IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

No. HT-2018-000334

Neutral Citation Number: [2020] EWHC 2738 (TCC)
Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 27 August 2020

Before:

MR MARTIN BOWDERY QC

(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

ROTAMEAD LIMITED — Claimant

- and -

(1) DURSTON SCAFFOLDING LIMITED
(2) JAMIE RYAN
(3) PAUL DURSTON — Defendants

MR M. SMITH (instructed by Palmers Solicitors) appeared on behalf of the Claimant.

MR H. BAIG and MR A. LO (instructed by Rainer Hughes) appeared on behalf of the Second Defendant.
THE THIRD DEFENDANT appeared in Person and on behalf of the First Defendant.

J U D G M E N T

(v i a S k y p e)

MARTIN BOWDERY QC:

1 At the trial of this action, Michael Smith was Counsel for the Claimant, and Hammad Baig and Arthur Lo were Counsel for the Second Defendant. The Third Defendant Paul Durston represented himself and also acted for the First Defendant as its director. Until when very late on Friday, 14 August 2020, the First Defendant's solicitors came off the record and withdrew instructions to Hammad Baig and Arthur Lo, Hammad Baig and Arthur Lo were counsel for both the First and Second Defendants and, indeed, on 13 August 2013 served a skeleton argument on behalf of the First and Second Defendants. However, all parties and the court agreed that the trial should proceed with Paul Durston representing himself and the First Defendant with Hammad Baig and Arthur Lo only acting for the Second Defendant. The parties have helpfully agreed a chronology which is set below.

Agreed Chronology

Date	**Event**	**References**
23 Jan 2013	Paul Durston Limited ("**PDL**") incorporated.	Bundle 2, tab 40.
24 Jan 2013	PDL applies for a credit account -with C. D3 signs off the application form. The application form includes a "Personal Guarantee" section, which is separately signed by D3.	Bundle 2, tab 40.
10 May 2016	Croudace Homes limited **("Croudace")** places order "Chelmsford, Channels - 020; Subcontract Order No. 020/563" for PDL to carry out and complete Scaffolding & Safety Decking - Labour, Plant & Materials at Croudace's "Channels" site in Chelmsford.	Bundle 2, tab 50.
24 Aug 2016	PDL enters into a sub-contract with Higgins Construction Pic ("**Higgins**") for the hire, delivery, erection and dismantling of scaffolding on Higgins' Sutherland Road project.	Bundle 2, tab 52.

Date	Event	References
17 Feb 2017	D1 incorporated. Initially, D3 is the only director and person with significant control. On 27 Feb 2017, he is replaced with D2 in both capacities.	Bundle 2, tab 54.
21 Mar 2017	A meeting is held between Barry Norfolk of C and D3 at which D3 informed Mr Norfolk of PDL's impending insolvency.	
28 Mar 2017	Barry Norfolk meets with D3. D3 applies for a credit account on behalf of Dl. The application form includes a "Personal Guarantee" section, which is separately signed by D3.	Bundle 2, tab 43
30 Mar 2017	Barry Norfolk emails D2 stating that if the debt and materials were to be novated, C would require a letter from each company (being PDL and Dl) on headed paper setting out the particulars of the novation.	Bundle 4, tab 15
31 Mar 2017	At a meeting between Barry Norfolk, and D2 and D3 where the novation is agreed.	
31 Mar 2017	Letters dated 31 March 2017 from PDL (signed by D3) and from Dl (signed by D2) written to C each confirmed that from 1 April 2017, the duties and obligations of PDL and the outstanding debt of £186,564.48 were transferred to Dl.	Bundle 4, tabs 16 and 17.
31 Mar 2017	PDL's contract in respect of "Project Ref: 020, Chelmsford, Channels - Subcontract Order Nr: 020/563" with Croudace Homes Ltd **("Croudace")** novated to Dl.	Bundle 2, tab 44.
18 Apr 2017	Meeting between representatives of Higgins, Mr Norfolk of C and D2 and D3 regarding the Sutherland Road and Bramber House sites.	
08 May 2017	PDL removed from Sutherland Road and Bramber	

Date	Event	References
	sites.	
24 May 2017	PDL enters creditors voluntary liquidation.	Bundle 4, tab 43.
15 Jun 2017	A payment arrangement agreed between C and Dl whereby Dl could delay its payment the invoices for May, June and July 2017 and make instalment payments in respect of the historic balance.	Bundle 4, tab 52.
15 Jun 2017	D2 signs the surety agreement.	Bundle 2, tab 45.
18 Feb 18	At a meeting between Barry Norfolk and D2 an agreement is reached whereby unpaid invoices for August 2017-January 2018 can be paid to a schedule from February 2018-June 2018, along with £5,000 per month in respect of the historic PDL balance. The agreement is recorded in an email from Barry Norfolk dated 19 Feb 2018.	Bund 4, tab 69.
16 May 2018	Ds raised issue with the amount of money allegedly owed to C.	Bundle 4, tab 73
12 Jun 2018	Letter before action.	Bundle 5, Tab 223 - 234
11 July 2018	Ds' response to the letter before action.	Bundle 5, page 254- 260
29 Oct 2018	Claim issued.	Bundle 1, tab 7
21 Jun 2019	CCMC.	Bundle 1, tab 13
31 Jan 2020	PTR.	Bundle 1, tab 17
2 Feb 2020	D3 is reappointed a director of D1 and listed as a person with significant control.	Bundle 3, tab 94

2 The background to these claims and counterclaims is as follows. The Claimant is a supplier of scaffolding equipment. The Claimant claims £226,711 for the unpaid charges for the hire of scaffolding plus accruing charges. The Claimant also claims delivery up of the scaffolding in the Defendants' possession with damages in the alternative. Originally the

Claimant dealt with a company owned by the Third Defendant called Paul Durston Limited ("PDL"). The Third Defendant had entered into a personal guarantee and indemnity agreement in respect of PDL's liability to the Claimant.

3 It is common ground that in early 2017, PDL was in serious financial difficulty. At that time, PDL had in its possession considerable scaffolding equipment on hire from the Claimant which it was using on its building projects. The Claimant's case is that by the end of March 2017, PDL owed the Claimant £186,564.48.

4 The Claimant's case is that PDL's obligations were novated to the First Defendant at the end of March 2017. The Third Defendant also had entered into a new personal guarantee and indemnity agreement in respect of the First Defendant's obligations on 28 March 2017. Separately, some but not all of PDL's scaffolding projects with third parties were novated to the First Defendant. PDL entered creditors voluntary liquidation on 24 May 2017.

5 In June 2017 the Claimant contends that the the First Defendant entered into a payment arrangement in respect of the historic balance owed to the Claimant and agreed to reschedule ongoing charges. As a condition of that arrangement, the Second Defendant entered into a written contract of indemnity and guarantee in respect of the First Defendant's obligations.

6 In essence, the Defendants' defence is that the novation agreement, the payment arrangement, and the surety agreements are void or ineffective due to coercion, economic duress, or unfair pressure. The First Defendant also contends he has overpaid hire charges and counterclaims for a sum to be assessed.

7 The Defendants contend that the Second Defendant and Mr Paul Winston who was engaged by the First Defendant as its accountant carried out a reconciliation exercise and discovered that the First Defendant had overpaid for the scaffolding suggesting that the total amount

invoiced by the Claimant to the First Defendant was £297,839.28 and in turn the total sum paid to the claimant was £314,963.18 inclusive of VAT.

