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Case No: BL-2022-000438

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

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

Date: 22 August 2025

Before :

SHARIF A SHIVJI K.C.
(sitting as a Judge of the High Court)

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Between :

PETER SCHOLEY DUNN	**Claimant**
- and -	
KOSTAS KAZOLIDES	**Defendant**

- -

Stefan Ramel (instructed by **DMH Stallard LLP**) for the **Claimant**
Dov Ohrenstein (instructed by **Canfields Law Limited**) for the **Defendant**

Hearing dates: 1st, 2nd, 6th, 7th, 8th, 9th, 12th and 22nd May 2025

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APPROVED JUDGMENT

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SHARIF A SHIVJI KC

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Sharif A Shivji K.C. :

A. Introduction

1. This case concerns a dispute over an alleged guarantee relating to a joint venture between the Claimant ("**Mr Dunn**"), the Defendant ("**Mr Kazolides**") and Mr Christopher Stylianou ("**Mr Stylianou**") to develop and sell villas in Droushia, Cyprus. The joint venture vehicle was a company, incorporated in Cyprus, called Astriver Co Limited ("**Astriver**" / "**the Company**").

2. In summary, whilst the construction of the villas was ultimately completed, the project was beset by various difficulties and ran behind schedule and over budget. The original main contractor for the project was removed and a new contractor appointed. Even then, further remedial works were required. The villas were eventually completed in October 2010.

3. Whilst efforts were made to sell the villas at various points, there is a dispute between the parties as to whether these efforts were sufficiently diligent and whether the pricing was realistic. The first villa was sold in 2018 and the other six villas were sold in 2019 to a company connected to Mr Dunn called Black Flamingo Limited ("**Black Flamingo**") although there is a dispute over whether this was a genuine transaction. Four villas have since been sold by Black Flamingo.

4. Mr Kazolides and Mr Stylianou provided the land for the joint venture and Mr Dunn provided the funding by way of loan to the Company. Under the terms of Mr Dunn's loan, save for a grace period up to 2008, interest was running at a rate of 8% per annum compounded.

5. The long period that it has taken to sell the villas has meant that the size of Mr Dunn's outstanding loan has grown significantly over the years and there is a large outstanding balance, even after taking into account the sales of the villas that have occurred.

6. Mr Dunn brings the present proceedings claiming that Mr Kazolides has guaranteed the repayment of Mr Dunn's loan to the Company and, pursuant to that alleged guarantee, he seeks recovery of the whole outstanding balance of his loan.

7. Mr Kazolides denies that he gave any guarantee and argues, in the alternative, that if the Court finds a guarantee was given, it was discharged on various bases.

B. Background

B.1. The Parties and other relevant persons

8. Mr Dunn is a former chartered accountant and insolvency practitioner, with a specialism in insolvency and corporate recovery, who during the relevant period lived in Monaco and the UK. Mr Kazolides is a businessman, restauranteur and chef based in London. Mr Stylianou is retired and during the relevant period lived in Cyprus.

9. Other relevant individuals involved in the factual matters underpinning the dispute were Malcolm Honey, a chartered surveyor, who assisted Mr Dunn in relation to the project; Mr Kim Heyes who acted as a general manager for the Company; Cheryl Heyes, a property realtor and the wife of Mr Heyes, who was engaged by the Company to assist with selling the villas; and Mr Timinis, the Company's auditor who also appears to have provided accountancy services.

10. The Company was owned by Mr Kazolides (through a nominee) and Mr Stylianou. The directors of the Company changed over time. The directorships can be divided up into three broad phases:

    (1) From late 2006 to March 2009, the directors were Mr Stylianou and Mr Michael, a lawyer who acted for Mr Kazolides. Ms Abou Shaaban, who worked at the same law firm as Mr Michael, was also appointed as a director in early 2007. Mr Stylianou resigned in March 2009 (after pressure from Mr Dunn to do so).

    (2) From March 2009 to November 2010, the directors were Mr Dunn, Mr Michael, Ms Abou Shaaban (up to February 2010) and their law firm (from February 2010). Mr Michael and the law firm resigned in November 2010.

    (3) From November 2010 onwards, the directors were Mr Dunn and Mr Heyes. Mr Heyes resigned in 2018 and was replaced by an individual called Andreas Pantelli.

11. Each of the three joint venturers played a different role in relation to the joint venture. As noted above, Mr Stylianou was the only one of the three joint venturers based in Cyprus and, until he resigned as a director, was the person on the ground at the development.

12. Once Mr Dunn became a director of the Company, Mr Stylianou's role was much reduced albeit that he did provide some input on the project from time to time.

13. Mr Dunn was based outside of Cyprus. At the earlier stages of the project, he was primarily focussed on financial matters but, over time, his level of involvement grew. From the point of his appointment as a director, it was his view that ultimately prevailed within the Company and the other directors ultimately acceded to his wishes.

14. Mr Kazolides took a much more minor role throughout the project. He was never a director of the Company and had little involvement in the Company's activities. The Court has the benefit of an extensive email record going back to the early stages of the joint venture. Many of the emails were reviewed during the course of trial. It is evident from the emails provided that Mr Kazolides was not involved in the detail of the project. His communications were intermittent and often brief and he was often not copied on email exchanges. In his Witness Statement, Mr Kazolides described his role at points as a *"silent partner*" and this was a phrase adopted by the Claimant when cross-examining Mr Kazolides. Mr Heyes also referred to him as a "*silent partner*". I do not consider that "*silent*

partner" is the most accurate way to characterise Mr Kazolides' role because he did have some involvement in discussions from time to time on the joint venture. Nonetheless, I consider that Mr Kazolides's role was very limited.

15. I note that the Claimant advanced a case that Mr Stylianou was a conduit by which information was provided to Mr Kazolides such that, even though Mr Kazolides was not directly involved in discussions, he was aware of them through the involvement of Mr Stylianou. I do not think that is a safe conclusion to reach. Although it is clear from the evidence that Mr Stylianou did speak to Mr Kazolides from time to time and was a source of information, I do not think that it can be assumed that information in the possession of Mr Stylianou was always relayed to Mr Kazolides. On the contrary, I consider that Mr Kazolides was largely disconnected from the detailed operation of the project.

B.2. The Land

16. The land for the project had been acquired by Mr Kazolides and Mr Stylianou through another company called Intelitalk Limited.

17. The land was subsequently transferred from Intelitalk Limited to the Company. In return, the Company recorded in its books a loan liability to each of Mr Kazolides and Mr Stylianou.

B.3. Currency

18. At the point that the JVA and SJVA (as defined below) were entered, Cyprus had its own currency, the Cypriot Pound. On 1 January 2008, Cyprus joined the euro.

B.4. The Contractual Arrangements

19. Mr Dunn, Mr Kazolides and Mr Sylianou entered a joint venture agreement dated 29 August 2006 (the "**JVA**") which was intended to govern the terms of their joint venture. The Company was also a party. The JVA was subsequently amended through a supplemental joint venture agreement dated 12 April 2007 (the "**SJVA**"). Mr Dunn, Mr Kazolides, Mr Stylianou and the Company were also parties to the SJVA.

20. Despite being drafted by a law firm, the JVA and SJVA contain a number of defects and inadequacies which has fuelled the dispute between the parties.

21. Under the JVA, the project was to be financed as follows:

    (1) The Company was deemed to have contributed what was described as the "*Deemed Purchase Price*" of CYP 330,000 for its provision of the land for the development;

    (2) Funding would be sought from a bank;

    (3) Mr Dunn would lend CYP 330,000 (or more, if so required) which was described as the "**PD Loan**".

22. The provisions of the JVA are considered in detail below. By way of introduction, I mention the following broad features:

    (1) First, the Company was required to use "*all reasonable efforts*" to dispose of the villas "*[a]s soon as is practicable after the commencement of the [development]*" (clause 14(1)).

    (2) Second, the PD Loan was repayable automatically on the occurrence of certain events including "*the insolvency of the Company*" (clause 5(c)). Beyond that the PD Loan was required to be repaid "*as soon as the Company (acting reasonably) is able so to do"* (clause 5(e)).

    (3) Third, there was a mechanism for the repayment of the PD Loan and the Deemed Purchase Price (clause 5(e)) and also an arrangement for sharing profits and losses (clause 6(e)).

    (4) Fourth, there was a guarantee provision (clause 18) which reads as follows:

> 18 In consideration of PD entering into this Agreement with the Company at the request of the Guarantor, the Guarantors HEREBY JOINTLY AND SEVERALLY GUARANTEE AND UNDERTAKE on their own behalf … with PD that the Company will duly and punctually perform all its obligations herein contained and will indemnify and keep indemnified PD from and against all actions proceedings claims and demands arising as a result of any breach thereof and further jointly and severally guarantee agree warrant and undertake as aforesaid with PD that the Company is the owner of the Property freed from all mortgages charges claims or the like and that the Property enjoys the benefit of Planning Permission without onerous conditions for the Development.

23. I will address the construction issues in relation to clause 18 below. At this stage, I mention only that clause 18 is one of the provisions in the JVA where the drafting is unsatisfactory. In particular, it references both "*the Guarantor*" (singular) and "*the Guarantors*" (plural) without defining either term.

24. The JVA was signed by or on behalf of each of the parties. In relation to Mr Kazolides, it was signed by his lawyer, Mr Michael, acting pursuant to a power of attorney. The JVA says that it has been executed as a deed but Mr Dunn's signature was not witnessed.

25. The SJVA was dated 12 April 2007. In essence the purpose of the SJVA was to reflect an agreed change to the JVA that funding would not be sought from a bank but that instead the PD Loan would be increased to CYP 800,000 to provide the additional funding required. The SJVA contained a number of provisions which sought to alter the terms of the JVA to achieve this purpose.

26. An issue was raised during the course of trial regarding the versions of the SJVA in the trial bundle. The SJVA had been signed in counterparts with one version

being signed by Mr Dunn and another version signed on behalf of the Company, Mr Stylianou and Mr Kazolides (with Mr Stylianou signing for the Company and Mr Michael signing for Mr Kazolides as his attorney). The latter version, which was apparently initialled by Mr Stylianou and by Mr Michael for Mr Kazolides was missing a block of text on page 3. It is obvious from reading the page that something has gone awry.

27. Separately in the bundle, there was a further version of the SJVA which was in the correct format and had appended the counterparts with Mr Dunn's signature page and also the signature page with signatures for the Company, Mr Stylianou and Mr Kazolides. This version includes the correct form of page 3 which appears to have been initialled by Mr Stylianou and by Mr Michael. I note that both Mr Dunn and Mr Kazolides were represented by law firms in the drafting and execution of the SJVA. Insofar as there was an issue with the version signed by Mr Kazolides, Mr Stylianou and the Company, this appears to have been corrected. I find that the complete version is the final executed version put in place by the parties and that this version of the document governs their relationship.

C. General Observations on the Evidence

C.1. The oral witness evidence

28. The Claimant served witness statements for Mr Dunn, Mr Honey and Mr Timinis. The Defendant served witness statements for Mr Heyes, Mr Kazolides and Mr Stylianou. The Court was asked to pre-read all of those witness statements and did so. All of the above witnesses were timetabled to give oral evidence during the course of trial.

29. At the end of day 3 of trial, the Defendant's counsel informed the Court that Mr Stylianou was "*not coming*". The only explanation offered was that Mr Stylianou was out of the jurisdiction. This was not a wholly satisfactory explanation since Mr Timinis was also out of the jurisdiction but had given evidence by video link. Nonetheless, the Defendant did not seek permission for Mr Stylianou to give evidence by video link.

30. During the course of Mr Kazolides' cross examination, the Claimant's counsel showed parts of Mr Stylianou's witness statement to Mr Kazolides and asked him questions about that particular evidence.

31. I asked the parties to explain to me the status of Mr Stylianou's evidence in their closing submissions. The Defendant argues that under CPR 32.5(5) if a party who has served a witness statement does not call the witness or put in a hearsay statement then the other party may put the witness statement in as hearsay evidence. He notes that the Claimant's counsel took Mr Kazolides to Mr Stylianou's statement in cross examination and says that this had the effect of putting the statement into evidence. He says that the effect of this is that the whole statement, not just the passages referred to, are in evidence as a hearsay statement.

