IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 199 of 2023 (RPJ)

BETWEEN:

FOLKVANG LIMITED

Plaintiff/Respondent

and

VALORTE CAPITAL

Defendant/Applicant

Before: The Hon. Raj Parker

Appearances: Mr Denis Olarou of Carey Olsen for the Plaintiff / Respondent

Ms Katie Pearson and Ms Alexia Adda of Claritas Legal and Mr Robert Farrell of Loeb Smith for the Defendant / Applicant

Heard: 24 January 2024

Draft Judgment circulated: 22 February 2024

Judgment delivered: 29 February 2024

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HEADNOTE

Strike out-GCR O. 18r19 -summary judgment GCR O 14r12-cryptocurrency trading -loan agreements-FTX collapse-parties dealings-whether claim compromised at 90%-construction of Loan Agreements-belief in consideration waived-estoppel-detrimental reliance -suitability for summary determination without a trial.

Introduction

1. On this application Valorte seeks:

   a) a strike out of Folkvang's claim pursuant to GCR O 18 R 19(1)(a), (b), and (d); or

   b) summary judgment for Valorte under GCR O 14 R 12 on the ground that Folkvang's claim has no prospect of success.

Background

2. Folkvang is a Cayman Islands exempted company. Valorte is also an exempted company incorporated under the laws of the Cayman Islands. Both Valorte and Folkvang trade digital assets, including cryptocurrency. Folkvang alleges that Valorte owes it 10% of the amount of "*USD Coin*" ("*USDC*") and "*Bitcoin*" ("*BTC*") outstanding and repayable under Loan Agreements dated 22 and 29 October 2021 (the "Loan Agreements").

The Loan Agreements

3. The Loan Agreements (both are in materially identical terms) provided Valorte with cryptocurrency (i.e. *USDC* and *BTC* tokens) "*for working capital purposes*" (clause 2.2). Valorte used the loaned USDC and BTC in "*active* [cryptocurrency] *trades*" on various cryptocurrency exchanges[1].

[1] *Lazarov 1, at [14]*

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4. Valorte traded the borrowed *USDC* and *BTC* on various cryptocurrency exchanges. This impacted its ability to satisfy the Loan Agreements. If Valorte was not trading the *USDC* or *BTC*, then Folkvang's ability to earn interest under the Loan Agreements would be compromised.

Drawdowns/Termination

5. The Loan Agreements contemplated the possibility of partial drawdown (clause 4.2), partial prepayment (clause 5.3), and further drawdowns (clause 4.3).

6. There is a dispute between the parties as to whether repayment under the Loan Agreements is separate from termination of the Loan Agreements. Folkvang's case is that even if full repayment is made that did not necessarily render the Loan Agreements otiose, since further drawdowns might be made.

Events of October and November 2021

7. As of 23 and 29 October 2021, Folkvang advanced 1,001,391 USDC and 10.8763802 BTC, respectively, to Valorte (pursuant to clause 4.1).

8. Valorte was obliged to pay interest on the principal sum advanced by Folkvang in an amount calculated by reference to the net profits and losses from trading activity made by Valorte using the loan (clause 6).

9. Clause 5.1 provided that the principal and interest were repayable "*on the Repayment Date to such bank as the Lender shall designate*".

10. Clause 1.1 defined the "Repayment Date" as "*the next day after the Lender request[s] Repayment that could be at any time after the Cure Period, or if such day is not a Business Day, the next succeeding Business Day*".

11. Clause 9.1, entitled "Events of Default", provided that:

> *"Upon the occurrence of any of the events set out in this Clause 9.1 below, the Lender at its sole discretion may by notice in writing to the Borrower demand immediate*

repayment of the Loan together with interest, fees and commissions (if any) and thereupon the Borrower shall forthwith repay or pay the same and the Facility shall terminate, that is to say:

[…]

(f) there occurs in the reasonable opinion of the Lender, a material adverse change in the financial condition of the Borrower or any other event occurs or circumstances arise which in the reasonable opinion of the Lender could adversely affect the ability of the Borrower to perform all or any of its obligations under this Agreement"

12. Clause 15.2, entitled *"Termination"*, provided that:

> *"If the termination of this Agreement is due to any of the Events of Default described in clause 9, the defaulting party shall have three (3) months from the occurrence of a default to cure (the "Cure Period") by providing satisfactory evidence to the other party that it has corrected the default. During the Cure Period the Agreement shall not be terminated without written consent of both parties"*.

The 13 November 2022 Notice

13. The insolvency of FTX (a leading cryptocurrency exchange) was announced on 9 November 2022.This was a massive 'Black Swan' event for the cryptocurrency market and participants had to adjust quickly to the potential ramifications.

14. The markets and exchanges in which Valorte was operating were fundamentally compromised and it was unclear when the situation might normalise, but it was likely to take more than a year[2]. Folkvang was reported as having "*half of its equity parked on FTX before it collapsed".*[3]

15. Folkvang's evidence is that, aside from concerns about its own business, FTX's collapse led Folkvang to form the view that Valorte may be unable to perform its obligations to repay under

[2] *see generally Van Rossum 1 and Hoath 1*

[3] Exhibit to ZL1, page 13

the Loan Agreements[4]. Valorte's evidence is that Mr Lazarov disputed that there had been an Event of Default, at first.