8 I have heard evidence from the following witnesses:

The Claimant:

(1) Barry Norfolk, the managing director of Rotamead Limited. Mr Norfolk, I consider, was an impressive witness. He gave his evidence clearly and his evidence was consistent with the contemporaneous documents. Gerry Dobbs, the managing director of D & B Scaffolding Limited, in his witness statement stated that:

> **"I have known and done business with the Claimant for a number of years and know the Claimant's managing director, Barry Norfolk, quite well. He is a good, honest, and trustworthy man. The Claimant has a very good reputation as a result within the scaffolding industry."**

Mr Dobbs was not challenged in respect of this part of his witness statement and I find that his assessment of Mr Norfolk is a fair and accurate assessment.

I should note that three documents were put to Mr Norfolk with the suggestion that each of them were not authentic. Mr Norfolk stated that such a suggestion was simply not correct. I agree. Prior to Mr Norfolk's cross –examination no suggestion had been advanced that they were not authentic No notice had been served pursuant to CPR Part 32.19. In the absence of such a notice, the Defendants are deemed to admit the authenticity of the three documents found at:

B 391

C 114

B 425.

To challenge the authenticity of these documents without any prior warning before Mr Norfolk's cross-examination I consider was unfair, unreasonable and wholly inappropriate.

(2) Robert Jones, the purchasing director of Rotamead, gave clear answers with no evasion. His evidence was not challenged to any great degree. In particular, he was not challenged in respect of the detailed and meticulous checklists he produced when 'scoring in' the return of scaffolding from the Higgins sites. The off-hire records of the scaffolding from the Higgins sites are in the Supplemental Bundle. The Defendant's by CPR Part 32.19 (1) have admitted the authenticity of these documents.

(3) David Coker is an estimator employed by D & B Scaffolding Limited. Again, his evidence was clear and robust. In particular, I accept his evidence at paragraphs 10-13 of his witness statement where he stated:

> **"From speaking with Paul Smith, I was made aware of the fact that the Claimant wanted its equipment back from the Sutherland Road site or wanted this paid for. Higgins needed the equipment, but did not want PDL on site. Therefore, Higgins wanted to engage D&B, on a labour only basis, to dismantle and return the equipment at the Sutherland Road site to the Claimant, as and when required.**
>
> **During March/April 2017, Paul Smith attended our offices to discuss our prices for transporting the equipment and to negotiate a labour rate (for the dismantling of the equipment at the Sutherland Road site). We agreed transportation costs and a labour rate. It was confirmed, by Paul, that Higgins would be responsible for the hire charges associated with the equipment at that site. At this stage, we were not aware of the likely quantities of equipment at the Sutherland Road site.**
>
> **Whilst I am unsure of the date, I know that the Claimant sent to D&B a hire note detailing the equipment which PDL believed to be at the Sutherland Road site. When I first looked at the hire note, I initially thought that the Sutherland Road site must be an extremely big job. However, this did not tie in with what I was**

told, by Paul Smith (who indicated to me that it was not a big job), and what we later discovered.

I am aware that Gerry went to have a look at the site to see what was there, in terms of equipment. The Sutherland Road site consisted of four apartment blocks with four or five storeys and the equipment was already up and erected. Gerry informed me that the site was not very big and that the quantity of the equipment, that we had been told to expect was there, could not have possibly have been there. I understand that Gerry did in fact call Barry Norfolk (Managing Director of the Claimant) on 25 April 2017 to inform him of this."

(4) Gerry Dobbs, the managing director at D & B Scaffolding Limited, explained D & B's involvement in removing the Claimant's scaffolding equipment from the Sutherland Road site. As stated earlier, I accept his assessment of Mr Norfolk being a good, honest, and trustworthy man, and his evidence at paragraph 19 of his witness statement that:

> **"On 25 April 2017, I spoke to the Claimant's managing director Barry Norfolk and confirmed that I did not believe that the equipment at the Sutherland Road site amounted to the quantities as outlined in the hire note as supplied by the Claimant."**

(5) Gary Sargeant was the commercial manager of Higgins Construction PLC and gave helpful assistance to the court. His evidence regarding the meeting held on 18 April 2017 was robustly challenged in cross-examination but I accept his evidence as to what was discussed at the meeting on 18 April 2017 and what happened thereafter, and particularly his evidence in paragraphs 13-20 of his witness statement where he stated:

> **"13. A meeting took place at Higgins' head office in Loughton on 18 April 2017. The meeting was arranged to discuss an amicable solution to PDL's poor performance and the breakdown of the working relationship between Higgins and PDL. I do recall that at a minimum, the Third Defendant, Barry Norfolk (Managing Director of the Claimant) and I were all in attendance at this meeting. I cannot recall whether anyone else was in attendance."**

14. I also recall discussing the mechanics of how the remaining erected scaffolding could be quantified as this was exceedingly difficult to do in its erected state. Therefore, it was subsequently agreed, following Higgins' agreement to take over hire of the equipment at the Sutherland Road site, to only pay hire charges for the equipment as dismantled and returned to the Claimant (which Higgins and the Claimant would keep a record of).

15. Contrary to what is stated in PDL's letter dated 18 April 2017, Higgins did not accept that the schedule of materials, as produced at the meeting on 18 April 2017, was necessarily an accurate reflection of the scaffolding equipment left at the Sutherland Road site (or the Bramber House site). Barry also doubted the Third Defendant's position in this regard.

"16. 1 do recall that in addition to the hire note, as produced by Barry, the Third Defendant also brought along with him to the meeting a table of the equipment he alleged to have been at the Sutherland Road site. I do not recall that it was any different to the hire note as produced by Barry (and as attached to Higgins' letter to the Claimant dated 9 May 2017).

17. Further, Higgins did not accept the notion, as put forward by the Third Defendant, that it was (or should be) responsible for any shortfalls between the amount of equipment the Third Defendant claimed should be at the Sutherland Road site and what was in fact there.

18. At this meeting on 18 April 2017 (which followed various discussions between Higgins and PBL), Higgins and PDL agreed to a mutual termination with an agreed final subcontractor sum (this was subsequently confirmed in a letter from Higgins to PDL dated 19 April 2017 which was intended to supersede PDL's letter dated 18 April 2017 — which was not a true reflection of what was agreed) [pages 12-14 of GS1].

19. By email dated 20 April 2017, the Third Defendant again requested that Higgins accepted that the quantities of equipment as stated in the schedule, as supplied at the meeting on 18 April 2017, were present at the Sutherland Road site (and I believe this also included the equipment at the Bramber House site) and that Higgins would agree to being solely liable to the Claimant for any shortages [pages 15«20 of GS1].

20. However, Higgins would not agree nor would it confirm the quantities of equipment as alleged to have been present at either the Sutherland Road and/or Bramber House. It was not possible to quantify what exactly was at those sites until

> **the equipment was dismantled, estimated and returned to the Claimant (who undertook the final count). Further, Higgins certainly never agreed that any shortages or shortfall would be its responsibility. (This was subsequently confirmed in an email from me to the Third Defendant on 10 May 2017)"**

This evidence is consistent with the contemporaneous documentation but is also consistent with Mr Norfolk's evidence at paragraphs 65-68 of his witness statement where he stated:-

> **"The Third Defendant put a lot of pressure on Higgins to confirm that the equipment at the Sutherland Road site was in the quantities as stated on the hire invoice supplied by me on April 2017.**
>
> **However, Higgins would not confirm this. Higgins is not m the scaffolding game and would not have been able to have said, looking at the site, what should and should not have been present in terms of scaffolding equipment.**
>
> **However, it was quite clear to all parties that the equipment the Third Defendant alleged to have been present at the Sutherland Road and Bramber House sites was simply not in the quantities as alleged.**
>
> **Gerry (Managing Director of D&B) confirmed to me, during our telephone call on 25 April 2017, that "*in no way is the gear* [equipment] *there*'' in the quantities as suggested by the Third Defendant."**

<u>The Second Defendant</u>:

(1) Jamie Ryan said in his witness statement that he had been a director of the First Defendant since 17 February 2017. Mr Ryan was, I found, a difficult witness who was keen to argue his version of events rather than give direct answers to the direct questions which he was asked. He came across as a man with strong views and great determination, and not the sort of person who would be easily bullied into signing agreements he did not agree with.

