termination without notice. Mr Abbott's case was that he had reasonably relied on the negotiations for repackaging the loans in not taking action on the arrears.

d) These were ongoing negotiations pursued in circumstances where both sides knew that the First Defendant was in default. In that context some warning and reasonable notice would need to be have been given that the negotiations were at an end and the Agreements were to be terminated so that the Defendants could change their position.

e) The Claimant gave no notice that those negotiations had ended. Mr Abbott's evidence was that there were difficulties in making up arrears after the lockdown started in India in early March 2020 and rental income also dried up. In closing it was said that he had changed his position because higher payments could have been made in January and February 2020 which would have continued into March and April 2020 had discussions not continued. In any event, valid notice of termination could not be given without reasonable notice that the negotiations had come to an end.

f) On 14 May 2020 Stephen Halstead informed Mr Abbott that the Claimant required an undertaking or a second charge and Mr Abbott had reasonably requested a draft but none had been provided.

26. On the law the Claimant emphasised that merely because it had elected to affirm the contract following earlier breaches by way of late payment did not mean that it was bound to accept similar breaches in the future. It was not required to give any notice before terminating on grounds of future breaches, e.g. *The Scaptrade* [1983] QB 529 (CA). Promissory estoppel required a clear and unequivocal promise or representation and the mere acceptance of sporadic late payments in the past was incapable of amounting to such a representation.

27. On the facts the Claimant denied that there was any unequivocal representation or reliance. Further there was no relevant waiver or estoppel precluding termination since:

a) The First Defendant had agreed a no-waiver clause under clause 10.8 of the Terms and Conditions precluding the argument.

b) The breaches relied upon were wholly different to the historical late payments that had been earlier accepted. By April 2020 the First Defendant had ceased making any payments so earlier acceptance of late payments could not give rise to a waiver of the right to terminate on grounds of the Defendants' failure to make any payments at all.

c) The Claimant did give adequate notice by warnings that it would terminate on 13 September 2019, and in February and March 2020.

Conclusions

28. There was little dispute between the parties as to the elements required for the equitable doctrine of forbearance. *Chitty on Contracts* at paragraph 6-094 and 099 explained as follows:

> *"For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on their promise. The doctrine most commonly applies to promises not to enforce contractual rights.*
>
> *…*
>
> *The purpose of the requirement that the promise or representation must be "clear" or "unequivocal" is to prevent a party from losing their legal rights under a contract merely because they have granted some indulgence by failing to insist throughout on strict performance of the contract; or merely because they have offered some concession in the course of negotiations for the settlement of a dispute arising out of the contract or merely because they have declared their willingness to continue such negotiations."*

29. Here there had been no agreement or unequivocal representation on the part of the Claimant to suggest that it would not enforce its contractual right to terminate. To the contrary, the Claimant had made clear that it would exercise its immediate right to terminate for arrears in September 2019 and also in February and March 2020.

30. The fact that payments had frequently been made late on earlier occasions did not preclude the Claimant from relying on the First Defendant's failure to make any payments on the various agreements from March 2020 as a breach allowing it to terminate. While the Defendant had been in arrears during earlier periods by around one monthly payment, by late March 2020 it was in arrears for around £115,000 in total. The Claimant had made clear that such arrears were unacceptable, and Mr Selig had indicated in an email on 29 March 2020 that it would terminate at short notice.

31. Negotiations that started in March 2020 with a view to the Defendants settling existing arrears by way of restructuring did not give rise to an unequivocal representation that the Claimant would refrain from exercising its rights under the existing agreements. To the contrary these negotiations were made in the context of the Claimant making clear (as supported by Mr Selig's evidence and also the contemporaneous messages including express warnings, in particular Mr Selig's unequivocal warning on 29 March 2020) that the arrears were unacceptable and that the Claimant had the right to terminate and would do so.

