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Case No: BL-2024-000734

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

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

Date: 18 August 2025

Before :

MR SIMON GLEESON
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between :

GLINT PAY LTD
GLINT PAY SERVICES LTD
GLINT PAY UK LTD

Claimants

- and -

JASON DANIEL BAKER
GEOFFREY PAUL ROWLEY

Defendants

Jonathan Miller (instructed by **Greenwoods Legal LLP**) for the **Claimants**
Lexa Hilliard KC and Jack Watson (instructed by **Reynolds Porter Chamberlain LLP**) for
the **Defendants**

Hearing dates: 30 June to 1 July 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 18th August 2025 by circulation to
the parties or their representatives by e-mail and by release to the National Archives.

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MR SIMON GLEESON

Mr Simon Gleeson :

1. A company, wishing to acquire another, purchased its secured debt from a third-party lender. It then called a default in respect of that debt and appointed administrators, hoping to acquire the company from those administrators. This is a common fact pattern, and is per se uncontroversial – it is at least as old as Wuthering Heights. The interesting point is that the company was not, at the relevant time, insolvent, and the default that was called was the consequence of the company failing to comply with non-financial covenants – specifically, those relating to the provision of information. The company’s existing shareholders, unimpressed with this manoeuvre, raised sufficient further capital to enable the company to refinance the debt on the basis of which the administrators had been appointed, and after a certain amount of negotiation the potential acquirers retreated disappointed. The administrators demitted office, leaving the company in the hands of its original owners.
2. These proceedings are the consequence of this chain of events. They are brought by the company (and its subsidiaries, which were also placed into administration) against the administrators, on the basis of a challenge to the validity of their appointment. It is of course the case that if the administrators were not validly appointed, they were illegitimate intermeddlers with the property of the companies, and may be liable to compensate them for their actions.
3. Ordinarily one might expect the potential purchaser who appointed the administrators to be joined as a party. However, that purchaser appears to have been an SPV formed for the purpose of the acquisition, and has long since ceased to exist.
4. These proceedings are brought by the companies – the three Claimants – against the administrators, the Defendants. This application is brought by the Defendants under CPR 3.4(2) to strike out the Claim Form and the Particulars of Claim on the grounds that they disclose no reasonable grounds for bringing the action or for reverse summary judgment pursuant to CPR 24.3.
5. The Defendants acted as administrators of the Claimants between 18 September 2019 and 19 November 2019. It is common ground that if the Defendants were validly appointed as administrators, this claim must fail. The question before me is therefore as to whether any of the challenges mounted by the Claimants to the validity of the Defendants’ appointment has sufficient substance to be considered to be arguable.
6. These challenges are broadly three in number.
 - i) That the appointors of the Defendants as administrators had no right to appoint them as such, because the assignment of the original lender’s rights to them was defective.
 - ii) That the rights assigned did not include the rights which they purported to exercise. The Claimants’ failure to respond to their purported exercise therefore did not constitute an event of default under the security documentation, and no right to appoint an administrator arose.
 - iii) That the appointor, as chargee, was obliged to exercise the power to require information for a proper purpose consistently with the objectives of the security.

This, it is argued, is both inherent in the nature of a charge, and required by a term to be implied into the charge document. It is argued that if the request was made for an improper purpose, it should be disregarded, as should the failure to reply to it, and that therefore no right to accelerate and appoint administrators arose.

7. The first two of these raises a number of issues as to the construction of the security documents and the assignment. The second involves both issues of law and fact – the legal issues being whether any such duty existed, what form it took, whether its breach would have the effect of invalidating the purported action, and the issue of fact being as to whether the power was in fact exercised in breach of the obligation.
8. The Defendants have a second line of defence. They say that even if it were the case that the Administrators were invalidly appointed, the Claimants, by reason of their conduct recognising the Administrators as such, are now estopped from denying the validity of their appointment.

The Facts

9. The Claimants (collectively, “Glint”) have developed and promote an app which permits use of a credit card linked to the gold price. Like many businesses of its kind, they are in “startup mode” – that is, they are mostly lossmaking, receiving new injections of capital from time to time, and their assets consisted primarily of the IT which they have developed to operate their business. At the relevant time they were neither balance-sheet insolvent nor failing to pay their debts as they fell due, although the auditors report for the 2018 consolidated accounts contained, as might be expected for a company in this position, a going concern qualification. The founder and guiding mind of Glint was Mr Jason Cozens.
10. David Fergusson is the Co-founder of Global Precious Metals, a Singapore based company, and is the main shareholder in Nimoi, a venture capital investment firm. Nimoi appears to have established another company, Niven Alpha Pte Limited (“Niven”), for the purpose of trying to acquire Glint. Niven approached the board of Glint in May 2019 with an offer to purchase 51% of the shares, which the board rejected.
11. Niven’s next step was to purchase a substantial secured loan to Glint from an existing lender, Brahma Finance (BVI) Limited (“Brahma”). The Claimants say – almost certainly correctly – that Niven acquired the loan as a platform for a hostile takeover of Glint.
12. The benefit of the loan and the security package was transferred to Niven by a Deed of Assignment dated 3 July 2019 (“the Deed of Assignment”) of the rights of Brahma under a £1.65 million secured term loan facility (“the Facility Agreement”) and a guarantee and debenture on 22 January 2019 (“the Guarantee and Debenture”). The Guarantee and Debenture contained provisions which required the chargor to provide on request certain information as to its assets to the chargee (paragraph 1.11.1 of Schedule 3 to the Guarantee and Debenture) and to notify the chargee of claims or potential claims against the Secured Assets (paragraph 1.11.3 of Schedule 3 to the Guarantee and Debenture). For brevity, I refer to these paragraphs as “1.11.1” and “1.11.3” hereafter, and to these obligations together as the “Information Obligations”.