(2) Mr Paul Winston is a chartered accountant and who acted for the First Defendant since August 2017. His evidence was somewhat disappointing. He believed or thought that Rotamead Limited had written off the historic debt of the novated balance in the 2017 accounts when that belief was based upon, at best, speculation based upon similar numbers at 31 July 2016 and 31 May 2018. It is common

ground that the novated account as at 31 March 2017 was £186,564.48. By 31 May 2018, the figure was now £99,500.84. It could not be the same £99,500 that appeared on the balance sheet dated July 2016. This flight of fancy was unimpressive and was a point not pleaded or pursued in any cross-examination of the Claimant's witnesses.

Furthermore and perhaps more importantly, his own Witness Statement does not support the suggestion made in paragraph 5(9) of the Skeleton Argument of the First and Second Defendants which stated that:

> **"Subsequently, the Second Defendant and Mr Paul Winston, who was engaged by the First Defendant as its accountant, carried out a reconciliation exercise and discovered that the First Defendant was in fact in a position of overpayment."**

What his Witness Statement stated is that: -

> **"Mr Ryan gave me in about May 2018 a one page schedule of invoices and payments, a copy of which is at [page 3]. This was an attempt by Mr Ryan to reconcile the invoices received by DSL in respect of scaffolding and related equipment hired to DSL, from Rotamead from April 2017. It will be seen that the schedule suggests that DSL had overpaid Rotamead in respect of their invoices by £17,000 or so."**

(3) Martin Chappell the First Defendant's Contract Manager, chose for unidentified personal reasons not to attend court to be cross- examined. The very serious allegations he made in his witness statement regarding Barry Norfolk's son was not put to Barry Norfolk or any of the Claimant's witnesses but those allegations were never withdrawn. He also shared the strange views adopted by Mr Ryan and Mr Durston that it is somehow wrong for suppliers to ask for its equipment to be returned when the hire fees have not been paid. In all the circumstances, I attach no weight to Martin Chappel's evidence.

The First and Third Defendants:

(1) Mr Durston gave evidence for himself and the First Defendant. I found Mr Durston a somewhat naive witness and who seems somewhat out of control as events unfolded. An illustration of his naivety is set out in the closing written submissions when he stated:

> **"I would like to explain here why I believe I should not be asked to pay the £511,064.81 claimed by Rotamead.**
>
> **As you know, I have enjoyed a good working relationship with Barry. PDL has been his client from around 2013. We socialised together and were good friends. While PDL and Rotamead were working together, PDL was behind on payment sometimes, but we always paid in the end.**
> **However, after Daniel Bell stole more than £300,000 from PDL in 2016, PDL was in serious trouble. There was no way that we could have continued to pay the hire costs. In the end, the company went into liquidation on 24th May**
>
> **I would like to think of myself as someone with a sense of responsibility. I do not like leaving people in the lurch, whether it was Barry or the clients PDL was working with and were relying on us to provide them with a service. I wanted some way to make sure that PDL's customers are not left holding the bag when PDL went under. So, I worked with Jamie to set up DSL, hoping that this new company could carry on serving PDL's customers."**

9 This apparent naivety may explain how his financial director managed to steal from PDL some £326,000 between June 2015 to July 2016 and then destroy a substantial number of invoices and other information relating to the finances of PDL. However, the statement of affairs prepared for the liquidators, I noticed, showed that amongst the unsecured creditors of Paul Durston Limited in liquidation were HMRC VAT of £421,044, HMRC PAYE, and ICIS £39,016.

THE FACTUAL BACKGROUND

10 On a review of the contemporaneous documentation and the witness evidence, I make the following factual findings in the following time periods, some of which are common ground and should not be controversial.

The First period is prior to the incorporation of DSL on 17 February 2017

11 In January 2013, PDL was incorporated and all three of its directors, including the Third Defendant, gave personal guarantees in respect of PDL's liabilities. Mr Durston gave his guarantee without objection because it was the price a newly incorporated company reasonably had to pay to obtain a credit arrangement with Rotamead Limited.

12 In June 2016, Mr Durston discovered his finance director had been stealing large sums of money from PDL to pursue his gambling habit. Thereafter, I accept the evidence that Mr Norfolk was not told about the theft by Mr Durston's co-director until 21 March 2017. Mr Durston's evidence was that he told Mr Norfolk a few days after discovering the fraud is inconsistent with his pleadings and I do not consider that it took place. Throughout this period, PDL continued to hire scaffolding from Rotamead and were often in severe arrears.

13 By January 2017, Mr Durston and Mr Ryan were forced to accept that PDL could not be rescued. They formed a joint venture to endeavour to rescue as much of the ongoing business as possible and set up DSL. Mr Durston said as much when cross-examined (see Day Three, page 32):

> **"Q. It was a joint venture from the start because that is what you say. You say "Go into business together."**
>
> **A. Yeah."**

14 From the founding of this joint venture the records of shareholdings and directorship, I find, were not intended to reflect the true ownership and control. DSL was incorporated on 17 February 2017. At that date, Mr Durston was listed as the only director and shareholder. However, true ownership and control was always jointly between themselves. (See Mr Ryan's evidence when cross-examined on Day two, Line 48):

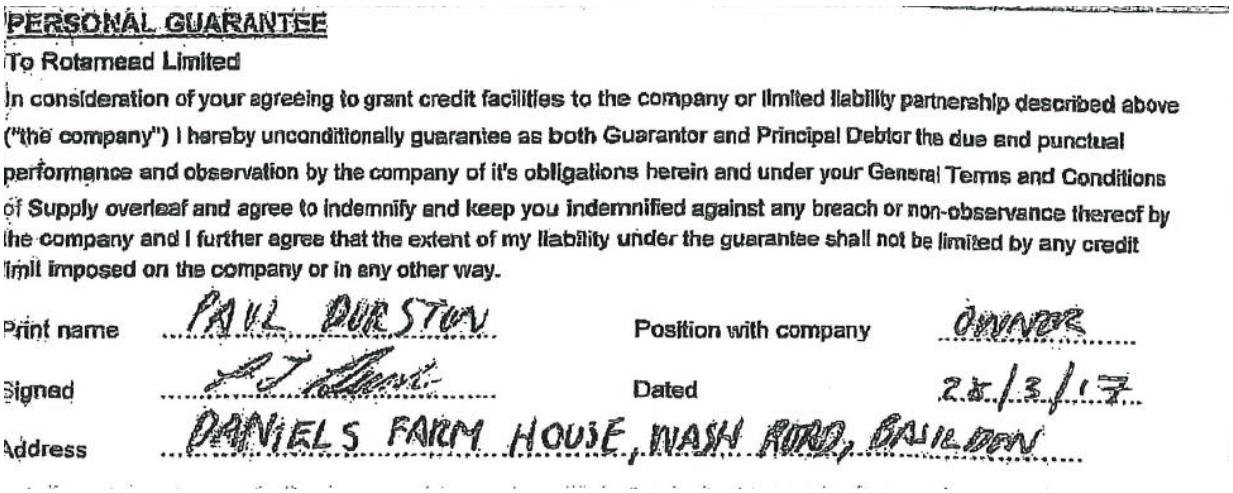
> **"Q. And the vehicle for that business venture, that joint business venture, was to be DSL.**
>
> **A. Correct."**

The Second Period is March 2017

15 The next time span is the three March meetings: 21 March 2017; 28 March 2017; and 31 March 2017.

16 On 21 March 2017, it is at this meeting that Mr Norfolk was finally told of the fraud. From my assessment of the evidence of the witnesses the suggestion that Mr Norfolk was trying to bully Mr Durston into doing anything or enter into any kind of unfavourable agreement is not made out. Mr Norfolk was understandably angry but he listened to Mr Durston as Mr Durston explained his and Mr Ryan's plan to novate PDL's contract with third parties to DSL with the suggestion of a novation of Rotamead Limited's contract with PDL to DSL. I do not accept Mr Norfolk subjected Mr Durston to verbal abuse, threats and profanities.