32. Further, the Defendants were unable to show that they had altered their position or relied on the Claimant's representations in such a way that it would be inequitable for it to rely on its strict legal rights. Mr Abbott had fairly accepted that even if he had been given notice in March 2020 that the Claimant would terminate if the First Defendant did not clear the arrears he would have been unable to pay the arrears. The Defendants' suggestion in closing that they would have made higher payments in January and

February 2020 was no answer. There was no evidential basis to suggest that these payments would have precluded the serious arrears that did accumulate. Further, this could not be treated as a change of position flowing from the negotiations that were said to support the estoppel since these only started in late March 2020. The mere fact of earlier late payments accepted without protest could not amount to a relevant unequivocal representation (or agreement) precluding the right to rely on arrears, not least since the arrears prior to 2020 were of a different nature. Further, the Defendants had failed to establish a forbearance that could prevail over the express agreement that rights would not be waived under clause 10.8.

Lack of valid notice

33. The Defendants alleged that the Claimant's notices of termination given on 22 May 2020 were invalid as they had not been communicated in accordance with clause 10.13 since they had been sent by email. They acknowledged that clause 7.2 of the Agreements does not expressly require termination to be effected by notice, but maintained that any election under clause 7.2 must be communicated to the customer. The Claimant's right to terminate was discretionary and it would make no sense in the absence of an implied term that the exercise of discretion must be communicated to the customer. They argued that the manner in which communications were to be made was governed by clause 10.13 which provides that any communication must be addressed to the physical address given in the UK, namely 19 Seymour Place, London.

34. The Defendants acknowledged that further notices were sent by post on 30 May 2020 but denied that they were effective since the Claimant could not rely on retrospective notices.

35. The Defendants' arguments on the validity of service had limited merit. There was no express requirement for a notice of termination under clause 7.2. While the termination could probably not be relied on unless it was communicated by the Claimant there was no need to imply a term that the Claimant must serve notice by way of post or delivery at the First Defendant's registered address. This was not necessary for the contract to work since the Agreements had expressly incorporated the Second Defendant's email address, and had also expressly provided for notice by fax. There was no basis for implying a term requiring communication by hand or post to a registered address. Indeed, the evidence showed that the parties had been communicating on significant matters by way of telephone, email and WhatsApp.

36. On its ordinary meaning clause 10.13 did not mean that every communication should be made by post or delivery to the addresses given. Indeed, it made better sense as applying to a notice given under clause 7.1, and this was supported by the express use of the term "notice" in both these provisions.

37. Accordingly, the notices given by email on 22 May 2020 were effective notices of termination. Even if wrong on this, the notices given by post on 30 May 2020 were effective to achieve a termination that would be enforceable from that date even if they might not have been effective to terminate as from 22 May 2020. Any short delay in giving notice of termination, and the existence of the earlier notices and the earlier repossession would not preclude those notices from being effective to bring the Agreements to an end. Again, it was relevant that there was no notice requirement under the Agreements.

38. Overall, the Claimant's termination of the Agreements was lawful and effective.

The Guarantee Issue

39. This was an issue as to the enforceability of the Third and Fourth Guarantees. The Second Defendant maintained that they were invalid because they were incomplete since the blank space for filling in the number of the Agreement had not been completed. He argued that this meant that the subject matter of the guarantee did not appear on the face of the document and accordingly the written document did not contain all the terms of the guarantee as required by the Statute of Frauds.

40. Mr Abbott's counsel argued that where enforceability is governed by the Statute of Frauds then if the written agreement is incomplete then the court cannot look to extrinsic evidence to complete the agreement or cure a deficiency, it can only interpret the written agreement before it. He relied on *Holmes v Mitchell* (1859) 141 ER 856, where the court held that a written document stating, "*I will take any responsibility myself respecting it should there be any"* was not a valid guarantee even though its meaning could have been ascertainable from surrounding conversations. Williams J held that "*The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations."*

41. He also relied on *State Bank of India v Kaur* (1995) Times 22 April 1995 as an example of an incomplete agreement and suggested that where something fundamental is missing from the written agreement then the court cannot look outside the agreement to fill in the blank. There the document relied on did not identify the debtor or the amount of the guaranteed obligation. He relied on Brown LJ's comment that, *"I do not believe that in this case extrinsic evidence would be admissible to remedy the defects which plainly exist in that particular document and to that extent, I do not believe that it can circumvent the Statute of Frauds."* He also relied on the comments in the judgment of Rose LJ stating:

