

Neutral Citation Number [2011] EWHC 3198 (QB)

IN THE HIGH COURT OF JUSTICE

Claim No. 1LS40622

QUEEN'S BENCH DIVISION

LEEDS DISTRICT REGISTRY

MERCANTILE COURT

Leeds Combined Court Centre

Oxford Row

Leeds LS1 3BG

Date: 6th December 2011

Before:

His Honour Judge Keyser Q.C.
sitting as a Judge of the High Court

Between:

SIMON ARTHUR SAMUEL McKAY
(t/a McKay Law Solicitors and Advocates)

Claimant

-and-

CENTURION CREDIT RESOURCES LLC

Defendant

HUGH TOMLINSON Q.C. (instructed by **Walker Morris** of Kings Court, 12 King Street, Leeds, LS1 2HL) for the **Claimant**

DAVID QUEST (instructed by **Simons Muirhead & Burton** of 8-9 Frith Street, London W1D 3JB) for the **Defendant**

Hearing dates: 8th and 9th November 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

H.H. Judge Keyser Q.C. :

Introduction

1. The claimant, Mr Simon McKay, carries on practice as a solicitor in Leeds in the name McKay Law Solicitors & Advocates. The defendant is an investment company incorporated in Delaware and carrying on business in New York City. On 19th November 2009 the claimant and the defendant made a written agreement (“the Loan Agreement”). The purpose of the Loan Agreement was to provide to the claimant funds with which he would be able to pay disbursements, including the premiums due under policies of after-the-event (“ATE”) insurance, in respect of up to 6,000 claims in which he proposed to act, pursuant to conditional fee agreements (“CFAs”), for debtors under regulated consumer credit agreements against banks and other financial institutions.
2. In these proceedings, the claimant alleges that the defendant repudiated the Loan Agreement by refusing to make an advance when validly requested to do so and by subsequently evincing a clear intention not to perform the Loan Agreement according to its terms and that by reason of that repudiation, which he accepted, he has suffered substantial loss and damage, which the particulars of claim put at a figure in excess of £70m. The defendant denies that it was obliged to make an advance, on the ground either that the decision whether or not to do so was within its sole discretion or that conditions precedent to the claimant’s right to request an advance had not been satisfied, and it denies that either its actions or its correspondence amounted to a repudiation of the Loan Agreement. It disputes the alleged loss and damage, should that issue ever become relevant.
3. On 7th April 2011 Mr Justice David Richards ordered that issues of liability be tried before issues of quantum of damage. This is my judgment upon the issues of liability.
4. I shall first set out some of the main terms of the Loan Agreement and identify the issues that arise for consideration. Then I shall summarise the relevant facts. Finally I shall turn to a discussion of the issues.

The Loan Agreement

5. The Loan Agreement is a long and detailed document. It describes the defendant as Lender and the claimant as Borrower (in each case, with inconsistent use of the definite article). The following are among its relevant provisions.

FOR VALUE RECEIVED, and in consideration of the granting by
the Lender of financial accommodations to or for the benefit of the

Borrower, ..., the Borrower represents and agrees with the Lender, as of the date hereof and as of the date of each loan, credit and/or other financial accommodation, as follows:

1.1 Loan. Subject to the terms and conditions of this Agreement, the Lender hereby agrees to make a loan (“the Loan”) and extend financial accommodations to or for the benefit of Borrower in the maximum original principal amount of US\$7,500,000.00 (the “Maximum Credit Amount”) as follows:

- (a) Advances. From time to time, upon satisfaction of the conditions precedent herein contained and upon receipt from Borrower of a request for an advance in the form of Schedule 1.1(a) attached hereto ..., Lender shall advance an amount of principal under the Loan (each an “Advance”) in accordance with the terms hereof. Lender’s obligation to make any Advance hereunder shall be in the Lender’s sole discretion.
- (b) Promise to Pay. The Borrower hereby unconditionally promises to pay to the order of Lender ... the principal amount of ... US\$7,500,000.00 ... or so much thereof as may be outstanding from time to time ...

...

- (i) Modifications and Interpretation. This Agreement may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought. ... Notwithstanding the above, from time to time, without affecting the obligation of Borrower or the successors or assigns of Borrower to pay the outstanding principal balance of the Loan ... and observe the covenants of Borrower contained herein or in any other Loan Document without affecting the guaranty of any person, corporation, partnership or other entity for payment of the outstanding principal balance of the Loan, without giving notice to or obtaining the consent of Borrower, the successors or assigns of Borrower or guarantors, and without liability on the part of the Lender, the Lender may, at the option of the Lender, decrease the maximum amount of the Loan, extend the time for payment of said outstanding principal balance or any part thereof, reduce the payments thereon, release anyone liable on any of said outstanding principal balance, accept a renewal of the Loan, modify the terms and time of payment of said outstanding principal balance, join in any extension or subordination agreement, release any security

given herefor, take or release other or additional security, and agree in writing with Borrower to modify the rate of interest or period of amortization of the Loan or change the amount of the monthly installments payable hereunder.

- (l) Delay Not a Waiver. The Lender shall not, by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies hereunder and no waiver by the Lender of its rights or remedies hereunder shall be valid against the Lender unless in writing, signed by the Lender, and then only to the extent therein set forth. The waiver by the Lender of any right or remedy hereunder upon any one occasion shall not be construed as a bar to any right or remedy which it would otherwise have had on any future occasion.

1.4 Making Advances: Execution and Delivery of this Agreement. Borrower may request an Advance of the Loan hereunder, in writing, by delivering to Lender a Request for Advance, together with all supporting documentation required thereunder. Prior to Lender's executing and delivering this Agreement to Borrower, Borrower shall have submitted to Lender all information requested by Lender in its sole and absolute discretion in connection with the Loan, and all information submitted pursuant to this Section 1.4 shall be certified as true, accurate and complete in all material respects by Borrower.

1.7 Making of Advances.

- (a) The Lender shall execute and deliver this Agreement upon satisfaction, in the Lender's discretion, of the following conditions [there then follows a list of conditions precedent to the execution and delivery of the Loan Agreement].
- (b) Borrower may request an Advance of principal under the Loan upon the satisfaction, in the Lender's discretion, of the following conditions:

...

- (ii) Borrower shall have delivered to Lender evidence that the applicable ATE insurance and Key Man insurance (as hereinafter defined) has been entered into (subject to the forty-five (45) day grace period provided in Section 4.15 herof, during which time this condition regarding Key Man Insurance shall

be deemed satisfied) and all payments with respect thereto have been fully paid;

...

(iv) Lender shall have determined that there has been no Material Adverse Effect on any aspect of the business, operations, properties, prospects or condition (financial or otherwise) of Borrower, or any event or condition which could reasonably be expected to result in such a Material Adverse Effect;

(v) Lender shall have received a duly executed Request for Advance, together with all supporting documentation thereby required to be submitted to Lender;

...

(x) Lender shall have received such other documents, instruments, and/or agreements as Lender may reasonably request.

...

(l) Delay Not a Waiver. The Lender shall not, by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies hereunder and no waiver by the Lender of its rights or remedies hereunder shall be valid against the Lender unless in writing, signed by the Lender, and then only to the extent therein set forth. ...

2.1 Grant of Security Interest. In consideration of the Lender's extending credit and other financial accommodation to or for the benefit of the Borrower, the Borrower with full title guarantee hereby grants to the Lender a security interest in, a lien on and pledge and assignment of, and a first fixed charge and encumbrance on, the Collateral (as hereinafter defined).

2.3 Definitions. The following definitions shall apply throughout this Agreement:

...

(a) "Collateral" shall mean all of Borrower's present and future right, title and interest in, to and under:

...

(iii) all policies of Key Man Insurance required to be maintained hereunder, together with the proceeds thereof.

(b) “Material Adverse Effect” shall mean, in the opinion of Lender, materially adversely affecting the operations or financial performance of the Borrower taken as a whole.

4.14 ATE Insurance. Throughout the term of the Loan, Borrower shall maintain, and deliver evidence to Lender of the maintenance of, one or more policies of “after-the-event insurance” (“ATE Insurance”), which will insure for each Case and Claim Borrower’s recoupment of any External Expenses not required to be paid to Borrower by adversaries in any Claims. Such ATE Insurance, together with the proceeds thereof, shall be and hereby is collaterally assigned to Lender. Borrower shall take all steps reasonably necessary to ensure that no policy of ATE Insurance is canceled or terminated by the issuer thereof including, without limitation, providing timely notice to the issuer of a claim for indemnity.

4.15 Life Insurance. Not later than forty-five (45) days from the date of this Agreement, and thereafter throughout the term of the Loan, Borrower shall maintain, and deliver evidence to Lender of the maintenance of, one or more policies of life insurance, in a fact amount equal to the Maximum Credit Amount, insuring the life of the Borrower (“Key Man Insurance”). Such Key Man Insurance, together with the proceeds thereof, shall be and hereby is collaterally assigned to Lender. Such Key Man Insurance shall show Lender as the loss payee and additional insured party, and shall not be cancelable by the issuer thereof without at least thirty (30) days prior written notice to Lender, and shall require not less than thirty (30) days prior written notice to Lender prior to the natural expiration of such policy.