17 On 28 March 2017 at this meeting Mr Durston met Mr Norfolk to set up the necessary credit account with Rotamead for DSL. The position facing DSL was clear: (1) they needed Rotamead's scaffolding; (2) they could not buy the scaffolding; and (3) they could not pay any hire charges up front. In respect of this meeting, I accept Mr Norfolk's evidence that there was no bullying, no unreasonable behaviour, and no duress. This was a commercial agreement favourable to both parties. Mr Durston signed the credit account set out at B8 of the Bundle which included the Personal Guarantees which stated: -



PERSONAL GUARANTEE

To Rotamead Limited

In consideration of your agreeing to grant credit facilities to the company or limited liability partnership described above ("the company") I hereby unconditionally guarantee as both Guarantor and Principal Debtor the due and punctual performance and observation by the company of it's obligations herein and under your General Terms and Conditions of Supply overleaf and agree to indemnify and keep you indemnified against any breach or non-observance thereof by the company and I further agree that the extent of my liability under the guarantee shall not be limited by any credit limit imposed on the company or in any other way.

Print name PAUL DURSTON Position with company OWNER

Signed P J Durston Dated 28/3/17

Address DANIELS FARM HOUSE, WASH ROAD, BAILDON

18 On 30 March 2017, Mr Norfolk sent to Mr Durston an email setting out the terms upon which Rotamead was prepared to offer to DSL. That email is to be found at C44 of the trial bundle and states as follows:

> **"Morning Paul, if the debt and materials currently on hire are to be novated to a different company, we will require two separate letters on headed notepaper for the company, stating:**
>
> **Paul Durston Limited trading as Durston Scaffolding:**
>
> **(1) As from 27 March 2017, Paul Durston Scaffolding Limited trading as Durston Scaffolding, transfers all hire duties and obligations as detailed on hire invoice numbers H29872 and H29873, and monies owed £186,564.48, to Durston Scaffolding Limited;**
>
> **Durston Scaffolding Limited:**
>
> **(2) As from 27 March 2017, Durston Scaffolding Limited accepts all hire duties and obligations and agree the hire material quantities as detailed in hire invoices number H29872 and H29873 and accepts the outstanding debt of £186,564.48 from Paul Durston Limited trading as Durston Scaffolding.**
>
> **Kind regards, Barry."**

19 Mr Durston must have shown or explained the terms being offered by Rotamead to Mr Ryan because the next day, a meeting took place. On 31 March 2017, Mr Durston and Mr Ryan had a meeting with Mr Norfolk and either signed letters there and then or signed letters thereafter all dated 31 March 2017 on behalf of PDL and DSL transferring and accepting all hire duties and obligations as set out on invoice numbers H29872 and

H29873, and the outstanding debt of £186,561.48. The purpose of this meeting was to finalise the novation and all parties knew that. All parties agreed that the historic balance £186,561.48. The letters stated as follows: -

> **"Re: Outstanding Debt 31st March 2017**
>
> **Further to our meeting on Tuesday 21st March 2017, we write to confirm that as of 1st April 2017, Paul Durston Limited T/A Scaffolding transfers all hire duties and obligations (as detailed on hire invoice Nr's H29872 and H29873) and the outstanding debt of £186,554.48 to Durston Scaffolding Limited.**
>
> **We trust the above is satisfactory.**
>
> **Yours sincerely**
>
> **Paul Durston"**

20 I find, having heard the evidence from the parties, that no pressure was placed on Mr Durston or Mr Ryan to sign those letters. It was a commercial deal which reflected the commercial realities which must have been obvious to all parties, which were:

(1) DSL could not use the scaffolding on hire to PDL without the agreement of Rotamead Limited;

(2) Rotamead Limited was not prepared to write off the historic debt from PDL of £186,561.48. Indeed, I question why should they?

Mr Norfolk's evidence is that PDL was obliged to pay that sum at the date of novation and that evidence was not challenged.

<u>The Third Period is the meeting of the 18 April 2017</u>

21 The next time span deals with the meeting on 18 April 2017. The Claimant contends that on 18 April 2017, it was agreed at a meeting held at Higgins's head office in Loughton that PDL and Higgins would terminate their contracts in respect of the Sutherland Road and Bramber House projects and that Higgins would take over the hire of the scaffolding

material at the Sutherland Road and Bramber House sites. The Claimant contends that there was no such agreement as to what was on the Sutherland Road site. The Defendants contend that at this meeting Rotamead, PDL and Higgins concluded what their Counsel would describe as a trilateral agreement concerning the disposition of Rotamead Limited's on-hire equipment located at the Sutherland Road site with no mention or agreement regarding the equipment at the Bramber House site. The terms of the agreement were allegedly set out in a letter the same date which, in what the Second Defendant submitted in his written closing submissions, included was a crucial third paragraph of the letter which reads as follows:

> **"It is also it is also agreed that Higgins Construction, as at 18 April 2017, would enter into a formal agreement/contract with Rotamead Limited for the hire of the remaining scaffolding that is currently on site at Sutherland Road, Walthamstow. At the meeting, Barry Norfolk of Rotamead Limited issued a schedule of materials that are currently on hire at the above-mentioned project which was accepted by Higgins Construction. It was also agreed that the liability of any shortages should be the liability of Higgins Construction. A copy of this schedule is enclosed for your information and retention."**

22 I consider that the Defendant's submissions as to the impact and the effect of this passage of the letter dated 18 April 2017 to be wrong. The reasons why the Defendants' case is wrong can be analysed as follows;

-1. **<u>The Pleadings</u>: -**

On the basis of the pleadings, the Defence of the Defendants states only that in early to mid-April 2017 it was agreed in respect of both the Bramber House and Sutherland Road sites that:

> **"(a) Higgins would release PDL of its above contracts with it; and**
>
> **(b) Higgins would then enter into new contracts with Rotamead taking over liability for hire and return."**

This can be found in the Defence of the Second Defendant at A53 of the bundle at paragraph 39, and at A71 at paragraph 39 of the Defence of the third Defendant.

23 There is no mention in these pleadings that the schedule produced by Mr Norfolk is binding as to what was on the Sutherland site and if there are any shortages that they will be the responsibility of Higgins. Furthermore, the pleadings do not refer to or rely upon the "crucial" 18 April letter. Given that the Defendants' pleaded case does not even refer to the 18 April letter, which is the crux of this new case, I do not think the Defendants in the absence of any application to amend can rely upon this new case.

- 2. **The Witness Evidence**

24 In any event, Mr Norfolk's evidence as to what was discussed on 18 April was clear. At paragraph 57 of his witness statement, he states that the letter dated 18 April 2017 confirmed that Higgins would terminate the agreement with PDL and would take over the hire of the Claimant's equipment at the Sutherland site. Paragraph 58 of his witness statement states he had doubts that all his equipment was at the Sutherland Road and Bramber House sites. This was confirmed by Mr Sargeant's evidence (see paragraph 13 to 20 of his witness statement quoted above).