> "*It is apparent from Mr Justice Scott's judgment in Perrylease Limited v Imecar, to which my Lord has referred, that extrinsic evidence may be admissible to explain the terms of a document even when the document relied on is one which has to comply with the statute of Frauds. In the present case, however, there is no term to be explained. The document relied on by the plaintiff is totally silent both as to the identity of the principal debtor and as to the amount of the defendant's obligation".*

42. Mr Abbott's counsel argued that the parties had chosen to define the term "Guaranteed Obligations" and "Agreement" by reference to an agreement identified by number. It was not open to the court to go behind that interpretation and extrinsic evidence was not admissible for this purpose. In the absence of an agreement number the document was little more than a dated proforma with the names of parties. Mr Abbott's counsel argued that the court cannot insert missing details into the document because if details are missing then the whole contract is not contained in the written instrument as required by the Statute of Frauds.

43. Further, Mr Abbott denied that the Claimant could resort to a claim by way of the indemnity because as a matter of substance this was a guarantee because any liability under the indemnity wording was co-extensive with that under the guarantee and accordingly the Claimant had to satisfy the Statute of Frauds.

44. The Claimant's primary position was that the subject matter of the guarantee had been clearly identified on the face of the Third and Fourth Guarantees. It referred to authorities such as *Actionstrength Limited (t/a Vital Resources) v International Glass* [2003] UKHL 17 identifying the policy reasons underlying the Statute of Frauds and how

ordinary principles of construction apply to guarantees (as explained in *Paul James Egan v Static Control Components (Europe) Ltd* [2004] EWCA Civ 392). While the legislative policy of the Statute of Frauds precluded the court from using evidence of an oral promise to answer a defence under the Statue of Frauds, extrinsic evidence was otherwise admissible as shown by the decision of Richard Salter QC in *Fairstate Ltd v General Enterprise* [2010] EWHC 3072.

45. It argued that the extrinsic evidence resolved any question as to the subject matter of these guarantees since the blanks had been inadvertently not filled in. Both sides understood that the Second Defendant was providing a personal guarantee covering the hire purchase agreement that was signed at the same time. The case was wholly distinguishable from cases such as *Holmes v Mitchell* and *Kaur*. The more relevant authority is *Perrylease Ltd v Imecar* [1988] 1 WLR 463 (where the guarantee identified the subject matter of the guarantee by referring only to "proposed leasing") which makes clear that extrinsic evidence is admissible.

46. Further, clause 1.2 of the Third and Fourth Guarantees amounted to a separate undertaking to indemnify that was not subject to the Statue of Frauds. It was not co-extensive with the guarantee obligation under clause 1.1, as explained in *Law of Guarantees*, Andrews & Millett, 7th Edition, paragraph 3-013.

Conclusions

47. There was an issue between the parties as to whether the subject matter of the Guarantee had been identified on the face of the Third and Fourth Guarantees so as to meet the requirements of the Statute of Frauds. There was a further question as to whether (and how) extrinsic evidence could be used to decide whether an agreement was unenforceable under the Statue of Frauds where there was an ambiguity, gap or deficiency in the written document.

48. It was common ground that modern principles of construction apply to guarantees. However, when deciding on the effectiveness and enforceability of a guarantee the usual starting point is section 4 of the Statute of Frauds which provides that:

"*no action shall be brought … whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person … unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised".*

49. The Statute of Frauds may be satisfied by having a note or memorandum of the agreement signed. This suggests that not every detail or the whole contract must be put in writing for the contract to be enforceable under the Statute of Frauds and the Defendants were wrong to suggest as such.

