EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 2013/0099

BETWEEN:

STEPHEN LESLIE PLANT

Claimant

and

PICKLE PROPERTIES LIMITED

Defendant

Appearances:

Elizabeth Talbot-Rice, Q.C., and David Welford of Maples and Calder, for the Claimant
Catherine Newman, Q.C., and Sebastian Said of Appleby, for the Defendant

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2015: June 30 and July 1
2016: June 16

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JUDGMENT

Claimant sued to recover from defendant, by way of contribution, one-half of monies claimant paid to settle liability of claimant and defendant to bank under joint and several limited guarantee, governed by English law, that secured a loan facility to a property company.

Property company had defaulted on loan, property market crashed, and after a few years, bank required expeditious sale of two properties that were loan security – Properties sold to companies in which claimant had 50% beneficial interest – Bank still had large shortfall on loan – Bank then sought payment under limited guarantee including limited capital amount (being far less than bank's shortfall), and interest on entire outstanding loan – Claimant disputed that full interest was covered by limited guarantee.

After bank sued claimant, claimant settled with bank, paying to resolve liability of himself and defendant – In this claim, claimant sought from defendant one-half of sums paid to bank which included the limited capital amount and compromised amount of bank's interest and costs claims – Also sought from defendant one-half of his own legal fees paid in dealing with bank – Contribution claim based on equitable right of guarantor to contribution from co-guarantor; alleged express agreement, which defendant denied; and English Civil Liability Contribution Act 1978.

Defendant asserted properties sold for less than their market value – Claimant responded that sale price was highest offer received after properties marketed for several months on open market – Also responded that even if undervalue sale, no basis to deny contribution as full limited capital amount of guarantee was going to have to be paid in any event given amount of bank's shortfall.

Equitable principles require co-sureties to be treated equally so if claimant benefitted in way that defendant did not, namely by an undervalue purchase of the properties, claimant would be required to share benefit received and thus not be entitled to contribution claimed – Issue was whether there was inequitable benefit, irrespective of how properly (or otherwise) it was obtained in relation to the bank.

Marketing efforts for properties found to have been bona fide, reasonable and realistic – No basis to conclude that higher sale price could have been obtained had marketing and sales process been handled differently – Actual price paid for properties was market value of properties – No additional, unjust or inequitable benefit received by claimant for which he must account to defendant – Claimant entitled to contribution in equity and under agreement between them which was found to exist – English Civil Liability Contribution Act 1978 not part of BVI law and cannot be applied by this Court even though guarantee under English law.

Claimant defended and settled with bank for benefit of himself and defendant – Was prudent and reasonable in defending claim – By claimant defending, common liability was materially reduced – One-half of legal costs in dealing with bank recoverable from defendant – Also claimant entitled to interest from defendant on all contribution sums.

[1] LEON J [Ag.]: The Claimant Stephen Plant ("Plant") sued to recover from the Defendant Pickle Properties Limited ("Pickle"), a BVI company, one-half of monies he paid to settle a liability of both of them under a joint and several limited guarantee ("Guarantee")[1] to Anglo Irish Asset Finance plc (later known as IBRC Asset Finance plc) ("Bank").

[2] The Guarantee, given by Plant and Pickle (together, "Guarantors") in August 2007, was of a £4.25 million loan facility ("Loan **Facility"** and **"Loan**") from the Bank for Newmarket Properties (Guernsey) Limited ("Newmarket"), a company owned 50% for the benefit of the family of Steven Paul Sharp

[1] Guarantee dated 25 August 2007.

("Sharp")[2] and 50% for the benefit of Plant and his family. More specifically, Pickle's shares were owned by a trust for the benefit of the family of Sharp[3].

[3] Plant, his wife Linda Plant, and Sharp had bought, developed and sold properties together for a number of years. In 2006-07 they established the Newmarket structure and in doing so obtained, in August 2007, the Loan which was secured by, among other security, an unlimited first fixed legal charge in respect of two properties owned by Newmarket in Digbeth, Birmingham (Smithfield House and Wolverley House) ("Properties")[4], and by the Guarantee.

[4] The Guarantee was of the following:

> … all moneys and liabilities (including interest) … together with all legal and other expenses which the Bank incurs in enforcing or attempting to enforce any rights against [Newmarket] including without limitation all capital (such capital limited to a sum of £500,000.00 only) together with all interest and costs otherwise payable under the Facility Agreement.

[5] Both the Loan Facility and the Guarantee were governed by English law, the former expressly[5], and the latter as a matter of law (which was not disputed between the parties).

[6] The Loan to be repaid 27 July 2008 but was not repaid when due.

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[2] Musa Holdings Limited, a holding company owned by the Cynthia Sharp Family Trust, acquired one-half of the shares of Newmarket. See Steven Paul Sharp's evidence, in his Second Witness Statement dated 3 December 2014, paragraph 9. He further stated in that paragraph that he "was in the past named as a beneficiary but have now been removed."

[3] Pickle is owned by the Cynthia Sharp Family Trust. See Steven Paul Sharp's evidence, in his First Witness Statement dated 21 October 2014 ("**Sharp Witness Statement 1**"), paragraph 3, and in his Second Witness Statement dated 3 December 2014 ("**Sharp Witness Statement 2**"), paragraphs 10 and 12. His evidence was that he was not authorised to act on behalf of Pickle and that that he did not purport to make any agreement or representation on its behalf. See his First Witness Statement dated 21 October 2014, paragraph 3, and his Second Witness Statement, paragraph 12. However, in an email to Plant dated 18 May 2011, Sharp referred twice to "our guarantees". Even if Sharp was not formally authorised to represent Pickle, he did so in relation to the matters in issue with Plant and the Bank. His denial in cross-examination, when the 18 May 2011 email was put to him, was not credible. Whatever the formal situation may have been, he held himself out as representing Pickle and in fact was representing Pickle, at least in his dealings with Plant regarding the central matters in issue in this litigation.

[4] Based on an appraisal obtained by the Bank early in 2007, it was estimated that the Properties were worth at the time £5.75 million undeveloped and £6.15 million if developed.

[5] Loan Facility, paragraph 22.1.

[7] The property market in England had crashed. The Bank did not begin to take steps to have Newmarket sell the Properties until about May 2011. In September 2011, the Bank required that the Properties be sold as soon as possible, either by private sale or, if not sold in that manner after a short marketing campaign, by auction.[6] Plant's evidence and the hearsay evidence of James Thompson ("Thompson")[7], the representative of the Bank involved with this matter (which evidence is discussed more fully below), did not differ on that point.[8] Thompson also stated that "speed of completion [by the purchaser] was a key component in any successful bid".

[8] In Pickle's defence to this claim, Pickle raised issues, discussed below, regarding the effectiveness of the marketing and sale process for the Properties and regarding the sale price of the Properties (in particular, whether it was an undervalue sale).

[9] After the Properties were sold in February 2012, the Bank sought payment under the Guarantee from Plant and Pickle, also as described below.

[10] Ultimately Plant paid a total of £625,000 to the Bank to resolve the Bank's claim against him on the Guarantee and both his liability and Pickle's liability under the Guarantee[9]. Also, Plant incurred £68,580 in legal costs in connection with the claim. The resolution with the Bank is described more fully below.