Breach of any of the Information Obligations would constitute an Event of Default under the Facility Agreement. The occurrence of such an Event of Default entitled the lender to accelerate the loan and demand immediate repayment of the amount due.

13. On 15 July 2019 Niven made a request under Paragraph 1.11.1. for certain items of information. It is common ground between the parties that no information was ever provided in response to this request.
14. On 30 August 2019, CMS, solicitors for Niven, wrote to Glint alleging that this failure was a breach of Paragraph 1.11.1. and also alleging a breach of 1.11.3 (the obligation to proactively notify the chargee of potential or actual claims).
15. Also on 30 August 2019, David and Alex Fergusson gave a presentation by webinar to some Glint shareholders, in an unsuccessful attempt to get support for Niven's attempted takeover.
16. On 4 September 2019, solicitors acting for Glint wrote to CMS, stating, inter alia, that:

“Instead of adopting the proper meaning and purpose of the terms of the Finance Documents to protect your client's interest in the Loan and the Secured Liabilities, your client appears to be abusing the terms of the Finance Documents for a collateral purpose which is contrary to the intentions of the parties at the time of entering the Finance Documents. Your client's actions appear to be in bad faith, with a view to disrupting our client's day to day management of its business and attempting to place it under onerous commercial pressure.”
17. On 6 September 2019, CMS wrote a further letter alleging a further breach of clause 10 of the Facility Agreement (alleged failure to give notice of a board meeting) and purporting to accelerate the loan and demand payment of all amounts outstanding.
18. Glint did not make payment. Such a failure to pay was a further Event of Default entitling the chargor to appoint the Defendants as administrators.
19. The Defendants were appointed on 18 September 2019 using the out-of-court appointment procedure pursuant to paragraph 14 of Schedule B1 Insolvency Act 1986. It is accepted that such an appointment would be ineffective if the charge concerned did not purport to empower the chargee to appoint an administrator (Sch B1 14(2)(c)).
20. It seems that the Defendants then entered into negotiation with Niven, presumably on the basis that Niven would acquire the business. However, Mr Cozens was in the process of raising further investment funds, and on 4 October 2019 he communicated to the Administrators that he was in a position to provide sufficient funds to pay Niven in full. These funds were transmitted on the 7th October, and a deed of release executed by Niven on the 10th October.
21. The speed of this process meant that there was no opportunity for the administrators' fees to be settled. The remaining parties entered into a deed of settlement (the “Waterfall Agreement”) on 19 October, whose effect was that the Defendants would immediately leave office as administrators by filing notices under Para 80(2) of

Schedule B1, would apply for discharge from liability as from the date that they left office pursuant to paragraph 98(2)(c) of Schedule B1, and would apply to the court for the determination and approval of their remuneration and expenses incurred during the administrations of each of the Companies pursuant to Rule 18.23 of the Insolvency (England and Wales) Rules 2016. The Waterfall Agreement recited that the Defendants were appointed as administrators of the Claimants, and provided for the Claimants to provide letters to be submitted to the court confirming that they did not object to the level of the Administrators' fees, and that those fees should be calculated on a time cost basis.

The Principles Applicable to a Summary Judgment Application

22. The principles in relation to applications to strike out and summary judgment are well-known - they are set out in the White Book at 24.2.3, as formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]:

“i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the

evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

Did Niven Ever Have the Rights it Purported to Exercise?

23. The Claimants raise a number of points relating to the construction of the documents by which the chargee's rights were created, and by which those rights were transferred to Niven. It is therefore helpful to begin by considering how such questions should be approached.
24. Cases on the interpretation of contracts are legion – it is conventional at this point to refer to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36, and *Wood v Capita Insurance* [2017] AC 1173. In *Witz Company v Edmund Truell* [2023] EWHC 2877 (Comm) at [25]-[26] John Kimbell KC sitting as a judge of the High Court endorsed the summary of the law from *The Ocean Neptune* [2018] EWHC 163 (Comm) at [8] per Popplewell J (reproduced by in Chitty on Contracts (35th edition, 2023) at paragraph 16-053). Similarly, a clear statement of the role of unambiguous language and the need to apply it is found in *JP Morgan v Werealize.Com Ltd* [2025] EWCA Civ 57 per Lewison LJ at [20]-[21].
25. One point which may be relevant here is that, where an agreement is reached between two parties and then transferred to a third, the question of the original intentions of the parties may arise as between the obligor and the transferee. The general rule here is that background knowledge available to all parties is admissible evidence in construing a commercial contract. However, its role is very limited in circumstances where the document in question is assignable and publicly available (or where third parties will or may rely upon it): *Cherry Tree Investments v Landmain* [2013] Ch 305, per Lewison LJ at [128].

26. The arguments which the Claimants put forward as regards the contractual position between the parties involve an extremely literal approach to the words used. As regards arguments of this kind, the principles were set out by Lord Hodge in *Wood*. He said:

“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corp'n* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.” (at [13]).