50. However, it is well established that the written agreement must state all the material terms of the contract (although need not identify the consideration), as explained by Richard Salter QC sitting as a Deputy High Court Judge in *Fairstate*. He provides useful guidance explaining the purpose of the Statute of Frauds and its impact on the construction of a guarantee:

"*55. The purpose for which section 4 of the Statute of Frauds was enacted is stated in the long title to the Statute. It is "An Act for prevention of frauds and perjuries. For prevention of many fraudulent practices, which are*

commonly endeavoured to be upheld by perjury and subordination of perjury". The history and purpose of the section was recently analysed by the House of Lords in Actionstrength Limited (t/a Vital Resources) v International Glass Engineering In.Gl.En. Spa, where Lord Bingham of Cornhill stated that the mischief which section 4 was intended to address was "to prevent the calling of perjured evidence to prove spurious agreements said to have been made orally". According to Lord Hoffmann, its purpose "was precisely to avoid the need to decide which side was telling the truth about whether or not an oral promise had been made and exactly what had been promised" since "Parliament decided that there had been too many cases in which the wrong side had been believed".

...

58. It was also not in dispute that, in order to comply with s 4, the written agreement relied on must state all the material terms of the contract which have been expressly agreed, except for the consideration. In that connection, it has been said that the identity of the principal debtor is so clearly a material term of a contract of guarantee as to render its absence from the written contract or memorandum "fatal non-compliance with the Statute of Frauds".

...

75. In my judgment, Mr Berry is correct in his submission that the modern approach is to apply to contracts of guarantee the same principles of construction as would be applied to any other commercial contract. There is nothing in the policy underlying the Statute of Frauds which prevents the application of these modern principles of construction, or which requires them to be modified (except in one respect) in their application to guarantees. In accordance with these principles (and in a suitable case), extrinsic evidence may be relied upon to identify the guarantor, the creditor, the principal debtor or the obligation to be guaranteed, where any of these have been inadequately or ambiguously described in the relevant document. Where the evidence is sufficiently convincing (and the other conditions are met) for an order for rectification to be made, such evidence may even be used to supply a missing name or obligation.

76. The one respect in which the application of these principles may require to be modified in some cases involving guarantees is this. Where there is a genuine dispute as to the existence of any agreement of guarantee, or as to precisely what has been agreed, the Court may need to consider the extrinsic evidence that is presented to it for these purposes with particular care. In such cases, the Court will be slow to deprive the defendant of a legitimate statutory defence on the basis of contested oral evidence alone. To do so would be to undermine the policy of the statute "to avoid the need to decide which side was telling the truth about whether or not an oral promise had been made and exactly what he been promised". However, where reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities enables the Court to be sufficiently confident about the "objective meaning which is conventionally called the intention of the parties" in relation to the point at issue, then the fact that the document to be construed or rectified is a guarantee should be

no impediment to the application of all of the law's tools for giving effect to that intention.

77. The decision of the Court of Appeal in State Bank of India v Kaur is not authority for a stricter or more rigid approach to issues of construction or rectification than that which I have outlined. In Kaur, the parties expressly requested the Court not to send the case back for the County Court to make the findings of fact that would have been necessary for the Bank's arguments based on extrinsic evidence to have had any prospect of succeeding. In the circumstances, no claim for rectification to supply the missing name of the principal debtor (whose identity was in dispute) was (or could been) made."

51. However, I would accept the Second Defendant's argument that the Court of Appeal's decision in *State Bank of India v Kaur* marks some caution in the use of extrinsic evidence on construction where the enforceability of a guarantee is in issue. In *Kaur* the parties agreed that the case should not be sent back for further findings of fact. This may have been enough to justify the decision that there was no enforceable guarantee but it was not the basis for the Court of Appeal's decision.

52. While the Court of Appeal confirmed that extrinsic evidence could be used to construe and explain terms that had been agreed in writing, the thrust of their decision was that deficiencies or gaps in the written agreement meant that there was no complete contract and these defects could not be remedied by construction by reference to extrinsic evidence since this would be to circumvent the Statute of Frauds. To this limited extent I would qualify the conclusions in paragraph 77 of *Fairstate.*

53. The Defendant also correctly pointed out that a question as to the construction of a guarantee may be separate from that as to whether an enforceable guarantee has been concluded, which will depend on the form of the agreement, and whether the written agreement is sufficiently complete or certain.