[11] There were many differences in the evidence on details relating to almost every aspect of the factual narrative, going back to the nature of the business relationship between the Plants and Sharp, to the

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[6] Witness Statement of Stephen Leslie Plant dated 2 December 2014 ("**Plant Witness Statement 1**"), paragraphs 23 and 28, and emails from Plant to Thompson and Anna Hitchcox dated 10 and 18 October 2011. The first email refers to Plant's view that the agents should be given "an 8 – 10 week run" and the second email refers to an agreement with the Bank to contact an auctioneer, and to Plant's view that "we should only go that route after having given the agents a short run, no more than eight weeks, without the market being aware that we are prepared to 'knock them out'." When Sharp was cross-examined on the Bank having made it clear at a meeting he attended that it wanted the Properties sold quickly, he agreed.

[7] Plant objected to the admission of hearsay evidence from Thompson. The Court reserved on the objection. Below the Court determined, for reasons set out, that the evidence should be admitted.

[8] Sharp had given Thompson the witness statements and affidavits, presumably including the Plant Witness Statement, and in his email of 14 April 2015, invited Thompson "to see if there are any other matters raised relating to you and the bank's involvement, on which you would have comments to make". He did not differ or comment on this speedy sale point, which would have been a material point on which it can be expected he would have raised if he differed.

[9] Settlement Agreement between Bank and Plant dated 12 April 2013.

formation of Newmarket, to the initial dealings with the Bank, and to dealings with the Bank from the default on the Loan through to the sale of the Properties. However, at the end of the day, the Court does not consider that anything material turns on most of those points of difference, and it is unnecessary to sort out all of those factual matters. The key factual matters relevant to the resolution of the present dispute are those set out in this Judgment.

[12] Plant claimed against Pickle in this action one-half of the £693,580, namely £346,790, that he paid to the Bank to settle the Bank's claim against him, and the liability of both of them to the Bank, under the Guarantee, plus interest on that sum. His claim was based on the equitable right of a guarantor to contribution from a co-guarantor; an alleged express agreement, which Pickle denied; and the English Civil Liability Contribution Act 1978 ("English Act"), each of which he submitted provided him with a right to the contribution he claimed.

Evidence and Submissions

[13] The fact evidence at trial included witness statements from Plant; Sharp; Rudiger Michael Falla, a director of the corporate directors of Pickle; and James McBride ("McBride"), an agent involved in the sale of the Properties. The expert evidence at trial included expert reports with opinion evidence on the value of the Properties from two property valuators, and expert reports with opinion evidence on issues of English law relating to contribution from co-guarantors. Plant, Sharp, McBride and the property valuation experts were cross-examined at trial.

[14] Neither party tendered a witness statement of Thompson or anyone from the Bank. Before trial the parties' legal practitioners communicated on the subject but apparently did not find common ground on a way forward. Hearsay evidence of Thompson was tendered by Pickle (in the Third Witness Statement of Sharp, dated 27 May 2015). Plant objected and the objection was argued at the commencement of trial. A ruling on the objection was reserved. The result of reserving was that the trial, for which there was limited time, could proceed. It meant that if the evidence was not admitted, it and any evidence regarding or arising from it would be disregarding by the Court. It also meant that the parties, particularly Plant as the objector, could refer to the evidence to which objection was taken without any need to repeatedly re-object, and without waiving the objection. In written closing

submissions Pickle asked the Court to draw an adverse inference from Plant's failure to call Thompson or a Bank witness.

[15] The ruling on the objection, which admits the hearsay evidence, and the denial of the request to draw adverse inference, are in a separate section near the end of this Judgment[10], as the context of the whole dispute is needed for them.

[16] The parties filed written closing submissions, being Closing Submissions of the Claimant dated and filed 2 September 2015, and Defendant's Closing Submissions dated September 2015 and filed 30 September 2015.

Right of Guarantor to Contribution from a Co-Guarantor

[17] A guarantor who has paid the guaranteed creditor has a right to contribution from a co-guarantor. The fundamental equitable principle, which is not controversial, was stated by the English Court of Appeal in Re Snowden (1881), 17 Ch D 44, as follows:

> The right of a surety who has paid the creditor is to have contribution from his co-sureties, that is to say, all the co-sureties must bear the whole burden of the debut equally. [per James LJ at 46]
>
> When the amount of the debt between the original creditor and debtor is ascertained, it may be that the sum which they as sureties are liable to pay is the who of that amount, but, as between themselves (if there are only two sureties), each of them is only bound to pay a half. When does the claim of one surety against the other arise? It is not when he has paid only his own half of the amount for which he originally became surety, but his claim arises when he has paid more than half of the whole of the debt to the creditor. [per Brett LJ at 47-48]

[18] Both English law experts in this case, whose evidence is discussed below, confirmed that to be English law, apart from a statutory enactment in 1978.[11] It is the law of the Territory of the Virgin Islands as well.

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[10] Paragraphs 124 – 147.

[11] English Act. The English law expert evidence dealt with whether the English Act is applicable in this case. The question is discussed further below. The evidence of the English law experts referred to here was of course only evidence of English law, not of the law of the Virgin Islands. However because BVI law was the same before the

[19] Citing Andrews and Millett, The Law of Guarantees, 6th ed. ("Andrews and Millett") 12-002, Tom Smith QC (the expert proffered by Pickle) stated that the equitable right to contribution between co-sureties arises where (1) the surety and the co-surety guaranteed a common liability; (2) the surety had paid more, or is about to pay more, than his rateable proportion of the total guaranteed debt *qua* surety; and (3) the right to contribution has not been contractually excluded or lost.[12]

[20] Richard Millett QC (the expert proffered by Plant) stated the same principles, and explained as follows:

> The guarantor's right of contribution in equity is based on the equitable principle that the creditor should not be entitled to bring down the burden of the whole debt on one guarantor only, and recognises that co-guarantors have a common interest and common burden: see Dering v Earl of Winchelsea (1787) Cox Eq Cas 318 per Eyre CB[13]

[21] Pickle accepted that unless Plant lost his right to contribution from Pickle, it was liable to pay Plant one-half of the £500,000 capital amount that Plant paid to the Bank. However, it contended that Plant's right to contribution in respect of the capital amount had been lost. Further, Pickle took that position that in any event it was not liable to contribute in respect of the amount Plant paid to the Bank for interest on the Loan and the Bank's legal costs, nor was it liable for Plant's legal costs in dealing with the Bank's claim.[14]

[22] Pickle contended that Plant's right to contribution in respect of the capital amount had been lost because the Properties were sold at an undervalue to two companies connected to Plant, which connection was not disclosed to the Bank, and had it been disclosed, the Bank would not have relinquished its security over the Properties without first obtaining a settlement of the guarantors' liability under the Guarantee.

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statutory change in England and Wales, referencing their evidence is a convenient means of describing the applicable law in the Virgin Islands.

[12] Expert Report of Tom Smith QC dated 1 September 2014 ("**Smith Report**"), paragraph 41).

[13] Affidavit of Richard Millett QC sworn 30 July 2014 ("**Millett Report**") paragraph 22, and see also paragraphs 23 and 24.

[14] Defendants Skeleton Argument for Trial ("**Defendant's Skeleton**"), para 27.

Sale of the Properties

[23] The Properties were sold in February 2012 for £475,000 to two companies of which Plant beneficially owned 50% (Uddington Holdings Ltd and Lethia Holdings Ltd), both incorporated in Gibraltar ("Gibraltar Companies").[15]

[24] Prior Offers. By mid-December 2011, offers between £350,000 and £425,000 had been received for the Properties. In January 2012, offers of £450,000 were received, one of which was from Birmingham Properties, an arms-length party. Birmingham Properties was prepared to raise its offer to £475,000. Plant was told by the representative of Knight Frank, one of the agents marketing the Properties, that the Bank was content with that price and did not want the other bidders to be re-approached to see if the price could be increased.

[25] Gibraltar Companies as Purchaser. Plant's evidence was that he asked Thompson whether it mattered to the Bank who bought the Properties at £475,000 and he was told that it did not matter so long as the sale went through quickly.

[26] It may be that Plant took the statement out of context, as Thompson suggested in his hearsay evidence,[16] to the extent the Bank may have been interested to know if the borrower or guarantor were the purchaser. However, while the hearsay evidence of Thompson differed about the purchaser's identity not mattering, most importantly Thompson's hearsay evidence did not suggest that market value for the Properties was not or may not have been obtained, or that there was any concern on the part of the Bank about the way in which the marketing of the Properties was handled. While Pickle submitted that the Bank was not given full information about the prospective purchaser's relationship to Plant, presumably it received the information it wanted regarding the marketing process, offers received and other matters that it considered material to its interests. If not, it had the means to be more involved in the process and to seek additional information.

[15] The other 50% is owned by Helm Trust Company Limited as trustee of the LP Trust.

[16] Thompson wrote in his email to Sharp of 5 May 2015: "Whilst I may have answered the query from Stephen [Plant] as stated below ["I asked Mr Thompson whether it mattered to the Bank who bought the properties at £475,000, he said it did not matter so long as a sale went through quickly."] I suspect my reply has been taken out of context."

[27] The Bank had wanted an "arm's length" marketing campaign. Thompson in no way indicated that it did not get such a marketing campaign even after being informed of the purchasers' connection to Plant. Thompson expressly stated in his hearsay evidence that McBride, the local agent, was used by the Bank "from time to time", and the "fact he was used in conjunction with a national firm, Knight Frank, does not surprise me." He added, in response to a question posed to him by Sharp, "I am not able to comment regarding James MacBride's reputation." Sharp gave Thompson a wide latitude to comment yet he did not say anything to suggest that knowing the facts now known (as told to him by Sharp), he had any concern that there was in inadequate marketing process or an undervalue sale.

[28] Pickle submitted that Plant's evidence about what Thompson told him regarding the identity of the purchaser not mattering was "self-serving hearsay" and he questioned its plausibility given the initial marketing strategy at a £1 million pricing.

[29] First, regarding the £1 million pricing, it was part of the marketing strategy for the Properties but there was no suggestion in the evidence that was reached after any full valuation of the Properties. Presumably setting that figure as an asking price did not mean there was an expectation it would become the selling price, as much as it might have been hoped for. Also, there is no indication that Plant opposed that figure as the asking price. If Pickle's theory that everything Plant did was self-serving to acquire the Properties undervalue, it seems that he would have urged a lower asking price.

[30] Second, regarding the identity of the purchaser not mattering to the Bank, with Thompson's second tranche of hearsay evidence available as well, the picture seems clearer. The Bank did not care who purchased the Properties, save that if it had known that one of the Guarantors was involved, it might have tried to use it as leverage in dealing with the Guarantors before releasing its security to enable the Properties to be sold. As explained below, none of that affects the right to contribution between Plant and Pickle, and indeed the Bank knowing might have resulted in the Guarantors getting a settlement that would have been less favourable to them.

[31] Plant's evidence was that he kept Sharp apprised of developments; Sharp disputes this. However, Sharp acknowledged that he was aware of Plant's interest in purchasing the Properties and his initial evidence was that he was "not surprised to learn" that Plant had bid and bought the Properties. In cross-examination he agreed that he "knew" Plant was behind the purchaser of the Properties and

that he did not complaint at the time. There was no suggestion that Sharp or Pickle intervened in any way to caution Plant that objection might be taken to him being a purchaser, or to warn him that there were concerns either Pickle or Sharp had about an inside purchaser somehow acting in a manner such that the best available offer might not be obtained. When asked in cross-examination why he was complaining now, he said that he was not complaining and that the purchase of the Properties (by the Gibraltar Companies) was fine with him.

[32] In the result, the Gibraltar Companies, not Birmingham, purchased the Properties for £475,000, and completed the transaction quickly.

[33] **Parties' Positions on Market Value** of the Properties. Plant asserted that £475,000 was the highest offer received for the Properties[17] after they had been marketed for sale for about four months on the open market; Pickle asserted that the Properties were worth at least £1 million, the original asking price in connection with the proposed sale.

[34] There was considerable evidence on the question of the value of the Properties, including expert opinion evidence and evidence of the actual marketing and sale process for the Properties.

[35] Expert Opinion Evidence. Both parties submitted expert opinion evidence on the value of the Properties as of February 2012.

[36] Paul Arnell ("Arnell")[18] provided expert opinion evidence on behalf of Plant. He opined, in two separate reports, that the market values of the Properties were £130,000 (Smithfield House) and £300,000 (Wolverley House), being a total market value of £430,000.

[37] Arnell's reports were based on what, in his opinion, the Properties could achieve by way of rental income without a redevelopment. He detailed a number of matters that would limit the interest of potential purchasers and depress the value of the Properties, including their poor location for office use, their existing rent structure, financing difficulties that a purchaser would face, and in the case of

[17] The amount of the offer matched the amount offered by another bidder, Birmingham Properties, and offering a quick completion of the transaction. This is discussed further below.
[18] Formerly of Vail Williams LLP and by the time of the trial, of Aitchison Rafferty.

Smithfield House, the limited time remaining on the lease of the property would make redevelopment unlikely.[19] While he was challenged on a number of aspects of the facts that supported his opinions, his opinions appear to be a realistic reflection of the market value of the Properties as they stood at the time.

[38] David Farrow ("Farrow")[20] provided expert opinion evidence on behalf of Pickle. He opined, in a Supplemental Expert Report (of which his initial Expert Report formed part)[21], that the market value of the Properties was £1,000,000.

[39] Farrow's valuation was based on the value of the Properties as redevelopment properties (using a comparable-sales approach). He declined to value the Properties based on their then current rental income because of the low level of the net income at the time, the vacancy situation, and a lack of information on lettings. He stated "it is my opinion that a more robust approach needs to be undertaken." Farrow summarized his views, in part, as follows:

> … there were speculators, developers and investors who would have considered this as a medium term opportunity. Such players would have considered the value in a much wider context than purely a net initial yield basis.
>
> …
>
> [T]he true value of this building is in its redevelopment potential or as part of a larger site assembly, and not purely as an income producing asset. However there still remains uncertainty in terms of obtaining vacant possession and planning permission together with managing the asset. In addition, Smithfield House is only held on a long leasehold basis, with a relatively short unexpired term thus renegotiation with the landlord would be required before any redevelopment of this part of the site.

[40] Significantly in the context of the Bank's desire of an expeditious sale (noted above and below), Farrow stated that he considered "a period of up to 15 months is a reasonable period within which to negotiation completion of a sale by private treaty of the [Properties] at the level of my valuation,

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[19] Expert Report of Paul J Arnell – Wolverly Valuation Report, dated 15 December 2014, especially Section 12.0 'Valuation' and Section 13.0, 'Summary', and Expert Report of Paul J Arnell – Smithfield Valuation Report, dated 19 January 2015, especially Section 12.0 'Valuation' and Section 13.0, 'Summary'.

[20] Of Savills.

[21] Supplemental Expert Report of David Farrow dated 23 June 2015 ("**Farrow Supplemental Report**"), (of which his Expert Report of David Farrow dated October 2014 formed part), especially Section 2.1 'Approach to Valuation' in the Supplement Expert Report.

taking into account the nature of the [Properties] and the state of the market."[22] This Court finds that such timing, based on the evidence of the desire of the Bank for an expeditious disposition either by private sale or failing that, auction, would not have been a timeframe that the Bank would have found acceptable. If a vendor needs an expeditious sale, often it must come with some sacrifice on the pricing side.

[41] This Court considers that the market value estimate of Arnell of £430,000 was more realistic reflection of the estimated value of the Properties in February 2012, particularly in light of the Bank's timing requirement and the uncertainties and particularly the timing attached to Farrow's approach.

[42] Arnell's value estimate is confirmatory of £475,000 being the best price reasonably obtainable at the time in all the circumstances, which circumstances include the requirement of the Bank for an expeditious sale.

[43] If there had been the luxury of time, possibly – and it would have been only a possibility – "a more robust approach", as Farrow considered necessary, might have located a speculator, developer or investor who (to adapt Farrow's words) would have been prepared to pay more by considering value in a much wider context than a net yield basis and viewing the Properties as a medium term opportunity. But in the context, it is too speculative of an approach to the market value of these Properties in the context that in fact existed for Newmarket, for Plant and Pickle, and for the Bank. It must be remembered that they were looking for the best alternative, available in a relatively short timeframe, to a sale by auction. A sale of the Properties by auction would not have been a desirable method of sale as it would have been viewed by prospective purchasers as what it would have been – a forced or distressed sale of the Properties, or as Plant described it to the Bank, 'knock[ing] them out'.[23]

[44] While opinion evidence on the market value of property assists a court, evidence of what in fact the market was prepared to pay for a property, where such evidence exists, is the best true indicator of

[22] Farrow Supplemental Report, paragraph 3.1.1, 'Market Value as at February 2012'.
[23] Emails from Plant to Thompson and Anna Hitchcox dated 18 October 2011. In cross-examination, Plant explained that the phrase meant "selling as a distressed sale."

market value, provided the market was tested reasonably and fairly (which of course was an issue in the case).

[45] Historic Market Evidence. Historic prices are simply that – historic. Pickle made reference to the sale price being less than 10% of what had been paid for the Properties. Also there was evidence of the valuation prepared for the Bank in early 2007 which valued the Properties at £5.75 million in their undeveloped state and £6.15 million developed. Clearly the Properties had been worth considerably more at the time of the Loan. If anything, the last decade has demonstrated how turbulent prices can be, whether of property, oil, gold, or other minerals.

[46] The Supplemental Expert Report of Farrow put it as follows: "The importance of the date of valuation must be stressed as property values can change over a relatively short period."[24]

[47] The historic prices, particularly after a property market crash, are of minimal relevance to the determination of market values several years later.

[48] Evidence of the Actual Marketing Process. The Court had considerable evidence about the actual process of marketing the Properties.

[49] The evidence covered the roles of the two firms involved in the marketing process for the Properties, Knight Frank (a large national agency, which Pickle's submissions described as "of some renown") and Stephens McBride (a local realtor that knew the Properties as it had managed them on behalf of Newmarket)[25], and the steps they took to market the Properties and locate potential purchasers commencing about mid-October 2011.

[50] The evidence included the common desire of those involved for a focused marketing campaign (as there was a concern that prospective purchasers would be turned off by a 'spread' marketing campaign); the pricing of the Properties (£1 million); the ways in which the Properties were exposed to the market; some relatively minor differences in views between the two firms on certain specific

[24] Farrow Supplemental Report, paragraph 1.1.3, 'Market Value as at February 2012'.
[25] Witness Statement of James McBride dated 2 December 2014; Cross-examination, 30 June 2015.

marketing steps (for example, the use of a "For Sale" board or banner at, and a brochure for, the Properties); and the efforts made or not made to contact and/or respond to potential purchasers.

[51] While Pickle raised complaints about how the marketing process was conducted, and that more could have been done, those complaints, neither individually nor in total, establish on a balance of probabilities that the marketing process was unreasonable, unprofessional or lacking in any material manner.

[52] Certainly there was no evidence of, for example, any actual prospective purchasers who might have been interested but had not been aware of the opportunity, not received information that was desired, or not been handled appropriately by the agents or anyone else involved in the marketing and sales process. Nor was there any evidence of additional market value which the Gibraltar Companies quickly realized or could have realized, such as by 'flipping' the Properties.

[53] Likewise, Pickle sought to show that the rental value of the Properties had not been achieved prior to the marketing process and "that with more active management and a bit of expenditure the Properties could produce more income … the Properties would have been worth far more than £475,000." Be that as it may, those charged with selling the Properties had to work with the Properties as they were, and even if there had been such potential, a prospective purchaser who would appreciate that potential and be willing to do what would be necessary to achieve it would have needed to be found in the limited time available. No such prospective purchaser was located.

[54] This Court finds that there were bona fide, reasonable and realistic marketing efforts. There is no basis to conclude that a higher sale price for the Properties could have been obtained had the marketing and sales process been handled differently.[26]

[26] The Closing Submissions of the Claimant, paragraph 55 and 56, deal with the suggestions put to McBride "that he was party to a dishonest scheme" to do little or nothing to promote the proper letting of the Properties so as to keep rents down in order to create an opportunity for Plant to pick up the Properties as quickly and cheaply as possible while making it look as though there was a proper marketing exercise going on, when there wasn't, so as to ensure that the Properties were sold to Plant at an undervalue. Whether that is a precise characterisation of the alleged scheme put to McBride, suffice it to say that the Court finds that there was no dishonest scheme of any kind involving McBride and Plant to enable Plant to acquire the Properties at undervalue.

[55] This Court finds that the actual price which Birmingham Properties was prepared to pay – £475,000, being the amount that the Gibraltar Companies paid, as described above, following the bona fide, reasonable and realistic marketing campaign for the Properties, is the best indicator of the market value of the Properties in February 2012. It was the best price reasonably and realistically obtainable in all the circumstances, including the timeline that the Bank had in mind.

[56] Bank Giving Up Its Security. Pickle complained that Plant arranged for the Bank's security over the Properties to be released so that the Properties could be transferred to the Gibraltar Companies free of any charges. It acknowledged that this would have been normal in a sale to an unconnected purchaser but "it would not automatically follow in the case of a sale to a party connected to the vendor or the guarantor." Pickle asserted that "the Bank would expect settlement of the guarantee before giving up its security or approving the sale." In cross-examination Plant acknowledged that if the Bank knew he was behind the Gibraltar Companies, the Bank might have come back and raised the Guarantee at that time. Thompson's hearsay evidence was in line with that evidence.

[57] The point seems to be that the Bank would have exercised, or tried to exercise, its leverage to obtain what it could obtain under the Guarantee before enabling completion of a sale to a party connected to one or both of the Guarantor.

[58] It is unclear where that leads in the context of Pickle's defence in this case. It is difficult to see how Pickle would have been any further ahead in that scenario.

[59] The natural consequence of the Bank having greater leverage to obtain an earlier or more favourable resolution for it of the dispute respecting the Guarantors' liability for interest likely would have been a less favourable situation for the Guarantors. Arguably some legal costs might have been saved but it would be far too speculative to conclude that any such savings would be greater than any increase in what additional amount the Guarantors might have had to pay in interest on the full debt.

[60] Focusing on the purchase price, if the Bank had known that one of the Guarantors was connected to the proposed purchaser and then tried to use its leverage to increase the purchase price, it is doubtful the purchase price would have been increase materially, if at all, whether the purchaser finally became the Guarantor-connected party or the other available purchaser.

[61] Certainly there was absolutely no way the purchase price was going to be increased enough to reduce the capital liability of the Guarantors, as explained below. So Pickle would have been no further ahead.

Even **If Undervalue Sale, No Consequence to Guarantors' Liability to Bank**

[62] Plant responded to Pickle's assertions of an undervalue sale by submitting that even if a sale of the Properties for £475,000 was an undervalue sale, there was no basis to deprive him of his right to a contribution from Pickle in respect of the Guarantee.

[63] Plant pointed out that a sale at £1 million would have made no difference to the amount of Pickle and Plant's capital liability on the Guarantee because when the Properties were sold, Newmarket owed the Bank £4.25 million plus interest and costs. Unless the Properties were sold for that amount, Plant and Pickle would have been called on the Guarantee in any event. Given the capital limit of the Guarantee of £500,000 plus interest and costs, it made no economic difference to Plant and Pickle's liability as Guarantors whether the Properties sold for £3.75 million or less. A sale at £3.75 million or less meant Plant and Pickle were exposed to the full amount of their Guarantee capital liability of £500,000, plus interest and costs.

[64] Pickle had no answer to this point.

[65] It was never suggested that any sale process in the relevant timeframe could have produced proceeds for the Bank of more than £3.75 million. Accordingly, as Plant claimed, the Bank always would have had a capital shortfall of at least £500,000 – likely considerably more – and in all circumstances the Bank would have looked to Plant and Pickle for the £500,000 capital amount.

[66] Even if Pickle were correct that Plant obtained the Properties for an undervalue price; the Properties had not been adequately exposed to the market; Plant had been able to rely on inside information to take advantage; and the sale process was designed and implemented to favour an "inside buyer' (that is, Plant) by limiting marketing activities and sales efforts, and even if, as alleged by Pickle, that Plant's objective, which he achieved, was to acquire the Properties for himself, at the lowest achievable price, the principle complaint would have been the Bank's complaint, not Pickle's

complaint. No matter what the Bank would have done if any of these things had been the case and it had known any of these things that it did not know, there is no way that the purchase price was going to be high enough to reduce the capital liability of the Guarantors.

[67] Pickle also submitted that "[t]here is a real risk then, that the Bank might seek to set aside the settlement on the grounds of Mr. Plant's material non-disclosure, or, depending on the Bank's perspective of communications between it and Mr. Plant, misrepresentation."[27] However, first, there is no evidence that the Bank had indicated it has any interest in making such assertions, and if it did, it would need to consider whether it would have been any further ahead if it knew that Plant was connected to the purchaser, given the offers that in fact had been produced. Second, even if that were to have happened or were to happen at this late date, Pickle would have its remedies at the time – this so-called risk is hardly a reason to deny Plant the contribution he seeks from Pickle.

Did Plant Receive an Unjust/Inequitable Benefit?

[68] The undervalue issue has relevance, however, to the question of whether Plant, if the Gibraltar Companies acquired the Properties for less than they were worth, received an unjust or inequitable benefit which his co-guarantor Pickle did not receive.

[69] Plant's submissions sought to draw the distinction between himself and the Gibraltar Companies, to rely on the fact the Plant was the beneficial owner of only 50% of the shares in each of the Gibraltar Companies, and to rely on Plant offering Sharp the opportunity to purchase the Properties with Sharp (an assertion which Sharp denied).[28] This Court does not see that any of those three matters would make any difference to this equitable analysis. If Plant, as a beneficial owner of even 50% of the Gibraltar Companies, benefitted from an undervalue sale and Pickle did not, even if Pickle declined the opportunity to purchase with Plant, Plant would have received an unjust and inequitable benefit, and his contribution claim would be affected in whole or in part (depending on the extent of the benefit).

[27] Defendant's Closing Submissions, paragraph 59.
[28] Closing Submissions on behalf of the Claimant, paragraph 72.

[70] Pickle sought to invoke the Hotchpot Principle, which both parties' experts on English law, Richard Millett QC and Tom Smith QC, explained would not actually apply on the facts here.[29] However, the rationale for the Hotchpot Principle is that all guarantors are given equal treatment in equity.[30]

[71] Equitable principles require co-sureties to be treated equally. If Plant in substance benefitted in a way that Pickle did not, that is, if he acquired the Properties (or a 50% beneficial interest in them) at less than their market value, Plant's his right to contribution may be reduced or curtailed and he should be required to share the benefit which he and persons connected to him who benefitted with him, obtained by acquiring the Properties at less than their true market value.[31]

[72] The equitable principle requiring contribution from a co-guarantor would appear to apply, if it on the facts it were to be engaged, whether or not there was any lack of disclosure by Plant of his connection to the purchaser, whether to the Bank or to Pickle. In other words, the focus is on whether there was an inequitable or unjust benefit, irrespective of how properly (or otherwise) it was obtained in relation to the Bank.

[73] This Court found above that the actual price that the Gibraltar Companies paid for the Properties, which was the price that Birmingham Properties was prepared to pay – £475,000 – is the best indicator of the market value of the Properties in February 2012. Therefore, Plant did not receive any additional, unjust or inequitable benefit for which he must account to Pickle.

Settlement with Bank

[74] After the sale of the Properties, the Bank was owed £3,775,000 plus interest and costs. Newmarket had no other assets that could be used to pay this debt.

[75] In February 2012 the Bank asked Plant for a proposal for settlement of the liability under the Guarantee and notified him that the liability was £829,216.06 (to 18 February 2012), which included interest accrued on the entire capital owed by Newmarket to the Bank, not just on the £500,000 to

[29] Millett Report, paragraphs 47 – 50); Smith Report, paragraphs 50 – 51.
[30] Millett Report, paragraph 48.
[31] Smith Report, paragraph 52.

which the Guarantee of the capital of the Loan was limited, and that interest would continue to accrue at "2% above LIBOR".[32]

[76] Plant informed Sharp and instructed solicitors, Clyde & Co, which informed that Bank that its claim for interest accrued on the entire capital owed by Newmarket to the Bank was disputed.

[77] On 11 May 2012, the Bank, through solicitors, made formal demands on Plant and Pickle under the Guarantee in the sum of £923,304.89, being the £500,000 capital guaranteed plus £423,304.89 in outstanding interest, calculated by reference to the entirety of the Loan, and costs.[33]

[78] Pickle ignored the Bank.

[79] Plant responded that the Guarantors' liability under the Guarantee was limited to £500,000, interest only on £500,000, and only a rateable proportion of the Bank's costs: the amount of that liability was calculated by the Bank to be £566,259.83 in 2012.

[80] Pickle submitted in these proceedings that it was not involved in Plant's strategy in dealing with the Bank. It matters not, provided Plant dealt with the Bank appropriately. He did.

[81] The interest issue was not resolved and the Bank commenced a claim against Plant in England on 24 July 2012 seeking a declaration as to the true construction of the Guarantee and payment of what was due pursuant to it.

[82] Plant paid £500,000 to the Bank on 5 October 2012, defended the claim, and counterclaimed for rectification of the Guarantee (to accord with the interpretation he asserted), Also he claimed in the proceeding against:

a. Pickle for contribution to the Guarantee liability – Pickle was served in this jurisdiction but chose not to submit to the jurisdiction of the English Court, and did not acknowledge service or take any part in the English proceedings; and

[32] Email from Anna Hitchcox to Plant dated 29 February 2012.
[33] Letter from Ingram Winter Green, solicitors for the Bank, dated 11 May 2012.

b. Sharp for equitable compensation or damages in breach of fiduciary duty, which claim only arose if the Bank's construction of the Guarantee was determined to be correct, and Plant's claim for rectification of the Guarantee failed.

[83] By agreement dated 12 April 2013, Plant and the Bank settled all claims against each other and that the Bank may have had against Pickle in relation to the Guarantee, excluding Plant's claims against Pickle, for a payment to the Bank, made by Plant, of £125,000 (termed a "Settlement Sum" and not allocated between the elements of the claim). The Bank agreed not to sue Plant, Pickle or Sharp in relation to the Guarantee. Accordingly, Plant reduced and crystallised his and Pickle's aggregate common exposure under the Guarantee, which by that time was £1,040,256.73 plus costs.

[84] Plant submitted in the present proceedings that the potential liability, based on the Bank's claim, would have continued in perpetuity because the capital sum owed to the Bank by Newmarket would never have been paid, and would have continued to accrue interest.

[85] In the result, the liability under the Guarantee that was fixed and paid by Plant was £625,000.

[86] He gave evidence that he paid his English solicitors £68,579.09 in fees in dealing with the Bank's claim and its settlement.

[87] **Pickle's Objections to How Plant Dealt with the Bank's Claim.** Pickle argued that Plant's actions in resisting the Bank's claim extended the time it took for him to settle with the Bank, pointing to his refusal to provide a statement of affairs, suggesting that time and money appeared to have been wasted by Plant "pretending that he could not afford to pay whist refusing to make a statement of assets". Pickle accepted that Plant's approach to the disputed interest calculation "was not in itself unreasonable"[34]. However it submitted that Plant's delay in paying the £500,000, to which there was no defence, led to higher interest and costs. Instead, according to Pickle, Plant forced the Bank to issue proceedings and then took the position that there were substantial issues of fact, not only issues of construction.

[34] Defendant's Closing Submissions, paragraph 55.

[88] The bottom line of Pickle's submission was that Plant ran up costs unreasonably and it was only when he was facing the likelihood that a judgment would be entered against him that he paid the £500,000. Pickle submitted that the fact the money was not paid until August 2013 "means that it is quite likely that the sum was the product of further time consuming and in themselves costly negotiations conducted on undisclosed terms from an undisclosed starting point."

[89] Plant explained in cross-examination that initially he was negotiating globally with the Bank, and was advised not to pay the £500,000 while he was negotiating.

[90] Also Pickle complained that evidence of the payment of the solicitors' costs of £68,579.09 was not provided until the Friday before the trial of this proceeding. Pickle concluded that it "cannot properly be asked to contribute to the costs of running an unmeritorious and tactical campaign."[35]

[91] This Court does not consider that there was anything in the manner in which Plant dealt with the Bank's claim that should impair his right to contribution from Pickle. He may have flexed his muscles a bit but at the end of the day, it appears that he obtained a reasonable settlement in a reasonable time and at a reasonable cost.

[92] He cannot be criticised fairly by Pickle for not paying the £500,000 earlier than he paid it. It would be common indeed for a person attempting to negotiate a global resolution of a matter to defer paying part of the claimed amount which was not really disputed. Many people in that position might consider that "holding the cash" would be more tactically advantageous that paying it over and being left to negotiate on the balance to be paid.

[93] Plant is entitled to be reimbursed by Pickle for one-half of the £500,000 that he paid to the Bank on account of the capital liability under the Guarantee.

[94] Defences to Contribution to Settlement of **Bank's** Interest and Costs Claim, and to **Plant's** Own Costs. Pickle's defences, in addition to the main defence applicable to the entire claim that the right to contribution was lost, was that first, Plant refused to or cannot break down, as between

[35] Defendant's Closing Submissions, paragraph 57.

interest and costs, the sums paid to the Bank to settle the Bank's interest and costs claims, and second, neither the costs paid to the Bank nor Plant's own cost are recoverable in any event in accordance with what is said in Andrews and Millett, paragraph 12-015.[36]

[95] This Court is at a loss to understand why the absence of a break down, as between interest and costs, should disentitle Plant to contribution from Pickle.

[96] For whatever reason, the settlement with the Bank was based on a global sum for interest and costs, which is not a surprising means of reaching a settlement. Settlements without allocations happen all the time.

[97] Pickle did not establish that the interest and costs sum was imprudent or unreasonable given the amount of the Bank's claims or any other factor. To the contrary, Plant showed that it was a prudent and reasonable settlement having regard to the potential exposure. Pickle could have, but did not, attempt to illustrate based on assumptions why either or both components of the £125,000 amount was unreasonable or imprudent. There is no merit to this defence.

[98] Legal Costs. Likewise, this Court is at a loss to understand what is said in Law of Guarantees (Sixth Edition) that supports the submission that neither the costs paid to the Bank nor Plant's own cost of £68,579.09 are recoverable in any event.

[99] Paragraph 12-015 of Law of Guarantees (Sixth Edition) reads as follows:

> Costs 12-015
> The surety cannot as a rule recover as part of his claim for contribution his costs of defending an action against him by the creditor, unless either he was specifically authorized by the co-sureties to defence the action or he was prudent and reasonable in doing so. Where by defending the claim the common liability of the co-sureties is materially reduced, the surety may recover these costs in contribution from his co-sureties. However, is a surety raises a defence that is personal to himself, he will not be entitled to his costs by way of contribution, because his defence has not and could not have led to any relief for his co-sureties.

[36] Defendant's Closing Submissions, paragraph 88.

[100] In this case, Plant defended and settled for the benefit of himself and Pickle. Plant met the conditions set out: he was prudent and reasonable in defending the claim and by defending the common liability was materially reduced, so that he may recover these costs in contribution from Pickle. His defences were not personal to himself, in the sense contemplated, and the defences he asserted led to relief for Pickle.

[101] Plant is entitled to be reimbursed by Pickle for one-half of the £125,000 that he paid to the Bank to settle the Bank's interest and costs claims, and for one-half of the £68,579.09 that he paid to his own solicitors as costs.

[102] In total, Plant is entitled to be reimbursed by Pickle for one-half of the £693,580, namely £346,790, that he paid to the Bank to settle total liability of the Guarantors under the Guarantee and that he paid as legal costs of dealing with the Bank's claim.

[103] Interest. Plant also is entitled to interest on the sums for which he is entitled to be compensated by Pickle.

[104] Paragraph 12-015 of Law of Guarantees (Sixth Edition) reads, in part, as follows:

> Interest 12-014
> The surety can recover interest from his co-surety on the sum due for contribution: interest will run from the date on which the surety paid the creditor more than his due share. It is immaterial that the principal debt did not carry interest.

[105] The interest should run to the date of this Judgment from the respective dates of payment by Plant to the Bank, namely on one-half of the sum of £500,000 (being 5 October 2012)[37] and on one-half of the sum of £125,000 (being 25 September 2013)[38], and to Clyde & Co, being one-half of the sum of £68,579.09 (being 26 April 2013)[39]. If the parties cannot resolve the interest rate or the calculations of interest, this Court will determine same.

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[37] Plant Witness Statement 1, paragraph 65.
[38] Plant Witness Statement 1, paragraph 67.
[39] Clyde & Co – Billing History for Plant (Matter: Bank – 1242210). Almost all payments were made on 26 April 2013, except for one made on 18 July 2012 and two made on 19 July 2013. Efficiency and simplicity dictates the use of 26 April 2013, and using that date is not materially unfair to either party.

Alternative Bases for Plant's Claim for Contribution

[106] As noted near the outset of this Judgment, in addition to basing his claim for contribution from Pickle on the equitable right of a guarantor to contribution from a co-guarantor, Plant relied on an alleged express agreement which Pickle denied, and on the Act.

[107] Alleged Agreement to Contribute. Plant stated that shortly before Newmarket agreed to the Loan, Sharp and Plant "agreed that any liability under the [G]uarantee would be shared equally between Pickle and me."[40]

[108] Sharp denied making any agreement to meet half of the liability under the Guarantee, and also stated repeatedly that he did not have authority to act for Pickle.[41]

[109] In his second witness statement, Plant referred to Sharp's denial and reiterated that "[i]t was always understood and agreed that the liability under the [G]uarantee would be split between [Sharp] and me, with Pickle standing for [Sharp]."[42]

[110] In cross-examination Plant was insistent that Sharp was conversant with what went on in February 2012 and that Sharp assure Plant that he would get 50% back of any expense he incurred in dealing with the Bank on the Guarantee.

[111] Sharp was involved in various aspect of arrangements with Plant and the Bank when the Loan and Guarantee were arranged, taking the position formally that he was doing so neither for himself or for Pickle. He repeatedly tried to skate a fine line between being involved and distancing himself based on his lack of formal legal capacity.

[112] It seems clear that at least in his dealing with Plant, Sharp was intending to speak for Pickle, and was speaking for Pickle, at least to the extent that he was committing personally to cause to happen things to which he 'agreed', or at least that he was representing and assuring that things to which he

[40] Plant Witness Statement 1, paragraph 17.
[41] Sharp Witness Statement 1, paragraphs 2 and 3; Sharp Witness Statement 2, paragraph 12.
[42] Plant Witness Statement 2, paragraph 12.

'agreed' would happen. In this way, he was taken by Plant as speaking for and making commitments for Pickle.

[113] Plant had concerns about being a personal guarantor while Sharp was not personally guaranteeing but instead was having Pickle be the guarantor. Plant and Sharp did discuss the point. While Plant accepted that he would be a co-guarantor with Pickle, it is more plausible than not that Plant and Sharp agreed – in the sense described above, committed Pickle – that any liability under the Guarantee would be shared equally between Pickle and Plant, as Plant stated was the case.

[114] Accordingly, this Court finds that Pickle is liable Plant is entitled to be reimbursed by Pickle for one-half of the £693,580, namely £346,790, that he paid to the Bank to settle total liability of the Guarantors under the Guarantee and that he paid as legal costs of dealing with the Bank's claim. Also Pickle is liable for interest, on the amounts and from the dates as above, as either interest is impliedly covered by the intent of the agreement or is available to Plant as pre-judgment interest.

[115] Liability Under the Act. The Act, in section 1, provides as follows:

> Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damages (whether jointly or otherwise).

[116] Were this litigation brought in England, the Act would be applicable to the Guarantee as the claim sounds in damages, not in debt.[43]

[117] The question then becomes whether the Act is applicable in the Virgin Island in this case, even though the Act is not part of the law of the Virgin Islands.

[118] If the Act is 'procedural', it is not applicable in the Virgin Islands. As a matter of English private law, and as a matter of the law in this Territory generally, matters of procedure are governed by the domestic law of the country in which the proceedings are taken (*lex fori*).

[43] Millett Report, paragraphs 28 and 29; Smith Report, paragraphs 25 – 27.

[119] Tom Smith QC opined that the Act "formed part of the 'rules of law applicable in an English court' which conferred a 'statutory right of contribution' in English law." He continued that "the issue of contribution as between co-sureties under the [Act] is to be regarded as a matter of procedural, rather than substantive law."[44] If he is correct, the Act cannot be applied by this Court.

[120] Richard Millett QC's opined that the Act created a statutory cause of action in England and Wales and accordingly it is part of the substantive law of England and Wales.[45]

[121] Nevertheless, even though the Guarantee is governed by English law, this Court cannot apply the Act – that is, entertain a statutory claim – in proceedings in this Territory. The authorities cited and the reasoning at paragraph 53 of the Millett Report support this conclusion.

[122] Accordingly, there is no need to decide whether the Act is procedural or substantive. Either way, the Act cannot be applied by this Court in this case.

[123] Plant cannot recover contribution from Pickle under his alternative claim under the Act. His recovery is to be based only on his equitable and contractual claims.

Admissibility of Hearsay Evidence of James Thompson; Whether Adverse Inferences against Plant

[124] As noted above, both parties made submissions regarding Thompson, the representative of the Bank involved with this matter, from whom there was no first hand evidence.

[125] The background is as follows. Pickle submitted that it was not aware until witness statements were exchanged in December 2014 that Plant was not submitting a witness statement of Thompson but "was planning to rely solely on his own self-serving statements about the alleged conversations with him, which, being hearsay, were of lesser weight."[46]

[126] Plant stated as follows in his witness statement:

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[44] Smith Report, paragraphs 33 and 34, citing Arab Monetary Fund v Hashim (No. 9), The Times, 11 October 1994, Chadwick J.
[45] Millett Report, paragraph 52 and 53.
[46] Defendant's Closing Submissions, paragraph 64.

> I asked Mr. Thompson whether he wanted us to go back to any other bidders to see if the price could be increased about £475,000. Mr. Thompson said that he did not wish to do so, he just wanted the Properties sold and a sale price of £475,000 was acceptable to the Bank. I asked Mr. Thompson whether it mattered to the Bank who bought the Properties at £475,000. He said it did not matter, so long as the sale went through quickly.[47]

[127] Pickle's legal practitioners wrote to Plant's legal practitioners on 27 February 2015 referencing that paragraph, but not objecting to it, and noting that evidence from Thompson (who was no longer with the Bank) had not been served. They were proposing to write to the Bank to produce a witness or their file "to cast light on this issue", and raising the possibility that the Bank might "look unfavorably" on Plant's conduct (in purchasing the Properties) such that "there may be consequences for the settlement of the English litigation." It appears the matter was discussed between legal practitioners on 10 March 2015 and on 11 March 2015 the legal practitioners for Plant wrote to the legal practitioners for Pickle stating, among other things, "it is a matter for your client what steps it takes to obtain evidence in relation to this dispute."

[128] The step that Pickle took was to submit the Third Witness Statement of Sharp, dated 27 May 2015, which exhibited a recent email exchange he had with Thompson. It appears Sharp spoke to Thompson by telephone on 1 April 2015 and then emailed him on 14 April 2015 saying "I am writing to set out my understanding of your recollection of events as discussed." Sharp concluded by asking if this understanding is correct, and whether there were any parts that should be corrected or clarified in light of Thompson's reading of the evidence provided and any further recollections he may have. Sharp followed up on 22 April 2015, presumably as no response had been received, and then on 5 May 2015 Thompson responded in a 1½ page email.

[129] Thompson's responding email began with his qualifications that the events occurred over three years earlier and as he was no longer with the Bank, he could not refer to any files or notes recorded at the time. He stated that he based his reply on the details provided by Sharp and his recollection of Bank policy and procedure.

[47] Plant Witness Statement 1, paragraph 49.

[130] Thompson indicated in his reply email that the Bank wanted an arms' length marketing campaign; that agreement to sales to parties connected with a defaulting borrower were very rare and that he only obtained a sanction for this once; if there was a personal guarantee the Bank would require that it be settled as part of the sanction; and that sanction could not have been given by the credit committee in London but would have been had to come from Dublin; the level of payment and the payment terms would have been agreed before the security was sold; and Plant would have been required to disclose his interest if he wished to purchase the Properties.

[131] Thompson's hearsay evidence, if admitted, would differ from Plant's evidence in paragraph 49 of his witness statement on what Plant was told by Thompson, as set out above. However, the hearsay evidence is at most tangential to the more significant question of whether there was an undervalue sale that gave Plant, as a guarantor, a benefit not enjoyed by Pickle, as a guarantor. In other words, the hearsay evidence does not provide much assistance to the Court much on the central issues.

[132] Pickle served a Notice of Intention to Rely Upon Hearsay Evidence dated 15 June 2015 stating that it does not intend to call Thompson to give evidence at trial "on the grounds that it would not be reasonably practicable to do so and that doing so would cause disproportionate and undue expense given the limited nature of the evidence", presumably seeking to invoke section 70(2) of the Evidence Act ("Where it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person" who is available to give evidence about an asserted fact").

[133] Plant responded with a Notice of Objection pursuant to section 73(3) of the evidence Act 2006, dated 22 June 2015. In their cover letter of that date, Plant's legal practitioners stated that Pickle "failed to provide any explanation as to why, if this evidence had been adduced in good time, you say that it would have been impracticable to secure the attendance of" Thompson. They asked for an explanation.

[134] The objection was maintained and argued at trial. Judgment on the objection was reserved.

[135] The effect of reserving was that the trial, for which there was limited time, could proceed. It meant that if the evidence was not admitted, it and any evidence regarding or arising from it would be disregarding by the Court. It also meant that the parties, particularly Plant as the objector, could refer

to the evidence to which objection was taken without any need to repeatedly re-object, and without waiving the objection.

[136] Contrary to the submission of Pickle, there was no waiver of the objection by Plant having been asked about it in his evidence in chief.[48]

[137] The Court is prepared to and does admit the hearsay evidence.

[138] The hearsay evidence was of limited relevance to the claim for contribution and Pickle's defence to it. Whether the Bank would have responded differently than it did to the Gibraltar Companies' offer if it knew of their connection to one of the guarantors does not give Pickle a basis to resist paying contribution for its half of what Plant paid to the Bank.

[139] Requiring Thompson, who is no longer with the Bank, to attend in person would have been unduly expensive relative to the limited relevance of the hearsay evidence in the email exchange, and not reasonably practical. The Court does note however that there was a lack of clear evidence that Thompson was not willing to testify by video conference. But in terms of securing a just outcome, that is not sufficient in this case to exclude this hearsay evidence. If the hearsay evidence had gone to a central issue, the need for an opportunity to test the evidence by cross-examination may well have led the Court to be much more concerned about the need for an opportunity to cross-examine.

[140] In Closing Submissions, Pickle submitted that the bottom line of Plant's evidence referring to what Thompson told him, and the hearsay evidence of Thompson, was that Plant had not proven that the Bank was not concerned if the Properties were sold to buyers connected with Plant. But as held above, nothing turns on it if the Properties were sold for the highest available price, which this Court found was the case.

[141] Thompson's explanation that Plant may have misconstrued what he said about the Bank's lack of interest in the identity of the purchaser is about as favourable to Plant on that point as Thompson's evidence was likely going to get. Thompson's hearsay evidence on that point is somewhat more plausible than Plant's take on what he testified that Thompson said to him.

[48] Defendant's Closing Submissions, paragraph 70.

[142] The Court notes that even if the Thompson hearsay evidence had been excluded, there would have been no difference in the outcome of the claim.

[143] No Adverse Inference. In its Closing Submissions, Pickle asked the Court to draw an adverse inference from the failure of Plant to call Thompson or a Bank witness.

[144] Pickle submitted that Plant should have provided Thompson's evidence (in a witness statement procured by Plant, and upon which Thompson could have been cross-examined at trial) about the Bank's dealings with the sale, in particular the meeting with Plant and Sharp, whether it mattered to the Bank who bought the Properties, and what the Bank might or would have done differently (if anything) if it had been aware that Plant was a prospective purchaser.[49] Pickle submitted that Plant's failure to take this route should be held against him by this Court drawing an adverse inference.

[145] The Court is not prepared to draw any adverse inference. It was open to either party to call Thompson, or someone from the Bank, even if both parties may have tried brinkmanship to get the other party to call Thompson so that there would be an opportunity to cross-examine him.

[146] In any event, on the central issue of whether the Properties were sold for less than their value, there is no indication that Thompson or any Bank witness had material evidence such that there can or should be an inference drawn that the evidence would have been unhelpful to Plant (or to Pickle, for that matter). The other issue on which Thompson or the Bank may have had something material to say is on the question of the Bank wanting an expeditious sale. However, the contemporaneous documents indicate it did, which seems logical in the circumstances in which it found itself. And of course the hearsay evidence did not suggest otherwise; indeed, Sharp did not even ask Thompson whether Plant's assertion of the Bank wanting an expeditious sale was incorrect.

[147] In coming to its decisions in this Judgment, this Court has not drawn any adverse inference against Plant for not calling Thompson or someone from the Bank.

[49] Defendant's Closing Submissions, paragraphs 24 and 63 – 65.

ORDERS

[148] Accordingly, for the reasons set out above in this Judgment, this Court orders as follows:

1. Pickle shall pay to Plant the sum of £346,790.

2. Pickle shall pay to Plant interest at rate to be agreed between the parties, or determined by this Court following submissions by the parties, on the three components of the sum of £346,790 to the date of this Judgment from the respective dates of payment by Plant to the Bank of the sum of £500,000, being 5 October 2012, and the sum of £125,000, being 25 September 2013, and to Clyde & Co of the sum of £68,579.09, being 26 April 2013.

3. The costs of this Claim shall be reserved pending submissions thereon.

Justice Barry Leon
Commercial Court Judge
16 June 2016