Was the Benefit of the Guarantee and Debenture Assigned to Niven?

27. The Claimants challenge the validity of the assignment of the secured claim to Niven. The essence of this argument is as follows. Clause 2 of the Deed of Assignment stated:

“Subject to the terms of this deed, the Assignor unconditionally, irrevocably and absolutely assigns to the Assignee:

...

2.1.1 all of the Assignor’s rights, title, interest and benefit in and to the Debt, the Facility Agreement and the Security.”

28. “Security” for this purpose is defined by reference to the Facility Agreement. There “Security is defined as:

“any mortgage, charge (whether fixed or floating, legal or equitable), pledge, lien, assignment by way of security or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.”

29. The Claimants argue that the effect of this was to assign to Niven only the bare equitable proprietary right in the collateral, and not the other rights which the Guarantee and Debenture created. Thus, they say, the rights to information which were created by Schedule 3 were never in fact transferred to Niven at all.
30. The basis for this argument is that in order to transfer those other rights, the assignment would have had to be of the “Guarantee and Debenture”, and not of the “Security”. This argument was not entirely clear (it is not possible to transfer a document by assignment), but I think what they mean is that there is a difference between the bare security interest in property which is created by a grant of security, and the bundle of rights in relation to that security interest which the agreement gives the secured creditor, and that by purporting to transfer the security, and not the bundle of rights, the result was that although the security interest was transferred, the bundle of rights against the creditor which the security agreement created was left behind with the transferor.
31. The Defendants submit that this argument is absurd, and I agree. The clearest indication of its wrongness is that clause 5 of the Deed of Assignment provided that “the parties agree from the Assignment Date the Assignor no longer has any rights in relation to the Debt, the Facility Agreement and/or the Security”. Thus, any rights not transferred to Niven would not have been retained by the transferor, but would simply have been extinguished. I am unable to come up with any plausible scenario in which this could have been considered commercially rational, and I feel confident that I can discard it as a possible interpretation of the words used.
32. I also think that the basis of the argument is incorrect as a matter of law. Where a security interest is created by agreement, the form of that security will be the form given to it by that agreement. Where the security agreement grants particular rights to the secured party, those rights are inherent in the security interest itself. A grant of security is a grant of an equitable property interest in the assets of another, and the rights associated with that property interest are proprietary, not contractual, such that a transfer of that property interest takes with it those rights which are incidental to it.
33. The proposition that the benefit of the Information Obligations was not transferred to Niven by the Deed of Assignment does not rise even to the level of arguability. I therefore proceed on the basis that the effect of the Deed of Assignment was that the Information Obligations were owed to Niven after the assignment took effect.

Were the Information Obligations confined to certain specific types of assets?

34. The Claimants say that Paragraph 1.11.1 as drafted only required the chargor to provide information as to certain types of assets – specifically, real property or fixed assets secured by the Debenture (and not the business of Glint more generally) (“the Fixed Assets Limitation”). It is accepted that there is no such limitation as regards the notification obligation arising under paragraph 1.11.3.

35. The basis of this argument seems to be as follows. The definition of the term “Secured Assets” is
- “all the assets, property and undertaking for the time being of the Obligors subject to the Security created by, or pursuant to, this deed (and references to the Secured Assets shall include references to any part of them);”
36. And “Security” is defined as
- “any mortgage, charge (whether fixed or floating, legal or equitable), pledge, lien, assignment by way of security or other security interest securing any obligation of any person, or any other agreement or arrangement having a similar effect”
37. The last part of the definition of Secured Assets means that, where the term is used, which part of the Secured Assets is being referred to in any clause of the Guarantee and Debenture will depend on the context. Thus, for example, in clause 5.4 (which refers to leasing and letting of the chargor’s property, the term “Secured Assets” is used to refer only to those assets which are capable of being leased or let. There are a number of other such usages in the charge document.
38. The Claimants therefore suggest that the term “Secured Assets” as used in paragraph 1.11.1 could mean something other than all secured assets. Their argument is that by necessary implication, this reference must be to only those secured assets which can be said to have a “location, condition, use and operation”. This, they say, can only be true of assets which are fixed assets.
39. They also suggest that this proposed interpretation is supported by the meaning given to the term “Secured Assets” in paragraph 1.11.2, which are expressly described as those Secured Assets which can be “inspected” and “examined” after entry on to the Obligors’ premises. I can see no reason why this approach should be adopted – the Claimants accept that the term “Secured Assets” can have different meanings in different contexts within the same agreement, and this seems to me to be simply an incidence of that usage.
40. The Defendants say that this interpretation is inconsistent with the clear words of the Guarantee and Debenture. There is no dispute that the security created by the Deed comprised: (a) a fixed charge pursuant to sub-clause 3.1.1 to 3.1.10, over all of the property of the Claimants as described in those sub-clauses; and (b) a floating charge pursuant to clause 3.1.11 over all undertaking and all property assets and rights of the chargors present and future not subject to the fixed charges. The term “Secured Assets” therefore *prima facie* includes all of the assets of the chargor. The issue here is as to whether the use of the words “location, condition, use and operation” has the effect of changing the meaning of that term in this context.
41. This is one of a number of arguments put forward by the Claimants which rely very heavily on the use of the words “location, condition, use and operation”. It therefore seems to me to be sensible to discuss in general terms how these words should be interpreted in construing the agreement as a whole.

42. As a preliminary point, the charge here is a floating charge, and is capable of attaching to any and every form of property. It would be very difficult for a draftsman in the context of something like the Information Obligations to envision each and every form of asset which might come into the hands of the chargor, and to employ a form of words that would be appropriate for that type of asset. My initial reaction is therefore that it would be wrong to place too much reliance on the specific words used, where the general sense is clear.
43. The Claimants argue that, since this is a professionally drafted agreement, a narrowly textual approach must be the correct one. However, I think it is clear from the context of the production of this agreement that that is not entirely correct. The Claimants themselves point out that the genesis of the Guarantee and Debenture was a document first agreed between Glint and Brahma where Brahma had provided finance for the purchase of certain fixed assets - indeed, they plead that “the majority of the financing provided by Brahma (i.e. to borrowers other than the Claimants) was made in connection with the acquisition of real property and/or in circumstances where security over real property was provided;” and “the templates for the Facility Agreement and the Guarantee and Debenture derived from drafts or previous agreements that Brahma or its owner had used in connection with financing involving real property.”
44. It is clear that in such a context, the drafting of paragraph 1.11.1 would be appropriate and typical. It is also accepted that at a later stage, in exchange for further funding relating to the business generally, the Guarantee and Debenture was expanded into a floating charge over the whole undertaking of the Claimants.
45. What the Claimants argue is therefore, in effect, that it was (or must have been) the intention of the parties that the rights to information should remain confined to the specific assets financed by the earlier financing, and that the addition of the floating charge would not have triggered any expansion of the right to information. I am unable to accept this argument, as it makes no commercial sense. The effect of the drafting of the paragraph in the context of the fixed charge is to give the lender rights of information as to the assets which he is funding, and which constitute his security. I think it entirely clear that the same principle would have been expected to apply when the scope of the charge was expanded. Not only would this be in accordance with ordinary commercial practice, but it seems positively perverse to argue that a lender under a floating charge would not have intended to have rights of information as regards not only all of the assets of the company, but also to all of the assets and liabilities which together make up what is, in fact his security – the net value of the company.
46. I therefore do not think that the Claimants have any valid argument on this point. Applying the approach set out by Lord Hodge JSC, I think it is clear that the paragraph should be interpreted on the basis that the intention of the parties was to give the holder of the floating charge the rights to information which would ordinarily be given to the holder of a floating charge, and that those rights are to information as to the assets and liabilities of the grantor of the charge. The literalistic approach of limiting the paragraph to the narrow scope of the words used not only runs contrary to commercial common sense, but is undermined by the fact that there is a clear explanation as to why words which do not accord with this construction might have come to be employed. This last point is, I think, important – where a phrase is crafted by the parties themselves and used for the first time, it should *prima facie* be given its literal meaning. However, where there is a context which explains why a phrase which is not in perfect accord

with the context in which it is used, Lord Hodge’s logic suggests that it should be construed in order to give effect to the presumed intentions of the parties.

47. I am therefore satisfied that there is no valid basis for the argument that the use of the words “location, condition, use and operation” in clause 1.11.1 implies any reduction in its scope to only physical assets and, again, I do not think that this proposition rises even the level of arguability.
48. The Claimants put forward a secondary argument on this point, that being that because the assets subject to a floating charge are not appropriated to the charge until it crystallises, prior to that point the assets are not charged assets. This is an error of law – see *In re Spectrum Plus Ltd* [2005] UKHL 41 per Lord Walker at [139]) “Under a floating charge... the chargee does not have the same power to control the security for its own benefit. The chargee has a proprietary interest, but its interest is in a fund of circulating capital”, citing *Worthington’s Proprietary Interests in Commercial Transactions* (1996) pp 74-77).
49. Finally, I note that for this purpose the negotiating background between the Claimants and the original lender is of no assistance in the construction of the Guarantee and Debenture in circumstances where (a) the Guarantee and Debenture was executed as a deed; (b) the Guarantee and Debenture were public documents registered at Companies House and (c) they were expressed to be assignable by the Lender.

Was there in fact an Event of Default?

50. The next group of the Claimants points go to the question of whether there was in fact an Event of Default arising from either the failure to respond to the request for information or the failure to notify the chargee of claims.
51. For this purpose, we begin with the formal request for information under 1.11.1. This was contained in an e-mail of 15 July 2019 from David Fergusson, who described himself therein as “Partner, Nimoi Holdings Pte Ltd”. It reads:

“Dear Jason,

Pursuant to the Assignment of the Brahma Finance Loan Facility to our subsidiary, Niven Alpha, please would you provide to us:

1. Minutes of any Board meeting held since entering into the Facility;
2. Cash balances for Glint Pay Ltd and all its subsidiaries as at the end of each calendar month since entering into the Facility;
3. A list of trade and other creditors for Glint Pay Ltd and all its subsidiaries as at the end of each calendar month since entering into the Facility;
4. Details of any intercompany lending or creditor arrangements between Glint Pay Ltd and any of its subsidiaries at the end of each calendar month since entering into the Facility;

5. Any information relevant under Clause 1.4 and 1.11 of Schedule 3 or the Guarantee and Debenture.

For the avoidance of doubt, we reserve all our rights.

Yours

David

David Fergusson

Partner, Nimoi Holdings Pte Ltd”

52. The Claimants make a number of points about this request. The first is that the request is not in fact from Niven, but from Nimoi, and therefore is not a valid request. The basis of the argument is the e-mail signature and the fact that it is sent from the email address “NIMOI – D Fergusson [df@nimoicapital.com]”. It is notable that after receipt of this e-mail, Mr Cozens replied, making exactly this point – that the request should have come from Niven – and received a response to the effect that Mr Ferguson had made the request in his capacity as sole director of Niven. However, the Claimants still say that the form of the e-mail invalidates it.
53. This argument is clearly wrong. There can have been no doubt in the mind of either the sender or the recipient of the e-mail as to what was being requested, the basis of the request, or that the request was being made on behalf of Niven. Detailed textual exegesis of e-mail signatures and addresses is simply not an appropriate basis for the analysis of commercial transactions.
54. The second point relates to the scope of the information requested. The Claimants say that the request does not address the “location, condition, use and operation” of anything. In particular, they say that the request did not ask for the “location, condition, use and operation” of cash balances, that creditors are not an asset, and therefore fall outside the scope of the provision, and that “intercompany lending” might in part be an asset, but again Niven did not ask for the “location, condition, use and operation” of intercompany lending, which again would have been a meaningless request.
55. The Defendants say two things in response to this. First, they say that the words “location, condition, use and operation” do not have the limiting effect that the Claimants say that they do. The more significant point, however, is that since no information at all was provided, the Claimants can only succeed on this point if they can show that no part of what was asked for fell in any way within the narrow scope that they say that these words have.
56. I have addressed the significance of the “location, condition, use and operation” wording above, and I do not intend to repeat it here. In summary, I do not believe that the use of these words has the effect of limiting the power conferred by the section which is for the chargee to ask for information about the charged property in general. Consequently I am satisfied that the Claimants’ failure to provide any information at all in response to this request constituted a breach of its obligations, and therefore an event of default. However, I also note that, even if this were wrong, the Claimants clearly fail on the Defendants’ second argument - cash balances, for example, have a

location and a use, trade creditors may have a condition (in the sense of their days due) and so on. Thus, even if the Claimants were correct on their narrow construction of the 1.11.1 power, they would still have been required to provide some response to the request, and by providing none at all, they breached their obligations under 1.11.1.

57. It therefore seems to me that the fact that an Event of Default had occurred by reason of the Claimants' breach of their obligations under 1.11.1 is clearly established.
58. The Defendants advance a second ground on which they say an Event of Default had occurred, that being the failure of the Claimants to notify the chargee of a claim or potential claim in breach of 1.11.3. Given my finding above that there is a clear breach of 1.11.1 this is no longer a live issue. However, since I heard argument on this point, I would note that I am by no means sure that the Defendants would have succeeded on this ground.
59. The terms of 1.11.3 are that the chargor must:
- “promptly notify the Lender in writing of any action, claim, notice or demand made by or against it in connection with all or any part of a Secured Asset or of any fact, matter or circumstance which may, with the passage of time, give rise to such an action, claim, notice or demand, together with, in each case, the Obligors's proposals for settling, liquidating, compounding or contesting any such action, claim, notice or demand and shall, subject to the Lender's prior approval, implement those proposals at its own expense.”
60. The question here is the difficult one of what level of certainty is required for a communication to constitute a circumstance which may give rise to a claim.
61. The specific points which the Defendants rely upon to show a breach of this provision are a concerned letter written by an unpaid supplier, an employment tribunal claim, and an action to restrain dealings with shares in Glint.
62. The first of these relates to an email letter dated 5 December 2018 (before the rights under the security arrangement were transferred to Niven) from a supplier called AIM. The Claimants say that this letter is neither a demand nor a claim, it is a request for a “firm level of commitment” and for information. Insofar as the letter contained a threat of further measures if the issues were not resolved, the issues were in fact resolved. There was never an “action, claim, notice or demand” by AIM during the currency of the Facility Agreement, nor any likelihood of one.
63. The second is an Employment Tribunal Claim, stamped “09 Apr 2019” against the First Claimant. The claim was for unfair dismissal and “whistleblowing”. The Claimants argue that a mere application to an Employment Tribunal is not an event which has a direct effect on the secured assets. Employment Tribunals do not enforce their own money awards, and a separate enforcement procedure through the High Court is required to be commenced once an award has been made. They say – and I think I agree – that it is only the commencement of enforcement proceedings in respect of an award made (or an agreement by the company to pay such an award) which would have triggered an obligation to notify under this clause.

64. The third is a claim by Mr Mahaffey. On 5 September 2019, Clarke Wilmott, on behalf of Mr Mahaffey, wrote a letter before action to the First Claimant putting them on notice of his intention to seek declaratory/injunctive relief preventing the disposal, transfer sale or otherwise of his shares in Glint. This was not a claim “in connection with all or any part of a Secured Asset”, nor could it have given rise to such a claim, since Mr Mahaffey’s shares were not a Secured Asset.
65. I think that there is real doubt as to whether the failure to notify these as claims to the chargee constituted an Event of Default under the Guarantee and Debenture. However, given that I am satisfied that such an event had taken place, the point is not relevant to the issue before me.

Did the Chargee exercise his Powers under the Charge Reasonably and for a Proper Purpose?

66. It is an established principle of English law that a chargee can only exercise the powers given to him under the charge for a purpose which is proper to that charge. In *Quennell v Maltby* [1979] 1 WLR 318, Denning MR said that equity would restrain a mortgagee from exercising their rights where the rights were exercised for an improper purpose (the improper purpose in that case being to go behind the protection from eviction provisions of the Rent Acts). In *Downsview Nominees Ltd v First City Corp* [1992] UKPC 34 Lord Templeman said

“Several centuries ago, equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower.”

67. In *Cukurova Finance International Limited v Alfa Telecom Turkey Ltd* [2013] UKPC 2, the Board said:

“In equity, a mortgagee has a limited title which is available only to secure satisfaction of the debt. The security is enforceable for that purpose and no other: *Quennell v. Maltby* [1979] 1 WLR 318, 322H (Lord Denning MR); *Downsview Nominees Ltd v. First City Corporation Ltd.* [1993] AC 295, 312G (Lord Templeman). It follows that any act by way of enforcement of the security (at least if it is purely) for a collateral purpose will be ineffective, at any rate as between mortgagor and mortgagee. The reason is that such conduct frustrates the equity of redemption which, as Sir John Stuart V-C observed in *Jenkins v. Jones* (1860) 2 Giff 99, a court of equity “is bound to regard with great jealousy.” (at [73]).

68. They also explained:

“More generally, however, the Board considers that if a chargee enforces his security for the proper purpose of satisfying the debt, the mere fact that he may have additional purposes, however significant, which are collateral to that object, cannot vitiate his enforcement of the security. If the law were otherwise, the result would be that the exercise of the right to enforce the charge for its proper purpose would be indefinitely impeded because of other aspects of the chargee’s state of mind which were by definition irrelevant ...” (at [78])

69. The position appears similar to that which arises where a power is wrongly used by a trustee (the “proper purpose rule”, as discussed by David Richards JSC in *Grand View Private Trust Co Ltd and another v Wen-Young Wong and Others* [2022] UKPC 47). However it is clear beyond doubt that a chargee is not a fiduciary of a chargor prior to taking possession (*Marquis of Cholmondeley v Lord Clinton* (1820) 2 J. & W. 1 at 182ff.). I therefore think that these are separate issues, and the “fraud on a power” authorities provide no assistance with this issue.

Was the power used for an improper purpose?

70. The Claimants say that it is clear that the purpose of the chargee in exercising its powers as it did was for a collateral purpose, since:
- i) The purpose of the appointment of the Defendants was not to obtain repayment. This is clear, because when repayment of the sums claimed was offered, Niven tried to refuse the payment.
 - ii) The whole history of Niven’s hostile takeover bid makes it obvious that Niven’s primary purpose was to put the Claimants into administration and to acquire the business from the administrators. They therefore say that Niven had no interest in recovering its debt, or rescuing the company as a going concern, or achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up, or a desire to improve the position of the general body of creditors or to enable an independent office holder to take control of the assets or to investigate alleged misconduct on the part of those in control of the company.
71. Accordingly, they say that Niven’s enforcement of its security interest (i.e. the appointment of Ds) was neither to obtain repayment, nor for any statutory purpose. The enforcement was wholly for a collateral purpose and the appointment is therefore void.
72. Putting it at its highest, I think the Claimants’ arguments on this point can be summarised as follows. The purpose of the request for information was to secure an event of default, the purpose of which was to accelerate obligations, the purpose of which was to appoint administrators, the purpose of which was to enable the lender to acquire the business from the administrator at a lower price than that for which the shareholders would have been prepared to sell it. The purpose behind the request for information was therefore illegitimate, since its objective was to secure the appointment of administrators.

73. In *Re Aartee Bright Bar Ltd (in Administration)* [2023] EWHC 606 (Ch); [2023] BCC 704, HHJ Stephen Davies (sitting as a judge of the High Court) held (in the context of a creditor's application under the Insolvency Act 1986 Sch.B1 para.81) that it could not be said that the only proper purpose for the appointor to appoint an administrator is to obtain repayment, because:

“It seems to me that it could not be improper for the appointor to be motivated, in whole or in part, by the belief that the appointment of an administrator was likely to achieve the statutory purpose, even if it could not be said that the appointor would necessarily receive payment in full, or possibly even any payment, at the conclusion of the administration and even if it could not be said that on an objective analysis his own economic interests would better be suited by not appointing an administrator. There is no reason, in my view, why the appointor should not be motivated, in whole or in part, by what he considered in good faith was a desire to improve the position of the general body of creditors or to enable an independent office holder to take control of the assets or to investigate alleged misconduct on the part of those in control of the company.”

74. I think that the objectives of Niven here fall clearly into the second of these instances – “to enable an independent office holder to take control of the assets”. I accept that the reason that they wanted such an independent officer appointed was in order to have the opportunity to acquire the business from that independent officer, but I do not consider that that motivation renders the objective of the exercise of chargee's rights improper.

Was there an implied “Braganza” term requiring good faith

75. The Claimants advance a second argument as regards proper purpose. They say that the requests were made in breach of an implied term that the contractual entitlement to information must not be abused, but exercised honestly and in good faith.

76. Paragraph 1.11.1 requires that:

“The Obligors shall.....give the Lender such information concerning the location, condition, use and operation of the Secured Assets as the Lender may require”.

77. It is the Claimants case that the words “as the Lender may require” import a discretion. The Lender is entitled to ask for information, but does not have to. The Lender has a discretion about whether it asks for information, when it asks for information and how often it asks for information.

78. They therefore argue that the existence of this discretion calls into effect the principle explained in *Braganza v BP Shipping Ltd* [2015] UKSC 17; that there is an implied term that the discretion (i.e. whether, when and what information to request) must not be abused, but exercised honestly and in good faith (*Braganza*, Baroness Hale [17] to [31]). If this principle were to apply here, they say that the Lender's power to ask for information would not be unfettered. In this regard they cite *Property Alliance Group*

v Royal Bank of Scotland [2018] EWCA Civ 355 (which concerned a power for a lending bank to ask for a valuation of its security):

“It can, however, be inferred that the parties intended the power granted by clause 21.5.1 to be exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG [the borrower] maliciously. It appears to us, accordingly, that RBS [the lender] could not commission a valuation under clause 21.5.1 for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them.”

79. What is argued here is that Niven did not request information in pursuit of a legitimate commercial aim. The requests were made in an attempt to find out information to assist Niven’s hostile takeover bid and then to “vex” the Claimants and attempt to manufacture an excuse to declare them to be in default.
80. The case law on the incorporation of an implied term in the form contended for by the Claimants was considered by John Kimbell KC sitting as a judge of the High Court in *Cathay Pacific Airways Limited v Lufthansa Technik AG* [2020] EWHC 1789 (Ch) from [150] – [174]. In particular at [153] Mr Kimbell KC noted that the Socimer-Braganza line of cases represents an exception to the general rule of English law. The general rule is as stated in *White & Carter (Councils) Limited v McGregor* [1963] AC 413 at page 430 (per Lord Reid): “It has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way...”.
81. At paragraph [174] of *Cathay Pacific* Mr Kimbell KC approved as correct the statement of the law by Chief Master Marsh in *UBS AG v Rose Capital Ventures Ltd and others* [2018] EWHC 3137 at [49]:

“1. It is not every contractual power or discretion that will be subject to a Braganza limitation. The language of the contract will be an important factor.

2. The types of contractual decisions that are amenable to the implication of a Braganza term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest. In one sense all decisions made under a contract affect both parties, but it is clear that Baroness Hale had in mind the type of decision where one party is given a role in the on-going performance of the contract; such as where an assessment has to be made. This can be contrasted with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause.

3. The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account: Braganza per Baroness Hale. Thus, it is more likely for a Braganza term to be implied in, say, a contract of employment than in other less 'relational' contracts such as mortgages.

4. The scope of the term to be implied will vary according to the circumstances and the terms of the contract.”

82. On the facts, Chief Master Marsh concluded that a clause permitting UBS to call in a loan was not the sort of discretionary power that Baroness Hale described in *Braganza*. He noted at [56] that the power under consideration was solely for the benefit of the mortgagee and that no Socimer / Braganza type clause ought to be implied. This conclusion was endorsed by Thompsell J in *Murfett v Property Lending LLP* [2024] EWHC 2787 (Ch) at [50].
83. The issue of whether rights to terminate and analogous rights could be subject to Braganza duties was the subject of careful consideration by His Honour Judge Pelling QC in *TAQA Bratani Limited v Rockrose UKSC LLC* [2020] EWHC 58 (Comm), at [44]-[53], who rejected the argument that rights of termination were to be analysed as contractual discretions.
84. In particular, HHJ Pelling noted at [48] the statement of the Court of Appeal in *Lomas v JB Firth* [2012] EWCA Civ 419 that:
- “46. The administrators did not pursue this third suggested implied term on the appeal. Had they done so, we would have rejected it because it is even more hopeless than the others. The right to terminate is no more an exercise of discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract. We have already commented that the specific right to terminate makes theoretical the question whether an Event of Default constitutes a repudiation of the contract which can be accepted by the innocent party as bringing the contract to an end. But no one would suggest that there could be any impediment to accepting repudiatory conduct as a termination of the contract based on the fact that the innocent party can elect between termination and leaving the contract on foot. The same applies to elective termination. Even if, moreover, it could be said that in some sense a contracting party had a discretion to bring the contract to an end and that such discretion should not be exercised capriciously or arbitrarily, it by no means follows that the same considerations could apply to allowing the contract to continue which does not require any positive act on the part of the Non-defaulting Party.”
85. My conclusion is that the right of a chargee to exercise rights under the charge document is not, and should not be, subject to a *Braganza* duty. In my view, a chargee exercising a right under the charge document is in the same position as a lender exercising a right to terminate under a loan document – he is absolutely entitled to act in accordance with his own interests as he perceives them to be, and a man is not to be subject to any requirement of rationality in pursuing his own interest for his own account.

86. Since this is an application to strike out and for reverse summary judgment, I note that the question before me is not as to whether I think that there was a breach either of an implied term or of a common law duty, but whether I think that either of these positions has a realistic chance of success at trial. I accept that neither point is completely unarguable. However
- i) I do not think that the Claimants have any real prospect of establishing the existence of a Braganza duty in the context of a contractual right of this kind, and
 - ii) Even assuming as true all of the propositions put forward by the Claimants as to the intention of Niven as regards the exercise of their powers, I do not think that there is any real prospect of establishing that that exercise was so improper that it should be struck down by the court.
87. I therefore do not accept that any of the consequences of the making of that request – including the appointment of the administrators – was invalidated by any such impropriety. They therefore have no realistic prospect of establishing that the administrators were not validly appointed on this ground.