54. In most contractual disputes questions as to whether an agreement (or clause) is sufficiently complete or certain to be enforceable will be decided together with questions as to the meaning of the agreement since both will inform each other and the same tools are applied.

55. On the first issue Vos J in *Westvilla Properties v Dow Properties* [2010] EWHC 30 (Ch) explained, quoting *The Interpretation of Contracts* by Lewison LJ that *"Where parties have entered into what they believe to be a binding agreement the court is most reluctant to hold that their agreement is void for uncertainty, and will only do so as a last resort".* Vos J was willing to use extrinsic evidence to complete a blank space that had been left for the percentage of a service charge in a lease.. He also referred to the often cited explanation of the court's powers of correction from the House of Lords' judgment in *Chartbrook v Persimmon Homes* [2009] UKHL 8 [25],

"*What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant".*

56. However, where enforceability is being challenged under the Statute of Frauds the formality requirement applies. As Richard Salter QC confirmed in *Fairstate*, the position is different in that all material terms must be evidenced in writing. This influences the relevance and use of extrinsic evidence in cases where there is a gap or mistake in the written instrument.

57. The main limitation on the use of extrinsic evidence is that evidence of oral conversations going to the existence and content of the material terms should not ordinarily be used to answer a defence under the Statute of Frauds since this would circumvent the legislative intention. *Holmes v Mitchell* is authority that the court should not have recourse to evidence of previous oral conversations in order to complete or supplement a written instrument. This approach is confirmed in the modern authorities, including *Actionstrength* and *Fairstate.*

58. Where the defence under the Statute of Frauds goes to whether the written agreement contains all the material terms or is sufficiently complete or certain to be enforceable then (subject to the main limitation mentioned above) extrinsic evidence is admissible in the ordinary way for the purpose of understanding the meaning of the written agreement (see *Perrylease* and *Fairstate*). However, the court also has to decide whether the written document is sufficiently complete to be enforceable. In *Perrylease* the court was confident that the document was a complete contract. In *Fairstate* the court came to the opposite conclusion, concluding that the catalogue of corrections and additions would amount to re-writing a new contract.

59. The writing requirement under the Statute of Frauds reflects the legislative purpose of requiring a written record where guarantees may be one-sided for the surety (as explained in *The Law of Guarantees* 7th Ed, Andrews & Millett, §3-002). The rule entails that material terms are to be in writing whereas in an ordinary contractual dispute the absence of a written record for a term would not generally preclude the use of extrinsic evidence to complete the contract. The writing requirement may prevail over the court's usual reluctance to find that a contract is void for uncertainty, depending on what sense the court can make of what has been agreed in writing. It may therefore limit the court's willingness to find answers in the extrinsic evidence and use "red ink and verbal rearrangement or correction" to re-write the guarantee by way of construction.

60. The Court of Appeal in *Kaur* confirmed that extrinsic evidence is admissible to explain the terms of a document where the existence of an enforceable guarantee is challenged under the Statute of Frauds. It decided that even though extrinsic evidence would be admissible to explain the terms of the document, the document was so deficient and silent on key matters that extrinsic evidence could not remedy the defects because this would circumvent the Statute of Frauds. A similar approach applied in *Fairstate* although there the court emphasised that rewriting by way of construction (and also rectification which was in issue) would not be consistent with the parties' objective intentions.

61. The short answer to Mr Abbott's defence under the Statute of Frauds is that the subject matter of the Third Guarantee (and the Fourth Guarantee likewise) had been identified on the face of that document by reference to *"the agreement dated on or about the same date hereof*" between the Claimant and the First Defendant, and the inserted date. The lender and debtor were specifically named, together with a clear explanation of what the guaranteed obligations were. The fact that the number of the agreement was missing (and a blank had been left unfilled) meant a detail was missing, but not a material term. The missing detail did not prevent the written instrument from being a complete contract. On

the face of the document the parties had agreed that the agreement was also identified by its date. There was no ambiguity in the Third or Fourth Guarantees as to which hire-purchase agreement was being referred to, and no need to refer to extrinsic evidence.