4.18 Consulting Agreement. Borrower shall execute and deliver to Lender a consulting agreement by and between Maxima LLP (“herein “Maxima”) and Borrower (“the Consulting Agreement”), pursuant to which Maxima shall, among other things, and at Borrower’s sole cost and expense, provide cost consultancy and litigation insurance facilities to Borrower and Lender, review Claims for which External Expenses are submitted to the Lender for funding, monitor Borrower’s Claim flow, review and advise Lender on the likelihood of success on the merits of particular Claims,

maintain the ATE Insurance required to be maintained hereunder ...

7.10 Amendments and Waivers. This Agreement may not be amended, or the obligations of the parties hereto modified, except in a writing executed by all of the parties. No delay or omission on the part of Lender in executing any right hereunder shall operate as a waiver of such right or any other right and waiver on any one or more occasions shall not be construed as a bar to or waiver of any right or remedy of Lender on any future occasion.

7.16 No Partnership. Nothing contained in this Agreement or the other Loan Documents shall be deemed to create an equity investment in Borrower on the part of Lender or a joint venture of partnership between Lender and Borrower, it being the intent of the parties hereto that only the relationship of lender and borrower shall exist with respect to the Loan ...

6. Schedule 1.1 (a) to the Loan Agreement was a "Form of Request for Advance". Part of the form read as follows:

Enclosed herewith (or delivered to you previously) are the following:

1. the Expense Budget ...
2. Evidence that the applicable ATE Insurance and Key Man Insurance have been entered into;
3. A copy of Borrower's practicing certificate; and
4. A fully executed counterparty of each of Borrower's engagement contract and conditional fee arrangement with the applicable Client.

The Issues

7. The issues that arise for consideration in respect of liability are the following:

- (1) Was the defendant entitled to decline to make the first advance under the Loan Agreement when requested to do so by the claimant? This issue sub-divides as follows:

- (a) Was the defendant entitled to decline to make the advance in the exercise of discretion under clause 1.1 (a)?
 - (b) Was the defendant entitled to decline to make the advance on the ground of non-satisfaction of the conditions precedent in clause 1.7?
 - (2) Was the claimant entitled to treat the defendant's conduct as a repudiation of the Loan Agreement?
8. It may be that issue (1) (b) is logically prior to issue (1) (a). However, because of the way that the facts of the case unfolded it was convenient to deal with the issues in argument in the order set out above and I shall discuss them in that order.

The Facts Relevant to the Issues

9. In September 2008 the claimant entered into an Individual Voluntary Arrangement with his creditors. Accordingly at all times material to these proceedings he was in an insolvency procedure and required the consent of the supervisor of the IVA to the making of the Loan Agreement.
10. The claimant's purpose in entering into the Loan Agreement was to obtain a facility by which he could take advantage of a business opportunity that presented itself in mid-2009. He had been introduced to Ratio Money Limited ("Ratio"), whose business consisted of the referral of consumer credit cases to solicitors in return for a referral fee. It was put to the claimant that Ratio could refer to him some 6,000 claims on behalf of individuals who sought to establish that the consumer credit agreements under which they were debtors were invalid or unenforceable. The proposed claimants under those claims would not be in a financial position to fund the litigation personally. Accordingly it was intended that the claimant would act under CFAs supported by ATE insurance policies. The result would be that the individual claimants would not have to fund the costs of the claims themselves and would not be exposed to the risk of paying the costs of the opposing parties: if a claim were successful, the costs of the individual claimant would be paid by the opposing party; if it were unsuccessful, the opposing party's costs would be met by the ATE insurance policy, as would any disbursements, and by reason of the CFA the individual claimant would not be liable for any costs of his own.
11. There remained, however, some payments that would or might have to be made at the outset or from time to time as the case progressed. One was the referral fee, which was an expense of the claimant and not of his individual clients. Another might be the premium for the policy of ATE insurance, although most insurers would defer the payment until the end of the case,

when it would either be paid by the unsuccessful opposing party or be covered by premium insurance provided under the ATE policy itself. There remained, however, disbursements such as court fees and payments to counsel. Because of the large number of cases that the claimant proposed to undertake, the total outlay in respect of those disbursements would be very substantial. The Loan Agreement was intended to enable the claimant to pay these disbursements as the need arose in each case.

12. By August 2009 the first tranche of some 200 cases had been referred to the claimant by Ratio but funding arrangements and ATE insurance were not yet in place. The claimant entered discussions with Maxima LLP (“Maxima”), which described itself as a broker of ATE insurance and funding options for litigation. His principal contacts at Maxima were Mr Mark Andrews and Mr John Laycock. Maxima entered into discussions with the defendant, which was represented by its managing director, Mr Brian Jedwab, and a senior investment analyst, Mr Ben Radinsky.
13. Mr Jedwab was immediately interested in the proposal, though neither he nor the defendant had any experience of funding litigation in the UK or any familiarity with the market for ATE insurance. On 27th August 2009 Mr Jedwab sent to Mr Laycock an email setting out his “thoughts on an outline for the proposed transaction”. (Nearly all of the relevant written communications took place by email, and unless otherwise stated any reference in this judgment to a written communication is to an email.) The email contained the following passages:

Business: Lender will advance funds to Borrower to be used solely to pay all third party costs (up to 1,500 GBP) for litigation of Unenforceable Credit Claims under the Consumer Credit Act of 1974 [costs to be itemized and verified]. Borrower shall purchase “After the Event” Insurance that will cover (i) no less than 66% of costs funded by Lender; and (ii) all costs potentially owed to prevailing party.

...

Monitoring: Maxima LLP will be engaged by the Borrower to, among other things: monitor inflow of cases, review likelihood of success, ensure inclusion of cases in each tranche, provide ATE insurance and oversee preparation of bills of cost and progression of the cases.

...

Of course, these terms do not represent a commitment to consummate a loan transaction, which shall be subject to an executed term sheet as well as due diligence and definitive documentation mutually satisfactory to all parties.

We look forward to hearing from you with the next steps and are prepared to move expeditiously to close the transaction.

14. The defendant then prepared and sent to the claimant a “Term Sheet”, which the claimant signed and returned by fax on 11th September 2009. That document made clear that it was neither a contract nor an offer of a contract but simply a basis for discussion. Its terms reflected in more detail those of Mr Jedwab’s email of 27th August 2009. Among its provisions were the following:

Loan: Lender shall make available up to US\$7,500,000 to be drawn by the Firm in advances for payment of External Expenses, not more frequently than monthly.

Insurance: The Firm shall, at all times which the facility is in force and effect, maintain “After the Event” insurance which will insure payment to the Firm of (i) all External Expenses ... and (ii) any liability imposed on the Firm or the clients on whose behalf the Firm prosecutes the Cases owed to any other party as a result of the Cases. All proceeds of such insurance shall be collaterally assigned to Lender

Monitoring: The Firm shall, throughout the term of the facility, engage Maxima LLP to, among other things, ... maintain “After the Event” insurance in the name of the Firm ...

The document provided that the claimant would pay to the defendant £5,000 for the costs of its due diligence procedures and, at a later stage, a further sum of £15,000 in respect of the defendant’s legal costs.

15. The claimant made the first payment under the “Term Sheet” on or about 11th September 2009. Shortly afterwards Mr Jedwab and Mr Radinsky came to the UK to meet the claimant and discuss the proposal with him in more detail. The claimant explained to them that, in order to take on the number of cases envisaged, he would need immediate funding and would also have to expand his practice greatly by taking on additional staff and office premises. The meeting ended in a spirit of shared optimism that a lending agreement would be concluded in due course.
16. On 6th October 2009 the finance manager of the claimant’s practice, Mr Lakhi Bual, sent to Mr Jedwab and Mr Radinsky a schedule setting out an estimated projection of movement on the loan account over a twelve-month period. The schedule was based on the commencement of 500 new cases each month, a success rate of 60% (though Mr Bual’s email said that the claims management company had a 100% success rate in the claims it had run) and profits of £4,000 on each case. It showed the full amount of the loan facility in the sum of £4,083,750 as drawn down in month nine; although further monthly drawings would be made, they would be more than offset by monthly repayments made by receipts from cases that had been concluded successfully. In evidence, Mr Bual said that the schedule was prepared on a “worst-case scenario”, taking the lowest realistic figure for profits and entirely omitting the success fees payable under the CFAs. The claimant said that he personally

would not have been able to repay the loan, though his practice might have been able to service the interest on it, and that if no cases had been won by month nine the loan would have been fully drawn down and the ATE insurer would have been exposed. He accepted that the potential exposure might have been as high as £13m, which was his estimate as stated by Maxima to the defendant's US lawyers in an email dated 19th November 2009 and copied to the claimant, Mr Jedwab and Mr Radinsky. However, he pointed out that the large number of cases would be dealt with over a period of time, not all at once, that the CFAs provided opportunities to review the cases as they progressed and that the chances of the insurers being liable to the maximum extent of their potential exposure were small.

17. From the outset, the existence of suitable ATE insurance was an important element in the proposed transaction, as it would provide the major element of the defendant's security, and its significance increased when Mr Jedwab learned, as he had not known from the outset, that the claimant was subject to an insolvency arrangement. Mr Jedwab's evidence, which I accept, was that he was initially unaware that there was not a developed market for ATE insurance for "Financial Irregularities" litigation (which included the kind of consumer credit cases to be undertaken by the claimant) and that from an early stage he was given the understanding that there would not be any difficulty in obtaining suitable ATE insurance. This is reflected in his email to the claimant on 21st April 2010:

As you know, the ATE Insurance was always a material component of the transaction, and from our discussions we were assured that there was a robust and healthy marketplace where this insurance was available.

18. The arrangements for the ATE insurance were dealt with by Maxima on the claimant's behalf. A number of potential ATE insurers were considered. One of those insurers was Focus Insurance Company Limited ("Focus"), a company based in Gibraltar. Another was Kinetic Insurance Brokers Limited ("Kinetic"), a Lloyd's of London broker, which was acting for Alpha Insurance, a Danish company with capital assets of £266m. By about 17th November 2009 the decision had been taken to use Kinetic rather than Focus, for reasons explained by Mr Andrews on the morning of 19th November 2009 in an email that he sent to the claimant, the defendant and the defendant's US lawyers:

We have discounted Focus for the following reasons:

1. Their asset position is only £7,000,000. Given the risk to be taken for McKay Law (on his projections) is £13,000,000 we have concerns over their ability to service the risk.
2. Given point 1 we would expect them to reinsure to resolve that problem. They do not and suggest they cannot.
3. The corporate background reveals a number of issues ...

4. Their policy wording is more “free flow” than Kinetic. That worries us in that it is too “easy”.

5. Whilst deferred premiums are cash flow desirable they are (as you Brian alluded to in your UK visit) unsustainable long term. Given the above and the offer of deferment, this is “too good to be true”.

Conversely, in terms of Kinetic:

They are an authorised Lloyds of London brokerage. Lloyds require additional regulation than an ordinary brokerage in insurance and we can take some comfort from that and the monitoring of financials they do.

The insurer proper is significantly capitalised for our needs and has no need to reinsure (making life easier).

Kinetic have been very thorough and difficult to agree terms with. That is because they are equally aware of the issues in this market (hence this deal) and their reservation to agree terms give us confidence they are serious.

19. The Loan Agreement was executed on 19th November 2009. At the same time Maxima entered into a Service Agreement with the claimant. The Service Agreement, which stated that neither party could terminate it without the defendant’s consent while any obligation of the claimant to the defendant remained outstanding, provided that Maxima would provide confirmation to the defendant of the existence and scope of ATE insurance cover in respect of claims intended to be prosecuted by the claimant.

20. No sooner had the Loan Agreement been executed than a problem arose over the identity of the ATE insurer. As appears from the email timed at 17:40 on 20th November 2009 from the claimant to Mr Laycock and the email timed at 18:27 on 21st November from Mr Bual to Mr Laycock, Kinetic was requiring payment of the premium on each ATE policy upon inception; given the large number of claims and policies involved, this represented a large expenditure. The claimant wrote:

I am astonished and inconceivably irritated about what is now being said, in particular about ATE. Where on earth did you think we would find a premium? Sack Kinetic. We will wait to December to draw down. Credit Issues [another referral company] will be online by then.

The requirement for payments up front was implicit in Mr Laycock’s email of 19th November, as was the fact that deferral of premiums had been considered unsatisfactory. The claimant’s apparent surprise at the requirement for advance payment of premiums is itself surprising. Mr Bual’s email of 21st November 2009 makes sense only on the basis that the need for payments up front had not been appreciated (“I’ve been through everything we have from

Kinetic, and there is nothing about payments upfront or the amount.”). In oral evidence the claimant said that he had always anticipated paying the premiums to Kinetic out of the recoveries made in the funded cases. I find that it is more likely that the claimant knew before and not after he signed the Loan Agreement that payment of the premiums was required at inception.

21. Despite the terms of his email on 20th November 2009, the claimant made a request for a first drawdown under the Loan Agreement on 23rd November 2009. There was some communication on the same day concerning the fact that that request had not been made in the manner prescribed by the Loan Agreement and regarding the defendant’s request for, among other things, evidence that ATE policies were in place. On 24th November Mr Bual wrote to Mr Radinsky:

We hope to secure an arrangement with the referrer that all cases that we take on are on cover with immediate effect and that the relevant disbursements are covered. A copy of the policy will be provided. The insurer is likely to be Elite or DAS. As soon as we receive their confirmation we will provide it to you.

Mr Radinsky replied that afternoon:

Who is reinsuring this new ATE policy? We have to make sure that the ATE is from a credit worthy counterparty.

Mr Bual replied:

I’m just awaiting the full ATE policy from Elite[.] They are well known in UK but I’ll give the full policy and details once it arrives.

22. Matters appeared to be going well. On 8th December 2009 Mr Radinsky wrote to the claimant:

Just to be clear, we need to review the file to make sure the ATE is in place with Trans Re as the reinsurer. As soon as we see evidence from Maxima that the ATE is in place for the requested cases we can fund. I left an email for John [Laycock] and Mark [Andrews], and am waiting to hear from them that ducks are in a row, so that we can proceed.

However, it proved unexpectedly difficult to conclude an agreement with Elite, apparently on account of reasons internal to that insurer. On 18th January 2010, with no arrangement for ATE insurance yet in place, Mr Laycock was writing to Mr Radinsky in these terms:

With regard to ATE insurance for McKay, I reiterate that most of the recent delays have been caused by the insurers and have been outside Simon’s control.

By the end of tomorrow evening, following meetings ... with Elite and Focus, we should know when they will be back up and running (both have previously been OK’d by you).

In the interim ... I attach details of a further ATE provider, Independent, which could come into play if the others procrastinate longer.

The further insurer referred to was The Independents' Advantage Insurance Company Limited ("IAICL"), a company registered in Guernsey. Mr Laycock's email attached IAICL's specimen policy terms and noted that the cover was "written 100% by Everest Re ... an A rated US reinsurer with a multi billion dollar balance sheet".

23. On 20th January 2010 Mr Radinsky replied to Mr Laycock:

It [i.e. IAICL] looks like a creditworthy counterparty. I would like to set the wheels in motion, but again we need the attorneys to look at the policy to make sure that it conforms in form and substance with our expectation. This I am sure will frustrate Simon, but we have to make sure the structure is intact.

Hopefully, this will ultimately bear fruit.

Having made contact with his attorneys, on 25th January Mr Radinsky informed Mr Laycock that the defendant was ready to lend once it received a number of "key items", all of which concerned the ATE insurance or the selection of the cases to which the drawdown would relate; the second key item was "assurance from attorneys that policy is in fact fully reinsured by Everest Re". The following day Mr Radinsky wrote again:

Still waiting to get sign off from the attorneys. I need something in writing from the insurance company about the reinsurance.

24. On 27th January 2010 Mr Andrews wrote twice to Mr Laycock. The first email raised the possibility that, as an alternative to IAICL, Focus and Elite might once more be available as insurers. Regarding reinsurance it continued as follows:

Independent are replying to your point on this matter and I will leave that to them. However, there is a general point that is important. Reinsurance rarely links directly to a policy in this market. That is called facultative reinsurance and is primarily used for large individual risks. As the individual risk on each of these cases is minor we are unlikely to see such fixed additional cover from anyone.

Most ATE insurers use reinsurance in the more common methodology of allowing them to increase their book of business beyond their own resource in a secure fashion.

Given a reinsurer such as Everest RE (I note 8th biggest in the World if you preclude Lloyds of London syndication business) would accept to reinsure Independent should be seen as a mark of

their quality. They will have done significant due diligence beyond our current scope.

As I say, Independent will reply in detail. However, I feel we are now applying a further “bar” that may be unrealistic. Independent have reinsurance for their business. It is not facultative but it stands. Given our original view that the risk in the deal was low on these small level case levels I think this is perhaps too much. We should also remember we are not planning to insure the whole 6500 cases with Independent at all.

This is tranche 1, 1000 cases, and the risk against Independent solvency is on those cases. Going forward we have other options again 2 of which you have approved.

The second email was in the following terms:

I have spoken with Independent.

Their reinsurance is currently not targeted at their book of business for ATE on Financial Irregularity. This is because the levels they currently cover sit well inside their capital adequacy.

They would be happy to acquire reinsurance specifically for your lend to McKay Law which would give you what you need. To do so they would need:

1. Certainty they will be covering the 6500 cases Simon will be launching under his business plan.
2. That the first 1000 planned in month 1 go on their risk book prior to their acquiring the reinsurance. They maintain their current capital adequacy is more than sufficient to cover any losses on those 1000.

We should remember that we are only taking cases with over 65% prospects of success. We are unlikely to lose any of these within the first 6 months and then the stats used currently by insurers would not expect more than 5% to be unsuccessful. That gives an exposure of £150,000 only.

Given all I think with only a likely exposure of £150,000 that the lend is very secure. The others approved offer similar risk/reward and seem Ok to you.

25. On 1st February 2010 Mr Laycock forwarded to Mr Radinsky a letter from IAICL confirming that there would be a regulatory requirement of suitable reinsurance protection if the ATE business were approved by its underwriting committee and that efforts were being made to identify suitable reinsurance. Mr Laycock explained that IAICL’s existing reinsurance with Everest Re did not extend to ATE policies for Financial Irregularity claims and that IAICL were looking to reinsure that business either with Everest Re or with another

A-rated reinsurer. Mr Laycock expressed the view that, as it was likely to be 3 – 6 months before any claims would be seen against the ATE policies, it was unnecessary to have reinsurance in place at the outset. Mr Laycock also sent to the defendant a copy of IAICL's financial statements to 30th September 2008, which, after a trading loss of £542k for the year, showed a balance sheet of £620k. It is clear that these figures, and in particular IAICL's small asset base, considerably disturbed the defendant.

26. The claimant was becoming increasingly frustrated at the delays in finalising the financial side of the business, as he had accepted files for 1,000 clients but was unable to pursue their claims. On 2nd February 2010 he mooted with Mr Jedwab the possibility of putting in place cover with one of the insurers who had previously been approved and informed him that 200 of his cases were likely to settle, if only they could be issued. Mr Jedwab replied, "So let's get coverage in place with a real insurer and start with these 200." However, that did not happen. Discussions took place between the defendant and Maxima, in the course of which the defendant made plain its concerns over IAICL and its insistence that reinsurance be in place from the outset. On 4th February Mr Laycock wrote to Mr Radinsky to confirm that IAICL was willing to reinsure from the outset with Everest Re or some other A-rated reinsurer but that, before it committed to the substantial reinsurance premium that would be required, it wanted the comfort of an assurance that, subject to the claimant's compliance with the Loan Agreement, it was still the defendant's intention to fund the number of cases proposed by him, namely 6,000. The email was forwarded to Mr Jedwab, who replied as follows:

Assuming Everest RE is strong and the insurance and reinsurance are opined on as being in compliance with the terms of the agreements (in terms of what is covered, named beneficiary etc.) and further assuming all other deliverables are completed, i.e. key man insurance in place, attorneys are paid etc., I would be glad to try a smaller sampling and initially fund the costs that are absolutely necessary (i.e. barrister review, some portion of the Maxima costs assuming they are also recoverable). Once cases are accepted we can then advance additional funds to cover court filing costs, balance of Maxima etc.

Honestly, I believe it is important for us to now (re)establish comfort with the process, the internal case management system (which should be completed by now) and Simon's commitment since so much time has elapsed. I think you would agree that Simon has not exactly been pushing the process along and indicating a strong desire to get moving. Frankly, that is something I do not understand and if the business is to move forward would need to get comfort on.

27. On 10th February 2010 the claimant, concerned that matters appeared to have stalled and that the defendant appeared to have lost confidence in him, proposed a telephone conversation with Mr Jedwab. The conversation took place on 11th February 2010. The only near-contemporaneous record of it is

the email that the claimant sent to Mr Jedwab and Mr Radinsky that afternoon. It reads in part as follows:

I was comforted by the conversation; I think we are completely aligned about the best way to make this work and move it forward for our mutual benefit.

You will speak to Maxima about fees. Otherwise, there are six things that need to [be] resolved:

1. The ATE policy. I am using Independent, an FSA regulated provider who is in the process of reinsuring with Everest Re, a NYSE quoted company. I will provide you with a copy of the policy straight away;
2. I will provide you with confirmation that their policy is reinsured per (1) above;
3. I will provide a letter from the barrister confirming my agreement with him;
4. I will provide a letter from Ratio confirming my agreement with them;
5. I will provide confirmation of the Life Cover (this is presently with their underwriting dept);
6. I will provide a proposed number of sample cases which will be the subject of the first tranche of funding.

I hope this accords with our conversation. There is nothing that you said that I disagreed with and I look forward to taking the project forward as soon as possible.

I shall say something more about that telephone conversation when I consider the issue of waiver.

28. On Friday 12th February 2010 Aviva Life Services UK Limited issued an offer of life insurance, open for acceptance until 11th May 2010. It is likely, though not certain, that the claimant received the offer on Monday 15th February, which was also the date on which he was notified by his insurance brokers by email that an offer had been made and that a letter would be received shortly.
29. On 16th February 2010 Mr Radinsky wrote to ask when the defendant could expect to receive the “deliverables”, namely the outstanding matters mentioned in the claimant’s email of 11th February. The claimant replied:

I have sent 225 cases to the insurer to have policies issued on. I have letters from Ratio and the barrister. I’m awaiting the signed agreement from the insurer. Life cover has now been accepted but I await the policy. In short, I anticipate Thursday or Friday.

30. On 17th February 2010 the claimant wrote to Mr Jedwab and Mr Radinsky, expressing the hope that he could request drawdown in respect of the 225 cases on Friday 19th February. The email dealt in turn with the six outstanding items mentioned in his email on 11th February and included the following:

3. The ATE contract as signed and the policy (to follow) (I have the policy documentation, which is attached, but not the counter-party signed agreement which is being emailed to me as soon as possible);
4. Life cover (you won't have a policy but I can send the documentation as signed and I can and do provide an undertaking to let you have the policy on its arrival);
5. The individual policies (these will be forwarded on Friday)
6. Confirmation as to reinsurance.

In respect of (6) are you happy to have a letter from the ATE provider that this is in the process of being put in place? It is a formality and will take some little time before we have formal confirmation (in light of the numbers we are now looking to process, I presume it is not an issue).

...

I am looking for reassurance that subject to the above, the request for a draw down is likely to be successful so we can move forward.

Mr Jedwab's response was cautious:

We will review all as soon as it comes in and get back to you. We also need to speak to Maxima today or tomorrow. Friday might be too optimistic but we will work through what's outstanding.

The claimant replied:

Thank you; I was hoping we could keep the momentum going.

I hope Friday is achievable in light of the clarity of (sic) our recent exchanges of emails has given to things. You will have everything except the actual re-insurance and life policy but will have evidence that both are being processed.

... If you think there are going to [be] other issues over and above the 6 we discussed recently, it would be most useful to know at this stage.

31. On 18th February 2010, having received no further substantive response to his email of the previous day, beyond some brief exchanges concerning the ATE policies, the claimant sent to the defendant his signed agreement with IAICL. He also forwarded to the defendant an email he had received from

administrators acting on behalf of IAICL, which indicated that IAICL was in the process of obtaining reinsurance from Everest Re and hoped to have finalised the matter by 5th March, and that the 225 ATE policies had been signed off and would be issued the following day. The claimant told the defendant that he had complied with its requirements regarding the CFAs so far as was possible and continued:

I hope that you are at a point whereby you can be satisfied that the 6 items identified as outstanding during our recent exchange of emails are for all practical purposes in place (as to life cover, I confirm that I have signed the proposal and expect a policy within 10 days).

I have in advance of tomorrow signed a letter of request. It is for \$130,000. I assume that in light of this, we are able to move forward but please confirm as soon as possible.

32. On the morning of 19th February 2010 the claimant sent to the defendant a formal request for an advance of \$130,000. The request was accompanied by evidence of the ATE insurance but not of the reinsurance. Later that day, Mr Radinsky replied to the effect that he was reviewing the documents and that he believed there were three outstanding matters, one of which (in fact, the only one of relevance) was evidence of reinsurance. The claimant replied, referring Mr Radinsky to the earlier statement from IAICL's and saying, "In a nutshell it is being processed and evidence that it is in place will be available on 5 March."
33. Some days were spent resolving an issue between Maxima and the claimant, which is not relevant to these proceedings. Then on 1st March 2010 Mr Radinsky wrote to Maxima, copying the claimant into the email, saying that Maxima "must sign off on all aspects of the proposed structure", including six specified items, one of which was "ATE, the initial policy and supporting reinsurance". Although the claimant says that he was concerned that the defendant's requirements were largely meaningless and went beyond what was required by the Loan Agreement, the only matter he raised in response on 2nd March was the point, which he described as uncontroversial, that funding was required immediately before the expenditure was incurred and not afterwards.
34. On 3rd March 2010 Mr Bual asked Mr Andrews whether he had all the information that he needed. In a reply copied to Mr Jedwab and Mr Radinsky, Mr Andrews said that he awaited details of the reinsurance and asked the defendant to confirm whether it was willing to proceed before the reinsurance was formalised. Mr Jedwab replied:

Obviously we need reinsurance. I believe we have always made that clear.

The claimant responded:

I had understood you were happy with the statement on reinsurance in view of the small number of cases and the fact that by the second draw down it will physically be in place. There's no question reinsurance will be in place. I understand it's imminent.

35. However, on 5th March 2010 there was still no reinsurance in place. On 8th March Mr Andrews wrote to all parties, observing that a promise of reinsurance was not the same as actual reinsurance, that it had always been the case that reinsurance had to be in place for drawdown, and that other options should be considered if IAICL was experiencing difficulty in reinsuring. IAICL was indeed experiencing difficulty, which it was unable to surmount. On 19th March it was confirmed that Everest Re had declined to provide reinsurance. An email from the administrator who had been attempting to conclude the deal with IAICL explained the position as follows:

For what it is worth—the reasons behind Everest's decision are based on the Jackson report, the recent BBC programmes on F.I. and the messages they are getting from other ATE insurers who are not writing this class, e.g. IGI and DAS.

More importantly is to establish if there are other reinsurers able to offer capacity to Independents. The answer is yes to that but I am very nervous about committing any time frames or names. ...

We are very close to being able to use a new insurer. This insurer is stronger than Independents—but still very small in insurance terms—a balance sheet of around £4 million.

Crucially though, this insurer is EU domiciled and has the benefit of the Financial Services Compensation Scheme (FSCS). Independents is not covered by this FSCS scheme because of its Guernsey domicile.

36. That concluded the efforts to deal with the matter by the provision of reinsurance. On 15th April 2010 Mr Laycock forwarded to Mr Jedwab and Mr Radinsky an email from the claimant. That email presented two alternatives: either the parties could accept that reinsurance acceptable to the defendant was not likely to be obtainable, in which case the Loan Agreement was to be considered as frustrated and there should be an attempt to agree a “schedule of compensation”; or the claimant could provide a guarantee for £5m from Royal Luxembourg SOPARFI SA (“Royal Lux”), for which the cost would be between £500k and £750k—a cost that the claimant said he intended to persuade IAICL to pay. On 16th April Mr Jedwab made a succinct response:

Simon needs to deliver the reinsurance as previously agreed.

There will be no “schedule of compensation”—is this a joke?

On 19th April, the claimant wrote to say that he remained committed to proceeding with the deal but was unable to provide the required reinsurance because “the insurers I have spoken to cannot see the need for it and are therefore reluctant to provide it”. He complained that the defendant's

requirements in respect of reinsurance went beyond any contractual requirement. On 21st April Mr Jedwab replied to the effect that a request for insurance to be issued by a creditworthy company or to be backed by reinsurance was a reasonable request and one of which the claimant had always been aware. Communications over the following days became increasingly fraught but were unproductive. On 25th April the claimant wrote to Mr Jedwab:

... I require you to meet your obligations under the contract.

You will receive correspondence from my office Monday. I suggest we allow things to take a more formal path from here on in.

Later that day, in an email copied to the defendant's US lawyers, Troutman Sanders LLP, the claimant wrote:

This matter is being dealt with by Elizabeth Egarr at my office. Please refer all future communications to her.

37. On 26th April 2010 Troutman Sanders LLP wrote to Ms Egarr:

I bring to your direct attention the provisions of Section 1.1 (a) of the Agreement, which read, in relevant part: "Lender's obligation to make any Advance hereunder shall be in the Lender's sole discretion."

Kindly conduct yourselves accordingly.

On 27th April, the claimant wrote to Troutman Sanders LLP. He said that the proposition that the defendant was under no obligation to make advances was "defective" and had "no foundation in English law" and asked for immediate confirmation that the requested advance would be made, indicating an intention, were that confirmation not forthcoming, to commence legal proceedings for specific performance or damages. The following day, Mr Jedwab—who had almost certainly by then been made aware of the terms of the claimant's letter to Troutman Sanders LLP, as can be gleaned from the chains of emails—wrote to Mr Andrews:

He can't honestly think I would now proceed after I have been threatened.

Further correspondence followed, and on 25th May 2010 the claimant wrote to the defendant's US lawyers, purporting to accept the defendant's repudiation of the Loan Agreement.

38. Proceedings were issued on 4th August 2010. In the context of the foregoing summary of the facts, I shall address the issues identified in paragraph 7 above, summarising counsel's submissions very briefly before setting out my conclusions.

Issue (1) (a): Discretion to Refuse an Advance

39. For the defendant, Mr Quest relied on the sentence in clause 1.1 (a): “Lender’s obligation to make any Advance hereunder shall be in the Lender’s sole discretion.” He submitted that the Loan Agreement provided for a two-stage process: first, the claimant was entitled to request an advance pursuant to clause 1.7 (b) when the conditions precedent to such a request had been satisfied; second, the defendant would then consider the request and had a discretion whether or not to make any advance. The terms of clause 1.1 (a) are clear. There is nothing in the circumstances in which the Loan Agreement was made or in its commercial purpose that permits any limitation upon the defendant’s discretion, beyond that which the general law imposes, namely that the discretion must not be exercised capriciously, arbitrarily, perversely or irrationally. The decision taken by the defendant was simply a decision not to make an advance when requested to do so in February 2010; it was not a decision never to make an advance in any circumstances. Particularly when viewed in the light of the history of the matter since November 2009, that decision cannot be considered irrational or capricious, and it is not for the court to substitute its own view as to what decision ought to have been made.
40. For the claimant, Mr Tomlinson Q.C. submitted that the mention of discretion in clause 1.1 (a) should be understood as a reference to the words “in the Lender’s discretion” in clause 1.7 (a) and (b). The discretion in clause 1.7 must be understood as a power of judgement in respect of the satisfaction of the conditions precedent: in paragraph (a), rather strangely, the conditions precedent to the defendant’s obligation to execute the Loan Agreement; in paragraph (b), the conditions precedent to the claimant’s entitlement to request an advance. To construe clause 1.1 (a) as conferring a distinct discretion would give rise to a number of problems. First, it would mean that discretion was used in two different senses within clause 1: in the sense of “choice” in clause 1.1, and in the sense of “power of judgement” in clause 1.7. Second, it would create a conflict between the use of mandatory language (“shall”) and the existence of an unfettered discretion. Third, it would sit uneasily with the contractual scheme, which included detailed provisions designed to ensure that the defendant’s position was adequately secured and protected. Fourth, it did not reflect the commercial realities of the situation, where the defendant well knew that the claimant must commit himself to considerable expenditure in the expansion of his business and must be able to rely on the obligations of the defendant to provide the necessary funding.
41. The principles applicable to the construction of commercial contracts are clear. The aim is to determine what the parties meant by the language that they used. However, the court is not concerned with the subjective intentions of the parties but with the meaning that the language used would have conveyed to a reasonable person who had all the background knowledge that would reasonably have been available to all of the parties to the contract, and that background knowledge must be considered in all cases, not merely in cases of linguistic ambiguity. The relevant background information does not, however, include the pre-contractual negotiations, which are inadmissible as

an aid to construction. If the language of the contract, when read against the relevant background, leads clearly to the conclusion that one particular construction is the correct one, the court must give effect to it. But if there is more than one possible construction, the court is entitled to prefer the construction that best accords with commercial common sense, even though another construction would not produce an absurd or irrational result. See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912F-913G, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, paras 21-26, *Pink Floyd Music Ltd v EMI Records Ltd* [2011] 1 WLR 770, paras 16 – 23, and *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, paras 15 - 30.

42. If the principles of construction are clear, the result of the application of those principles often is not. This is evidenced by the frequency with which judges of the appellate courts disagree among themselves, and with judges of first instance, as to the construction of contracts. The law is committed to the view that any contract can have only one “true” interpretation; cf. *Egan v Static Control Components (Europe) Ltd* [2004] EWCA Civ 392, [2004] 2 Lloyd’s Rep. 429, *per Arden LJ* at [27]. But what is true as a matter of legal dogma is not necessarily true in any other sense. I shall come back to this point.
43. Turning to the provisions of the Loan Agreement, I consider first the wording of the critical sentence in clause 1.1 (a)—“Lender’s obligation to make any Advance hereunder shall be in the Lender’s sole discretion.”—which I shall call the Discretionary Sentence. Contrary to Mr Quest’s submission, the meaning of that sentence seems to me to be far from clear. Its wording is rather peculiar and some work is required to make it accord with either of the interpretations that have been advanced before me. To begin with the defendant’s proposed construction: it is an odd locution to say that A’s obligation to do X is in A’s sole discretion. If what is meant is that A has a choice whether or not to do X, the language of obligation adds nothing: one might as well say that the decision whether to do X is in A’s sole discretion. Indeed, to speak of obligation in those circumstances is inapt, as the making of a loan will be a matter of choice and not of obligation. One might properly speak of a discretionary obligation if one meant a discretion to *assume* an obligation—if, for example, the defendant had a choice whether or not to execute some further document that would itself create an obligation. However, the Loan Agreement contains no provision for the creation of an obligation to lend, other than by the making by the claimant of a request for an advance upon satisfaction of conditions precedent. On the other hand, the claimant’s interpretation of the Discretionary Sentence requires not merely that “discretion” be used in the sense of “judgement” but that the object of the judgement be understood in some such sense as “[the question whether or not there has arisen any] Lender’s obligation” or “[the fact of there having arisen an] obligation”. Although a possible reading, that is not an immediately obvious one. In short, each of the alternative constructions advanced before me requires some glossing of the words of the Discretionary Sentence.
44. One sentence of the Loan Agreement cannot be read in isolation; the contract must be read as a whole. There are passages that suggest that the defendant

was indeed under an obligation to advance moneys. The recital might reflect that financial accommodations in the form of commitment to lend had already been granted. More importantly, clause 1.1 (a) the sentence immediately preceding the Discretionary Sentence uses mandatory language: “shall advance”. Against this, the Loan Agreement repeatedly emphasizes the control to be retained by the Lender. Thus the language of discretion is used in clause 1.7 (a) and, less redundantly, in (b), where what is meant is not that the Lender has a choice whether to satisfy the conditions but rather, I think, that it is for the Lender to judge whether the conditions have been satisfied. The fact that provisions relating to the conditions precedent give an element of control to the Lender does not mean that this control must survive the satisfaction of the conditions. However, it does reflect the concern of the Loan Agreement as a whole with the protection of the Lender. Further, the claimant’s construction of the contract would mean that the Discretionary Sentence was nothing more than another way of saying the same thing as the opening words of clause 1.7 (b). That conclusion might be correct, but it is more natural to understand the two provisions to deal with different things, particularly when, as mentioned above, the Discretionary Sentence has to be heavily glossed before it can be read as a statement regarding the satisfaction of the conditions precedent.

45. One provision that is in my view of some relevance, though it was not referred to in argument, is clause 1.1 (i):

Notwithstanding the above, from time to time, without affecting the obligation of Borrower ... to pay the outstanding principal balance of the Loan ... and observe the covenants of Borrower contained herein ... the Lender may, at the option of the Lender, decrease the maximum amount of the Loan ...

This does not in so many words confer on the Lender a right to refuse to make any advance whatsoever. But neither is there anything in the provision to limit the Lender’s ability to decrease the maximum amount of the loan to periods after some initial advance has been made, nor do I see how the provision can be read so as to require some minimum level of advance to be made. If, subject to the general principles of law applying in such circumstances (as to which, see below), the Lender might decide to advance no more than it has already advanced, so it might decide to advance nothing at all.

46. Regarding the commercial framework and purpose of the Loan Agreement, I do not accept Mr Tomlinson’s suggestion that the relationship created by the Loan Agreement was more that of a joint venture than that of lender and borrower. The express statement by the parties that they had created only the relationship of lender and borrower—see clause 7.16—would not of course determine the matter: see, for example, *Pawsey v Armstrong* (1881) 18 Ch.D. 698, *Street v Mountford* [1985] A.C. 809, and *Agnew v Commissioner of Inland Revenue* [2001] 2 A.C. 710, *per* Lord Millett at 725-6, para [32]. Even so, the parties have in my view correctly characterised their relationship. The business of the consumer credit legislation was to be carried on by the claimant, not by the defendant, and there was no provision for profit-sharing. The fact that the Loan Agreement displays a detailed concern on the part of

the defendant with the business of the claimant relating to consumer credit litigation is to be explained not by joint venture but by the defendant's wish to ensure that it had proper security and was not lending to a failing business.

47. Mr Tomlinson accepted that, as Mr Quest had submitted, it is by no means uncommon for a loan agreement to confer on the lender an ultimate discretion whether or not to make a loan. However, he submitted that such a discretion would be contrary to the commercial reality of the arrangement between the parties. The detailed provisions of the Loan Agreement, and in particular of clause 1.7 (a) and (b), had the result of giving to the defendant a high degree of comfort, as well as of control over the claimant's business model, before the stage was ever reached at which the claimant could make a request for an advance. In those circumstances, Mr Tomlinson submitted that it was less likely that the agreement would properly be construed as making no provision at all for an obligation to lend. Further, the claimant was seeking funding to enable him to exploit a new seam of business, and it was within the contemplation of the parties that, to do so, he would have to expend substantial moneys and time in setting up the infrastructure necessary for the new business. Although there is nothing in principle to preclude the conclusion that all of the steps taken by the claimant would be entirely at his own risk, it is, submits Mr Tomlinson, more commercially sensible to suppose that, once he had complied with all of the defendant's detailed requirements regarding his business and made a request for an advance after satisfaction of all conditions precedent, he should be entitled to a loan in accordance with the Loan Agreement.
48. Although Mr Tomlinson's submissions in this regard were attractive, I am not persuaded that considerations of commercial common sense can bear quite the reliance that he placed on them. From the claimant's perspective, it was obviously important that his efforts vis-à-vis the defendant should be with a realistic view to obtaining finance and that he was not simply being "messed about". On the other hand, from the defendant's point of view it could equally be seen as important that it retained the ability to assess the merits of the loan right up until the moment at which it parted with the money. Both parties had expended a considerable amount of time and effort on the relationship, and it is not to be forgotten that the defendant, as a company that made its money by making loans, had its own commercial reasons for looking for the opportunity to advance money—it is unnecessary to import contractual obligations to give reality to that consideration.
49. Having regard to the various considerations put forward by counsel and mentioned above, I am of the opinion that the correct construction of the Discretionary Sentence is essentially that advanced by the defendant. It does not mean that (as the claimant maintains) it is for the defendant to decide whether or not the conditions precedent to the existence of an obligation to lend (namely, the conditions precedent to the making of a valid request for an advance) have been satisfied. It is nearer to the truth to say that it is a matter for the defendant whether or not it makes an advance. I shall explain more precisely how I understand the Discretionary Sentence and set out shortly my reasoning.

- (1) Taken by itself, the Discretionary Sentence is unclear of meaning when closely analysed. But when one steps back from close analysis and asks what it is trying to convey, it seems to me more natural to understand it as saying “It is up to the Lender whether or not to make an advance” than as saying “It is for the Lender to judge whether or not its obligation to make an advance has arisen.”
- (2) The sentence immediately preceding the Discretionary Sentence uses the language of obligation. The construction that I prefer is capable of giving some practical, though necessarily very qualified, significance to that language.
- (3) The first and second sentences of clause 1.1 (a) can be construed as qualifying each other by supposing that the satisfaction of the conditions precedent gives rise to a prima facie obligation to lend but that the Lender nonetheless retains a residual discretion not to lend. Even though the surviving notion of obligation is greatly attenuated, it represents a practical way of considering the operation of the Loan Agreement.
- (4) When a contract confers on one of the contracting parties a discretion, the exercise of that discretion is not entirely unconstrained. It is not for the court to substitute its own decision for that of the person on whom the discretion is conferred. The court can interfere only if the discretion has been exercised irrationally, capriciously or arbitrarily. A decision is not “irrational” merely because it is in a looser sense unreasonable. It must be “so outrageous in its defiance of reason that it can properly be categorised as perverse”; to put it another way, the test corresponds to that used in public law: see *Ludgate Insurance Co Ltd v Citibank NA* [1998] EWCA Civ 66, [1998] Lloyd’s Rep IR 221, per Brook LJ at [35]; *Paragon Finance plc v Staunton* [2001] EWCA Civ 1466, [2002] 2 All ER 248, per Dyson LJ at [38]; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd’s Rep. 558, per Rix LJ at [60] – [66].
- (5) In one sense, any talk of obligation in such circumstances is redundant: there is simply a discretion to be exercised lawfully. But, particularly in circumstances where the Loan Agreement does not yield a clear meaning on a strict and literal reading, it does not seem impermissible to convey its meaning by saying that, although the Lender has a prima facie obligation to lend upon receipt of a valid request, it retains a residual discretion to refuse to lend. In this sense, while Discretionary Sentence has the effect of qualifying very heavily the notion that the defendant was under an obligation, it does not entirely negate it. Language of discretion and of obligation can co-exist.
- (6) Clause 1.1 (i) supports the interpretation according to which satisfaction of the conditions precedent does not, without qualification, impose on the defendant an obligation to lend: see paragraph 45 above.

50. The defendant decided not to make an advance in response to the claimant's request dated 19th February 2010 because it was not satisfied with the ATE insurance that was being offered. It required that the insurer either have a substantial capital base or have reinsurance of its exposure. If the defendant's discretion were entirely free, unconstrained and unreviewable, that would be an end of the matter. However, on my preferred construction of the Loan Agreement, the question arises whether that decision was a valid exercise of the discretion in clause 1.1 (a). On behalf of the claimant, objection was taken that, having regard to the amount involved, the low degree of risk and the apparent soundness of the ATE insurer, the level of exposure in respect of the requested advance of \$130,000 dollars was so low that it was irrational and capricious to require reinsurance. In my view, that is precisely the kind of assessment that is properly to be made by the lender and not by the court, particularly having regard to the history that I have set out at length in this judgment. The claimant was insolvent, was clearly unable to obtain finance from mainstream UK lenders and was branching out into an unfamiliar area of business. The defendant had shown itself very cautious about proceeding with the loan; its approach was characterised by belt and braces, and it was entitled to feel disquieted by the course of events in the preceding couple of months. I am satisfied that the defendant's decision not to make an advance pursuant to the request was made on commercial grounds, and I do not consider that it is appropriate for me to tell it, as a commercial lender, that its refusal to make the advance sought was irrational in the circumstances. This is not in my judgment an appropriate case for a court to substitute its own view for that of the defendant.
51. If I had accepted Mr Tomlinson's proposed construction of the Discretionary Sentence, I would ultimately have come to the same conclusion, though for different reasons, which I may summarise as follows.
- (1) On Mr Tomlinson's proposed construction, the Discretionary Sentence is, for present purposes, a different formulation of the discretion in clause 1.7 (b), namely a power of judgement in respect of the satisfaction of the conditions precedent to the claimant's entitlement to request an advance.
 - (2) Clause 1.7 (b) (x) provides that, before the Borrower requests an advance, the Lender "shall have received such other documents, instruments, and/or agreements as Lender may reasonably request".
 - (3) The defendant maintained that, in view of the proposed identity of the ATE insurer, it was entitled by clause 1.7 (b) (x) to request proof of reinsurance.
 - (4) The defendant's stance has given rise to two distinct questions: first, whether it is an appropriate use of clause 1.7 (b) (x) to seek to impose a discrete requirement, namely for reinsurance, going beyond the specific requirements of, in particular, clause 1.7 (b) (ii); second, whether the requirement for proof of reinsurance, even if capable of being within the scope of clause 1.7 (b) (x), was reasonable.

- (5) If it was for the defendant to judge whether the condition in clause 1.7 (b) (x) had been satisfied, it is the defendant's view on the question that matters, provided only that the decision is not irrational or capricious or made in bad faith; cf. *Brown v GIO Insurance Ltd* [1998] EWCA Civ 177, *per* Chadwick LJ; also the cases mentioned in paragraph 49 (4) above.
- (6) I should have held that the defendant's decision was unimpeachable in this court. I have already expressed my view on the rationality of the decision. It is not for the court to substitute its own view of what is reasonable; it suffices that a rational lender could have exercised its judgement in the manner that the defendant did. That leaves the question whether an insistence on reinsurance fell within the scope of clause 1.7 (b) (x) at all. In my judgment, it did. There is nothing in the wording of the particular provision, the scheme of the Loan Agreement or the factual matrix that leads me to restrict clause 1.7 (b) (x) to documents that evidence or give effect to the specific requirements of the preceding sub-clauses. The fact that such specific requirements are expressed is in itself of use to the parties, because it establishes a framework of necessary steps towards drawdown, but it does not mean that no other requirements could be made in the light of judgements to be made by the Lender from time to time.
- (7) Further, I should be of the view that the discretion which on the claimant's view is conferred on the Lender by the Discretionary Sentence was sufficient to make the Lender the arbiter of the scope of clause 1.7 (b) (x), subject to good faith and rationality. There is real value in such a power of judgement, because contractual provisions are often patient of more than one interpretation and can lead to considerable disagreements of opinion. The existence of such disagreements is not itself indicative of irrationality, as is clear from the frequent disagreements within the appellate courts and between those courts and judges of first instance.

Issue 1 (b): Conditions Precedent

52. In the light of my decision as to Issue (1) (a), the answer to Issue (1) is in my judgment that the defendant was entitled to decline to make the first advance under the Loan Agreement when requested to do so by the claimant. Nonetheless, I shall also consider Issue (1) (b).
53. The claimant was entitled to request an advance under the Loan Agreement only when the conditions in clause 1.7 (b) had been satisfied. It follows from my conclusions in paragraph 51 above that, regardless of questions of discretion, the claimant had not satisfied the condition precedent in clause 1.7 (b) (x) when it made the request for an advance on 19th February 2010. See in particular paragraph 51 (6).

54. Further, it is common ground that condition in clause 1.7 (b) (ii) was not satisfied when the claimant requested an advance on 19th February 2010, because he had not delivered evidence that he had taken out a policy of Key Man insurance and had, indeed, not taken out such a policy. The claimant (who, of course, denies that he had failed to satisfy the condition in clause 1.7 (b) (x)) contends that the defendant had waived the requirement of satisfaction of the condition in clause 1.7 (b) (ii) and so was obliged to make an advance.
55. Waiver, at least in this context, is a form of estoppel. Although it is not necessary to prove consideration to support the waiver, the waiver “requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back on his representation”: see *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd’s Rep 391, per Lord Goff of Chieveley at 398 – 399; also *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850, per Lord Diplock at 882 – 883.
56. Clause 1.1 (l) of the Loan Agreement purports to restrict the ability of the parties to effect informal waiver of their rights and remedies: see paragraph 5 above. The decided cases do not clearly resolve the question whether or not a contractual term can effectively prevent the parties from waiving compliance with the provisions of the contract, including that particular term: compare *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413 and *United Bank Ltd v Asif* (unreported, CA, 2000). Both parties were content to accept as correct the preliminary view of H.H. Judge Mackie QC in *Spring Finance Ltd v Hs Real Company LLC* [2011] EWHC 57 (Comm) where, in respect of the question whether an oral variation could have been effective in the face of a requirement in the contract that variations could only be in writing, he said at [53] that his first impression was:

that there could in theory be an oral variation, notwithstanding a clause requiring that to be in writing, but that the court would be likely to require strong evidence before reaching such a finding.

There is some attraction in that approach, but Judge Mackie was not purporting to state a legal proposition and it is necessary to enter a *caveat*. There is a single standard of proof that applies in all civil cases, namely proof on the balance of probabilities. While it is true as a matter of fact and common sense that one will more easily be persuaded of some things than of other things, that consideration has no part to play in the formulation of the standard of proof: see *In re B* [2008] UKHL 35, [2009] 1 AC 11, and *In re S-B* [2009] UKSC 17, [2010] 1 AC 678. If in principle the defendant was able informally to waive clause 1.1 (l) and satisfaction of the conditions precedent to a valid request for an advance, the proper approach of the court must in my judgment simply be to assess the evidence in the case and, if that evidence persuades on the balance of probabilities that there has been a waiver, to find accordingly. This is not, of course, to deny that, in assessing the evidence, one may be assisted by regard to the inherent probabilities: cf. *The Ocean Frost* [1985] 1 Lloyd’s Rep. 1, per Robert Goff LJ at 57. As to the question whether an oral variation could be effective in principle, I shall proceed on the basis of

the defendant's concession, for the purposes of this case, that it could be effective. I should anyway regard the concession as rightly made.

57. The claimant's case is that there was discussion of the Key Man insurance in the telephone conversation on 11th February 2010. In paragraph 60 of his witness statement he said this:

Centurion knew following my conversations with Brian Jedwab and Ben Radinsky on 11 February 2010 that I didn't want to actually enter into the financial commitment of a life-insurance policy until the money to be advanced was to be forthcoming. They were happy with this, so long as they knew that life cover was to be made available before funds were drawn down. This specific confirmation was given to me when we spoke on 11 February 2010, though self-evidently it would be absurd for me to take out life insurance for their benefit if at the time they had no intention to fund the loan as had been agreed. Having spent so much in respect of their fees and legal fees Ben Radinsky was quite comfortable with the position and said as long as he knew the policy was in place immediately before funds were released he was comfortable with the arrangement. Accordingly, it was agreed that the offer of life cover would be forwarded to them as soon as it was received, as indeed it was, but the policy itself would not be taken out until a draw down was confirmed as being processed.

The claimant says that this is the context in which he wrote at point 5 of his email of 11th February 2010, "I will provide confirmation of the Life Cover (this is presently with their underwriting department)." By 15th February he had received his offer letter from Aviva. On 16th February he forwarded to the defendant confirmation of the offer of life cover, and later that day he informed the defendant, "Life cover has now been accepted but I await the policy." In his email on 17th February he promised a copy of the policy when it became available, while making it clear that this would not be before the request was made, and on 18th February he stated that he had signed the proposal and expected a policy within ten days. The defendant did not comment adversely on this, either before or after the request was made; this is said to be consistent with the conversation on 11th February. Further, reliance is placed on Mr Radinsky's email of 19th February 2010 (see paragraph 32 above).

58. I reject the claimant's contention that there was a waiver of the requirement that he deliver evidence that the Key Man insurance had been entered into.
59. Mr Tomlinson observed that clause 4.15 of the Loan Agreement required that the Key Man insurance be taken out within forty-five days of the date of the Loan Agreement, that is by 4th January 2010, and that the defendant had clearly waived compliance with that timetable, as it knew by 11th February that there was no such insurance in place. That is true, but it does not establish a waiver of sufficient scope to avail the claimant; its force is rather evidential, possibly tending to indicate a willingness by the defendant to accept a substantial compliance that was sufficient for its purposes rather than an

insistence on strict compliance. Even evidentially, however, the point has limited force. Clause 4.15 required the Borrower to maintain, and to deliver evidence of the maintenance of, Key Man insurance. Clause 1.7 (b) (ii) provided that the obligation in respect of Key Man insurance should be deemed satisfied during a forty-five-day period of grace after the making of the Loan Agreement. If an advance had been made during that grace period and no evidence of Key Man insurance had been delivered at the end of it, the Borrower would be in default and liable to repay the advances. On the other hand, if, as was in fact the case, no advance had been made within the grace period, the Lender would be sufficiently protected by the ability to insist on delivery of evidence of insurance, waiving only the—by now, largely irrelevant—stipulation as to the earlier date when the insurance ought to have been effected. (In this regard, I note that, when on 28th December 2009 the defendant's US lawyers wrote to remind the claimant that the Key Man insurance was due to be in place on 4th January 2010, he replied: "I'm afraid it hasn't yet been put in place but I will chase in January. There has been no draw down, so I assume it's not a major problem at this stage.") In short, the fact that the defendant was not concerned with the failure to effect Key Man insurance by 4th January 2010 neither amounts to an implied waiver of the requirement that evidence of such insurance be provided no later than the making of the request for an advance nor provides any real indication that the defendant is likely to have waived the requirement of proof of insurance at the date of a request for an advance.

60. Regarding the particular facts of the case, I find that there was no clear and unequivocal assurance or representation by the defendant that it would not require delivery of proof of insurance before a valid request was made.
61. I reject the claimant's evidence of what was said in the telephone conversation of 11th February 2010 regarding Key Man insurance.
 - (1) That part of the evidence was not accepted by Mr Jedwab, who said he had understood that the claimant would be able to address the matter of insurance without difficulty or delay. Accordingly there is an issue that I must resolve.
 - (2) I think it unlikely that either man has a precise and accurate recollection of the details of what was said. As regards the claimant's evidence, this observation is not only a matter of inherent probabilities but is supported by indications that he has tended to reconstruct his recollection in the light of later knowledge. Accordingly I consider it prudent to check the witnesses' recollections against the contemporaneous documents.
 - (3) Although the contents of the claimant's email of 11th February 2010 cannot be said to be strictly inconsistent with his evidence on this particular point, they do not contain any indication that there had been any expression of agreement or understanding such as he now asserts. As regards the Key Man insurance, the email simply says that it is with the insurers' underwriting department and that the claimant will provide confirmation of life cover. Nothing in that suggests a relevant

waiver or a discussion concerning unwillingness to commit to a life policy until the availability of the advance had been confirmed.

- (4) The claimant's explanation of his reason for that unwillingness is unconvincing, on the evidence before me. He said that he did not want to commit to a liability of about £25,000 without an assurance that he would receive a loan. But the extent of that liability depends on two things, namely the duration of the commitment under the insurance policy and the size of the premiums. The claimant arrived at his figure of £25,000 on the basis of the sum of monthly premiums of a little in excess of £400 p.m. over a five-year term. When he gave evidence, I understood the claimant to say that the problem was that the entirety of the premiums was payable in advance, requiring payment of a lump sum of £25,000. That interpretation of his evidence was also reflected in the course of the cross-examination of Mr Jedwab, who said that he understood there were to be monthly premiums but did not understand that they were to be payable by a lump sum in advance. In final submissions, Mr Tomlinson said that the tenor of the claimant's evidence had not been that the premiums were payable in advance but rather that there was from the outset to be an obligation to pay the premiums throughout the entire five-year term of the policy. Whichever of these interpretations better reflects what the claimant intended, neither is supported by the documents. The offer letter refers only to monthly premiums; it does not say that they are payable in advance and it does not say that the claimant is obliged to maintain them. Although a policy could well provide for an obligation to keep paying the premiums, in the absence of such a provision the expectation would be that the policy would lapse if payments were not maintained. Further, the figure of £25,000 represents the sum of premiums of around £400 p.m. But the offer letter providing for those premiums post-dated the conversation on 11th February 2010. The email dated 15th February 2010, by which the claimant's insurance brokers informed him that Aviva had accepted his proposal on special terms, notes that "the premium has increased by £210.00 from £207.00 to £417.00 ... on medical grounds". There is no evidence to show that the claimant knew the size of the premiums until he received the offer letter or the email of 15th February—in either case, after the conversation on 11th February. The evidence before me indicates the probability that the claimant's reliance on the total figure of £25,000 in respect of premiums reflects knowledge he did not have at the time of that telephone conversation. It may also result from some confusion in his own mind, stemming from the fact that his later proposal to put in place a guarantee from Royal Lux involved a willingness to pay a premium of £25,000 if the defendant had been willing to accept such a guarantee.
- (5) The documentation in the period between the telephone conversation and the making of the request for an advance does not, in my judgment, support the claimant's case. As is mentioned in paragraph 29 above, when on 16th February 2010 Mr Radinsky asked when the

defendant could expect to receive “the deliverables”, namely the outstanding matters mentioned in the claimant’s email of 11th February, the claimant replied: “Life cover has now been accepted” [he does not make clear whether this means that he had accepted an offer or that an insurer had made an offer in response to his proposal] “but I await the policy.” That is consistent with his earlier email on the same day: “I hope to sign off the policy in the next couple of days.” Neither of these responses is consistent with what the claimant now says; on his present case, the answer would more probably have been along the lines: “Here is the offer I have received from Aviva. I shall formally accept it as soon as you confirm your readiness to make an advance.”

(6) On the morning of 17th February the claimant wrote concerning the six matters previously identified as outstanding; relevant parts of the email are set out in paragraph 30 above. Although the claimant seeks to rely on the final sentence of the email as confirming that he would not finalise insurance until he had the reassurance sought, that is not the natural meaning of the email when it is viewed in the context of the preceding communications, for they had indicated that the claimant was simply awaiting the policy; the obvious way of reading point 4 in the email of 17th February is simply that the policy was not expected to arrive before the request that the claimant was hoping to make on Friday 19th February. Further, the claimant did not receive confirmation from the defendant that it would accept the position with which he was presenting it. Mr Jedwab’s response on the afternoon of 17th February was to reserve his position and express the view that “Friday might be too optimistic”. The next communication of relevance to the present issue was the claimant’s email on the afternoon of 18th February (paragraph 31 above). This again was in my view inconsistent with the claimant’s present evidence, as it carries the implication that he had done all that was necessary on his side to put the insurance in place, not that he was awaiting further assurance from the defendant before doing so. No response was received to the email of 18th February before the claimant made his formal request for an advance.

62. In the circumstances outlined above, I find that neither on 11th February nor at any time thereafter until the request was made on the morning of 19th February did the defendant give an unequivocal assurance that it would not require delivery of proof of insurance before a valid request was made.

63. The claimant relies also on Mr Radinsky’s email on 19th February (see paragraph 32 above), in which he identified only three matters that appeared to be outstanding after the submission of the request for a loan, none of which was proof of Key Man insurance. Mr Tomlinson submits that the terms of that email amount to an acceptance that the offer of insurance which the claimant had in place satisfied the requirement under the Loan Agreement. I reject that submission. The email of 19th February falls well short of an unequivocal assurance that the offer of insurance satisfied the requirements of the Loan Agreement. No such assurance had been given previously. The email does

not state any such assurance. Mr Radinsky had only recently received the request and accompanying documents and said expressly that he was still reviewing them. In those circumstances, he expressed a belief that there were three outstanding matters; he did not commit either himself or the defendant to an acceptance that no issue arose in respect of any matter to which he did not refer. Moreover, the matter has to be considered in context. The claimant had led the defendant to believe that he had accepted an offer of insurance and that a policy would be forthcoming within ten days.

64. After 19th February 2010, the parties did not return to the matter of Key Man insurance, because their attentions were diverted to the question of reinsurance, which was an unresolved problem that prevented them from moving forward; next to that, all other matters were of subsidiary importance.
65. If it were necessary, I should also find that the claimant had not relied on any such assurance so as to make it inequitable for the defendant to resile from it. The assurance, whether said to have been given expressly on 11th February or impliedly thereafter, is not said to have been supported by consideration and so could avail only in equity. The communications to which I have referred show that in the days leading up to 19th February the claimant was purporting to have accepted the offer of insurance and to be merely awaiting the policy. In those circumstances, I cannot see why it should be inequitable for the defendant to choose to await the policy or at the very least documentary proof of the acceptance of the offer of insurance—proof that, as a matter of fact, the claimant could not give, because he had not accepted the offer of insurance. If the claimant's present evidence were to be accepted (as I do not accept it), the basis on which the assurance had been given, namely that the claimant would not commit to insurance until he received confirmation that an advance would be forthcoming, no longer obtained so far as the defendant was concerned. Further, so far as concerns the position when the request was made, the claimant had sought from the defendant confirmation that it was satisfied with the steps taken prior to the making of a request and had gone ahead and made the request before receiving any such confirmation. If (contrary to my view) any assurance were to be implied from Mr Radinsky's email of 19th February, that could only be an assurance that the *acceptance* of Aviva's offer (not, as Mr Tomlinson would have it, the offer itself) was sufficient compliance with the conditions. The claimant could not complain that he had relied on the assurance by not then accepting the offer of insurance, because it was he who had misled the defendant into believing that he had already done so. In all these circumstances I see no reason of equity why the claimant should be held to have been permitted to act in reliance either on what had been said in a conversation eight days previously or on any insurance that could possibly be implied from subsequent communications.
66. In conclusion, I would hold that, quite apart from any question of discretion, the defendant was entitled to refuse to make an advance pursuant to the request of 19th February 2010 on the ground that the conditions precedent in clause 1.7 (b) (ii) and (x) had not been satisfied.

Issue (2): Repudiation

67. The claimant's case on repudiation is set out in the particulars of claim as follows:
13. On 19th February 2010, the conditions precedent under the loan agreement having been satisfied, the claimant submitted, in the prescribed form, a claim for an advance under the loan agreement of US\$130,000 ...
 14. Wrongly and in breach of contract, the defendant failed to make the requested advance.
 15. Thereafter, *inter alia* in a letter from its New York attorneys Troutman Sanders LLP dated 26th April 2010, and from its English solicitors DLA Piper UK LLP dated 7th May 2010, the defendant asserted that it was not obliged to make advances under the loan agreement, and in particular that making advances was wholly discretionary.
 16. The defendant thereby repudiated the loan agreement and evinced its intention not to be bound by its terms, which repudiation the claimant has accepted.
68. In this area, contractual terminology varies. Among several uses of the concept of repudiation, two are relevant in the context of this case. First, it can be used to refer to a breach of a condition or to a serious breach of an intermediate term, such as gives rise to a right in the innocent party to terminate the contract. Second, it can be used to refer to a renunciation, whereby one party evinces an intention not to perform the contract in accordance with its terms. A repudiation in the latter sense can occur when a party refuses to comply with its obligations unless the other party complies with conditions for which the contract does not provide. Although the former sense may be encompassed by paragraph 14 of the particulars of claim, it is the latter sense that predominates, having regard also to paragraphs 15 and 16.
69. If the defendant had been contractually obliged to make an advance pursuant to the request of 19th February 2010 but (a) had wrongfully refused to do so and (b) had wrongfully made it clear that it would not do so in future, unless the claimant complied with conditions with which in fact the claimant was not obliged to comply, it would thereby in my judgment have renounced or repudiated the Loan Agreement. In the light of my decision on Issue (1), I hold that the defendant did not renounce or repudiate the Loan Agreement.
70. In the event, the claim fails and will be dismissed.