25 Perhaps more fatal to this new unpleaded case based upon the alleged tripartite agreement is that it is not supported by Mr Durston. He makes no reference in his Witness Statement to the 'crucial' meeting on 18 April 2017 or the crucial letter dated 18 April 2017. Mr Ryan's witness statement is far from clear. He does state at paragraph 26 that Higgins took over responsibility for the payment of the hire of Rotamead's equipment at the Sutherland site on 18 April 2017. However, he makes no reference in his witness statement to any agreement that Higgins were liable for all shortages.

-3 **Contemporaneous Correspondence**

26 Then in respect of contemporaneous correspondence, the correspondence from the parties from 18 April to 23 May 2017 is completely inconsistent with the submissions that Higgins took over the responsibility for everything on Mr Norfolk's schedules including shortages (see, for example: Gary Sargeant's email of 20 April 2017; Paul Durston's email of 20 April 2017; Paul Durston's email of 4 May 2017; and Gary Sargeant's email of 10 May 2017 which stated: -.

> **"Paul**
>
> **We acknowledge the schedule and believe that this list of materials is not exclusively for materials at Sutherland road. We confirm have undertaken with Rotamead to honour ongoing hire of materials at Sutherland Road as of 18/4/17; Material at Bramber house remains your responsibility whilst you are in contract."**

27 This unpleaded and unsupported claim, whether one looks at the witness evidence or contemporaneous documents, that Higgins became responsible for the hire of all the Rotamead scaffolding and any shortages I find is simply wrong. I remain surprised that it was pursued when Mr Ryan and Mr Durston knew that Rotamead's scaffolding equipment was on other significant sites including the Croudace sites. See for instance the Agreed Chronology. What, in fact, happened is that all the scaffolding on the Sutherland and Bramber sites were cleared by D & B Scaffolding and Mac Scaffolding and returned to the Rotamead site. The evidence of Robert Jones is clear that he personally counted the scaffolding in and the off-hire notes relating to the Higgins sites are meticulously set out in the supplemental bundles which, for reasons of their own, the Defendants never reviewed in any detail. It was never put to Mr Jones that those detailed records were not complete or correct. Indeed, it is relatively clear that all the scaffolding returned in respect of Sutherland Road and Bramber House sites were taken off hire from the unchallenged records of Rotamead Limited.

The Fourth Period in June 2017

28 The June agreements are summarised in Mr Norfolk's letter to Mr Ryan dated 15 June 2017. The letter stated as follows: -

> "**Dear Jamie,**
>
> **Further to our telephone conversations and in light of your proposal to fully repay the total outstanding account balance by the 30th September 2017 from the sale of Mr Paul Durston's property. (Daniels Farm, Wash Road, Basildon Essex, SS15 4AZ), please find below Rotamead's agreement to a short term amendment to our payment terms.**
>
> - **The May 2017 hire invoices totalling £23,207.21 are to be paid by the 7th July 2017.**
> - **The June 2017 hire invoices are to be paid by the 7th August 2017**
> - **The July 2017 hire invoices are to be paid by the 7th September 2017**
>
> **In addition a minimum monthly payment of £5,000.00 is to be paid by the 7th July 2017, 7th August 2017, and 7th September 2017.**
>
> **The account will revert back to your current terms of payment (30 days net monthly) on the 30th September 2017.**
>
> **This agreement is subject to the completion of a credit application form and continuing guarantee.**
>
> **Yours sincerely"**

29 The personal guarantee was signed by Jamie Ryan as a director of DSL and stated as follows:-

> **"In consideration of your agreeing to grant credit facilities to the company or limited liability partnership described above ("the company"). I hereby unconditionally guarantee as both-Guarantor and Principal Debtor the due and punctual performance and observation by the company of it's obligations herein and under your General Terms and Conditions of Supply overleaf and agree to indemnify and keep you indemnified against any breach or non-observance thereof by the company and I further agree that the extent of my liability under the guarantee shall not be limited by any credit limit Imposed on the company or in any other way."**

On the back of that form were the General Terms and Conditions of Supply, which included the following clauses:-

> **"2.4.7 The Customer grants to the Company an irrevocable licence to enter upon the land occupied or used by the Customer in connection with the tasks for which the Equipment is bought or hired as the case may be.**

The Customer warrants that he is able to grant such a licence mid chat any party whose consent is also required has agreed to be bound by such a licence.

3.4 **Payment In all cases for approved accounts is due within thirty days from the date of the Company's invoice. In all other cases, payment in full is required before the Equipment will be despatched or collected. All sums paid late are liable to Interest at the rate of the higher of 1.75% above the base rate of Barclays Bank Plc or the rate allowed from time to time by the Late Payment of Commercial Debts (Interest) Act 1998 or any replacement or modification thereof.**

5.2 **The Customer will at all times during the period of hire:**

(i) **keep the Equipment In his custody and control.**

(ii) **ensure that the Equipment is erected and dismantled in a proper manner and only by those persons having the appropriate qualifications and experience to erect and dismantle the Equipment and in accordance with any instructions given out by the Company.**

(iii) **ensure that the Equipment Is used ONLY within its designed load limits and other requirements. The Customer warrants that he is aware of all such limits and requirements.**

(iv) **take proper care of the Equipment and ensure that It Is safely and properly stored.**

(v) **retain possession and control of the Equipment at all times and not sell, loan, charge or part with possession of It**

(vi) **return the Equipment In good order to the place of hire and to ensure that the Equipment Is clean, fully usable and loaded in such a manner that unloading may be carried out by forklift. The Customer will be responsible for the Cost of repair and cleaning and any missing or damaged Equipment will be charged at the list price subject to any applicable Customer discount. The Company may In Its absolute discretion decline to sell any damaged item to the Customer,**

6. **If the Customer shall default in making punctual payment of any sum due to the Company under the Contract or these Conditions or shall fail to observe and perform any of the terms of the Contract or these conditions or shall go into liquidation or bankruptcy or so or cause to be done or allow any act or thing to be done whereby the Company's rights in the Equipment may be prejudiced then the Company may treat this Contract and the Conditions as bring repudiated by the Customer and the Company may without any notice or other requirement on its part re-take possession of the Equipment and for that purpose the Company may enter into and upon any premises or sites at which the Equipment may be and remove it from any land and**

buildings (the Customer being responsible for any damage caused thereby) but without prejudice to any pre-existing right of the Company against the Customer for recovery of monies due or any other breach of the Contract or these Conditions."

30 Having heard the factual evidence I do not accept that economic duress or illegitimate pressure forced Mr Ryan to sign this personal guarantee. It was an agreement, which was to the commercial benefit of both parties. The Defendants were given more time to pay and the Claimant had the benefit of Mr Ryan's personal guarantee.

31 The Second Defendant's Written Closing Submissions state that the elements of economic duress are: -

(a) The employment of illegitimate pressure;

(b) a causal nexus between the illegitimate pressure employed and the decision to acquiesce;

(c) In the event of refusal, consequences of such severity that the innocent party is left with no alternative but to comply.

32 Mr Norfolk did not put Mr Ryan under any illegitimate pressure. He merely stated that obvious which was if DSL could not pay the hire charges they could not keep the scaffolding on hire. I agree with the Claimant's closing submissions that Mr Ryan signed the guarantee because it got him what he wanted – more time to pay.