62. Even if wrong on that conclusion, extrinsic evidence was admissible, as explained above, to understand the meaning of the document. This evidence was admissible even where the wording suggested that the parties had expected a number to be inserted. There was evidence that no other agreement was concluded between the Claimant and the First Defendant on or about that date so the identity of the relevant agreement was beyond doubt. Further, Mr Abbott fairly accepted that he would have been expecting to sign personal guarantees to cover the Third and Fourth Agreements and both sides understood he was doing so. Both sides also accepted that the absence of the number on these two documents was a matter of inadvertence and the Guarantee and Agreement had been put forward together. It would be obvious to any reasonable person what the parties had agreed on the subject matter of the guarantee and this was evidenced in writing.

63. Relying on this evidence would not circumvent the wording or purpose of the Statute of Frauds. The facts are firmly distinguishable from *Holmes v Mitchell, Kaur* or *Fairstate* which involved documents that were wholly deficient as evidence of a complete contract.

64. Further, even if the Second Defendant had a defence under the Statute of Frauds to liability as a guarantor, he would have been liable to indemnify in the same amount under clause 1.2 of the Third and Fourth Guarantees. Clauses 1.1 and 1.2 were worded differently such that the Second Defendant's liability under the indemnity was wider than that under the guarantee, and extended to consequential loss and liabilities not recoverable against the customer or by way of the guarantee.

The Credit Issue – the Bentley

65. The Defendants accepted that the Lamborghinis and the Daytona were not sold by the Claimant at an undervalue and accepted the figures put forward as a credit for their value (although there was an issue as to the date for which credit should be allowed for all the Vehicles which is addressed below in relation to interest).

66. There was, however, an issue in respect of the credit for £51,000 given for the value of the Bentley. This represented the price at which the Bentley was sold on 22 September 2020. The Claimant accepted that it had not obtained a trade valuation from a dealer as provided for under clause 8.2 but maintained that this represented its trade value. It relied on Mr Naemi-Pour's evidence that he had obtained the CAP ID prices for the Bentley which were £60,700 for clean, £58,100 for average and £55,600 for below average condition. His evidence was that the Bentley was in terrible condition when repossessed and he relied on an inspection conducted by HR Owen in September 2020 which recommended work worth more than £18,000, including some serious issues. He explained that he did not have the car's full service history (or the spare key or registration certificate) which prevented him achieving two initial offers which were then withdrawn. He had asked Mr Abbott for the service history but had only been provided with one minor service invoice, and nothing more was forthcoming even after he followed up to ask for the full service history. For a car of this type a full service history was important and its absence meant that he was unable to realise the CAP ID prices even though initial bids had been £53,000 and £57,500.

67. The Defendants maintained that in the absence of any evidence from a dealer as required by clause 8.2 of the Agreements, the court should find that the trade value was no less

than the CAP ID figure of £58,100 for a model in "average" condition since the CAP ID prices were the best evidence of its trade value. Mr Abbott took issue with the HR Owen report because it was done some months after the Bentley was repossessed and he considered it overstated the works required.

68. Mr Abbott had fairly explained in his evidence that the Bentley was a rental vehicle that had been bought in 2015 and rented out to a number of customers. Mr Abbott may have considered it was in average condition as a rental vehicle. However, the CAP ID prices were not based on rental cars. He had been in India from December 2019 until at least October 2020 and had no direct evidence of the Bentley's condition as at May 2020.

69. I preferred Mr Naemi-Pour's evidence since he was dealing directly with the Bentley from May 2020 and it was supported by the HR Owen report. The number of matters where work was recommended suggested that the car's condition was well below average, and this also reflected the fact that it been used as a rental vehicle. I also accept his evidence that the full service history would be regarded as a standard requirement when buying this sort of high-end vehicle. Mr Abbott had not provided the full service history even after being followed up. This meant that the Bentley would not have achieved the CAP ID price for a model in average condition, and this was apparent from the fact that the initial offers were withdrawn or lowered when the service history was not provided.

70. In all the circumstances the Claimant's figure of £51,000 better reflected the trade value of the Bentley when it was offered for sale in September 2020.