32. In support of that proposition, the Defendant cites the White Book at §32.5.3 and *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355; [2018] 1 W.L.R. 3529. For the *Property Alliance Group* case, the Defendant does not cite a particular paragraph but I note that the White Book reference given refers to the paragraph 173 of that case.

33. I do not agree with the submission that the Claimant is deemed to have put Mr Stylianou's witness statement into evidence as a hearsay statement as a result of the Claimant's cross-examination of Mr Kazolides on parts of Mr Stylianou's statement:

    (1) I note that at the point that the Court was told that Mr Stylianou would not be coming to testify, the Defendant accepted that his statement was not in evidence.

    (2) I do not consider that either the White Book reference or the *Property Alliance Group Ltd* support the argument that where a party puts a witness statement (for a witness who has not been called to give evidence) to another witness, he is deemed to have put the whole statement into evidence as hearsay evidence pursuant to CPR 32.5.3.

34. The statement is nonetheless before the Court in an agreed bundle (see CPR PD32/27.2) and is admissible as to evidence of its contents.

35. The Defendant accepts that it is a matter for the Court as to the weight that should be placed on that evidence, in the absence of it being tested in cross-examination. I read Mr Stylianou's statement as part of my pre-reading. I decline to place weight on it in circumstances where (a) the Court has not had the benefit of Mr Stylianou's oral testimony or any cross-examination; (b) the Court has had the benefit of evidence from other key contemporaneous witnesses; (c) many of the events in question took place a long time ago and it is inevitable that recollections will fade (see the next section below); and (d) there are other sources of evidence including a body of emails and other correspondence which provide insight into the relevant events.

36. I note that the Claimant contends that the Court should draw an adverse inference against the Defendant for failing to call Mr Stylianou, although the Claimant was not able to specify with sufficient particularity the factual issues on which such an inference should be drawn. I decline to draw such an inference in circumstances where there was an extensive documentary record before the Court, the Court had the benefit of the testimony of numerous other witnesses and much of the case turned on events after Mr Stylianou had been removed as a director and when his involvement was substantially reduced.

C.2. <u>The recollection of witnesses generally</u>

37. As mentioned above, I note that the factual events which underpin this dispute go back as far as 2006, being 19 years before trial. Both parties were keen to emphasise the fallibility of the recollection of witnesses over such a long period and I was directed to passages from *Onassis v Vergottis* [1968] 2 Lloyds Rep 403, per Lord Pearce p 431, *Grace Shipping v Sharp &* Co [1987] 1 Lloyd's

Law Reports 207, at p. 215, *Armagas Ltd v Mundogas S.A. the Ocean Frost* [1985] 1 Lloyd's Rep 1, *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm)) and *Kogan v Martin* [2019] EWCA Civ 1645. I also note, in this context, the speech by Popplewell LJ – *Judging Truth from Memory: The Science* dated November 16, 2023 which appears on the Judiciary UK website.

38. I have taken note of these authorities in considering the oral evidence. I observe that, in this case, the Court has the benefit of a documentary record with a substantial body of emails which provides insight into the relevant events.

D. The central issues for determination

39. This Judgment adopts the following structure:

(1) First, I consider some of the key areas of dispute between the parties over the operation of the JVA – the Construction Issues.

(2) Second, I address the question of whether Mr Kazolides gave a valid guarantee – the Guarantee Validity Issues.

(3) Third, I consider whether any claims under the guarantee are statute barred – the Limitation Issues.

(4) Fourth, I examine the various bases on which it is said that the guarantee has been discharged – the Guarantee Discharge Issues.

E. The Construction Issues

40. The JVA and SJVA were the subjects of detailed argument by the parties during the course of trial. Aside from the dispute over whether a guarantee was given and, if so, how it operated, which is considered below as part of the Guarantee Validity Issues - there was also a dispute between the parties over the profit and loss sharing arrangements under the JVA (clauses 1, 6 and 15) and also the payment waterfall for any recoveries made by the Company (clause 5(e)). These points are addressed first as they provide useful context when considering the other issues.

41. There was no dispute between the parties on the approach to be adopted on contractual interpretation which have been set out authoritatively in cases such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Arnold v Britton* [2015] UKSC 36.

E.1. The profit sharing arrangements under the JVA

42. There was a dispute between the parties over the operation of the profit sharing arrangements in the JVA:

(1) Clause 6(d) of the JVA provided that "*[f]orthwith after the sale of all of the Property the Company shall cause to be prepared completion*

accounts drawn up to determine the amount of the Net Profit or Net Loss…". Clause 15(2) was in similar terms, albeit that it envisaged that completion accounts may also be drawn up where there was a part sale.

(2) "*Net profit*" was defined as the "*excess of the aggregate of the Income and the Sale Proceeds over the aggregate of the Deemed Purchase Price and the [costs of the development]*"

(3) "*Net Loss*" was defined as "*any excess of the aggregate of the Deemed Purchase Price and the Development Expenditure and the Pre Completion Expenses over the aggregate of the Income and Sale Proceeds*".

(4) Clause 6(e) provided that: "*Following the repayment of the PD Loan to PD and the Deemed Purchase Price to the Company the Net Profit shall be shared (or the Net Loss shall be borne as the case may be) 50% for the Company and 50% for PD*".

43. The parties disagreed over the meaning of clause 6(e). The Claimant placed emphasis on the words "*following the repayment of the PD Loan to PD and the Deemed Purchase Price to the Company*" to contend that the repayment of the PD Loan was a prerequisite before there could be any sharing of profits or losses under the JVA.

44. I agree with the Claimant that it was necessary to repay the PD Loan and the Deemed Purchase Price to the Company before there was any sharing of profits under the JVA. It is no surprise that the lending had to be discharged before the joint venturers could enjoy the profits.

45. However, as regards a loss scenario, I consider that the Claimant's interpretation is wrong.

(1) First, as a matter of construction of clause 6(e), the loss scenario is addressed by the words which appear in brackets and the profit scenario is dealt with by the words outside of the brackets. I consider that the reference to the repayment of the PD Loan and the Deemed Purchase Price (all of which appear outside of the brackets) is dealing solely with the profit scenario. The loss scenario is covered by the words in brackets and contains no requirement that the PD Loan and the Deemed Purchase Price must be repaid first.

(2) Second, in a loss scenario (such as the one that arises in this case), there will by definition be insufficient funds to repay all of the Company's debts. In the circumstances, it makes little sense for the repayment of the PD Loan and the Deemed Purchase Price to be a prerequisite before the operation of any loss sharing provision.

46. The Claimant's position was that the loss-sharing provisions do not apply in the scenario which arises in this case where the proceeds of sale were insufficient to repay the Company's debts. The Claimant contends that, in the present scenario, the losses fall in the first instance entirely on Mr Dunn, who is then

entitled to recover them in their entirety from Mr Kazolides under the guarantee clause.

47. Given that submission, I raised the question with the Claimant's counsel of when the loss sharing scenario covered by clause 6(e) might arise. The Claimant gave an example where the development completed, five of the villas had sold, enabling the Deemed Purchase Price and the PD Loan to be repaid, and then an unexpected tax liability accrued. It was said that the loss sharing provisions were designed to apply in a scenario like that, rather than the present scenario.

48. I find it difficult to accept that clause 6(e) was designed to provide for loss sharing in that unlikely scenario and not in the much more obvious and likely loss scenario (which has in fact arisen) where there were insufficient net funds on a sale to discharge the outstanding loans.

49. In my view, clause 6(e) provides for loss sharing between Mr Dunn on the one hand and the Company on the other hand in circumstances where the Company has insufficient funds to repay the whole of the PD Loan and the Deemed Purchase Price.

50. As is explained in further detail below, the guarantee performs an important function in ensuring that this loss-sharing mechanism works in practice, in particular in a scenario where the Company has insufficient funds to bear its half of the losses. This is considered in further detail below in Section F.1.1 below.

E.2. <u>The payment waterfall under the JVA</u>

51. There was also a dispute between the parties in relation to clause 5(e) of the JVA which provides, in material parts: "*The Deemed Purchase Price shall not be repayable until the repayment of the PD Loan in full on a pari passu basis…*". The Claimant contended that the words "*pari passu*" should be ignored and the effect of this clause was that the PD Loan must be discharged first ahead of any payment to the Company. The Defendant argued that the clause provided for pari passu distribution.

52. I disagree with the Claimant's interpretation of this clause. I recognise that there is some difficulty with interpreting the language "*The Deemed Purchase Price shall not be repayable until the repayment of the PD Loan <u>in full on a pari passu basis</u>*" (emphasis added). This could be interpreted to mean that the Deemed Purchase Price was not repayable at all until the repayment of the PD Loan in full. However, such a construction would ignore the choice of the words "*on a pari passu basis*" and indeed would be inconsistent with that concept.

53. As a matter of construction, I understand that I ought to seek to give meaning to all of the words used by the parties. I have reached the conclusion that the reference to "*until the repayment of the PD Loan <u>in full</u>*" (emphasis added) is intended to cover the fact that:

    (1) the PD Loan might vary in amount because it depended on the amount which the Company required to complete the development. If the

Company reasonably required sums above CYP 800,000 to complete the development then, absent any triggering of the automatic repayment provisions under the JVA, Mr Dunn was required under clause 5(a) to lend it.

(2) interest was being charged on the PD Loan.

54. In the circumstances, I consider that the phrase "*until the repayment of the PD Loan in full*" means that the pari passu exercise was intended to bring into account all of the sums advanced by Mr Dunn including interest. I consider that clause 5(e) envisaged a pari passu repayment exercise where any repayments were made based on the relative contributions of the Deemed Purchase Price on the one hand and the entirety of the PD Loan (including interest) on the other.

55. In any event, it seems to me that such an arrangement was subject to the overall profit and loss sharing provisions in clause 6(e). In the circumstances, however sums were distributed under clause 5(e), there was still a levelling-up process under the profit sharing arrangements.

F. The Guarantee Validity Issues

56. The following issues arise in relation to the validity of the alleged guarantee contained in clause 18:

(1) Did Mr Kazolides provide a guarantee under the JVA?

(2) If Mr Kazolides does not fall within the scope of the term "*the Guarantors*" in clause 18, should it be rectified to name him as a guarantor?

F.1. Validity Issue 1: Did Mr Kazolides provide a guarantee under the JVA?

57. The Defendant contends that there is no express provision of the guarantee which provides that Mr Kazolides is a guarantor. He disputes the validity of the guarantee on the following grounds:

(1) The joint venture was intended to be a 50/50 arrangement and the guarantee is inconsistent with that arrangement;

(2) Mr Kazolides is not expressly mentioned in clause 18; the clause refers at separate points to a guarantor (singular) and the guarantors (plural) and neither term is defined in the agreement;

(3) The failure to name Mr Kazolides expressly means that the guarantee does not satisfy s.4 of the Statute of Frauds 1677. The Defendant contends, based on *Williams v Lake* 121 ER 132 and *Lovesy v Palmer* [1916] 2 Ch 233, that a document which fails on its face to name the guarantor is not a valid guarantee for the purposes of s.4;

(4) Mr Kazolides did not give authority to his attorney, Mr Michael, to provide any guarantees on his behalf.

F.1.1. The argument that the joint venture was intended to be a 50/50 arrangement and the guarantee is inconsistent with that arrangement

58. I note that, on the sharing of profits and losses under the JVA, in his witness statement, Mr Dunn said: "*It was always the agreement that the profits and losses would be divided equally between me on the one hand and Chris and Kostas on the other*". This was a point which Mr Dunn re-affirmed in his oral evidence. The Defendant in his closing submissions appeared to endorse that view, referring to the above passages as part of the "*wider factual matrix*", and referring expressly to Mr Kazolides' half share of the losses.

59. I do not consider that the guarantee is inconsistent with the joint venture being a 50/50 arrangement as described. In fact, I consider that the guarantee performed a critical role in ensuring that losses were distributed 50/50 between Mr Dunn on the one hand and Mr Kazolides and Mr Stylianou on the other hand. I reach that conclusion on the following basis:

(1) As explained above, the Company was a vehicle wholly owned by Mr Kazolides (through a nominee) and Mr Stylianou.

(2) Clause 6(e) of the JVA provided for losses to be shared 50/50 between the Company and Mr Dunn.

(3) In circumstances where, on the sale of the villas and after using the entire proceeds to part pay its debts, the Company faced a substantial shortfall, there was the prospect that the sums outstanding to Mr Dunn might far exceed the sums owed to the Company under the JVA (i.e. the Deemed Purchase Price of CYP 330,000). In short, there was the possibility that the bulk of the loss might fall on Mr Dunn.

(4) Whilst under the Net Loss provisions, that loss was to be shared 50/50 between the Company and Mr Dunn, if the Company had expended all of its funds, in practical terms there was no way in which Mr Dunn could require the Company to pay for its share.

(5) The guarantee performed the function of providing a mechanism for Mr Kazolides and Mr Stylianou to plug this gap by paying for the Company's shares of the Net Losses.

(6) As was common ground between the parties, the guarantee is a "*see to it*" obligation where Mr Kazolides and Mr Stylianou guaranteed that the Company would perform its obligations under the JVA. Any claim under the guarantee sounds in damages, not debt (*Moschi v Lep Air Services Ltd* [1973] A.C. 331 at 345B, 348H, 357E).

(7) The damages suffered by Mr Dunn in a shortfall scenario would be capped at the level which the Company had failed to contribute under the loss-sharing arrangements (as required by clause 6(e)), so that he only bore 50% of the Net Losses.

(8) In the circumstances, I reject the Defendant's case that there was no guarantee at all. Absent the guarantee clause, if there was a material shortfall and the Company had insufficient funds to bear the loss, Mr Dunn in practice would have had to bear all of the shortfall.

(9) For the avoidance of doubt, I also reject the Claimant's case that the guarantee provision would allow Mr Dunn to recover the entirety of his loss (plus interest) from Mr Kazolides, which is what he claims in this action. Such an interpretation would mean that Mr Kazolides would bear the entirety of the loss of the joint venture, even though the joint venture was a failure, and that Mr Dunn would be repaid the entirety of his investment plus 8% compounded over a 17 year period. Such an outcome would be inconsistent with Mr Dunn's own description of the profit and loss sharing arrangements as quoted in paragraph 58 above.

F.1.2. The failure to name Mr Kazolides expressly and the Statute of Frauds

60. The Defendant contends that there is no enforceable guarantee because he is not named expressly and that the clause fails to comply with s.4 of the Statute of Frauds. As to these points, I find as follows:

(1) Although the JVA does not define the terms "*the Guarantor*" or "*the Guarantors*", the only parties to the JVA were the Company and the three joint venturers (Mr Dunn, Mr Kazolides and Mr Stylianou).

(2) The opening words of clause 18 read: "*In consideration of PD entering into this Agreement with the Company at the request of the Guarantor, the Guarantors HEREBY JOINTLY AND SEVERALLY GUARANTEE AND UNDERTAKE on their own behalf*".

(3) Those opening words refer expressly to two of the four parties; Mr Dunn and the Company. Accordingly, the only two persons who could be covered by the term "*the Guarantors*" are Mr Kazolides and Mr Stylianou.

(4) For the reasons explained in sections E.1 and F.1.1 above, a guarantee from Mr Kazolides and Mr Stylianou was a necessary part of the mechanics if the loss-sharing arrangements were to work.

(5) I do not consider that the guarantee was non-compliant with s.4 of the Statute of Frauds 1677 as the Defendant alleges. I note that *Williams v Lake* was a case concerning authority to issue the guarantee to the guarantor in question. As for *Lovesy v Palmer*, the Judge, Younger J, explained at p239 that, on the facts in that case, there was "*no reference, either expressly or by necessary implication, to the plaintiff in the whole of the documents referred to as constituting the memoranda except in a character in which, according to the terms of the bargain as now alleged, he was not to figure*". In the present case, it is clear from the face of the JVA that both Mr Dunn and Mr Kazolides are parties. Further, as noted above, as a matter of construction (or to use the language of

Younger J "*by necessary implication*"), it is clear that the references to "*the Guarantors*" are references to Mr Kazolides and Mr Stylianou.

(6) I note that the clause also provides that the guarantee has been provided at the request of "*the Guarantor*" (singular) but this does not undermine the above construction. First, as noted above, it is sufficiently clear that the guarantors were Mr Kazolides and Mr Stylianou, and it is not legally significant in that context who originally requested the guarantee. Second, construing the guarantee as a whole, it is apparent that the guarantee was being provided in return for Mr Dunn being willing to take on a key funding obligation (which after the SJVA became the sole source of the Company's funding) and that Mr Kazolides and Mr Stylianou as the ultimate owners of the Company were the parties who would enjoy the benefits (if they accrued) of the provision of any such funding. Accordingly, I consider that the term "*the Guarantor*" was intended to cover both Mr Kazolides and Mr Stylianou.

(7) In all of the above circumstances, in my view, it is sufficiently clear as a matter of construction that "*the Guarantors*" and the "*Guarantor*", although not expressly defined, are Mr Stylianou and Mr Kazolides.

F.1.3. Whether Mr Michael had authority to enter the guarantee

61. I reject the suggestion advanced in Mr Kazolides' witness statement that he never gave authority to Mr Michael to provide any guarantee on his behalf in relation to the Company.

(1) Mr Michael had a power of attorney to act for Mr Kazolides which expressly and clearly included, at paragraph (f), authority to enter a guarantee. Mr Kazolides accepted that he knew that Mr Michael had signed the JVA on his behalf. Mr Michael's covering email of 29 August 2006 confirmed that he would be signing the JVA as attorney for Mr Kazolides. Mr Michael's letter to Mr Dunn's solicitors dated 29 August 2006 explained that he had signed the JVA as Mr Kazolides' attorney pursuant to the power of attorney and enclosed both the signed JVA and the power of attorney. That letter was copied to Mr Kazolides at an address in Cyprus.

(2) Mr Kazolides accepted in his oral evidence that he would have read the JVA and the JVA clearly included a guarantee. Although, as noted above, the JVA did not define the term "*Guarantor*" / "*Guarantors*", I consider that it would have been obvious to Mr Kazolides that he was giving a guarantee through this clause. Mr Kazolides tried at a later stage in his oral evidence to suggest that he had not read the guarantee clause but I did not find that evidence credible.

F.2. <u>Validity Issue 2: Should clause 18 be rectified to name Mr Kazolides as the Guarantor?</u>

62. In the event that Mr Kazolides does not fall within the definition of "*the Guarantors*" under clause 18, the Claimant seeks rectification of the agreement.

Since I have resolved the construction point in favour of the Claimant, the issue of rectification does not arise. However, for completeness, I address it below.

63. Rectification can be available in cases of common mistake and, occasionally, where there has been a unilateral mistake.

(1) In relation to common mistake, Snell on Equity at 16-014 says: "*The prior agreement between the parties on which a claim for rectification is based need not amount to an enforceable contract; it suffices if there is a common intention in regard to the particular provisions of the agreement in question continuing up to the date of the written instrument, together with some outward expression of accord. This requirement of an "outward expression of accord" was once thought to serve only an evidentiary function but is now treated as a legal requirement*".

(2) In relation to unilateral mistake, Snell on Equity at 16-014 says "*a document may exceptionally be rectified for unilateral mistake where one party knows of the other's mistake and acts unconscionably in seeking to take advantage of it*".

64. The Claimant's case on rectification was put briefly in his written and oral submissions. In my view, that reflected the fact that there was very limited evidential material to support such a case.

65. As regards common mistake, the Claimant has not identified any "*outward expression of accord*" which would justify rectification on the basis of common mistake save for drafts of the JVA. I have been provided with a draft JVA which includes a version of clause 18 (with the defects identified above regarding the reference to "*the Guarantor*" and the "*the Guarantors*" without definition of those terms) and which has manuscript amendments which say "*Discussed + ag'd 18.7.06*". This draft appears to have been discussed at a meeting between Mr Stylianou and Mr Dunn which Mr Kazolides did not attend. Perhaps unsurprisingly given the passage of time, the evidence regarding the negotiation of the JVA was piecemeal. The recollection of both Mr Dunn and Mr Kazolides on matters that far back was limited and the documentary trail was also limited.

66. The draft JVA referenced above, discussed between Mr Dunn and Mr Stylianou, is not any more illuminating than the final JVA on the "*outward expression of accord*" because the same inadequacies also exist in that clause. The Claimant also pointed to certain email correspondence, but none of that material could properly be characterised as an "*outward expression of accord*" in relation to the guarantee. In the circumstances, if I am incorrect on the construction point above, then I do not consider that there is a sufficient basis to rectify the agreement on the basis of common mistake.

67. In closing submissions, the Claimant disavowed a case based on unilateral mistake saying that "*[u]ltimately, this is a case of, at best, common mistake*". In my view, the Claimant was right to do so since I do not consider that a case on unilateral mistake could be made out.

G. The Limitation Issues

68. Having established that the JVA contains a valid guarantee clause, the next question is whether any claims under the guarantee are barred due to limitation.

69. Both parties accept that the cause of action under the guarantee accrues at the point that the Company defaulted on repaying the PD Loan, *Moschi v Lep Air Services Ltd* [1973] A.C. 331 at 348D per Lord Diplock. This, in turn, raises the question of when the PD Loan fell due for repayment. Both parties agree that the relevant trigger is the "*insolvency of the Company*" under clause 5(e) of the JVA although there is a dispute about what that term means.

70. The limitation issues are:

(1) Issue 1: Is the Limitation Period 6 or 12 years?

(2) Issue 2: What is the test for insolvency under clause 5(e)?

(3) Issue 3: Was the Company in default more than 6 / 12 years before the issue of the claim?

G.1. Limitation Issue 1: Is the Limitation Period 6 or 12 years?

71. This issue turns on whether the JVA is to be analysed as a simple contract or a deed for limitation purposes. If it is the former then the limitation period is six years and if the latter, 12 years.

72. As regards execution requirements for a deed, I note that s.1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 ("**LPMPA**") provides:

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed.

73. As noted above, the JVA was executed as a deed by or on behalf of Mr Kazolides, Mr Stylianou and the Company. However, on Mr Dunn's side it was signed on his behalf without an attestation from a witness. In that sense, it was not compliant with the formal execution requirements contained in s.1(3) of LPMPA.

74. Section 1(2) of LPMPA provides that:

"*An instrument shall not be a deed unless—*

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties."

75. In *MacDonald Hotels Ltd v Bank of Scotland Plc* [2025] EWHC 32 (Comm.) at [234], HHJ Pelling KC analysed (albeit obiter) this provision and concluded that the question of whether a document could be a deed had a binary answer. He rejected the argument that an agreement might take effect as a deed against some parties but not others. He considered that there were two statutory requirements before an agreement could be classed as a deed:

(1) First, does the agreement make it clear on its face that it is intended to be a deed by all of the parties to it? If that is not so in respect of any of the parties to it, then the document is not in law a deed; and

(2) Second, has the document been validly executed as a deed by one or more of those parties?

76. I have given careful consideration to the decision in *MacDonald* and I have also considered an article about the case entitled "*Schrodinger's deed: can an instrument be two things at once?*" by James Hall and William Golightly B.J.I.B. & F.L. 2025, 40(6), 372-374 and footnote 14 of Section 3 of the Law Commission Report entitled The Execution of Deeds and Documents by or on behalf of Bodies Corporate (CP143) which was cited by HHJ Pelling KC.

77. I note the view expressed in *Macdonald* that s.1(2) envisages a binary answer to the question of whether a document is a deed. The opening words to s.1(2) state that they are dealing with the characterisation of an instrument ("*An instrument shall not be a deed unless…"*). On that basis, the instrument is either a deed or it is not.

78. As to the conditions identified by HHJ Pelling KC, the logic of his interpretation is that, if it is clear from the face of an instrument that it is intended to be a deed for all parties and all the parties agree to its terms, then the mere fact that it has not been validly executed by all parties should not be a bar to it being considered to be a deed. The interpretation means that a party could not evade the consequences of having agreed that an instrument should take effect as a deed simply by failing to have their signature attested.

79. I note, however, the decision of Newey J (as he then was) in *Briggs v Gleeds* [2015] Ch 212. That case concerned the question of whether certain pension scheme documents took effect as deeds. The intention was for such documents to be deeds. The trustees of the scheme executed them as deeds but the employers did not. The judge found that the instruments were not deeds.

80. The decisions in *Macdonald Hotels* and *Briggs* are not easy to reconcile. I note that *Briggs* is not referenced in the judgment of HHJ Pelling KC in *Macdonald Hotels*, probably because the decision was not drawn to the judge's attention.

81. If the approach in *Macdonald Hotels* applies, I note that both of the conditions identified by HHJ Pelling KC are met. The agreement does make clear on its face that it is intended to be classed as a deed by all of the parties. Page 16 states: "*IN WITNESS whereof the Parties hereto have executed this instrument as their Deed*". Similarly each of the signature blocks record that the document is "*Signed as a Deed*". The document was executed as a deed by all of the parties, save for Mr Dunn.

82. However, in the present case, I do not need to decide whether to prefer the approach in *Briggs* or *Macdonald Hotels* because, as is further explained below, the cause of action accrued more than 12 years before the issue of the claim and so even if the approach in *Macdonald Hotels* is to be preferred, the claim is statute barred.

G.2. Limitation Issue 2: What is the test for insolvency under clause 5(c)?

83. Clause 5(c) of the JVA provides: "*The PD Loan will automatically be repayable on the sale of the Company the passing of the resolution to wind up the Company the insolvency of the Company or the Company making any arrangement for the benefit of its creditors*".

84. There is a dispute between the parties as to the meaning of the phrase "*the insolvency of the Company*". The JVA provides (at clause 19) that it is "*subject to the laws of England*". Prior to trial, there was a dispute between the parties as to whether regard should be had to the law of Cyprus (that being the law of the place of the Company's incorporation) in considering whether the Company was insolvent pursuant to this clause. The parties agreed at the start of trial that the Court should approach the question as if it was solely a question of English law.

85. The Claimant argues that:

(1) the phrase "*the insolvency of the Company*" refers to the Company being unable to pay its debts, which is one of the grounds on which a company may be wound up by the Court (s.122(f) IA 1986). The Claimant refers to s.123 IA 1986 (headed "*Definition of inability to pay debts*") and contends that "*insolvency of the Company*" means "*[the Company] going into a formal insolvency process (such as a liquidation or administration) or, applying the insolvency law of England and Wales, one of the deemed insolvency events in s.123(1) of the Insolvency Act 1986, but not including the balance sheet test of insolvency contained in s.123(2) of the Insolvency Act 1986*".

(2) for the purposes of the JVA, the basis for insolvency must be linked to a "*definable or identifiable event*". He excludes balance sheet insolvency because he contends that it does not refer to a single, identifiable event

but involves the Court undertaking an assessment. He says that it is not a sufficiently certain test to apply and would be unworkable.

(3) The phrase *"the insolvency of the Company"* is to be construed eiusdem generis with the phrase *"[Astriverl making any arrangement for the benefit of the creditors"* which clearly refers to a Creditors Voluntary Arrangement i.e. a formal insolvency process.

86. The Claimant says that the Company was first insolvent when he obtained Judgment against it in November 2012 or alternatively when the villas had all been sold (largely to Black Flamingo) leaving a substantial deficit.

87. In the event that, contrary to the Claimant's primary case, a balance sheet insolvency test applies, the Claimant contended at trial that the Company was not balance sheet insolvent until the Company's financial year ended December 2011 when the Claimant was asked by the Company's accountant, Mr Timinis, for a letter of comfort that he would not demand repayment of his loan within twelve months. I note that in the Claimant's Particulars of Claim (paragraph 19), he contends that if the balance sheet insolvency test in s.123(2) IA 1986 applies: "*Mr Dunn will contend that at no date prior to December 2010 was the value of [the Company's] assets less than the amount of its liabilities, taking into account its contingent and prospective liabilities"*.

88. The Defendant contends that:

(1) The phrase "*insolvency of the Company*" has a simple meaning. He refers to the dictionary definition of insolvent as "*Unable to pay one's debts or meets one's liabilities*" and refers to Goode on Principles of Corporate Insolvency Law 5th Ed at 4-01 "*A company is insolvent when it is unable to pay its debts. The concept is simple*";

(2) insofar as the Claimant advances an argument based on the *eiusdem generis* principle that the phrase "*insolvency of the Company*" should be taken to mean a formal process, such an argument is flawed and is an impermissible attempt to imply an unnecessary additional requirement;

(3) insolvency processes such as winding up orders, administration orders, and arrangements with creditors typically take place after a company is insolvent. Such a process cannot be a pre-condition for a finding of insolvency.

89. I agree with the Defendant that the phrase "*the insolvency of the Company*" was intended to have a simple common-sense meaning in the JVA. Having regard to the context and purpose of the JVA, I note that:

(1) Mr Dunn was required as funder to provide not only the funding sum specified (originally CYP 330,000 and later CYP 800,000) but also "*such reasonable amount as the Company shall acting reasonably require in order to complete the Development*" (clause 5(a)(iii)).

(2) As a matter of construction, the automatic repayment provisions must have the effect of terminating Mr Dunn's obligation to provide the funding specified (and any additional sums) and instead impose an immediate repayment obligation on the Company.

90. I do not agree with the Claimant's argument that the phrase was intended to refer to a formal insolvency process (such as the appointment of an administrator or a liquidator). That would mean that Mr Dunn would be stuck with a funding obligation even after the presentation of a winding-up petition against the Company.[1]

91. The Claimant's submission that the term the "*insolvency of the Company*" also encapsulates the occasions on which a company is deemed insolvent under s.123(1) IA 1986 sits uneasily with the Claimant's prior argument that the "*insolvency of the Company*" relates to formal insolvency process. That is because the matters of deemed insolvency in s.123(1) are usually precursors to the commencement of insolvency proceedings and generally occur well in advance of any formal insolvency process (such as an administration or liquidation order).

92. I also disagree with the Claimant's submission that a test focussed on the assets and liabilities of a company is insufficiently certain and workable to apply under the JVA. On the contrary, I think that there is good reason to reach the view that the balance sheet insolvency test would apply under clause 5(c) of the JVA:

(1) The whole purpose of the joint venture was to develop and sell the villas.

(2) It seems to me a matter of common sense that if the expected sale price of the villas was clearly insufficient to discharge the actual and contingent liabilities of the company then the company would be insolvent.

(3) If that were not the case then Mr Dunn would have been contractually obliged under the JVA to continue lending if so required by the Company under clause 5(a), irrespective of whether there was any prospect of recovering that additional lending.

93. As to the Claimant's suggestion that the balance sheet test is insufficiently certain, that is undermined by the fact that the test is nonetheless applied by the Courts under s.123(2). In my view, in the context of the JVA, the fact that the test can be difficult to apply is a point which goes to the burden of proof not the application of the test. As Lord Walker noted in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others [2013] UKSC 28, [2013] 1 WLR 1408*, the balance sheet test is a "*very far from an exact test*" and

[1] I note that, at the point that the issues of Cypriot insolvency law were still live, there was a dispute between the parties as to the available insolvency processes in Cyprus. My view on the construction of the JVA does not depend on matters of insolvency process under Cypriot law but rather the simple point that the formal appointment of an officeholder in relation to a company generally occurs after the company has experienced serious financial difficulties.

ultimately "*the burden of proof must be on the party which asserts balance-sheet insolvency*".

94. If in considering whether "*it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities*", it was unclear whether the assets would be reasonably expected to meet the liabilities then the person asserting balance sheet insolvency would be unable to discharge the burden on them.

95. In the present case, the question is whether the Defendant can discharge the burden on him to establish that the Company was insolvent according to the balance sheet test by 10 March 2010 (at the latest). In my view, he has, as I explain in Section G.3 below.

G.3. Limitation Issue 3: Was the Company in default more than 6 / 12 years before the issue of the claim?

96. For the purposes of this analysis, I have proceeded on the basis as set out in Section G.1 above that the limitation period is 12 years. Accordingly, the question is whether the Company was insolvent and had defaulted on repayment more than 12 years before the issue of the Claim Form (10 March 2010).

97. I agree with the suggestion that it would likely have been unattractive for the Company to sell the villas in an uncompleted state. By late 2009 / early 2010, the villas were sufficiently in sight of completion that it was possible for the Company to seek to sell the villas as completed, albeit that the purchasers might have had to wait a few months for the completed villas to be handed over.

98. The JVA envisaged that the villas might be sold off-plan or ahead of final completion because the obligation to sell arose from the start of the development, not its completion. Clause 14(1) provided for the Company to use "*all reasonable efforts*" to dispose of the villas as "*[a]s soon as is practicable after the commencement of the Development*" (emphasis added).

99. By the beginning of March 2010, the villas were not finished but the majority of the major building works had been completed and the project was nearing completion. In these circumstances, in assessing the asset value of the villas, there is good reason to look to the expected sale price with the villas being transferred on completion rather than the likely lesser value of a sale of the villas "*as is*".

    (1) This is in my view necessary to approach the question in a commercial realistic manner as *Eurosail* envisages, and is supported by *Cresta Estates v MPB Developments* [2025] EWHC 198 (Ch) at [33(iii)] which says that "*an inquiry into the nature of the present assets will also include their future profit or loss generating potential (Carton-Kelly v Darty Holdings SAS [2023] BPIR 305, [2022] EWHC 2873 (Ch) per Falk J (as she then was) at [126])*".

(2) If, contrary to my view expressed above, that is not the approach envisaged by *Eurosail*, then I consider that it remains appropriate as a matter of construction of the insolvency test under the JVA to look at the price of the villas on completion. The JVA was put in place to "*acquire and exploit the Property*" and I consider that for the purposes of assessing whether the Company is insolvent, it is appropriate to value the villas on the basis that the Company would seek to maximise the value of any sale. This means that they could be sold to purchasers off-plan on terms that the Company would ultimately be delivering the villas to the purchaser in a completed state.

(3) I do not consider that the test of whether the Company was insolvent means that the future expected sale price must be ignored and instead that the villas must be valued solely on the assumption that the development will be sold on an immediate basis "*as is*". Given that in the early stages of the project, the funds expended would likely have outweighed the incremental increase in value of the site, adopting that latter construction would lead to the odd result that the Company would likely have been insolvent (and thus Mr Dunn's loan repayable) from an early stage in the project, even if the expected sale values of the villas were well in excess of the anticipated liabilities (including any contingent liabilities). I do not regard clause 5(c) to operate in that way.

(4) Further, I do not regard it as permissible either under the *Eurosail* approach (or if different on the construction of the JVA) for any balance sheet assessment of the Company's solvency to assume that the Company is permitted to wait beyond the completion of the development for the property market to recover or improve. Further, given the high compounded interest rate attracted by Mr Dunn's loan, it seems highly unlikely that waiting to sell the villas would improve the balance sheet position of the Company.

100. The financial statements of a company can be a starting point for assessing the value of a company's assets and liabilities. However, the focus must ultimately be on their commercial value, see *Cresta Estates* at [33(iii)]. As regards the financial statements, I address the following points:

(1) The Company's financial statements record the Company's assets materially exceeding its liabilities from 2008 onwards (for the prior years, the assets were slightly below liabilities).

(2) For the years from 2009 onwards, the Company had two major assets recorded in its financial statements; the value of the villas and VAT reclaims.

(3) The financial statements record the value of the villas within inventories. The notes state that "*Inventories are stated at cost*". For the reasons explained above, I consider that when assessing the solvency of the Company at the beginning of March 2010, regard should be had to the likely sale price of the villas rather than their historic costs.

(4) In relation to the VAT reclaims, these appear to be purported claims for the recovery of VAT on the construction of the villas. The claims appear to have been included at Mr Stylianou's direction and as a result of him registering the Company for VAT. It is doubtful that these VAT claims had any real prospect of success. The view of Mr Timinis, whose firm prepared the Company's financial statements and audited them, was that the correct VAT position was that the Company should never had been registered for VAT. He said that the land was VAT exempt and I note that the Company's own marketing materials for the villas described it as a 'VAT exempt project'. The Company itself looked to Mr Timinis for advice on the VAT claims and, as recorded in a 2013 email from Mr Heyes, Mr Timinis' view was that the chances of the Company actually receiving a VAT refund were remote. Mr Heyes described the VAT refund as "*pie in the sky*". Notwithstanding Mr Timinis' view, the VAT reclaims were included in the Company's accounts. For the purposes of assessing the solvency of the Company, I consider that the likely value of those claims was zero.

G.3.1. The expert evidence on valuation of the Property

101. Both parties adduced expert evidence on valuation. The Claimant called the evidence of Dr George Mountis MRICS of Delfi Real Estate LLC and Dr Mountis gave evidence via video link. The Defendant adduced a joint report of Mr Constantinos Pierides MRICS and Mr Constantinos Georgiou MRICS of PropertyServe Chartered Surveyors; the latter gave oral evidence via video link. Each expert produced a main report and they collectively produced two iterations of a Joint Statement. In addition, Mr Georgiou produced an Addendum to his main report. These materials were lengthy running to over 350 pages (including various exhibits).

102. Dr Mountis and Mr Georgiou gave evidence over the course of two days. In the case of Mr Georgiou, he was assisted by an interpreter.

103. Although the expert evidence covered valuations of the villas from 2006 to 2019, for limitation purposes, the valuations of the villas prior to the cut-off for limitation purposes of 10 March 2010 are of particular importance.

104. Given that the villas were not completed until October 2010, the experts made various assumptions regarding the stage that the villas had reached for the purposes of their valuations. The valuations for the years 2008, 2009 and 2010 can be summarised as follows:

Date	Dr Mountis (Claimant)		Mr Georgiou (Defendant)	
	Valuation	**Completion Stage**	**Valuation**	**Completion Stage**
31/12/2008	€2,422,000	75%	€1,968,057	62%
31/12/2009	€3,172,000	90%	€2,395,366	86%
10/3/2010	€3,580,000	100%	€2,807,000	Notes that €151k + VAT was spent between March and October 2010 on final stages
31/12/2010	€3,566,000	100%	€3,027,250	100%

105. Dr Mountis' valuations for March 2010 and December 2010 were based on four comparable transactions from the Paphos district. The table below lists the purchase contract date for each of the comparables and also the date on which the contract was subsequently registered with the Land Registry.

	Registration Date	**Contract Date**
Comparable 1	04/02/2008	27/03/2007
Comparable 2	14/01/2010	12/09/2009
Comparable 3	25/02/2009	19/02/2009
Comparable 4	19/06/2009	06/08/2009

106. As is apparent from the table, the contract date for all of the key comparables relied on by Dr Mountis was long before the valuation dates of March 2010 and December 2010. That discrepancy is potentially significant because the Cypriot residential market suffered a downturn after the global financial crisis. For example, the Central Bank of Cyprus reported in its Residential Property Price Index that residential prices had fallen by 9.4% in the period between Q3 2008 and Q4 2010.

107. In the circumstances, there is a concern that Dr Mountis' approach in valuation based on contracts which were entered materially before the valuation date might overstate their value.

108. Dr Mountis sought to address that discrepancy by suggesting that it was the date of registration that really mattered because that was the stage that the purchaser was committed to proceed with the contract. Based on the evidence before the Court, the practice of purchasing a property in Cyprus does not appear to be materially different to England and so, in my view, the price stated in the contract is likely to be largely reflective of the market conditions at the date of the contract. As with the position in England, it appears that a purchaser in Cyprus is committed to the transaction from the point of exchange of contracts and so, whilst I recognise that a purchaser may theoretically not proceed with the transaction if there was a substantial deterioration in market conditions after the exchange of contracts, it is the date of exchange of contracts which will generally be the more illuminating rather than the date of registration.

109. In the circumstances, I consider that it is striking that all of Dr Mountis' comparables are chosen from a time when the residential property market was materially stronger than it was in March and December 2010.

110. In relation to Mr Georgiou's valuations, for the period from 2007 to 2009, he valued the land on a comparable basis and based the value of the development on the inventories in the financial statements and included developer's profit, overheads, other expenses and contingencies. For the period from 2010 onwards, Mr Georgiou used the comparable approach albeit for the valuation as at March 2010, he appears to have taken his December 2010 valuation and made a deduction to reflect the fact that there remained work to be done. The precise calculation is unclear. The difference between his valuations for March and December 2010 is €220,250 albeit that the joint statement refers to the work remaining as €151,104 + VAT. In cross-examination, the figures for the remaining work were suggested by the Defendant's counsel to be €174,000 and a further €9,000 for road construction.

111. Mr Georgiou's methodology involved providing a long list of potentially comparable properties but without identifying the precise transactions which led to his valuations. In relation to the four comparables chosen by Dr Mountis, Mr Georgiou says that one is not comparable, two are "*superior to the under-study property*" and one is similar. For two of the comparables, Mr Georgiou says that Dr Mountis has incorrectly recorded the square metreage and nature of the spaces at these properties, and that in fact they were more substantial than Dr Mountis' analysis indicates (thereby suggesting that Dr Mountis has overstated the price per square foot for these comparables).

112. I note that Dr Mountis' view is that the value of the villas was essentially the same at March 2010 and December 2010. He has conducted both valuations on the basis that the properties were 100% complete. As explained above, I think that it is logical to value the villas as at March 2010 on the basis that a purchaser would require the Company to finish the properties before completion and so they were being sold on the basis that they were 100% complete (as Dr Mountis assumes). For that reason, I do not follow Mr Georgiou's approach of making a deduction to the valuation to reflect the remaining works.

113. Instead, I consider that the appropriate approach is to value the villas on the basis that the remaining works (which were nearly complete) would be completed and to include the costs of doing so in the Company's liabilities. In my view, this was likely to be the best way of the Company maximising the value of its assets and would lead to a better net return for the Company than selling the villas "*as is*" in their uncompleted state.

114. In relation to the absolute values of the villas, I think that Mr Georgiou's valuation of €3,027,250 as at December 2010 is more realistic than Dr Mountis. I also consider that the villas were likely at around the same level (€3,027,250) in March 2010. I note that this value is about 10% below the level that the villas were actually on the market at the time. Given that none of the villas sold during this period, it is logical in my view to assume that true value of the villas was at a discount to the price that they were advertised in the market. I consider that 10% is a reasonable discount and is supported by the valuation evidence.

115. There are various other factors which lead me to the conclusion that Dr Mountis' valuations of c. €3.5 million for March 2010 and December 2010 are too high:

(1) The property market, in terms of overseas buyers, had deteriorated significantly by early 2010. I note from the evidence an email circular dated 12 January 2010 from Overseas Property Professional received by Mr Heyes and forwarded to Mrs Heyes and Mr Honey entitled "*Govt figures confirm Cyprus meltdown*". The circular reported that "*[f]ewer than 1,800 properties were sold to non-Cypriot buyers during 2009 compared to over 11,200 in 2007, according to data released by the Cyprus Department of Lands and Surveys*". The second worst hit area was Paphos (where the villas were located) which had suffered a drop in sales of 89%. One developer, Aristo, was quoted saying that they had been offering discounts of up to 30% on a number of its completed and near-completed properties, and that it was unlikely for new projects to be launched. It was noted that developers were unlikely to want to spend on developments without profit. There were also fears of negative equity in the market.

(2) Another circular from Antonius Loizou & Associates dated March 2010 said "*2010 can be very well described as the most difficult year for Greece since the aftermath of W.W. II. When looking the numbers, one wonders how, and if, Greece has the capacity to rebound from this unprecedented crisis and return to normal conditions*". The circular also said: "*In the wake of Cyprus' remarkable real estate boom it is widely accepted that property on the Island is overpriced. … When … one calculates the residential property yields, based on the RICS Cyprus Property Index, [one] would conclude that they are extremely low ranging from 1.5% to 3.9%; a clear indication that property is overvalued*."

(3) On or around 5 March 2010, Mr Stylianou approached Mr Dunn with a potential buyer who was interested in purchasing the entire site. He had already visited two of the villas and Mr Stylianou considered that he was a "*genuine 100% possible buyer*". The proposed price was 30% of the listed prices on the website; i.e. an overall price of around €2.5 million.

(4) Mr Dunn claimed in cross-examination that he would have been delighted with a sale of the site at this point at €2.5 million but I consider that this is an after-the-event rationalisation. There is no evidence that he took steps to achieve a sale at that level at that time and the properties were on the market for €3,335,000 which I consider was an unrealistically high price. Nevertheless that evidence reflected the likely true state of the market at the time. Mr Dunn accepted in his evidence that it was not realistic to get much more than €375,000 for a house at that moment in time. Although the properties had different sizes and configurations, an average price of €375,000 per villa would have meant a total price of €2,625,000 for all seven villas.

(5) As noted above, the properties were on the market at an aggregate price of €3,335,000, which is lower than Dr Mountis' valuation of €3,580,000, but had not sold (or indeed attracted much interest at all).

(6) The Claimant's own pleaded case is that the open market value of the villas in December 2010 was €3,335,000.

G.3.2. The Liabilities of the Company in March and December 2010

116. In assessing the solvency of the Company, I consider that it is necessary to take into account liabilities including contingent liabilities in assessing the Company's solvency.

117. The Company would incur costs in effecting the sale as set out below which must be brought into account. For present purposes, it does not matter conceptually whether they are analysed as part of the net value of the assets on realisation or as contingent liabilities.

(1) The costs of an estate agent which were likely to be 8% to 10% plus VAT (of 15%). I consider that 8% plus VAT is a reasonable estimate;

(2) The fee payable to Mrs Heyes of 1.3%;

(3) Legal fees which were budgeted (based on an earlier budget from May 2008) to be €28,175 + VAT.

118. As is explained in the Company's financial statements, the main liabilities of the Company were the "*payables to related parties*". The table below shows these liabilities based on the financial statements for the year ended 31 December 2009 and 31 December 2010. For the figures for the 9 March 2010, these are taken from the shareholder funds document.

Creditor	**31/12/2009**	**09/03/2010**	**31/12/2010**
Peter Dunn	€2,603,485	€2,728,043	€3,252,944
Kostas Kazolides	€282,019	€282,019	€282,019
Christopher Stylianou	€244,271	€244,271	€244,271
TOTAL	**€3,129,775**	**€3,254,333**	**€3,779,234**

119. As explained above, I consider that the best realisation for the Company would have involved selling the villas completed rather than selling them in an unfinished state. In those circumstances, in March 2010, I consider that it would have been reasonable to assume that it would take another six months to complete the villas and to sell them. Accordingly, in assessing the Company's liabilities as at the beginning of March 2010, it is necessary to include:

(1) The likely costs of completing the villas. These were budgeted to be €105,000. By June 2010 the budgeted figure had increased to €174,000;

(2) The costs of maintaining and insuring the villas which was likely around €4,000 per month or €24,000 over six months.

(3) The financing costs for the Company until the point at which the sale of the villas would complete which at its earliest would have been, around six months, when construction of the villas was finished. Interest was running on Mr Dunn's loan at 8% compounded which amounted to over €50,000 per quarter or €100,000 for six months.

G.3.3. The solvency of the Company in early March 2010

120. Taking the assets and liabilities of the Company into account, I consider that the Company was insolvent to a significant extent by the first week of March 2010 (prior to 10 March 2010).

121. In the table below, I set out the Company's solvency position based on (a) my assessment of the likely value of the villas of €3,035,000 (b) the advertised sale price of the villas at the time of €3,335,000 and (c) Dr Mountis' view of the value of the villas at the time of €3,580,000. I note that the figures that I have included for the remaining works are conservative and may well have been expected to be higher. I also note that the exact interest costs on Mr Dunn's loan would have been a little higher but the precise calculation requires assumptions to be made of when additional funds would have been disbursed and that level of detail is not necessary for the presentation below.

	My assessment	**The advertised sale price**	**Dr Mountis' view**
ASSETS			
Property Value	€3,035,000	€3,335,000	€3,580,000
Estate agent's commission at 8% + VAT	€279,220	€306,820	€329,360
Mrs Heyes' commission at 1.3%	€39,455	€43,355	€46,540
Legal fees	€32,401	€32,401	€32,401
TOTAL ASSETS (after sale costs)	€2,683,924	€2,952,424	€3,171,699
LIABILITIES			
Remaining budgeted building works	€105,000	€105,000	€105,000
Insurance and maintenance	€24,000	€24,000	€24,000
Interest costs on Mr Dunn's loan	€100,000	€100,000	€100,000
Mr Dunn's loan	€2,728,043	€2,728,043	€2,728,043
Mr Kazolides' loan	€282,019	€282,019	€282,019
Mr Stylianou's loan	€244,271	€244,271	€244,271

TOTAL LIABILITIES	€3,483,333	€3,483,333	€3,483,333
SHORTFALL	**(€799,409)**	**(€530,909)**	**(€311,634)**

122. As is apparent from the table, on my assessment, as at the first week of March 2010 (prior to 10 March 2010), the Company was insolvent to a significant degree, to the tune of nearly €800,000. Even on Dr Mountis' valuation, the Company was insolvent to a significant extent. It is not necessary for present purposes to establish precisely when the Company became insolvent but given the state of the property market and the views of market commentators, I consider that this was not a new state of affairs in early March 2010 and, as I explain below, the Company had been insolvent for, at least, several months.

123. Even using Dr Mountis' valuation of the villas as at 31 December 2009 of €3,172,000 (which I consider was overly optimistic), I note that the Company was insolvent at that point too. The net proceeds of sale would have been €2,806,539 taking into account estate agency commission of 8% plus VAT, Mrs Heyes' commission and the legal costs. These were exceeded by the levels of the loans owed to Mr Dunn, Mr Kazolides and Mr Stylianou of €3,129,575 as stated in the accounts. Adding in the costs of funding Mr Dunn's loan to completion, the remaining building costs and maintaining the villas until sale would have increased the shortfall by at least another €300,000.

124. Given the extent of the shortfall, I consider that the Company had likely been insolvent since at least autumn 2009. For example, looking at 30 September 2009 and using Dr Mountis' valuation of the villas for the end of the year of €3,172,000 (which I consider was overly optimistic), the net proceeds of sale would have been €2,806,539, taking into account estate agency commission of 8% plus VAT, Mrs Heyes' commission and the legal costs. The outstanding debts at that date to Mr Dunn, Mr Kazolides and Mr Stylianou was €2,705,402. In addition, the project was likely at least 9 months from completion requiring €150,000 of further interest on the PD Loan, €36,000 of insurance and maintenance costs and over €400,000 of further build costs (and likely more). The total costs were therefore at least €3,291,402 giving rise to a shortfall of at least €480,000.

125. Although I do not consider it legally relevant, for completeness (given that the parties filed extensive evidence on valuation right up to 2019), I do not consider that the Company returned to solvency after early March 2010. This is unsurprising because by that stage, Mr Dunn's loan which represented by far the largest component of the Company's liabilities was growing at 8% per annum compounded on a quarterly basis. For much of that period, the Cyprus property market was falling and even though market conditions have since improved, prices have not recovered to a level where Mr Dunn's loan could be discharged in full. That is self-evident from the existence of the sums claimed in the present proceedings where, in essence, Mr Dunn claims under the guarantee the significant shortfall between the Company's assets and its liabilities.

126. I also record that I do not consider Mr Timinis' views on the solvency of the Company to be illuminating for the assessment that the Court has to carry out.

I note that Mr Timinis wrote to Mr Dunn on 28 June 2021 to say that the first year that he had any concern about the solvency of the Company was in relation to the Financial Statements which ended on 31 December 2011. The Court does not have the detail of the prior communications which prompted this letter and Mr Timinis does not address the issue in his witness statement. I do not consider that this letter, written a decade after the relevant financial period, is revealing as to the point at which the Company in fact became insolvent. Further, although an accountant may identify concerns during the process of preparing accounts that a company might be insolvent, the fact that such concerns are not raised does not necessarily mean that the company itself is solvent. Any conclusions that can be drawn from the work of the accountant will in turn depend on the process carried out by the accountant and the material shown to him.

127. In this case, as noted above, the solvency of the Company depended substantially on the prices that it was likely to realise on the sale of the villas. The accounts recorded the value of the villas at cost (rather than resale value). In the circumstances, there was no reason for Mr Timinis to satisfy himself on the resale value of the villas during the course of his work.

128. I also note that:

(1) on other financial matters, clearly relevant information was not provided to Mr Timinis on a timely basis. Thus Mr Timinis was not told of Mr Dunn's demand for repayment of his loan from the Company or the subsequent judgment at the time that they occurred. He learnt of the judgment a few years later.

(2) Mr Timinis ultimately did not object to the inclusion of VAT reclaims as receivables in Astriver's accounts even though those claims had no real prospects of success.

129. In the circumstances, I consider that the Company was insolvent for the purposes of clause 5(c) of the JVA from at least 30 September 2009 and that the PD Loan fell due for automatic repayment at that point. The Company was in no position to repay the loan at that point and was in default from then onwards.

G.3.4. Cashflow insolvency

130. The Defendant also contends that the Company was insolvent on a cashflow basis by March 2010 because the cashflow insolvency test includes examining debts which fall due in the "*reasonably near future*". The Defendant argues that the villas were meant to be sold as soon as reasonably practicable and the "*reasonably near future*" encompassed a time when the villas would be sold. Mr Dunn's loan would need to be repaid once the villas were sold and the Company would have been unable to repay the loan in full.

131. As regards the legal principles, I rely on Lewison LJ's judgment in *Bucci v Carmen (Liquidator of Casa Estates (UK) Ltd)* [2014] BCC 269 [27] to [28] which in turn sought to summarise the Supreme Court's decision in *Eurosail*. I note the passages which state "*The cash-flow test looks to the future as well as to the present*", "*The future in question is the reasonably near future; and what*

is the reasonably near future will depend on all the circumstances, especially the nature of the company's business", "*The test is flexible and fact-sensitive*", "*The test of cashflow insolvency and balance sheet insolvency stand side by side*" and "*The express reference to assets and liabilities [in the balance sheet test] is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test*".

132. This argument by the Defendant is effectively a repackaging of the balance sheet insolvency argument. I do not consider it illuminating to consider the issue through the lens of cashflow insolvency. My conclusions are as follows:

(1) Absent the occurrence of an event listed in clause 5(c) which would have made the loan automatically repayable, Mr Dunn's loan was only repayable as soon as the Company acting reasonably was able to do so.

(2) As noted below, by late 2009, there was an understanding between Mr Dunn and the Company that the villas would be sold at a date and time of his choosing and that the PD Loan would be deferred until then.

(3) In the circumstances, I do not consider that the Company was likely cashflow insolvent by reference to the reasonably near future.

H. The Guarantee Discharge Issues

H.1. Legal Principles

133. There is a significant body of authority on the circumstances where a guarantee is discharged as is evident from a survey of the leading works. The Defendant contends that there are three legal principles which apply:

(1) discharge by alteration to contractual obligations of the debtor / interference with the rights of the surety, per *Holme v Brunskill* (1878) 3 QBD 495;

(2) discharge by giving time to the principal debtor, again per *Holme v Brunskill;*

(3) discharge by the creditor's breach and discharge by injuring the surety, per Andrews & Millett Law of Guarantees, para 9-036.

134. I address these principles below.

H.1.1. Variation of the contract between creditor and debtor

135. In *Holme v Brunskill*, Cotton LJ summarised the general principle as follows:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented

> to the alteration, although in cases where it is without inquiry evident that the alteration is insubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, and will hold that in such as case the surety himself must be the sole judge whether or not he will consent to remaining liable notwithstanding the alteration, and that if he has not so consented, he will be discharged.

136. The rule in *Holme v Brunskill* forms part of the law of guarantees. In summary, unless excluded by the contract of guarantee, a guarantor is discharged where:

(1) There has been a variation to the contract between the creditor and the debtor (*Chitty on Contracts*, 35th Edition, para 48-112);

(2) It is not, without enquiry, evident that (a) the variation is insubstantial and (b) the variation cannot be otherwise than beneficial to the guarantor;

(3) The guarantor did not consent to the variation.

H.1.2. Agreement between creditor and debtor to give debtor additional time to pay

137. As regards the specific circumstance of time to pay, unless excluded by the contract of guarantee, the guarantor is discharged where:

(1) there is a binding agreement between the creditor and the debtor to give the debtor time to pay (*Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2004] EWHC 472 (Comm) at [168]);

(2) the guarantor has not consented.

138. The policy behind this rule is that it deprives the guarantor of the right to use the name of the creditor to sue the principal. A short extension, which does not injure the guarantor in any financial terms and may in fact benefit him, still results in discharge.

H.1.3. Breach by the creditor

139. Under this ground, a guarantor may be discharged where "*the creditor omits to do something which he is bound to do for the protection of the surety*" (Andrews & Millett, para 9-036). In the same passage, it states that: "*There is no duty of active diligence placed on the creditor: it is the surety's obligation to see that the principal performs the guaranteed obligation"* and *"a failure by the creditor to take some step that he is bound to take, either because of some provision in*

the guarantee, or because such a step is a condition precedent to the surety's liability, will discharge the surety".

H.2. Grounds for Discharge

140. The Defendant contends that the guarantee was discharged on four principal bases. He alleges discharge as a result of:

(1) A material change in the JVA by reason of the execution of the SJVA;

(2) Mr Dunn giving an extension of time for payment by the Company;

(3) Breaches of or a departure from the terms of the JVA in relation to the timing of the sale of the villas and other matters relating to the joint venture;

(4) An oral agreement Mr Dunn and Mr Kazolides.

141. For the reasons explained below, I consider that the allegations of discharge based on an extension of time are closely tied to the question of discharge due to a variation in the timing for the sale of the villas. Accordingly I consider these points together below under Discharge Ground 2. I consider other complaints about departure from the JVA under Discharge Ground 3.

H.2.1. Discharge Ground 1: Material change in the JVA due to the execution of the SJVA

142. The Defendant alleges that insofar as there was a guarantee in the JVA, it was discharged by the agreement in the SJVA to increase the amount of Mr Dunn's loan. The Defendant complains that the SJVA does not mention the guarantee or that it is extended to cover this additional obligation.

143. I do not agree with the Defendant's argument that the guarantee was discharged on this basis for the following reasons:

(1) The SJVA was signed by Mr Kazolides' authorised attorney and he is bound by its terms.

(2) The terms of the SJVA operated to vary the terms of Mr Dunn's loan to the Company as contained in the JVA. Mr Kazolides consented to that variation.

(3) Both parties accept that the guarantee obligation was a "*see to it*" guarantee; the guarantors had guaranteed that the Company would "*perform all of its obligations*" contained in the JVA.

(4) If the Company's obligations were altered by agreement of all parties, as I find that they were, then the guarantee remains in place. Under the rule in *Holme v Brunskill*, the discharge of the guarantee only arises when the guarantor does not consent.

H.2.2. Discharge Ground 2: Mr Dunn giving an extension of time for payment by the Company

144. The Defendant contends that the guarantee was discharged on the basis that Mr Dunn's loan had become repayable on the insolvency of the Company and additional time was given to pay by Mr Dunn.[2] The Defendant relies in particular on the following factual matters:

(1) By May 2012, Mr Dunn had commenced proceedings against the Company in the High Court, Queen's Bench Division (Claim No: HQ12XO1936) for recovery of his loan. In those proceedings, he had made an application for permission to serve the claim out of the jurisdiction supported by a witness statement of his solicitor, Mr Martin of Brook Martin. In that statement, Mr Martin had said: "*What has happened in this case is that the development costs have increased and have all been borne by the Claimant. He now believes that the value of the completed development is less than is owed to him… if, as he believes, the potential sale price is less than the amount owed to him, there will be a shortfall and the Company is insolvent under English law*".

(2) On 2 November 2012, Mr Dunn wrote a letter to Mr Timinis (the "**Letter of Comfort**") which said: "*I hereby confirm that the loan advances I made to the company from year 2007 onwards plus accrued interest, totalling the sum of €3,640,964 … will not be demanded by myself for repayment within the next twelve months*".

145. The Defendant alleges that:

(1) the Letter of Comfort was a formal and binding commitment to postpone the repayment obligation of the Company which was done with the intention that the Company would avoid cashflow insolvency. The Defendant also relies on Mr Timinis's evidence that: "*I accepted Peter's assurances that he would continue to provide funding until the houses were sold, and that he would not seek to recover his debt from Astriver by any other method*" and refers to the Claimant's apparent acceptance in inter-partes correspondence that Mr Dunn's position that he would not call in the loan had the effect of "*postponing the trigger to insolvency*".

(2) If consideration is required for the postponement of the obligation to repay the PD Loan, it was provided by the Company continuing to trade and that absent the letter it would have gone into insolvent liquidation.

[2] This ground of defence was added by an application to amend dated 14 April 2025 which was heard at the start of trial. I heard submissions on whether this amendment should be permitted at that very late juncture. The Defendant argued that the amendment would not change the scope of the factual enquiry at trial and that the time spent on legal argument would be limited. The Claimant opposed the amendment but did not identify any relevant grounds of prejudice to the Claimant as a result of the late amendment and accepted that permitting the amendment would not require trial to be adjourned. I allowed the amendment as recorded in my order of 1 May 2025.

146. The Defendant also raises, as a separate ground of discharge (but one in my view which is closely connected to the Letter of Comfort ground), that the terms of the JVA regarding the timing of the sale of the villas were varied as follows:

(1) clause 14(1) of the JVA provided that "*As soon as is practicable after the commencement of the Development the Company hereto shall use all reasonable efforts to dispose of the Property*".

(2) Clause 5(e) of the JVA provides that "*the PD Loan shall be repaid as soon as the Company (acting reasonably) is able to do so*". The Defendant alleges that it is implicit in this provision (for reasons of obviousness/ business efficacy) that even if Mr Dunn's loan could not be repaid in full as much as possible should be repaid as soon as the Company acting reasonably could do so.

(3) The first villa was not sold until 2018 with the remainder being sold to Black Flamingo in 2019. The Defendant alleges the failure to sell the villas for 9 years after completion was a variation (or fundamental breach) of the key terms of the JVA which therefore has the effect of discharging any guaranteed liability on the part of Mr Kazolides.

147. Although they are raised as separate grounds of discharge, I consider that the grounds of discharge based on the timing for the sale of the villas and the timing of the repayment of the PD Loan, identified in paragraphs 144 to 146, are closely connected and ought to be considered together.

148. I have considered in section G.3. above the question of when the PD Loan became due for repayment under clause 5(c) of the JVA. I now consider below the provisions of the JVA concerning the timing of the sale of the villas (clauses 14(1) and 5(e)). I then consider whether the JVA was varied on the timing of the repayment of the PD Loan and / or the timing of the sale of the villas.

The terms of the JVA concerning the timing for the sale of the villas

149. As noted above, clause 14(1) of the JVA provided that "*As soon as is practicable after the commencement of the Development the Company hereto shall use all reasonable efforts to dispose of the Property*".

150. I note the following points in relation to this clause:

(1) The focus of clause 14(1) is on the disposal of the Property, rather than price. Indeed price is not expressly mentioned. Under clause 3(c) the directors were required to act in the best interests of the Company and on sound commercial profit making principles. On that basis, I consider that directors were required to achieve a reasonable price on a disposal. Nonetheless, the key obligation under the JVA was disposal rather than price. This is logical given the interest rate payable on the PD Loan. Subject to a grace period, the PD Loan carried interest at the rate of 8% per annum until repayment in full, with interest to be compounded quarterly in arrears. I do not consider that the directors were entitled to adopt a wait and see approach to the market in the hope that market

prices would materially improve over time. Indeed, there was an urgent commercial need to sell the villas; hence the requirement under clause 14(1).

(2) As the Defendant highlighted in his submissions, clause 14(1) imposed an obligation on the Company from the date of "*commencement of the Development*", not the completion. It is logical that a commercial property developer might want to proceed in that way. As Dr Mountis noted in his evidence "*no property developer or property expert sells the property when they are completed; they sell them almost before they start*".

151. Clause 5(e) of the JVA provided that "*... the PD Loan shall be repaid as soon as the Company (acting reasonably) is able to so to do*".

152. I consider that the requirement that "*the PD Loan shall be repaid as soon as the Company (acting reasonably) is able to so to do"* imposed on the Company an obligation to repay the PD Loan or part thereof as soon as it was able to do so. I note that the words "*in full*" are not used in this part of the sentence (in contradistinction to the first part of clause 5(e) considered in section E.2. above) and I consider that the clause imposed an obligation on the Company to repay what it could.

153. Thus, for example, if after completion of the development (i.e. at a point when contractors had been paid and future expenditure ought to be minimal), the Company had sold one of the seven villas, the Company would have been obliged under clause 5(e) to use the net proceeds of sale to make a distribution under clause 5(e).

154. For the avoidance of doubt, I do not consider that clause 5(e) would have permitted the Company to delay the sale of the villas until the point that it was able to repay the PD Loan in full. That is not what clause 5(e) says. Such a course would have been inconsistent with clause 14(1) which requires the Company to sell the villas as soon as is practicable after commencement. It would also have likely led to problems in that the high compound interest rate on the PD Loan meant that, if there was an anticipated to be a shortfall in repaying the PD Loan after the villas were sold, that shortfall would likely grow over time. In the circumstances, it is unsurprising that the scheme of the JVA prioritises a sale.

Whether the JVA was varied

155. Drawing together the points from the JVA:

(1) Under clause 14(1) of the JVA, the Company was required to sell the villas as soon as is practicable after commencement of the Development. The main contractor Oikosytheseis started work in around September 2006 and so there was a requirement to sell from that point onwards.

(2) Clause 14 did not dictate a sale price. If the market was depressed, it was not permissible to wait to see how the market behaved.

(3) By at the latest 30 September 2009, under clause 5(c) of the JVA, the Company was insolvent and the PD Loan had become automatically repayable. The Company was in default of its repayment obligations.

(4) Under clause 3(c), the directors had to act in the best interests of the Company and "*on sound commercial profit making principles*". Where the Company was insolvent, this actually meant minimising the Company's loss. This was a further reason to sell the villas forthwith.

156. Mr Dunn and the Company did not comply with these provisions of the JVA. I find, as explained below, that at some point in late 2009, after the PD Loan had fallen due for repayment and the Company was already in default, Mr Dunn and the Company reached an understanding that the villas would not be sold as soon as practicable but instead at a time and price of Mr Dunn's choosing. Mr Dunn would fund the Company until that point and would not require repayment of the PD Loan prior to that.

157. I note that at this stage, the other directors were content to accede to Mr Dunn's view in reaching decisions for the Company. In the circumstances, it was Mr Dunn who dictated the decision-making at the Company.

(1) From his appointment as director of the Company in March 2009, Mr Dunn was effectively in control of the Company. Mr Stylianou was no longer a director. At that point, the other directors were Mr Michael and Ms Abou Shaaban. They do not have appear to have had any detailed involvement in the running of the Company.

(2) Mr Michael and Ms Shaaban resigned as directors in 2010 and were replaced by Mr Heyes in November 2010. Mr Heyes was involved in the day to day running of the Company and did express views, from time to time, to Mr Dunn about the advertised price of the villas being too high. Nonetheless, he was ultimately content to accept Mr Dunn's view as to the approach which the Company would take.

(3) By late 2009, Mr Michael and Ms Shaaban were content for Mr Dunn to make the decisions for the Company on what remaining works needed to be completed on the villas, the price at which the villas would be advertised for sale and ultimately the pricing and timing of any sale. After he was appointed as a director, Mr Heyes was also content for Mr Dunn to make decisions on such matters.

158. I consider that there was an understanding between Mr Dunn and the Company that the villas would not be sold as soon as practicable but instead at a time and at a price of Mr Dunn's choosing based on the following matters:

(1) On 22 October 2009, after the PD Loan had become automatically repayable, Mr Dunn emailed Mr Stylianou copied to Mr Kazolides "*I have made my mind up on only one thing, and that's easy, - I will not lose any money on this project. All other options are open …*". I consider that this email was likely sent by Mr Dunn in the realisation that the

Company was already insolvent and absent a recovery in the market, he would lose money on the project.

(2) By this point, Mr Dunn had decided, as he accepted in evidence, that he was not prepared to take a loss on the PD Loan and would veto a transaction which would result in a loss.

(3) The villas were on the market at a combined price of €3,270,000. I consider that this price was too high given the relative lack of interest from buyers and the obvious weakness in the market following the financial crisis. The appropriate step, consistent with the obligation in clause 14(1), was for the Company to lower its prices in order to facilitate a sale as soon as practicable.

(4) Nonetheless, in December 2009, the Company put the prices of the villas up to €3,335,000. That price was much too high. In this regard, I note Mr Dunn's evidence that, in March 2010, he would have been delighted with a sale of the villas at €2,500,000. As noted in paragraph 115(4), I consider that this evidence was an after-the-event rationalisation because at the time, Mr Dunn was looking to achieve a sale at a much higher price, even though the market would not sustain it.

(5) Given the state of the Company's liabilities, by at the latest March 2010, I consider that a sale at €3,335,000 would have involved the Company sustaining some loss although obviously a smaller loss than would have been sustained if the Company had sold the villas at market prices. I consider that from this point onwards, the Company set its prices by reference to the prices that Mr Dunn wanted to achieve rather than the market price. Over time, the Company did start lowering prices but I consider that its pricing, at Mr Dunn's instigation, remained unrealistically high.

(6) As noted elsewhere the Company did not effect its first sale until 2018 and even then only sold one villa. I consider that this failure to sell the villas was due to the approach on pricing which in turn affected its ability to market the villas successfully.

(7) Mr Dunn's own expert said that the volume of sales only reduced from 2010 or after 2010 and was clear that the villas could have been sold in 2009 / 2010.

(8) Mr Dunn seeks to explain away the failure to sell the villas prior to 2018 as due to difficulties in obtaining the title deeds for the villas in Cyprus. I do not consider that this was the real reason for the delay which was down to the price. The difficulties in obtaining title deeds for many properties was a long standing issue in Cyprus. However, it did not prevent sales being made (albeit that a purchaser might want additional comfort before executing a sale where the title deeds were not available and the lack of title deeds might themselves impact price). Ultimately, I do not consider that the issue had a material adverse impact on buyer interest until much later, likely around 2014. At that point, the issue was,

as noted in a Daily Express article dated 12 May 2014, that developers were failing with outstanding debt secured on their properties and buyers were unaware of that debt when purchasing their properties due to the lack of title deeds.

159. On the deferral of the obligation to repay the PD Loan, I set out my findings below. I consider that by the time of his October 2009 email, Mr Dunn knew that the Company was insolvent and that the PD Loan had fallen due for payment:

(1) The PD Loan had already fallen due for payment by at the latest, 30 September 2009, on the basis that the Company was insolvent under clause 5(c).

(2) Mr Dunn will likely have appreciated that the Company was insolvent by this stage. His own assessment in May 2009 of the likely build costs to completion was already €2.8 million. Including interest, he recognised that the figure might be €3.3 million and there were further costs for commissions and legal costs to add on top which Mr Heyes had previously estimated, the previous year, to be in excess of €250,000. That meant a combined cost of €3,550,000. The asking prices for the villas were at €3,270,000 from November 2008 and later €3,335,000 from December 2009. On that basis, the sale price of the villas would be insufficient to discharge fully the Company's costs. Mr Dunn likely had a good understanding of the state of the market in late 2009 because he had access to estate agents and the advice of Mrs Heyes (a professional realtor), Mr Heyes and also Mr Honey.

(3) Mr Dunn's career had been in insolvency and corporate recovery and he had worked as an insolvency practitioner. In the circumstances, these considerations would have been at the forefront of his mind. In particular, I consider that the reason that Mr Dunn was talking about his unwillingness to suffer a loss in his October 2009 email was because he was aware that is precisely what would have happened if the villas had been sold at that point.

(4) I also note that, in May 2012, Mr Martin had stated in the proceedings brought by Mr Dunn in the High Court that the Company was insolvent.

160. I find that Mr Dunn and the Company were content to defer the repayment of the PD Loan:

(1) Mr Dunn continued to bankroll the Company, meeting all expenses through to completion of the villas and beyond. The expenses were not limited to items which were strictly necessary to complete the project. They included various upgrades to the villas, such as the installation of barbeque areas, pool shower areas and an additional pool, which were all intended to enhance the sale price received. All of these activities were inconsistent with Mr Dunn demanding immediate repayment and in fact reflected Mr Dunn's agreement that the repayment would be

deferred until the villas could be sold at a time and price of Mr Dunn's choosing.

(2) I note that, consistent with the above understanding, notwithstanding the downward pressure on market prices, the prices were increased (overall by €65,000) in December 2009; that reflected a desire on Mr Dunn's part to minimise his losses rather than to prioritise the sales.

(3) In early November 2012, the Letter of Comfort was issued which confirmed formally that Mr Dunn would not demand the repayment of the PD Loan for 12 months. By the time of the Letter of Comfort, Mr Dunn had already issued proceedings against the Company and he had applied for default judgment. The determination of the application was imminent, and was subsequently granted on 22 November 2012.

(4) Mr Timinis explained that he requested the Letter of Comfort "*in order that I could complete the accounts on a going concern basis*" (emphasis added); the implication from Mr Timinis being that the accounts would not have been prepared on the basis absent Mr Dunn adopting the position set out in the Letter of Comfort.

(5) The Letter of Comfort must have been intended to defer the repayment obligation faced by the Company both before and after the default judgment (which had been applied for but not received at the time of the Letter of Comfort). If the Letter of Comfort had no legal effect at all then it would have had no bearing on whether the accounts could be completed on a going concern basis, as Mr Timinis confirmed that it did.

(6) Although no other letters of comfort have been located by the Claimant, I consider that it is likely that there would have been other letters. The logic of Mr Timinis's request for the letter of comfort is that once the issue was identified by him, the point would arise for each subsequent accounting year. The evidence indicates that the point was first raised as part of the preparation for the 2011 accounts and it is reasonable to assume that such letters were requested for those subsequent financial years. I note that Mr Dunn's witness statement refers to "*letters of comfort*" in the plural, saying "*As the only creditor of [the Company] I told the auditor that I had no intention of enforcing my debt against [the Company] prior to completing the sales of the properties, and I signed appropriate letters of comfort when asked to do so*". This is also consistent with my view that there were other letters of comfort.

(7) As to the position for prior financial years, it is unclear whether there were any letters of comfort. However, in my view, the contents of the Letter of Comfort confirmed what was already the understanding between Mr Dunn and the Company reached after the October 2009 email, namely that he would not be requiring repayment of the PD Loan for the foreseeable future.

(8) This understanding was, as Mr Timinis noted, a factor which was relevant to the going concern assumption. I note that, notwithstanding

the clear insolvency of the Company, the directors had been content to record that in their management representation letter dated 22 March 2010 for the financial year ending 31 December 2009, and 16 December 2011 for the financial year ending 31 December 2010 that "*We confirm that we have reviewed the going concern considerations and are satisfied that it is appropriate for the financial statements to have been drawn up on the going concern basis. In reaching this opinion, we have taken into account all relevant matters of which we are aware and have considered a future period of at least one year from the date the financial statements are to be approved*".

(9) In the circumstances, I consider that there was an understanding between Mr Dunn and the Company that Mr Dunn would fund the Company until a sale at a price and time of his choosing and he would not require repayment of the PD Loan (or any judgment based on it) prior to that.

(10) I note that, during the relevant period, Mr Dunn was wearing two hats, *qua creditor*, and also *qua director* for the Company. However, I consider that it is appropriate to conclude that there was such an understanding between the Company (as a whole) and the creditor, rather than a simple disregard by Mr Dunn for the Company's interests. The other directors were content to take Mr Dunn's continued funding, let Mr Dunn have day to day conduct of the Company and to make the decisions on marketing (including setting the price of the villas), completing the build and the timing of any sale. I consider that was the case both for the period when the directors were Mr Michael and Ms Abou Shaaban and later when Mr Heyes was appointed.

161. The understanding between Mr Dunn and the Company was a departure from the terms of the JVA. I consider that it was a binding variation with both sides providing consideration.

(1) Mr Dunn benefitted from such a variation because it offered the chance of a market recovery which would increase the return to him and in the interim, he was earning a strong rate of interest on the PD Loan. In return, the Company continued to operate as a going concern rather than ceasing operations and crystallising the loss. Mr Dunn accepted that he had received a benefit in his oral evidence:

> Q. So, there was a benefit passing to you in exchange for writing this letter: the company could continue in existence without insolvency -- without a liquidation?
>
> A. My Lord, yes, that is correct.

(2) As regards the Company, it also benefitted from not having to crystallise its losses by selling the villas at that point. It also had the prospect of a market recovery and was able to continue trading as a going concern. The Company also had the benefit that there was, at least for the period up to the default judgment on 22 November 2022, a forbearance on Mr Dunn's part to advance his claim.

162. Mr Kazolides did not consent to these variations of the JVA.

163. In the circumstances, I consider that the JVA was varied in a number of material respects; in particular, there was a variation of the obligation to sell the villas as soon as practicable and an extension of time for repayment of the PD Loan, which had already fallen due. These variations and the extension were not approved by Mr Kazolides and operate, pursuant to the legal principles set out in Section H1 above to discharge his guarantee.

H.2.3. Discharge Ground 3: Breaches of or a departure from the terms of the JVA in relation to the timing of the sale of the villas and other matters relating to the joint venture;

164. The Defendant contends that the guarantee is also discharged on the grounds that there has been a "*not unsubstantial*" breach by a creditor of a term of the principal contract which has been itself "*embodied*" into the guarantee (relying on Millett & Andrews §6-029).

165. These points do not arise for consideration in light of my findings that (a) the Claimant's claims are statute barred and (b) the guarantee was discharged pursuant to Discharge Ground 2, as set out in Section H.2.2 above.

166. However, for completeness, I reach the following conclusions on this part of the case. In summary, the Defendant alleges the following breaches of the JVA:

(1) Clause 9 –the parties failed to act in utmost good faith towards one another in all aspects and in particular in connection with leases and sales of the villas.

(2) Clauses 1, 3, 8, 11, 12 and 14 – the joint venture ceased to be joint. The Defendant alleges that (a) Mr Dunn ran the venture for himself without regard for Mr Kazolides or Mr Stylianou; (b) Mr Dunn insisted that Mr Stylianou resign as a director and banned him from entering the property; and (c) Mr Dunn insisted on taking all or nearly all relevant decisions himself.

(3) Clause 3(a)(ii) – the decision to replace the Company secretary in 2011.

(4) Clause 3(c) – Mr Dunn's failure to act in the best interests of the Company and on sound commercial profit-making principles.

(5) Clause 15(1) – failure to keep full accounts sufficient to calculate the Net Profit or Net Loss.

(6) Clause 6(d) and 15(2) – failure to prepare completion accounts forthwith after the sale of all of the villas.

(7) Clause 8 – failure to keep Mr Kazolides informed of all aspects concerning the villas.

(8) Clause 5(a)(iii) – causing the Company to accept loans in amounts which were not reasonable and which it did not reasonably require to complete the development.

(9) Clause 14(2) - failure to obtain approval from Mr Kazolides in respect of any sales that took place or any leases.

167. Putting aside the arguments over breach which were fact sensitive, I do not consider that the Defendant has established that these were the duties of the creditor in its principal contract with the Company. Further, I do not see that these were terms which were then embodied into the guarantee as an obligation of the creditor. In the circumstances, I do not consider that any of these matters could give rise to a discharge.

H.2.4. Discharge Ground 4: An oral agreement between Mr Dunn and Mr Kazolides

168. In Mr Kazolides' evidence, he suggested that there had been an oral "*gentlemen's agreement*" between him and Mr Dunn around summer 2009 that Mr Kazolides was "*out of the JVA*". As was demonstrated during the course of Mr Kazolides' cross-examination, the alleged gentlemen's agreement could not have been reached in Summer 2009 and was inconsistent with the subsequent communications between the parties. I find that no such gentlemen's agreement was reached and I note that the Defendant accepted in his Closing Submissions that no binding agreement was reached. Accordingly this matter cannot lead to discharge of the guarantee.

H.2.5. Other matters

169. I note that Mr Dunn's lawyers, Brook Martin, sent a letter to Mr Kazolides and Mr Stylianou on 30 November 2010 giving one month's notice of termination of the JVA (as amended by the SJVA). This was defined in the letter as a "*Termination Notice*", a term which has particular contractual consequences under the JVA. I note that neither party contended that this letter had any contractual effect under the JVA and it was not relied on by Mr Kazolides as a ground of defence. The effect of the letter raised questions of fact (including whether the notice was withdrawn or agreed by the parties not to have effect) and questions of law and if Mr Kazolides wanted to pursue such a point, he would have had to plead it, which he had not.

170. Some time was spent at trial considering the sale of 6 villas to Black Flamingo in 2019 and whether this was a breach of the JVA. I agree that the transactions with Black Flamingo were highly unorthodox and were not arms-length transactions. The Defendant characterised them as shams and I agree that there is a serious question about whether they were legally enforceable. Nonetheless, I do not consider that they ultimately have a bearing on this dispute in light of my finding that the claims are statute barred and that the guarantee had also long since been discharged.

I. Conclusion

171. Notwithstanding that it was common ground between the parties that the project of developing the villas was a joint venture, between Mr Dunn on the one hand and Mr Kazolides and Mr Stylianou on the other hand, which involved profit and loss sharing, both parties argued for starkly different outcomes.

172. On the Claimant's case, he contended that, notwithstanding the failure of the project, the entire loss for the project should fall on Mr Kazolides with Mr Dunn receiving a full return with 8% interest compounded from 2008. That, in my view, was an unrealistic case in light of the terms of the JVA and the context in which it arose.

173. On the Defendant's side, he claimed that no guarantee had been agreed and that Mr Dunn was to bear the bulk of the economic risk of the project. Again, I found that to be an unrealistic case.

174. As explained in further detail above, I have concluded:

(1) Mr Kazolides did give a guarantee as set out in clause 18 of the JVA;

(2) By at the latest 30 September 2009, the Company was insolvent and the PD Loan had fallen due for repayment. The Company was unable to repay the loan and was in default. Accordingly the cause of action under the guarantee had accrued by this point.

(3) Irrespective of the question of whether the limitation period for the JVA was 6 or 12 years, the guarantee claim was brought out of time and is statute barred.

(4) At some point after October 2009, Mr Dunn and the Company reached an understanding that the villas would not be sold as soon as practicable but instead at a time and price of Mr Dunn's choosing. Mr Dunn would fund the Company until that point and would not require repayment of the PD Loan prior to that.

(5) The understanding was binding on the Company and Mr Dunn and had the effect of discharging Mr Kazolides' guarantee.

175. In the circumstances, the claim must fail.