33 However, DSL continued to be late in paying invoices. I reject the suggestion that the First Defendant was somehow forced to buy a large amount of scaffolding in February 2018. That scaffolding was taken off-hire by Rotamead on the invoices presented to DSL on 28

February 2018 and no further hire charges were raised in respect of that equipment thereafter. By May 2018, the balance owed by DSL as alleged by the Claimant was £195,012.94, a sum of £99,584 in respect of the novated account or historic debt, and £95,512.10 owed in respect of DSL's invoices for December to May 2018. DSL has not made any payment to Rotamead since 23 April 2018 as contended by the Claimant. The unpaid balance, the Claimant contends, is £386,423.77. DSL also said the Claimant alleges it has or should have in its possession 215,962 ft of galvanised tubing, 16,584 double couplers, and 21,003 single couplers, all of which is allegedly Rotamead's property. The value of that equipment is said to be £217,691.27.

THE DEFENDANT'S CASE

34 It is now necessary to review the Defendants' defences and challenges to these claims. The written closing submissions for the Second Defendant very helpfully summarise the reasons why Mr Ryan contends he has no liability for the sums claimed (see paragraph 69 of those submissions):

> **"a. The Rotamead procured Mr Ryan's consent for DSL assuming responsibility for PDL's Historic Debt on 31 March 2017, and to enter into a personal guarantee on 15 June 2017, through the use of economic duress. These agreements should be regarded as void.**
>
> **b. If the Court is not persuaded by the economic duress argument, Mr Ryan submits that:**
>
> **i. On a proper construction of either his 31 March letter, or the terms set out in his personal guarantee, he cannot be held personally liable for either the Historic Debt or any debt incurred by DSL prior to 15 June 2017.**
>
> **ii. During the meeting of 18 April 2017, in which PDL, Rotamead and Higgins entered into a trilateral agreement to execute a further agreement for the release of PDL from its Sutherland Road subcontract and the novation of the relevant hire responsibilities to Higgins, Higgins had accepted that the quantities of material deployed at its sites amounted to 469,028 feet, as set out in the Schedule presented by Mr Norfolk.**
>
> **iii. In the course of the same meeting, Higgins had accepted sole liability for any shortages.**

iv. Given the fact that only some 19,936 feet of tubing was subsequently found at Bramber House, and considering the fact that Higgins had accepted the total figure of 469,028 feet for its sites, the balance between these two figures must be regarded as 'shortages' for the purposes of the 18 April trilateral agreement, for which Higgins was solely liable. The fact that, according to rough estimates, the amount of tubing at Sutherland Road might be lower than originally envisaged is irrelevant - no estimation after the event can alter the three parties' agreement on 18 April 2017.

v. Rotamead has therefore wrongly invoiced DSL for equipment which ought to have been novated to Higgins subsequent to 18 April 2017. The total value of these sums is [£x], which must be excluded from the claim.

c. Even if the court is not persuaded as to the contractual argument set out above, and holds that all invoices issued by Rotamead to DSL are valid, then upon a proper Consideration of the reconciled accounts exhibited, DSL is in overpayment in the amount of £17,123.90.

d. The total value of DSL's counterclaim is [£X]"

35 Taking each point in turn. First, it is said that Rotamead procured Mr Ryan's consent for DSL assuming responsibility of PDL's historic debt on 31 March 2017 and entering into a personal guarantee on 15 June 2017 through the use of economic duress and that agreements should be regarded as void. The First and Second Defendant in their written 'Skeleton Argument' stated that: -

"<u>The elements of economic duress</u>

6. The First and Second Defendants aver that, in the Claimant's efforts to induce the Second Defendant to:

(a) Agree, on behalf of the First defendant, for the novation of PDL's historic debt to the First Defendant; and

(b) Enter into a personal guarantee in respect of the First Defendant's liabilities to the Claimant;

The Claimant had done so through the use of economic duress. This rendered these agreements unenforceable *vis-a-vis* these two parties.

7. As set out above, in order to compel the Defendants to acquiesce to the above, the Claimant threatened to attend the site and to dismantle all equipment originating from the Claimant."

36 However, having heard the evidence of Mr Norfolk, Mr Ryan, and Mr Durston, I do not consider that Mr Norfolk either procured Mr Ryan's consent for DSL to assume responsibility for PDL's historic debt or forced Mr Ryan to enter into personal guarantees through the use of economic duress. These submissions of duress simply do not sit easily with the nature of Mr Ryan and Mr Durston's character as revealed during their cross-examination. Neither individual, whilst being cross-examined, gave the impression they could be bullied into signing documents they did not want to sign.

37 In any event, there is a fatal flaw to this argument of economic duress which as a matter of law it cannot be economic duress if Mr Norfolk decided not to enter into a contract with the Defendants. DSL had no right to use Rotamead's scaffolding without Mr Norfolk's consent. Finally, even if that was all incorrect, Mr Norfolk's statement was that in the absence of the novation, he would enter the sites and reclaim his equipment was a legitimate right for the following reasons:

- Firstly, the Defendant had no right to exclude Rotamead from the sites. That right belonged to the main contractors or the employers in each case. Under clause 2.4.7 of the General Terms, PDL granted Rotamead a license to enter the site so long as it had the right to do so.

- Secondly, it is common ground Mr Norfolk did make arrangements with Higgins in respect of their sites. Nothing was suggested he would not have made proper arrangements with the main contractors or employers on the other sites in order to take possession of equipment. It was not put to him that he would not have done so.

- Thirdly, the Defendants had no entitlement to the scaffolding. Only PDL could have claimed to have the right to prevent Rotamead taking possession and PDL did

not make such a claim and could not have done so in any event. Even if as suggested by Counsel that PDL owned some of the scaffolding, Rotamead was entitled to take its share from the mix of scaffolding.

38 Finally, if all that is wrong, the Defendants' case still cannot succeed. It was not put to Mr Norfolk that he did not have a *bona fide* belief he was entitled to take possession.

39 The Court of Appeal in Times travel UK Limited & Anor v Pakistan International Airlines Corporation [2019] 3 WLR 445 held as follows: -

> **"Contract - Validity - Economic duress - Contract entered into following exercise of lawful pressure in good faith - Whether contract voidable on grounds duress**
>
> **The claimant travel agency, whose business was almost exclusively the sale of flight tickets for travel to and from Pakistan, was very largely dependent on its ability to sell tickets with the defendant airline, which, was the only airline operating direct flights between the United Kingdom and Pakistan. When a number of the defendant's agents brought proceedings to recover substantial sums said to be due by way of commission, the defendant-terminated existing agency contracts, offering each a new contract on terms that it included a waiver of the agent's claim for unpaid commission. The claimant was one of the agents which accepted those terms. Subsequently the claimant brought proceedings to recover the commission and other payments which it said were due under its previous contract. The judge allowed the claim, holding that the claimant was entitled to avoid the new contract on the grounds that it had been procured by economic duress, even though the defendant's actions had been entirely lawful.**
>
> **On the defendant's appeal –**
>
> **Held, allowing the appeal, that where A used lawful pressure to induce B to concede a demand to which A did not bona fide believe itself to be entitled, B's agreement would be voidable on the grounds of economic duress, but the doctrine of economic duress would not apply where A believed in good faith that he was entitled to the demand, whether or not, objectively speaking, he had reasonable grounds for that belief; and that, accordingly, since the judge had found on the facts that the claimant had failed to establish bad faith on the part of the defendant, the claimant had not been entitled to avoid the contract (post, paras 62, 70, 105-107, 113-115, 116, 117). CTN Cash and Carry Ltd v Gallaher Ltd [1994] 4 All ER 714, CA applied.**
>
> **Dicta of Leggatt LJ in Al Nehayan v Kent [2018] EWHC 333 (Comm) at [187]—[188] not applied.**

Decision of Warren J [2017] EWHC 1367 (Ch) reversed."