Interest

71. Interest was claimed at 8% under clause 2.6 of the Agreements. The main issue on interest was as to the dates from which credit should be given for the value of the Vehicles. The Claimant's calculation applied the credit from the date when the relevant Vehicle was sold. In relation to the Daytona and Lamborghinis the Claimant maintained that the Defendants were estopped from claiming that the Vehicles should have been sold earlier since Mr Abbott had specifically requested that he be given an opportunity to refinance the Vehicles and keep them. In addition, a fair sale price was not available during the COVID 19 lockdown.

72. The Defendants maintained that if a vehicle was not sold within 28 days of repossession the Claimant was obliged under clause 8.2 of the Agreements to give credit for the trade value established in accordance with that clause at that stage (namely 28 days after repossession). They argued that this reflected the wording and the fact that the Claimant would at that stage then have the benefit of the asset (and the customer would have lost that asset) such that the Claimant must then give credit for its value. They also relied on the fact that no trade valuation had been obtained from a dealer in accordance with clause 8.2.

Conclusions

73. The express terms of clause 8.2 were dealing with the sum to be paid to a customer who had paid outstanding sums due after termination. It makes clear that the Claimant, if in possession of a Vehicle after termination, was obliged to *"try to sell"* it and pay the customer the proceeds of sale. If a sale was not achieved within 28 days of repossession then the Claimant was obliged to pay the customer the Vehicle's trade value which was

to be *"established as soon as practicable after the 28 days by a dealer… in vehicles of the same kind as the vehicle"*.

74. The terms of clause 8.2 are relevant in indicating what the Claimant was required to do following termination where the customer has not paid outstanding sums (which was the case here) and the car remains unsold. The ordinary meaning of the wording is that the Claimant is only obliged to obtain an appropriate trade value "as soon as practicable" after 28 days following possession, and upon obtaining such a trade value it would give credit. There was no agreement on an absolute 28 day guillotine for giving credit for a trade value. The express terms of clause 8.2 are focusing on an appropriate trade value being obtained by a relevant dealer as soon as practicable and then paying that value. It would not always be practicable to achieve this within 28 days.

75. It was in the interests of both sides that the most appropriate value be obtained as soon as practicable. An inflexible rule setting a fixed 28 day limit could operate unfairly for both sides and incentivise the Claimant to obtain a trade value regardless of whether a substantially better value could practicably be obtained by waiting for the car to be cleaned, serviced or valued by the most relevant dealer. This was particularly important for specialist high-end vehicles that might require specialist marketing.

76. The wording did not suggest that if the trade valuation was only practicably obtainable after 28 days then the customer should be credited at the 28 day point rather than the date when the trade valuation was obtained. To the contrary, the ordinary meaning of the express terms was that the customer could only be paid the trade value when the valuation was obtained. It was implicit that any credit should be given on the same basis. This reflected the express wording and it would have been anomalous if the non-paying customer was given more favourable credit than the customer that had paid all outstanding arrears. The fact that the Claimant had possession of the Vehicle as an asset did not in itself justify credit since as a finance company it had not bargained for possession and would not derive benefit from possession in the same way as a customer who had chosen the Vehicle for personal use, rentals or its own trading for profit, but would instead face liability for storage and finance costs.

77. Further, the Defendants' construction would not fairly reflect the fact that trade values would fluctuate depending on market conditions, the condition of the vehicle and the specialist dealer used, and that holding a vehicle would entail storage and finance costs. The Claimant and the First Defendant were experienced commercial operators familiar with trading in high end vehicles and would have been aware of these factors, and known that giving the cash payment (and credit) against the date of valuation would more accurately reflect the trade value of the Vehicle at the relevant time together with the cost of holding it. Giving an ante-dated credit was not only anomalous and inaccurate, but it would be against the customer's interest for the finance company not to wait to obtain the most favourable trade valuation.

78. Taking account of all these considerations, much clearer wording would have been required to justify the Defendants' construction and I reject the argument that clause 8.2 required credit to be given 28 days after possession regardless of when the trade valuation was given.