Estoppel

88. The second ground on which the Defendants seek to strike out the claim and/or obtain reverse summary judgment is that the claim must fail because the Claimants are now estopped from denying that the Defendants were at all times validly appointed and/or have waived or compromised any such argument.
89. Given my findings as set out above, this point is no longer live. However, since I heard a great deal of argument on it, I set out my findings below in case they may be of use.
90. On 19 November 2019, the Claimants, Mr Cozens, Ms Fukuda, the Defendants and Golden Phoenix entered into the Waterfall Agreement by way of Deed pertaining to the exit of the Claimants from administration. The recitals to that agreement stated in terms “The Joint Administrators were appointed as joint administrators of each of the Companies on 18 September 2019”. It then set out a detailed procedure for bringing about the Claimants’ exit from administration.
91. The Waterfall Agreement provided that the Administrators should apply to the court for their remuneration to be fixed under Rule 18.23 of the Insolvency Rules 2016. The Claimant companies provided letters to the Defendants (for the express purpose of being shared with the Court in the remuneration application) which confirmed that the Defendants “were “appointed ... as joint administrators of the [Claimants]”, and that they “would not object to the Administrators’ fees and remuneration incurred in relation to the administration”.
92. ICC Judge Prentis, who determined the application on 6 December 2019, said “plainly, the applicants are within Rule 18.23 of the 2016 Insolvency Rules” – in other words, that they were validly appointed administrators.
93. It seems to me to be entirely clear that the Claimants would be estopped *per rem judicata* from denying that they were liable to pay the administrators their costs as

awarded by ICC Judge Prentis, and they do not dispute that. The issue, however, is that the Defendants say that by recognising that the administrators are entitled to receive their fees as administrators under Rule 18.23, they have in fact accepted that the administrators are validly appointed as such, and cannot now challenge that appointment.

94. The Claimants say in response to this that the statement made in the Waterfall Agreement is not that the Defendants were validly appointed, but merely that they were appointed. On its own, this would be a non-point. However, they also point to the fact that there was ongoing correspondence between Mr Cozens and the Defendants which – they say – made clear to them at all times that Mr Cozens did not accept, and intended to challenge, the validity of their appointment. This – they say - undermines any reliance which the Defendants seek to place on the recital in the Waterfall Agreement.
95. The Claimants also say that they were, in effect, compelled to take the actions that they did. Their point here is that their primary objective was to get Glint released from administration and trading solvently as quickly as possible. Challenging the validity of the appointment of the administrators would potentially have delayed the process – indeed, I do not believe that ICC Judge Prentis would have made the order that he did if he knew that the validity of the administrators’ appointment was in dispute. The Claimants’ position is therefore that they said what they had to say to the court get the administration closed off as quickly as possible, communicating to the administrators all the while that their true position was very different from that which was being presented to the Court.
96. I think the key point here is as to whether the fact that the Claimants, having presented one position to the court, and obtained a judgment, can now take a different position in different proceedings.
97. The relevant authorities here are *LA Micro Group* [2021] EWCA Civ 1429 and *Malik v Malik* [2024] EWCA Civ 1323.
98. At paragraph [26] of *LA Micro Group*, Sir Christopher Floyd stated:

“It is clear, therefore, that this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Ginsburg J in the New Hampshire case. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute.
99. The “matters enumerated by Ginsburg J in the New Hampshire case” are (see *LA Micro Group* at [24]):

“First, a party’s later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party’s earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

100. In *Malik v Malik* [2024] EWCA Civ 1323, Zacaroli LJ adopted the above principles from *LA Micro Group* and stated at [36]:

“Although Sir Christopher Floyd did not use the phrase, the form of estoppel by conduct in issue can readily be seen as a species of abuse of process.”

101. That seems to me to be a correct characterisation of the position here. Having supported an application which could only have been made if the Defendants were validly appointed, I think it is an abuse of process for the Claimants now to bring a claim whose fundamental basis is that they were not.
102. I heard substantial argument on the topic of a number of different types of estoppel, by representation and by conduct. In summary, the arguments put forward were that the fact that the statement concerned was contained in a deed to which the Claimants were parties meant that they could not challenge its accuracy. This is not quite true - as Lord Maugham said in *Greer v Kettle* [1938] AC 156,

“A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part.”

103. However, there is no such fraud, deception or mutual mistake here. It was also suggested that by reason of their active co-operation with the administrators throughout the period of the administration, the Claimants were estopped by conduct (or possibly by convention) from denying the appointment. I do not think that this is necessarily correct, but the question of its correctness or otherwise does not arise for the purposes of this decision.

Conclusions

104. The Claimants do not have an arguable case that
- i) the charge was not fully assigned to Niven as chargee;
 - ii) their failure to respond to the chargee’s request for information under the charge was not a breach of their obligations under the charge documentation, or that that failure did not constitute an event of default;

- iii) the request for information, the consequent exercise of the right to accelerate, or the consequent appointment of an administrator, was invalid; or that
- iv) the powers exercised (separately or collectively) were exercised for an improper purpose so as to invalidate them.

I therefore order that the Claim Form and the Particulars of Claim be struck out on the grounds that they disclose no reasonable grounds for bringing the claim and the Claimants have no real prospect of succeeding on the claim.