The communications between the parties

16. Against that background, on 10 November 2022 there was the following exchange between Mr Hoath, a director of Folkvang, and Mr Lazarov of Valorte, via "Telegram", by which Folkvang requested repayment of the sums it had advanced to Valorte.

> .....
>
> *"[Mr Hoath]: We are requesting a full withdrawal (20:53)*
> *[Mr Lazarov]: Yes, its 3 months (20:53)*
> *or a haircut of 10% in the current conditions*
> *[Mr Hoath]: Ok (20:54)*
> *Will revert (20:54)*
> *[Mr Lazarov]: ok, send me an email (20:54)"*

17. On 11 November 2022 FTX filed for bankruptcy.

18. On 13 November 2022, Mr Anderson spoke with Mr Lazarov. The contents of the call are disputed. Mr. Anderson says that Mr Lazarov agreed to repay the loan in full immediately[5].Mr Lazarov disagrees.[6]

19. The conversation was followed by an email from Mr Anderson to Mr Lazarov, with the subject "*Request for Withdrawal*", which "*confirm[ed] [Folkvang's] request for withdrawal of funds from Valorte"*. The email stated the outstanding balance under the Loan Agreements as 1,520,148 USDC and 45.51233 BTC. This email on Folkvang's case, provided Valorte with notice under clause 9.1 of the Loan Agreements to repay the loan.

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[4] §19 of Van Rossum 1"*In the circumstances, we at Folkvang formed a perfectly reasonable view that, quite apart from questions over the immediate financial condition of Valorte, market events could adversely affect Valorte's ability to perform its obligations under the Loan Agreement".*

[5] Anderson 1 §11
[6] Lazarov 3 §16

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20. Mr Lazarov asked in response by email: '*Can you confirm also that you agree with 10% fee for the early redemption?"*

21. Mr Anderson's response was *"No, we're not ok with that. Please ping me when you are awake."*

22. There is a response from Mr Lazarov which says *"So on the phone you said you were ok with the fee, but on email you are saying no."*

The Compromise

23. On Folkvang's evidence, there were two further calls between Mr Anderson and Mr Lazarov after 13 November 2022.

24. The first was on 14 November 2022 in which Mr Lazarov is reported by Mr Anderson as "*not say[ing] to me that there was no event of default. On the contrary, Mr Lazarov said that he had three months to cure the default. I told Mr Lazarov that the cure was out of his hands, because he could not change the market dynamics"*. Further, Mr Lazarov repeated later on the same call that "*he had three months to cure the default"*.

25. The second was on 16 November 2022, during which Mr Anderson describes that "*Mr Lazarov put forward a proposal for [Folkvang] to consider"*. It is undisputed that that proposal was not accepted.

26. Mr Lazarov then asks, "*In that case, can you give me formally the basis and the reasons for this early return of funds?"*

27. On 19 November 2022 at 21:31, Mr Anderson emailed Mr Lazarov in the following terms:

> *"We will pay the 10%.*
> *Please send $1,360,608.30 USDC ERC20 ($1,511,787.00 less 10%) to:*
> *0xf92f913685af75ba758a1b40ee1017224b13b0e8*
>
> *Please send 41.9541984 BTC (46.615776 less 10%) to:*
> *1Grm8P2HBJcFmoABJpy3mEF36JzKFUd8C7*

Please confirm that these amounts are correct and that you will send the funds today.

As discussed, our rationale for the withdrawal remains clause 9.1 (f): there occurs in the reasonable opinion of the Lender, a material adverse change in the financial condition of the Borrower or any other event occurs or circumstances arise which in the reasonable opinion of the Lender could adversely affect the ability of the Borrower to perform all or any of its obligations under this Agreement."

28. On 21 November 2023 Valorte sent smaller amounts of USDC 46.8 and 0.0008 BTC to Folkvang as "test amounts" to ensure that Folkvang would receive the full amount, as is recorded in an exchange on Telegram between Mr van Rossum and Mr Lazarov:

"[Mr Lazarov]: @[Mr van Rossum] test amounts were sent.
You can check email
[Mr van Rossum]: checking
yep! test amounts received…"

29. Mr Lazarov sent Mr van Rossum a further message on Telegram asking him "*to give confirmations on email as well please*", which Mr van Rossum replied he had "*done".*

30. The email to which Mr Lazarov was referring, and to which Mr van Rossum responded was as follows (Mr van Rossum's responses are embedded in Mr Lazarov's email):

"[Mr Lazarov] Can you confirm that you received the two test transactions?
[Mr van Rossum] We have received the two test transactions as following:
46.8 USDC
0.0008 BTC
[Mr Lazarov] Do you otherwise agree that when you receive the next few transactions totalling to 1,360,60.30 USDC and 41.9541984 BTC, all the parties' dealings will be finalized and, neither party will have additional claims against the other, whether legal, financial or otherwise.
[Mr van Rossum] Yes"

31. On 21 November 2022, Valorte transferred 1,360,651.90 USDC and 41.9547984 BTC to Folkvang's cryptocurrency wallet, as Mr Anderson had requested in his email of 19 November 2022.

32. This on Valorte's case fully and finally compromised the claim.

Valorte's case

33. Katie Pearson appeared for Valorte. She argued as follows.

34. Folkvang promised to (and did) accept 90% of the amount outstanding under the Loan Agreements in satisfaction for Valorte's indebtedness. That agreement is recorded in an exchange of emails on 21 November 2022 in which Folkvang expressly agreed that, as a result of Valorte's payment of said amount, "*all the parties' dealings will be finalized and, neither party will have additional claims against the other, whether legal, financial or otherwise".*

35. Folkvang's promise is binding because Valorte gave good consideration for it, which consisted in a promise to waive its claim to insist upon paying after lapse of a three-month "Cure Period", which resulted in Folkvang receiving 90% the outstanding amount three months earlier than it was otherwise entitled.

36. Ms Pearson submitted that Folkvang is now seeking a second bite at the cherry to recover the additional 10%, that was worth $224,000 on the 21st of November 2022 when the repayment was made. At the date of Mr Lazarov's second affidavit, which was 13th of November 2023, it was worth some $322,000 due to a rise in the value of *BTC*.

37. Ms Pearson submitted that Folkvang's position that the right which Valorte claims to have had was "illusory" and therefore waiver of it cannot have amounted to valid consideration, is wrong as a matter of law. It does not matter whether Valorte actually had such a right, what matters is whether it had a valid claim to that right; *"surrendering of the claim is sufficient consideration even if it is later found that the claim would not have been upheld"*[7]. Valorte's claim to the right will be valid unless it can be shown Valorte believed it not to be at the time it agreed the compromise[8].

38. In fact, she argued, in this regard it is clear that Valorte is correct in its construction of the effect of clause 15.2 of the Loan Agreements on the repayment obligation under clause 9.1 applying

[7] *Furmston, infra*, paragraph [11.89]
[8] *Simantob*, *infra*.

the principles of construction set down by the Privy Council[9]. To construe the Loan Agreement in a manner which requires repayment three months prior to termination of the agreement would denude clause 15.2 of any purpose, which the Court should strive to avoid. She argued that as a matter of common sense Valorte did not have to repay before the 'Cure Period' was up. There was no point in having a 'Cure Period' if the borrower had to repay before it expired. In addition, clause 9.1 says that "*The borrower shall forthwith repay and the facility shall terminate* …" which implies that repayment and termination will be simultaneous.

39. Even if this construction is wrong, Ms Pearson pointed out that Folkvang does not allege in: (i) its pleaded case or (ii) its evidence in response to Valorte's summons that Valorte had no belief that it was entitled to the benefit of the Cure Period, nor does it advance any other basis for avoiding the compromise.

40. It follows that, in surrendering its claim to the Cure Period, Valorte gave good consideration and the agreed compromise is binding. Ms Pearson pointed out that Mr Lazarov confirms that he believed in the Cure Period point when he raised it[10]. None of Folkvang's witnesses allege that Valorte knew or even believed that the Cure Period point was a bad one.

41. There is also, she argued, the general public policy "in favour of holding people to their commercial bargains".[11]

42. This was a bargain struck against the backdrop of market turmoil caused by FTX's collapse, and it would be contrary to public policy to entertain arguments that bargains made in such circumstances could simply be undone with the benefit of hindsight. In fact, from the timing of the Claim and the sharp increase in the value of BTC, it is a ready inference that the Claim is motivated by the desire to escape what Folkvang perceive as a bad bargain, which should not be permitted.

43. Alternatively, if Valorte is wrong about consideration, Ms Pearson argued that Folkvang is nevertheless estopped from enforcing any strict legal right to payment under the Loan Agreements in circumstances where: (i) Folkvang represented it would accept 90% of the amount outstanding, (ii) Valorte relied on that representation to its detriment by (a) going to lengths and expense to raise the money to repay Folkvang and (b) actually transferring the 90%

[9] *Ennismore Fund Management Ltd v Fenris Consulting Ltd [2016] UKPC 9*
[10] *ZL2,§§22 to 24*
[11] *Simantob, paragraph [50].*

to Folkvang, such that (c) it would now be inequitable for Folkvang to enforce any right to payment under the Loan Agreements.

44. Ms Pearson submitted that Mr van Rossum clearly represented in his email to Mr Lazarov on 21 November 2022 that, if Valorte paid 90% of the sums outstanding under the loan agreement *"neither party will have additional claims against the other, whether legal, financial or otherwise"*.

45. Valorte relied on that representation by actually transferring to Folkvang 90% of the amount outstanding under the Loan Agreements and incurring the cost of doing so immediately.

46. It would be inequitable for Folkvang to enforce its strict legal rights given the lengths to which Valorte went to make payment to Folkvang. Valorte incurred "*a large amount of collateral expenditure that was secured until the end of 2022"*. [12]

47. Mr Lazarov says[13]:

> *"More importantly, however, the Defendant also had to pay USD 1.5m into a margin account with 42 BTC borrowed against it, which was used to make the immediate repayment to the Plaintiff. From that amount, the Defendant withdrew USD 400,000 so as to leave USD 1.1m as collateral, which was the amount of collateral required for the BTC borrowing, noting that this was almost double the value of the borrowed 42 BTC. This collateral remained tied up and unavailable for the Defendant to use to generate profits, until the end of the year when the Defendant repaid the borrowing. As the Plaintiff would have been well aware, this type of business makes the most profit during volatile periods of trading and typically, those weeks in November 2022 would have provided the best opportunity for a company to make most of its profit for the whole year. This is why the size and timing of the collateral was so costly for the Defendant.'*

48. It follows, she submitted that Valorte has a complete defence to the Claim and its summons should succeed.

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[12] *§30 of Mr Lazarov's Second Affidavit,*
[13] *§31 ibid.*

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Folkvang's case

49. Mr Denis Olarou appeared for Folkvang.

50. He argued that this is a case in which the debtor, Valorte, forced the creditor, Folkvang, to take part-payment of a debt as purported settlement of the full amount through commercial pressure, effectively holding Folkvang to ransom. It is well settled that, in such circumstances, the creditor is not bound by any purported promise to accept a lesser sum and retains the right to claim for the balance[14].

51. He submitted that instead of complying with its contractual obligations, Valorte took the view that possession is nine-tenths of the law, and attempted to leverage the fact that Folkvang's capital was at risk of being destroyed by a new exchange collapse (on a daily basis) in order to extract a discount on its debt obligations.

52. Instead of repaying "*forthwith*" pursuant to clause 9.1, Valorte made it clear that it would hold the funds ransom for three months unless Folkvang agreed to a 10% discount.

53. During those three months Folkvang's funds could have disappeared altogether if one of the (non-FTX) exchanges Valorte was trading with went down. As Mr Van Rossum and Mr Hoath explain in their affidavit evidence, the choice offered to them by Valorte was no choice at all and they had no practical alternative but to agree. Contrary to what Valorte has asserted, Folkvang did not receive any additional benefit beyond what it was already contractually entitled to (less 10%).

54. Valorte now brings its Strike-Out Summons seeking to prevent Folkvang's claim for the balance from going to trial, on the basis of an argument that there has been a valid and binding variation of the debt obligation such that the balance is not due.

55. Mr Olarou argued that there were numerous factual and legal controversies raised by Valorte's arguments requiring resolution through cross-examination, discovery, and full argument on complex points of law. They are not suitable for summary determination on the Strike-Out

[14] *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617, at [625]

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Summons, but must be properly tried. Accordingly, the Strike-Out Summons should be dismissed.

56. Rather than being mired in interlocutory battles, this claim, which is concisely pleaded, should proceed to trial expeditiously. There is no reason why full trial cannot come on foot reasonably soon, obviating any perceived benefit from curtailing this claim by summary determination.

57. On the proper construction of the Loan Agreements, he argued, the Cure Period in clause 15.2 only deferred the termination of the Loan Agreements. Nothing is said about deferral of the repayment obligation. The 3-month Cure Period in clause 15.2 of the Loan Agreements relates solely to the termination of the Loan Agreements as a whole. Clause 15.2 does not deal with repayment at all and did not confer any right on Mr Lazarov to defer repayment for 3 months.

58. This he submitted was consistent with clause 9.1, which provided that repayment on the occurrence of the Event of Default shall be "*forthwith*" but did not specify the timing of "*termination*". Clause 15.2 dovetails with clause 9.1 by supplying a timing for termination (after the Cure Period). It does not disturb or displace the requirement in clause 9.1 for repayment to be made "*forthwith*".

59. Clause 9.1 of the Loan Agreements unequivocally obliged Mr Lazarov to repay the Total Loan Amount immediately. Clause 15.2 did not modify or suspend this obligation in any way.

60. Mr Olarou argued that this does not make the Loan Agreements otiose. The Loan Agreements contemplated the possibility of periodic drawdowns, repayments, and further drawdowns up to the borrowing limit. Full repayment "*forthwith*" under clause 9.1 did not necessarily, in and of itself, mean the end of the borrowing relationship.

61. Further, in principle, if the Event of Default were cured within the Cure Period, the Loan Agreements could remain in force and further drawdowns could occur.

62. Valorte rests its 'merits' strike-out application and its summary judgment application on the contention that the parties reached a binding agreement to reduce Valorte's liability under the Loan Agreements to repay the Total Loan Amount by 10%.

63. To succeed in this argument, Valorte must show:

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a) First, that the circumstances are such that there could be a true accord and satisfaction between the parties in respect of the purported 'settlement'. A debtor who exploits a tactical advantage to force the creditor to accept part payment in full settlement does not achieve 'accord and satisfaction'. There is authority which states that there is no equity in such debtor to prevent the creditor from claiming the balance, and the debtor remains liable for the balance. This is exactly what happened in the present case, with Valorte holding Folkvang to ransom.

b) Second, assuming true accord and satisfaction was possible, the purported 'settlement' involved something more than part-payment of a debt in purported settlement of a full debt, since part-payment of a debt is no consideration. A debt can only be released for additional valuable consideration.

64. In this regard, Valorte claims that it provided additional benefits to Folkvang (in the form of allegedly early repayment) and supposedly agreed to waive a defence. However, Mr Olarou argued, these arguments cannot be determined against Folkvang summarily without the benefit of discovery, cross-examination, and consideration of complex points of law.

65. Even if Valorte succeeds on the first two points, Valorte must also show that the purported agreement to reduce Valorte's liability under the Loan Agreements to repay the Total Loan Amount by 10% is valid and not contrary to clause 18 of the Loan Agreements, which provides that no variation shall be effective unless signed for or on behalf of all the parties. Valorte cannot show this, certainly not on the present state of the evidence.

66. Folkvang was entitled to immediate repayment of the Total Loan Amount and Valorte offered nothing other than the performance of its existing contractual obligations 'in exchange' for a 10% reduction of its obligations under the Loan Agreements. In effect, Folkvang bowed to Valorte's threat to retain its money unlawfully unless a 10% ransom was paid, accepting the 'offer' under duress.

67. Mr Olarou made a number of specific points which he argued showed that Valorte has not proved Folkvang’s case was ‘fanciful, improbable or bound to fail’.

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True Accord Issue

68. This involves an examination of whether the circumstances were such that there could be a true accord between the parties or whether agreement was procured by illegitimate means. There was no true accord and satisfaction between the creditor and the debtor, because the debtor "*held the creditor to ransom*", exploiting a commercial advantage.

69. He also pointed to parallels with economic duress cases where agreements are procured by illegitimate pressure, leaving a party no practical choice but to agree to the proposed settlement or variation of contract.

70. In the present case, Folkvang's evidence is that it only agreed to the 10% haircut, because the alternative was that Valorte would, in breach of contract, hold its capital hostage on cryptocurrency exchanges that could go bust at any moment, potentially resulting in a total loss of the capital, which was not a reasonable alternative.

71. Indeed, Mr Lazarov's own evidence is effectively that he considered Folkvang to be in a vulnerable commercial position: "*... the Plaintiff itself was heavily exposed to FTX and needed to realise assets as quickly as possible in November 2022*".

72. Far from supporting Valorte's 'consideration' argument, this tends to support Folkvang's case that the purported 'settlement' agreement was extorted from it. In any event, the truth of the matter cannot be established without cross-examination of Mr Lazarov, Mr van Rossum, Mr Hoath, and Mr Anderson.

Event of default issue

73. This involves an assessment of whether or not an Event of Default occurred under clause 9.1(f) of the Loan Agreements ("Event of Default Issue"). The resolution of this issue requires the Court to determine whether the opinion formed by Folkvang as to the consequences of the FTX collapse for Valorte was "*reasonable*". The Event of Default Issue clearly cannot be resolved without discovery and cross-examination. It is not appropriate to hold a summary mini-trial on this issue.

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Loan agreement issue

74. This involves whether clause 15.2 of the Loan Agreements creates an entitlement to defer *repayment* for 3 months or only an entitlement to defer *termination* for 3 months and, if the former, how it interacts with clause 9.1 of the Loan Agreements.

75. If there was no entitlement to defer payment by 3 months, then Folkvang received no additional benefit from receiving part-payment when it did, and the purported settlement agreement would not be supported by consideration.

76. Mr Olarou submitted that the plain language of clause 15.2 makes no reference to any deferral of repayment obligations or any modification of the obligation to repay immediately in clause 9.1. Therefore, the starting point for the analysis will always be that clause 15.2 does no more than what it says 'on the tin', and that does not include any right for Valorte to defer payment by 3 months.

77. He submitted that it is for Valorte to persuade the Court that the natural meaning of the words in clause 15.2 should be displaced in favour of something else. Any such argument, even if it can be made, will require the Court to engage in consideration of complex issues of contractual construction and associated law. To the extent Valorte wishes to pray in aid surrounding circumstances, this is likely to bring in factual controversies as to what information was reasonably available to the parties when the contract was made.

78. Therefore, while Folkvang can rest its case on the plain language of the clauses, Valorte would have to resort to witness evidence (yet to be produced). All these factors make the Loan Agreement Issue unsuitable for summary determination on a strike-out / summary judgment application.

Defence waiver issue

79. This involves what exactly Valorte offered to Folkvang and, in particular, whether the offer purportedly made by Mr Lazarov (on behalf of Valorte) to Mr Anderson (on behalf of Folkvang) in various phone conversations included an offer that Valorte would forego a defence based on the Event of Default Issue.

80. The relevant question is not what defences Valorte is running now, but whether this particular defence was raised at the time of the purported settlement and its waiver actually tendered as consideration for the 10% haircut.

81. Therefore, the Defence Waiver Issue is entirely a matter of witness evidence between Mr Lazarov and Mr Anderson. Lazarov 2 and 3 claim that the occurrence of the Event of Default was disputed in phone conversations and that an offer was made in those phone conversations to waive the dispute.

82. Anderson 1 denies that Mr Lazarov ever disputed the occurrence of the Event of Default or offered to waive any such purported dispute in exchange for a 10% haircut. That alone disqualifies the Defence Waiver Issue from being decided at the present strike-out/summary judgment hearing, without the benefit of cross-examination of Mr Lazarov and Mr Anderson.

83. Lazarov 2 and 3 contradict Lazarov 1 and Valorte's Defence on this point. Lazarov 1 (at [12]) and Valorte's Defence (at [13]) both describe the purported 'settlement terms' (defined there as "Repayment Terms") by claiming that the 10% 'haircut' was in consideration of Valorte waiving its supposed entitlement to defer payment by 3 months (the purported 'Cure Period'), which on Valorte's case was a benefit which Folkvang was not entitled to.

84. Neither Lazarov 1 nor the Defence include the Defence Waiver Issue as part of the consideration under the supposed Repayment Terms. Indeed, Lazarov 1 at [6] puts the supposed deal this way: "*The choice for Folkvang was therefore a simple one; did it want 100% of the Total Loan Amount after expiry of the Cure Period, or did it want 90% of it in short order.*" Mr Olarou argued that no suggestion is made that, at the time, Mr Lazarov also offered to forego some purported defence as part of the supposed bargain – on the contrary, the express premise of the bargain was that, save for the issue of timing, Folkvang was entitled to 100% of the Total Loan Amount.

85. Mr Olarou argued it is only in Lazarov 2 and 3 that Mr Lazarov (tentatively) started to suggest that this supposed further consideration was offered as part of the overall package. Even then his argument appears to be that it was offered by implication rather than expressly (see e.g. Lazarov 2 at [29]). This clearly calls for a careful factual enquiry unsuited to a strike-out hearing.

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Mr Lazarov's state of mind

86. This issue involves whether Mr Lazarov, acting on behalf of Valorte, believed such defences as he was (purportedly) asserting in telephone conversations with Mr Anderson to be valid. A compromise of a claim or defence which is not believed by the party offering to compromise it to be valid is not contractually binding. The key issue in all cases is not the validity of the claim or the defence as such but whether the party (allegedly) offering to forego such claim or defence (i) believed in good faith that it had a fair chance of success; and (ii) seriously intended to pursue the claim. This cannot be resolved without cross-examining Mr Lazarov and without disclosure of documents by Mr Lazarov. It is not suitable for summary determination.

Variation issue

87. This covered whether the purported 'settlement' agreement, which Mr Olarou argued had the sole effect of varying the obligation to make payment of the Total Loan Amount, by substituting an obligation to pay less, is valid. Clause 18 of the Loan Agreement expressly states, in this regard, that the Loan Agreement "*sets forth the entire agreement and understanding between the parties… [and] no variation of this Agreement shall be effective unless signed for or on behalf of all the parties*".[15]

88. In the present case Valorte has not put forward any evidence that the purported 'settlement' agreement has complied with the requirements set out in clause 18 of the Loan Agreements. In the absence of such evidence, this point cannot be resolved in Valorte's favour.

Estoppel issue

89. Valorte's Defence also attempts to set up an estoppel argument. This raises at least the additional issue of whether there was in fact detrimental reliance. This is obviously something that would have to be tested through cross-examination and discovery.

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[15] In *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, at [17] it was held that a purported oral variation of such an agreement would be invalid, for want of writing and signatures as prescribed in an entire agreement clause.

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The law

90. *Whether the claim is frivolous, or vexatious, or an abuse of process (GCR O 18 R 19(1)(b) and (d)) or has "no prospect of success" (GCR O 14 R 12).*

91. Order 18, r.19 of the Grand Court Rules provides, so far as is relevant, as follows:

> *"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

92. Order 14, r.12 of the Grand Court rules provides, so far as is relevant, as follows:

> *"Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the whole or part of the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be dismissed and judgment entered for the defendant on the whole or part of the claim".*

93. Applications to strike out and for summary judgment are not lightly granted and are discretionary remedies. The pleaded case must be untenable and the jurisdiction is to be exercised sparingly and only in clear cases[16].

94. The applicant has to show that the claim does not merit a trial. A part of the exercise of the Court's discretion is whether the Overriding Objective is met so that bringing these proceedings to an end would result in material time and cost advantages compared to allowing it to proceed to trial.

[16] *Murphy and Slutsky v Hacet and Montgomery* [2020 (1) CILR 47], at [20]

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95. The fact that the Court takes the view that the case is weak and not likely to succeed is not sufficient[17].

96. The following general propositions derived from Cayman Islands authority apply to an application to strike-out:

a) "*jurisdiction to strike out must be sparingly used, as its exercise deprives the party of the normal procedure for establishing rights by way of trial with the discovery and oral evidence tested by cross-examination*";[18]

b) "*the court's function is to decide whether the case is so plainly unarguable that there is no point in having a trial*";[19]

c) where the Defendant relies on several grounds of strike-out "*the court must take a broad brush approach and simply ask whether the case was a plain and obvious one for striking out rather than considering each ground in detail*";[20] and

d) the fact that a case is weak on the documents does not mean it is unarguable and it must be "*plainly and obviously unarguable*" for strike-out to succeed.[21] The Defendant has to show that the claim is bound to fail.

e) the court should not perform a mini trial without the benefit of discovery and the cross examination of witnesses, to decide the case on written material alone. Applications should not be granted when there is any serious conflict as to the material facts or any real difficulty as to the law.

f) the facts as pleaded must generally be assumed to be true unless there are good reasons against this assumption.

[17] *(Moore v. Lawson* (1915) 31 T.L.R. 418, CA*; Wenlock v. Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA

[18] *Southdown Regency Development Ltd v Cayman National Bank Ltd.* (unreported, Cause No. 249 of 2005 (Levers J), 12 March 2007), at [11:2-5]
[19] *Ibid*., at [11:5-7].
[20] *Ibid*., at [11:5-7].
[21] *Ibid*., at [15:7-9]. and *AHAB v SAAD* [2011] (2) CILR 434

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97. Similarly in relation to summary judgment applications the Court must be satisfied that the Plaintiff's claim has no prospect of success[22]. The Defendant has to prove that there is no real prospect of success. Although the test is somewhat lighter than in an application to strike out, the burden is still on the Defendant to show that the Plaintiff's case is 'worse than improbable' and even then the Court has a discretion as to whether summary judgement should be entered[23].

98. In *Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch),* Lewison J summarised the approach to an application for summary judgment at paragraph [15]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 2 All ER 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

[22] *GCR O 14 R 12(1).*
[23] *Simamba v Health Services authority* [2019 (2) CILR 213], at [51]

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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] FSR 63;*

vii) On the other hand it is not uncommon for an application under Part 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."*

Compromise – Relevant Law

99. A compromise like any agreement, must be supported by consideration and while questions of adequacy of consideration do not concern the Court[24] the consideration must be real and not "illusory"[25].

100. Performance of a pre-existing contractual duty will generally not amount to good consideration[26].

[24] Chitty, paragraph [6-015]
[25] Chitty, paragraph [6-026].
[26] Chitty, paragraph [6-060].

101. In *Pinnel's Case (1601) 5 Coke Reports 117a 237* and *238*, it was held that "*payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction of a greater, cannot be any satisfaction for the whole"* (known as the "*Rule in Foakes v Beer*" after Lord Blackburn's judgment in in *Foakes v Beer (1884) 9 App Cas 605).*

102. However, variation in performance of such a duty will amount to good consideration where it is of benefit to the creditor. Thus, in *Pinnel's Case* itself, payment by Cole of 5 pounds, 2 shillings and 2 pence "*before the said day [on which it was due"* was held to be "*a good satisfaction in regard of circumstances of time."*

103. As further explained in Chitty at paragraph [6-105] by reference to *Pinnel's* Case:

> "*payment of a smaller sum at the creditor's request before the due day is good consideration for a promise to forgo the balance, since it is a benefit to the creditor to be paid before they were entitled to payment, and a corresponding detriment to the debtor to pay early."*

104. In the context of agreements to compromise, consideration consists in the promisee surrendering their claim to the relevant legal right and not the legal right itself. In *Callisher v Bischoffsheim (1870) LR 5 QB 449,* Cockburn CJ said at p 452:

> "*Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it."*

105. In Foskett on Compromise (9th Ed., 2019) ("Foskett"), paragraph [3-11] where the claimant does not bona fide believe he has a chance of success:

> *"It would seem that a forbearance from pursuing a claim (a) known by the claimant to be baseless or (b) which is vexatious or frivolous would constitute no consideration for a compromise based upon it. Equally, a forbearance to pursue an illegal claim, for example, one made illegal by statute, would represent no consideration. So too a*

forbearance which itself is prohibited by law or is contrary to public policy is no consideration.

106. Furmston and Tolhurst on Contract Formation: Law and Practice (3rd Ed., 2023) ("Furmston"), at §11.89 explain further as follows:

"*in both a forbearance and compromise the relevant party (typically a creditor) only surrenders their claim to the relevant legal right, they do not surrender the right itself. The surrendering of the claim is sufficient consideration even if it is later found that the claim would not have been upheld. A forbearance to sue is distinct from the notion of abandoning a claim. However, in both compromises and forbearances it is necessary that the claim be honestly made; thus, it is no consideration for a party to forbear to take action on a claim they believe to be invalid, nor can they conceal from the other party facts that would negatively impact on the validity of the claim. It may also be a requirement that the claim be reasonable and not vexatious or frivolous."*

107. Furmston further provides at § 11.86:

"A compromise might occur over a bona fide dispute as to the construction of a contract. For example, party A under a contract may construe the contract and take the view that its obligation is to do X, while party B may construe the same obligation and believe that A must do Y. They can compromise that dispute, for example, by agreeing that A will do Z (and assume that it is something less than Y) and agreeing to abandon their claims. That agreement is enforceable even if later it is determined that one of the parties was correct in their interpretation and even if the correct interpretation was that of B, so that A has now agreed to do less than he or she was originally contractually obliged to do."

108. In *Simantob v Shavleyan* [2019] EWCA Civ 1105 ("Simantob") English CA it was held per Simon LJ*:*

49. Mr Ramsden's public policy point was somewhat different from that suggested by Chitty. It is one thing for a person to threaten a claim or defence in which that person has no confidence at all. It is a quite different thing for a person to intimate a claim or defence which, whilst the person recognises that it raises a doubtful or undecided point, he or she also believes in and intends to pursue it in court if necessary. On the Judge's findings, this case fell squarely into the second category. The respondent had raised

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his concerns about the $1,000 per day clause, had intimated the penalty defence and plainly intended to raise it in any proceedings brought by the appellant. By entering into the April/May 2014 variation agreement, he agreed that he would no longer be able to raise that defence and the debt would be consolidated at $800,000. The fact that the appellant subsequently sued for the whole amount allegedly due under the Settlement Agreement, denying the existence of the April/May 2014 variation agreement in the process, can have no effect on the legal position at the time that when that agreement was made in April/May 2014; and the fact that the respondent then pleaded and relied on the penalty defence, having agreed to compromise the point is equally irrelevant.

50. Furthermore, there is another countervailing public policy that must also be taken into account in this context: namely, the public policy in favour of holding people to their commercial bargains. This element of public policy provides a limitation on the public policy discouraging parties from threatening unreasonable claims or defences. There cannot be any sensible public policy against encouraging parties to raise claims or defences that they reasonably believe may succeed, even if they eventually turn out to fail. It may be noted that the suggestion that the $1,000 per day clause was a penalty was made at a time when there was considerable uncertainty in the law, and before the Supreme Court ruled in Cavendish Square Holding BV v. Makdessi , ParkingEye Ltd v. Beavis (see above).

51. See, also, Cheshire and Fifoot (above) at p.115:
"In the modern law, the consideration in [cases where the promise is not to pursue a claim or defence] is said to be the surrender, not of a legal right, which may or may not exist and whose existence, at the time of the compromise remains untested, but of the claim to such a right."
This attitude is sensible. It is true that if the claim is baseless, the claimant may appear to have got something for nothing, or that contrariwise, if a claimant settles a good claim for less than its true value, he may appear to have given up something for nothing but this is to ignore the cost, both monetary and psychic, of litigation. It is in the public interest to encourage reasonable settlements

52. It is in the light of these considerations that the decision of Master McCloud must be seen. In our view, whether she was right or wrong is immaterial. The question of the

validity of the consideration for the April/May 2014 variation agreement must be judged at the time that it was made."

Determination

109. Valorte has not persuaded the Court that Folkvang's claim should be struck out. It is not plainly and obviously unarguable. The high bar to a strike-out succeeding has not been met. Neither has Valorte persuaded the Court that summary judgment is appropriate on the basis that Folkvang's claim has no real prospect of succeeding.

110. As to the proper construction of the material clauses in the Loan Agreements the Court does not express a concluded view on the basis that the matter will now proceed to a trial. The Court has understood the helpful arguments of Counsel on Clauses 15.2 and Clause 9.1 in particular.

111. The essential issue is whether termination and payment are to occur at the same time, which is an issue that can be investigated and argued further at trial. It is essentially a matter of construction, but the way in which the working capital facility operated that allowed Valorte to make trades may inform whether the Loan Agreements provided for drawdowns and repayments separately from termination under clause 15.2.

Defence waiver issue

112. Ms Pearson submitted that the Event of Default defence initially run by Valorte was not to be resolved on this application, but if the case went forward would be a matter for the trial. The Court agrees that it is not in a position to decide that issue as it involves resolving contested facts.

113. As to the defence that the 10% 'haircut' was in consideration of Valorte waiving its supposed entitlement to defer payment by 3 months (the purported 'Cure Period') Mr Olarou wishes to cross examine Mr Lazarov on his evidence in Lazarov 2 and 3 where he suggests that this supposed further consideration was offered as part of the overall package. The Court agrees that a factual enquiry into that issue is fair and appropriate and a summary determination of the issue is not appropriate.

114. The Court accepts that Mr Lazarov's evidence as to his belief is not challenged or put in issue on the pleadings as they presently stand. Nor is there a case of fraud pleaded. However, it seems to the Court that Folkvang is entitled to test Mr Lazarov's state of mind as to his belief in the 'Cure Period' defence at a trial[27]. Mr Olarou is entitled to test why Mr Lazarov believed that clause 15.2 entitled him to a three month period to delay payment, rather than only to delay termination of the Agreement.

True accord issue

115. The Court considers that Folkvang's case of economic duress, exploitation or threat looks somewhat unpromising on the written material. However, Mr Anderson's evidence is that in making Folkvang wait three months for repayment Mr Lazarov was intent on holding their money hostage and it was against that backdrop that he e-mailed Mr Lazarov on 19 November 2023 saying that they would pay the 10% fee.[28] Whether or not Folkvang was put in an impossible position, or held to ransom, and had no effective choice but to accept the payment of 90% of the debt, or whether this was just commercial bargaining in the moment of a 'Black Swan' event, can be best resolved at a trial.

Variation issue

116. The validity of the purported 'settlement', and whether it varied the obligation to make payment of the Total Loan Amount, by substituting an obligation to pay less, is a matter which should also be tried having regard to clause 18 of the Loan Agreements. Valorte contends it was not a variation at all but a settlement on terms. The oral evidence of the parties to the various communications will be important in this regard as the documentary record is not clear cut with regard to any legal consequences which should follow the exchange of communications.

Estoppel issue

117. It seems to the Court that the 'detrimental reliance " issue should also be tested through cross-examination and discovery, and it would not be appropriate to determine it on the basis of affidavit evidence alone. Folkvang says the costs and expenses incurred by Valorte would have

[27] *Lazarov 2 §§22-24 and Lazarov 3 §13*
[28] *Anderson 1 §29*

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had to have been incurred in complying with its contractual obligations. This is also a matter which should be tried.

118. These arguments individually and collectively cannot be safely discarded or resolved in Valorte's favour on this application without the benefit of discovery and cross examination at a trial.

119. The pleaded cases are in a fairly confined state (subject to any amendment) and the scope of the evidence and arguments is fairly contained. There is no reason why the claim cannot come on for a hearing in accordance with the Overriding Objective in relatively short order.

120. The summons to strike out is dismissed and the application for summary judgment is refused.

121. Costs should follow the event and Folkvang's costs are to be taxed on the standard basis if they cannot be agreed.

THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

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