79. The fact that the Claimant had not obtained a dealer valuation on 19 June 2020 could not in itself justify treating the sums the Defendants accepted as being trade valuations obtained on that date. The Defendants failed to show that there was any breach of clause 8.2, or that any greater trade value would have been obtained if the Claimant had sought earlier valuations.

80. Instead the issue was as to whether the Claimant could justify giving the credit on the dates when the Vehicles were sold rather than an earlier date.

81. All the Vehicles had been repossessed during the first UK lockdown arising out of the COVID 19 pandemic. It was common ground that market conditions were very poor at that stage in May 2020 when most dealers and garages were not open and there was very limited demand. A CAP ID valuation was obtained by the Claimant for the Bentley in September 2020 and it was sold around that time shortly after having gone to HR Owen for a report of what work on it was required. I am satisfied that September 2020 was the earliest date that the Claimant could practicably have obtained an appropriate trade valuation in accordance with clause 8.2.

82. All the evidence as to market conditions suggested that all four Vehicles would not have been sold or valued at a fair price during the lockdown, and that trade valuation at an earlier date would have been lower than what was ultimately achieved. The Claimant's evidence on this was not challenged. Indeed, it was Mr Abbott's evidence that the market for the Vehicles had remained substantially depressed until mid-2022. The evidence as to the state of the market during that initial lockdown suggested that even if a trade value for any of the Vehicles could have been obtained on 19 June 2020 then it would have been very substantially lower than the sale proceeds ultimately achieved at later dates.

83. In relation to the Lamborghinis and the Daytona it was not disputed that Mr Abbott was keen to retain those vehicles and continued to seek a negotiated solution to achieve this. He had asked the Claimant to discuss possible resolutions rather than begin the process for selling them and there were unsuccessful discussions about reaching a settlement. I accept the Claimant's evidence that following a number of direct telephone calls between Mr Selig and Mr Abbott the Claimant concluded that Mr Abbott was not forthcoming on a resolution. It obtained CAP ID prices for the Lamborghinis in July 2021. It decided in around August 2021 to solicit bids for the two Lamborghinis and sold them promptly on 13 August 2021 for sums that corresponded to the CAP ID prices.

84. The Daytona was a fairly unique car. Mr Naemi-Pour explained that it was a specialist and rare racing car that was eligible to participate in racing events on a racing track. It was a very high value vehicle and it was common ground that there would only be a very specialist market for it. The Claimant had obtained two specialist valuations for it. The first was from a specialist Ferrari valuer in early December 2021. In January 2022 Mr Abbott had nominated his own expert, Mr William Smith of RM Sothebys. The Claimant had arranged an inspection and Mr Smith had strongly recommended that the Daytona be sold by auction at RM Sotheby's biennial Monaco classic car auction in May 2022. This was arranged and Mr Abbott had not objected to the sum allowed by reference to the valuation.

85. By asking the Claimant to enter and maintain negotiations for a settlement under which he would retain the Vehicles Mr Abbott was estopped from claiming that the Claimant

was in breach of clause 8.2 in having failed to obtain an earlier trade valuation or give credit at an earlier stage. Given the unique nature of the Daytona, the auction in May 2022 reflected the trade valuation that Mr Abbott's preferred valuer had given, which was based on a sale by way of specialist auction, and credit at that stage was in compliance with clause 8.2.

86. The Defendants had correctly accepted that the sums credited fairly represented the Vehicles' relevant value (save for the issue on quantum regarding the Bentley). Clause 8.2 did not justify treating these sums as being trade valuations obtained on 19 June 2020 or giving credit at that point as the 28th day. There was no basis to suggest that any higher sums would have been credited if a trade valuation had been obtained at an earlier stage. The Claimant was entitled to give credit for the value of the Vehicles as at the date when they were actually sold because, taking account of the impact of COVID 19 restrictions, the characteristics of the cars, the Second Defendant's own requests for a resolution to keep the Lamborghinis and Daytona, it had promptly sought to fix their value (and realise it), and those dates best represented the earliest date when a trade value could practicably be obtained.

Final conclusion

87. For all these reasons the Claims are allowed against both Defendants in the sums claimed.