40 It was not put to Mr Norfolk that he did not have a *bona fide* belief he was entitled to possession. It is also suggested the novation agreement did not make commercial sense. I disagree. The Defendants' intention was to take over as much of PDL's business as possible. It was commercially sensible and common for a new company to take on an old company's trade debt to ensure the continuity of supply. Furthermore, the business was coming to DSL without the burden of the £421,044 of VAT owed to HMRC. In the circumstances, I find that DSL is bound by the novation agreement. Even if DSL could make out its case in respect of economic duress, the effect of that would be to make the novation agreement voidable not void. DSL clearly affirmed that contract by its later dealings with Rotamead. So DSL is, in any event, bound by the novation.

41 Secondly in paragraph 69 of the Second Defendant's written closing submissions it is contended that on a proper construction of either the 31 March letter or the terms of the personal guarantee, Mr Ryan cannot be held personally liable for either the historic debt or the debts incurred by DSL prior to 15 June 2017. The wording of the guarantee clause is set out above in paragraph 29 of the Judgment and is clear and unambiguous and cannot attract the contra preferentem rule as alleged by the Second Defendant.

42 Mr Ryan's case on construction is that it is a guarantee which only covers hire invoices raised by DSL. I consider that submission to be incorrect. Firstly, PDL had an obligation under the general terms and conditions to pay the invoices that made up the novation balance. Secondly, the novation clearly transferred that obligation under the general terms and conditions to DSL. Thirdly, Mr Ryan clearly guaranteed the due and punctual performance of DSL's obligations under the general terms and conditions and agreed to indemnify Rotamead in respect of any breaches by DSL and the liability is expressly not limited to any credit limit.

43 It is also clear from the letters sent on 16 June 2017 from DSL to the Claimant, copied to Mr Ryan between DSL, Mr Ryan, and Mr Durston, that Mr Ryan was liable for the historic debt. That letter stated:

> Dear Sirs,
>
> RE: Rotamead Limited Outstanding Debt of £202,778.70 (inclusive of VAT| from Paul Durston Limited
>
> **"Further to various meetings and your agreement with Rotamead Limited to repay the above outstanding balance in full by the 30th September 2017 from the sale of the property at the above mentioned address, you also give you full agreement to personally fully indemnify Durston Scaffolding Limited and it's Directors against the above stated sum of £202,778.70 should the sale of the above mentioned property not proceed or raise sufficient funds to settle the debt in full.**
>
> **Any future payments due to Rotamead Limited from 1" May 2017 will be the liability of Durston Scaffolding Limited with payment being arranged between Durston Scaffolding Limited and Rotamead Limited.**
>
> **It has also been agreed that in "good faith" Durston Scaffolding Limited will make an additional payment to Rotamead Limited of a minimum of £5,000.00 (inclusive of VAT) monthly until the balance is settled in full from the sale of the above mentioned property or other means. The total of this amount will be an interest free loan from Durston Scaffolding Limited to Mr Paul Durston Limited and is repayable in full on demand.**
>
> **Yours sincerely**
>
> **Mr Paul Durston**
>
> **Mr Jamie Ryan**
> **Director**
> **Durston Scaffolding Limited"**

44 This letter is not a very happily worded letter but clearly, at the time, the Defendants did not think the guarantee was limited so as to exclude the historic debt. I note that the Agreed Chronology also contends that on the 15 June 2017 a payment arrangement was agreed between Claimant and the First Defendants which included the historic balance.

45 Turning to Mr Durston's guarantee, Mr Durston whilst being cross-examined accepted that he had given a guarantee and accepted, realistically, the personal guarantee was the reasonable price for the new company to hire material on credit.

46 Thirdly going back to paragraph 69 of the Second Defendant's closing submissions, it is submitted:

> **"During the meeting of 18 April 2017, in which PDL, Rotamead and Higgins entered into a trilateral agreement to execute a further agreement for the release of PDL from its Sutherland Road subcontract and the novation of the relevant hire responsibilities to Higgins, Higgins had accepted that the quantities of material deployed at its sites amounted to 469,028 feet, as set out in the Schedule presented by Mr Norfolk."**

47 For the reasons set out above, I do not accept any such trilateral agreement was pleaded or was supported by the evidence and was, in any event, inconsistent with the contemporaneous correspondence. I understand that this Defence was advanced on instructions from Mr Ryan but it is a defence without, in my view, any merit. It is only an aside but I note that Mr Ryan and Mr Durston must have known at all material times that Rotamead's equipment out on hire was not just on the Sutherland Road site and Bramber House site. Indeed, Mr Durston in his witness statement said, in terms, that the scaffolding that PDL had on hire from Rotamead was located at a number of building sites but the largest by far were the two sites of Higgins and one building site with Croudace (see paragraph 18 of his witness statement). Higgins never accepted that they would be liable for "shortages" as contended by the Second Defendant's counsel.

48 The final death knell of this unpleaded and unsupported Defence is Mr Ryan's own evidence given when cross-examined on day two:

> **"MR SMITH: Mr Ryan, you are copied into this letter C62 dated 2 April and at no point do you respond saying "hang on, we have got a binding agreement"?**
>
> **A. For all intents and purposes, it is not my battle.**

Q. You are relying on that binding agreement now; you did not respond and say you had a binding agreement then?

A. As we established earlier, that has nothing to do with DSL, it is PDL.

Q. Is it your case that whatever was agreed between PDL and DSL, and Higgins and Rotamead, DSL's obligations are unchanged; is that your case?

A. Those agreements are not DSL's concern.

Q. I am going to go through them to make sure that we understand we are coming from the same position because your barrister has put very hard that there is a binding agreement that DSL is able to take advantage of and I do not want it to be said that I am making you abandon your case in cross-examination so I will continue. We looked at the email at the bottom of 62 where Mr Durston asked to confirm. He then chases on 4 May (bottom of C61). You have dropped off the address list in a moment, but we will see in a moment it does get forwarded on to you. Then on 10 May, at the bottom of C61, there is an email from Mr Sergeant to Mr Durston, which says they believe that the schedule is not exclusively for materials at Sutherland Road. This email again you are not on, but it is forwarded to you on 18 May, we see at the top of the page. There is no response from you saying, "hang on, that is the schedule I have accepted and that means DSL does not have any hire charges to pay"?

A. Again, the contract — DSL is not part of that contract so it is not my concern. That contract is between PDL, D&B Scaffolding, Higgins and Rotamead,"

49 So if there was any binding tripartite agreement it did not involve, on the basis of Mr Ryan's own evidence, DSL. If Higgins was in breach of any tripartite agreement it was in breach of an obligation owed to PDL and that must be a matter for, Higgins, and PDL's liquidator.

50 Finally, in its Written Closing Submissions, the Second Defendant contends even if the court is not persuaded as to the contractual arguments set out above and holds that all invoices issued by Rotamead and DSL are valid, on proper consideration of the reconciled accounts, DSL was in overpayment in the amount of £17,123.90.

51 There are two fundamental problems with the Defendants' quantum case. Firstly, Rotamead has produced an impressive and meticulous paper trail supporting its invoices.

This document record is set out in some six lever arch files. This document trail was not challenged in these proceedings and was not raised in any significant detail with any of the Claimant's witnesses who explained what they had done and why the Court could rely upon this. Indeed, the Defendants and their legal teams have not carried out any detailed review of this documentation which is particularly surprising given much of their documentation was allegedly destroyed by their former finance director albeit in June 2016. After that date, they should have had access to proper detailed records. Secondly, what the Defendants rely upon is a schedule dated 24 May 2017 which Mr Ryan and/or Mr Durston produced. Mr Ryan denied that Mr Durston as Mr Durston maintained had counted the scaffolding on the sites and said the schedule had been prepared by him from a desktop exercise from various unidentified notes. However, the 24 May schedule was woefully inaccurate and incomplete. For example, from the hire notes in the supplemental bundles only just over quarter of the galvanised type 4 tubes Mr Ryan said were left at Sutherland Road appear on delivery notes referring to Sutherland Road or Walthamstow E14.

52 Finally, I note that in Mr Durston's closing written submission he does not pursue his counterclaim or make any assertion that the First Defendant has overpaid the Claimant or that the First Defendant is entitled to pursue any counterclaim against the Claimant.

53 So turning to the question of the quantum claims, I consider that the best evidence is that based on the Claimant's comprehensive and unchallenged records. The statement of account for DSL can be found at B450 and B451 of the trial bundle. It represents transactions from 7 August 2017 to 4 June 2018. The opening balance is stated to be £221,798.19. It was not put to Mr Norfolk that the opening balance was wrong. Now, clearly, it would have been better if the opening balance had started on 31 March 2017 but the Claimant submits, and I accept his submissions, that it can be seen that £221,798.19 is a reasonably correct figure for the following reasons. The documentation establishes that

the balance at 31 March 2017 was £186,564.48. No challenge has been made to that figure. Invoices totalling some £71,221.21 from 31 March and 7 August can be found in the supplemental bundle. These references are: G1; GI; G21; G32; G46; G50; G51; G54; G74; G91; G104; G136; G151; and finally, G152.

54 Payments in that period, according to the Defendants' own schedule to be found at B386 and B387, total £36,650. If one adds the invoice to the opening balance and subtracts the payments, that gives the figure of £221,135.65. This difference amounts to some £662.50. I accept this difference is likely, on the balance of probabilities, to be attributable to the difficulties trying to reconcile accounting information from a fixed content bundle without access to the accounting system. I am invited to find the opening balance on the statement of account is correct and I do so find.

55 Further transactions can be seen on the statement of account at B471. This statement runs from 30 April to 31 October 2019. The balance as at 31 October, including continuing hire fees, is £325,321.14. The balance as at 23 September, which is the last invoice before the claim was issued (that is 201) was £226,711.21. That is the amount claimed in the Particulars of Claim. Ongoing hire is claimed at £247.14 per day. This daily rate is calculated by dividing any of the later invoice values by the number of days in the period, for example, £6,919.99 is £247.14 per day for 28 days. The amount of equipment still on hire is as seen from the later invoices, for example, the invoice of 29 September 2018 at G420, 215,962 ft of galvanised tube, 16,584 double couplers, and 21,003 single couplers. The total balance as at 21 August 2020 is £325,321.14, plus 295 days at £247.14. This totals some £398,227.44. Again the Defendant by not reviewing this documentation cannot challenge these numbers.

56 DSL is entitled to credit for the hire payments made by D & B and Max Scaffolding. The evidence of Mr Jones was that those amounts were £8,573.29 and £3,230.38. Therefore,

if the arithmetic is correct, and it has been checked and I say it is correct, the total due from DSL in respect of the hire fees as at 21 August 2020 is £386,423.77. Rotamead also claims the return of scaffolding on hire and the amount on hire set out above. Rotamead claims damages as an alternative to delivery up. The evidence of Mr Jones of the value of the equipment on hire was £217,691.22. That figure was not challenged by the Defendants when Mr Jones was cross-examined.

57 I have asked for these figures to be broken down into figures that are exclusive and inclusive of VAT. I have received a breakdown, which I reviewed and checked and I consider correct.

Description	**Ex VAT**	**VAT**	**Gross**
Hire charges up to 21/8/2020	£322,019.81	£64,403.96	£386,423.77
Daily hire fees	£205.95	£41.19	£247.14
Value of equipment	£181,409.35	£36,281.87	£217,691.22

The interest calculated at the contractual rate is at the date of judgment £65,816.92.

58 Finally the Defendants have raised during the course of trial is a VAT invoice point. The Defendants seem to rely upon the lack of VAT invoices issued to the First Defendant in respect of the historic balance. However the novation transferred PDL's obligation to pay the historic balance to the First Defendant. There is no new supply which will attract VAT. PDL has already been credited with VAT and any adjustment is a matter between the First Defendant PDL and HMRC, and as I understand it, it has nothing to do with the Claimant. It was suggested by Mr Winston:

> "**The correct procedure for Rotamead to follow was to write off the unpaid invoices sent to PDL, recover the VAT from HMRC, and to issue new invoices for the relevant amounts to the First Defendant."**

59 I consider that that is incorrect. Novation is a matter of contract law. It transferred the obligation to pay the invoices from PDL to the First Defendant. There is no write-off and no need for write-off and, therefore, I think the VAT invoice point is a bad point.

60 Accordingly in my judgment.

IT IS ORDERED THAT:

1. There be judgment for the Claimant on the Claim.

2. The First Defendant's Counterclaim be dismissed.

AND IT IS DECLARED THAT:

3. The Second and Third Defendants are liable to indemnify the Claimant's losses caused by the First Defendant's breaches of the Claimant's General Terms and Conditions.

AND IT IS FURTHER ORDERED THAT:

4. The Defendants shall pay to the Claimant the sum of £492,514.19, which is made of the following:

   (a) £387,906.61 in respect of unpaid hire charges (£323,255.51 + VAT);

   (b) £65,816.92 interest; and

   (c) £45,372.35 pursuant to CPR Rule 36.17(4)(d).

5. The Defendants shall by 4 pm on 24 September 2020 deliver up to the Claimant the following scaffolding equipment belonging to the Claimant (which shall in a fit state to be re-hired by the Claimant):

   (a) 215,962 feet of Type 4 galvanised scaffold tube;

   (b) 16,584 double couplers; and

   (c) 21,003 single couplers.

6. The Defendants shall pay to the Claimant the sum of £247.14 (being £205.95 + VAT) for each day following the judgment that die Equipment is not delivered up. If some but not all of the Equipment is delivered up in accordance with this Order, the daily rate following the partial delivery up shall reduce to reflect the Claimant's hire charges on the balance of the Equipment that has not been delivered up to the Claimant.

7. If, by 4 pm on 24 September 2020, the Defendants have not delivered up the Equipment to the Claimant, the Defendants shall pay the Claimant the sum of £230,889.60 (being £217,691.22 (£181,409.35 + VAT) plus the sum of £13,198.38 pursuant to CPR Rule 36.17(4)(d)) in lieu of delivery up. If, prior to 4 pm on 24 September 2020, the Defendants deliver up some but not all of the Equipment, the Defendants shall pay a sum in lieu of delivery up in respect of the balance of the Equipment that has not been delivered up to the Claimant, which will be calculated by reference to the rates set out at paragraph 11 of the witness statement of Robert Jones dated 21 November 2019 plus an additional sum pursuant to CPR Rule 36.17(4)(d).

8. The Defendants shall pay the Claimant's costs of the Claim and defending the Counterclaim, such costs to be assessed on the indemnity basis if not agreed. The Defendants shall pay interest on the Claimant's costs from 20 November 2018 at a rate of 10%.

9. The Defendants shall pay the Claimant the sum of £120,000 on account of the costs ordered at paragraph 8 above.

61. I am grateful to Counsel for agreeing the Terms of this Order.

30th September 2020
MARTIN BOWDERY Q.C.
(Sitting as a Deputy Judge of the High Court)

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital