Case No: HC-2016-000674

Neutral Citation Number: [2016] EWHC 2068 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings,
Fetter Lane,
London, EC4A 1NL

Date: 19/07/2016

Before:

HIS HONOUR JUDGE HODGE Q.C.
(Sitting as a Judge of the High Court)

- -

Between:

	THE CO-OPERATIVE BANK PLC	**Claimant**
	- and -	
	(1) HAYES FREEHOLD LIMITED (IN LIQUIDATION) **(2) DEUTSCHE BANK AG** **(3) SENTRUM (HAYES) LIMITED** **(4) SENTRUM HOLDINGS LIMITED**	**Defendants**

- -

Digital Transcription of Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 5-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

- -

MR. JONATHAN GAUNT Q.C. and MR. MARK SEFTON (instructed by **Forsters LLP**) for Deutsche Bank AG

MR. STEPHEN ROBINS (instructed by **White & Case LLP**) for Sentrum Holdings Limited.

- -

Judgment**HIS HONOUR JUDGE HODGE QC:**

1. This is my extemporary judgment on two applications in the course of pending litigation between Deutsche Bank AG (to which I shall refer as "Deutsche Bank") and Sentrum (Hayes) Limited (to which I shall refer as "Sentrum") and Sentrum Holdings Limited (to which I shall refer as "Holdings"), claim number HC-2016-000674.

2. Deutsche Bank is represented by Mr. Jonathan Gaunt QC, leading Mr. Mark Sefton (of counsel), and instructed by Forsters LLP. Sentrum is taking no part in this litigation. I am told by Mr. Gaunt this morning that a Liquidator may be appointed to Sentrum within the next seven days. Holdings is represented by Mr. Stephen Robins (also of counsel), instructed by White & Case LLP. Since 4th July 2012, Holdings has been in entirely separate ownership from Sentrum. They were associated companies prior to 4th July 2012.

3. By a claim form issued on 26th February 2016 by The Co-Operative Bank plc (to which I shall refer as "the Co-Operative"), the Co-Operative sought relief in relation to the validity and the effect of a purported Deed of Surrender of some commercial premises known as the Digiplex Megaplex Centre at Brookfields, Beaconsfield Road, Hayes, which had been entered into between the four defendants. They are Hayes Freehold Limited (now in creditors' voluntary liquidation, hereinafter "Hayes"), Deutsche Bank, Sentrum and Holdings. Like Sentrum, Hayes is not in the same ownership as Holdings. Again, they were in the same ownership before 4th July 2012.

4. The Co-Operative seeks a declaration that the purported Deed of Surrender is void and ineffective vis-a-vis itself; alternatively, an order that it be set aside. It also seeks a declaration that Deutsche Bank and Sentrum continue to be liable under covenants in a Superior Lease dated 29th June 2001 and an Underlease dated 26th February 2010 respectively. There was an alternative claim for an order pursuant to section 423 of the Insolvency Act 1986 that the purported Deed of Surrender be set aside or that such other order be made as the court should think fit for the purpose of protecting the Co-Operative's interests. It is likely that that claim will prove unnecessary. That is the underlying litigation.

5. On 8th April 2016, Deutsche Bank issued a Part 20 additional claim against Sentrum and Holdings. That claim sought a declaration that the Deed of Surrender was of no effect or was void and for further declaratory relief and/or an order under section 423 of the Insolvency Act 1986 that the Deed of Surrender be set aside or the court make such other order as it thinks fit. The only active defendants to the underlying claim are Deutsche Bank and Holdings. The only active defendant to the Part 20 claim is Holdings.

6. There are two applications before the court. The first was issued by Holdings on 10th

June 2016. That application seeks an order striking out the Part 20 claim under CPR 3.4, or dismissing it summarily under CPR 24.2. On 4th July 2016, Deutsche Bank issued an application seeking permission to amend the particulars of its additional claim against Sentrum and Holdings to include a claim based on fraudulent misrepresentation and setting aside the Deed of Surrender. The application notice also sought an order for an expedited trial of the additional, but not the underlying, claim.

7. The evidence in support of Holdings' application is contained within a witness statement of Valerie Maria Elizabeth Walsh, dated 8th June 2016. She is a Vice-President of Portfolio Management for the Digital Group, which includes Digital Stout Holdings LLC, the present parent company, since 4th July 2012, of Holdings.

8. The evidence for Deutsche Bank, both in opposition to the strike-out and summary judgment claim, and also in support of the applications to amend the Particulars of Claim in the Part 20 claim and for expedition of the trial, are contained within three witness statements. They are a witness statement of Mr. Christopher James Mitchell, a retired chartered surveyor, who was on secondment as a transaction manager in Deutsche Bank's real estate department at the time of the Deed of Surrender. His witness statement is dated 3rd July 2016. Secondly, there is a witness statement of Mr. Andrew Watson, the Interim Head of Non-Performing Assets at the Co-Operative. His witness statement is dated 5th July 2016 and evidences the fact that the Co-Operative never gave its consent to the Deed of Surrender. The third, and final, witness statement relied upon by Deutsche Bank is from Mr. Jonathan Mark Henry Ross. He is a solicitor and partner in Deutsche Bank's solicitors, Forsters LLP. His witness statement is dated 4th July 2016.

9. Mr. Gaunt and Mr. Sefton, for Deutsche Bank, and Mr. Robins, for Holdings, have produced detailed written skeleton arguments which I had the opportunity of pre-reading before coming into court yesterday morning. I had also pre-read the statements of case, the applications, the evidence contained in the witness statements and also the Deed of Surrender which lies at the heart of the underlying claim and the additional claim.

10. The background can be taken from Mr. Robins's skeleton argument at paragraphs 9 through to 22. Digiplex UK Limited was the freehold owner of the property. It leased the property to Deutsche Bank by the Superior Lease dated 29th June 2001 for a term expiring on 14th September 2021. On 26th February 2010, Deutsche Bank entered into an Underlease of the property in favour of Sentrum for a term expiring on 11th September 2021. Holdings was a party to the Underlease as a guarantor of Sentrum's liabilities to Deutsche Bank. Holdings was not a party to the Superior Lease.

11. Pursuant to a share sale and purchase agreement dated 26th June 2012, on 4th July 2012 Digital Stout Holdings LLC purchased the issued share capital in Holdings. Under the terms of that agreement, a company then known as Sentrum Construction Management

Limited, later known as Optimum Technical Construction Limited, agreed to procure the release of Holdings from liability under the Holdings guarantee.

12. On 18th December 2012, the freehold reversion expectant upon the determination of the Superior Lease became vested in Hayes, which subsequently became the registered proprietor of that freehold title on 10th January 2013. On 18th December 2012, Hayes (as borrower) and Sentrum (as guarantor) entered into a finance agreement and debenture with the Co-Operative as lender. Hayes charged the reversion to the Superior Lease to the Co-Operative. On the same day, a further debenture was entered into between Sentrum (as guarantor) and the bank (as lender) and the Underlease was charged to the Co-Operative. Both debentures required the consent of the Co-Operative to any dealing with or surrender of the Superior Lease and the Underlease.

13. On 6th August 2015, the Deed of Surrender was entered into between Hayes, Deutsche Bank, Sentrum and Holdings. Pursuant to that deed, Deutsche Bank surrendered the Superior Lease to Hayes, which accepted the surrender: see clause 2; Sentrum surrendered the Underlease to Deutsche Bank which accepted that surrender: see clause 3 of the deed; Deutsche Bank entered into a release in clause 4 as superior landlord; there was a release of the landlord under the Underlease in clause 5; and by clause 6 of the deed, Deutsche Bank "unconditionally and irrevocably" released both Sentrum, as underlessee, and Holdings, as guarantor, from any liability under the Underlease and the Holdings guarantee.

14. It is appropriate at this stage for me to refer to the terms of the Deed of Surrender. That is to be found at pages 196 and following of Exhibit VW1 to Ms. Walsh's witness statement. The Deed of Surrender was expressed to relate to a Superior Lease and Lease of premises known as the Digiplex Megaplex Centre, Brookfields, Beaconsfield Road, Hayes. It is dated 6th August 2015. The parties are expressed to be Hayes (described as the Superior Landlord), Deutsche Bank (described as the Landlord), Sentrum (described as the Tenant), and Holdings (described as the Tenant's Guarantor). The Recitals read as follows:

> "(A) This deed is supplemental to the Superior Lease and the Lease.
>
> (B) The Superior Landlord is entitled to the immediate reversion to the Superior Lease.
>
> (C) The Landlord is entitled to the immediate reversion to the Lease.
>
> (D) The residue of the term granted by the Superior Lease is vested in the Landlord.
>
> (E) The residue of the term granted by the Lease is vested in the

Tenant.

(F) The Tenant's Guarantor guarantees the tenant covenants and other obligations of the Lease.

(G) The parties have agreed that the Superior Lease and the Lease are to be surrendered in accordance with the terms of this deed."

15. Clause 1 (headed "Interpretation") contains definitions and rules of interpretation which apply in the deed. The terms defined are the Superior Lease, the Lease, the Lease Demise and the Superior Lease Demise.

16. Clause 2 is headed "Surrender of the Superior Lease". It provides:

> "In consideration of the releases by the Superior Landlord pursuant to clause 5, the Landlord surrenders and yields up to the Superior Landlord with full title guarantee all its estate interests and rights in the Superior Lease and the Superior Lease demise and the Superior Landlord accepts the surrender. The residue of the term of years granted by the Superior Lease shall merge and be extinguished in the reversion immediately expectant on the termination of the Superior Lease".

17. Clause 3 is headed "Surrender of the Lease". It provides:

> "In consideration of the releases by the Landlord pursuant to clause 6, the Tenant surrenders and yields up to the Landlord with full title guarantee all its estate interest and rights in the Lease and the Lease Demise and the Landlord accepts the surrender. The residue of the term of years granted by the Lease shall merge and be extinguished in the reversion immediately expectant on the termination of the Lease."

18. Clause 4 is headed "Release to the Superior Landlord". It provides:

> "The Landlord hereby unconditionally and irrevocably releases the Superior Landlord and its predecessors in title, if any, from all the landlord covenants of the Superior Lease and from all liability for any subsisting breach of any of them."

19. Clause 5 is headed "Release of the Landlord". It provides:

> "The Superior Landlord and the Tenant hereby unconditionally

> and irrevocably release the Landlord and its predecessors in title, if any, from all the landlord covenants of the Superior Lease and the Lease respectively and from all liability for any subsisting breach of any of them."

20. Clause 6 is headed "Release of the Tenant and the Tenant's Guarantor". It provides:

> "The Landlord hereby unconditionally and irrevocably releases the Tenant and the Tenant's Guarantor and their respective predecessors in title, if any, from all the tenant covenants, indemnities and other obligations of the Lease and from all liability for any subsisting breach of any of them."

21. Clause 7 addresses capital allowances; and clause 8 addresses third party rights.

22. The deed concludes:

> "This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it."

That date was, of course, 6th August 2015. The deed is then executed by the relevant parties.

23. In its Particulars of Claim, the Co-Operative advances two claims. Its primary claim is one for a declaration that the surrender of the Superior Lease and of the Underlease in the deed is void as against it. In summary, the Co-Operative asserts that it had a charge over the Superior Lease and the Underlease and that they could not be surrendered without its consent. The Co-Operative says that it has not consented to the surrenders and that the deed is, accordingly, void as against it. The Co-Operative claims, in the alternative, under section 423 of the 1986 Act. The Co-Operative makes it clear that that alternative claim arises only if the deed is held to be valid and effective as against the Co-Operative.

24. The issue regarding the Co-Operative's lack of consent relates to the surrender of the Superior Lease and the Underlease. Holdings emphasises that the Co-Operative's consent was not required for the release of Holdings from the Holdings guarantee of the Underlease contained in clause 6 of the deed.

25. In Deutsche Bank's Defence, it does not admit the Co-Operative's primary claim and, in particular, it did not admit that the Co-Operative had not consented to the surrenders. Now, however, having seen the evidence of Mr. Watson's witness statement and the supporting documentation, Deutsche Bank accepts that the Co-Operative did not consent

to the surrenders.

26. Deutsche Bank contends that if the surrender of the Superior Lease is void and ineffective, then so too is the surrender of the Underlease, and the release of Holdings from its guarantee is also void and ineffective. In support of this, Deutsche Bank advances an implied condition argument, contending that the deed contains an implied condition precedent that Hayes had the power to accept a surrender of the Superior Lease and that since, on the Co-Operative's case, this implied condition precedent has never been satisfied, the surrender of the Underlease, and the release of Holdings from the Holdings guarantee, has never become effective: see paragraphs 21 and 22 of Deutsche Bank's Defence.

27. Deutsche Bank also advances a common mistake argument, contending that the surrender deed was executed under a shared misapprehension that Hayes had the power to accept a surrender of the Superior Lease and that since, on the Co-Operative's case, Hayes did not have the power to accept a surrender of the Superior Lease, the surrender of the Underlease, and the release of Holdings from the Holdings guarantee, were void for mistake: see paragraph 24 of Deutsche Bank's Defence.

28. Further, and to cater for the possibility of the surrender of the Superior Lease being held to be valid, Deutsche Bank sought to adopt the Co-Operative's claim in the alternative under section 423. In paragraph 35 of its Defence, Deutsche Bank said that in the event that the deed is not void, then Deutsche Bank joins with the Co-Operative in seeking an order that it be set aside under section 423 of the Insolvency Act 1986.

29. In reliance on the implied condition argument, the common mistake argument and the section 423 argument, Deutsche Bank has issued the additional claim against Holdings in which it repeats paragraphs 4 to 24 of its Defence, and it seeks a declaration that the Surrender Deed is of no effect or is void, a declaration that Holdings continues to be liable to Deutsche Bank pursuant to the Holdings guarantee, and, in the alternative, an order under section 423 of the Insolvency Act 1986 setting aside the Deed of Surrender, or granting such other relief as the court thinks fit.

30. I need say no more about the section 423 argument because, following a dialogue towards the end of Mr. Robins's opening yesterday morning, after the luncheon adjournment Mr. Gaunt, recognising the limited terms of his existing pleading on section 423, and that even his proposed amended Particulars of Claim contained no change to the substance of the section 423 argument along the lines of paragraph 27 of Mr. Gaunt's skeleton, Mr. Gaunt indicated that the correct and sensible way to proceed was for him to withdraw his section 423 claim as presently pleaded, reserving the right, if thought fit, to make a further application to amend to include an alternative section 423 claim along the lines of paragraph 27 of his skeleton argument. He therefore indicated that he did not propose to trouble the court with any further submissions in support of his section 423

claim. That, therefore, falls out of the picture. I will strike out the section 423 claim.

31. Mr. Robins, for Holdings, submits, on his strike-out application, that the additional claim is unsustainable as a matter of law and that, consequently, there are no reasonable grounds for bringing the additional claim and/or that it has no real prospect of success. He relies upon CPR 3.4 (2)(a) and CPR 24.2 respectively. In summary, he submits that the implied condition argument is unsustainable because the release of Holdings from liability in clause 6 of the deed was expressly "unconditional and irrevocable". He submits that the implied condition for which Deutsche Bank contends is impermissible because an implied term cannot contradict the express terms of the contract. In relation to the common mistake argument, he submits that this, too, is unsustainable because, by providing in clause 6 of the deed for the release of Holdings from liability to be "unconditional and irrevocable", the parties have allocated the risk of any mistake to Deutsche Bank and, consequently, there no room for the application of the doctrine of common mistake.

32. So far as the amendment application is concerned, whilst Holdings considers that the misrepresentation claim sought to be advanced will fail at trial, it consents to the amendment application on the basis that the misrepresentation claim raises factual issues which make it unsuited to summary determination. On this basis, the misrepresentation claim will, in any event, proceed to a trial.

33. On Deutsche Bank's expedition application, the position of Holdings is that this is opposed on the footing that there is objectively no urgency, and that an expedited trial would cause irremediable prejudice to Holdings.

34. Mr. Robins began his address yesterday morning by addressing the principles that govern his strike out application. CPR 3.4(2)(a) provides that the court may strike out a statement of case if it appears to the court that it discloses no reasonable grounds for bringing or defending the claim. CPR 24.2 provides that a court may give summary judgment against a claimant on the whole of a claim, or on a particular issue, if it considers that the claimant has no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial.

35. Mr. Robins took me to the court's duty to manage cases under CPR 1.4. He pointed out that active case management includes, by CPR 1.4(2)(c), deciding promptly which issues need full investigation and trial, and, accordingly, disposing summarily of the others; and, by subrule (2)(i), dealing with as many aspects of the case as the court can on the same occasion. He reminded me that constituent elements of the overriding objective of enabling the court to deal with cases justly, and at proportionate cost, include saving expense, ensuring that a case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. He submitted that the court should in this case "lop off the dead

wood" and allow the case to proceed on a more streamlined basis.

36. He referred me to the decision of the Court of Appeal, speaking through Moore-Bick LJ, in the case of *ICI Chemicals & Polymers Limited v. TTE Training Limited* [2007] EWCA Civ. 725. He took me to paragraphs 10 through to 14 of Moore-Bick LJ's judgment. In particular, he emphasised what was said at paragraph 12:

> "It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim, or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

37. Mr. Robins submitted that the application raises short points of law and construction and that the court should grasp the nettle and decide them now. The court has all the relevant evidence. No party is saying that any further evidence will be available at trial in relation to these specific points.

38. I accept those submissions, subject to a point made by Mr. Gaunt during the course of his subsequent address. Mr. Gaunt made the point that Deutsche Bank does not have to show that it is necessarily right. It is, rather, for Holdings to show that Deutsche Bank has no realistic cause of action. I make it clear that nothing that I say in this judgment is intended to bind the trial judge to any particular view on either the implied condition or the common mistake arguments. Mr. Robins addressed the implied condition argument at paragraphs 23 through to 34 of his written skeleton argument. I will not burden this judgment by repeating what is said therein.

39. Mr. Robins took me in his submissions to the Deed of Surrender. He explained that the parties to a deed can adopt one of two different approaches: they can make its operation and effect conditional upon some stated event or some particular state of affairs; alternatively, they can make its operation and effect unconditional. In the present case, Mr. Robins submits that the parties always intended to adopt the unconditional model. It was for the legal advisers to each of the parties to ensure that the deed worked in accordance with their client's wishes.

40. At an early stage of his address, I referred Mr. Robins to clause 6 of the Deed of Surrender and inquired whether Sentrum was released even if the surrender of the

Underlease proved to be ineffective. That was on the basis that the wording of the release in clause 6 was the same for both Sentrum and Holdings. Mr. Robins answered in the affirmative. He submitted that if a supervening external event prevents the release of the tenant under the Underlease, that nevertheless has no effect on the release of the tenant's guarantor, because the release of the guarantor is expressed to be "unconditional and irrevocable". The court must distinguish between the subjective intentions or wishes of the parties and the legal effect of the instrument into which they have entered. There may be some extraneous legal obstacle that thwarts the intention of the parties to effect a surrender of the Superior Lease and the Underlease, but there is no such external obstacle to thwart the release of the guarantor of the Underlease. The wording of the Deed of Surrender is said to be paramount. If the release is expressed to be unconditional, then it cannot be the subject of any implied condition. Mr. Robins pointed out that the guarantee was not an asset of Sentrum which had been charged to the Co-Operative. Rather, it was an asset of Deutsche Bank and not of the Co-Operative. Mr. Robins pointed out that there is no plea that the release by Deutsche Bank of the rights to which it was entitled against the guarantor could have been rendered ineffective by the terms of the Co-Operative debentures. Mr. Robins accepts that Deutsche Bank now admits that the Co-Operative Bank did not give its consent to the surrenders and that the surrender of Deutsche Bank's Superior Lease was therefore ineffective. He says that Deutsche Bank is now not seeking to get itself off the hook but, rather, to hook someone else (in the person of Holdings) as well. He took me through the terms of Deutsche Bank's pleaded Defence. He addressed me on the doctrine of escrows; but, in the light of Mr. Gaunt's acceptance that this is not an escrow case, I do not need to refer to those elements of Mr. Robins's submission.

41. Mr. Robins took me to the authorities on the implication of terms. The first authority on which he relied was, naturally, the recent decision of the Supreme Court in the case of *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited* [2015] UKSC 72, reported at [2015] 3 WLR 1843. He took me through the leading judgment of Lord Neuberger of Abbotsbury, President of the Supreme Court, on implied terms in contracts at paragraphs 14 through to 32. He placed particular emphasis upon Lord Neuberger's adoption of the observations of Lord Simon of Glaisdale in the Privy Council case of *BP Refinery (Westernport) Pty Limited v. Shire of Hastings*, reproduced at paragraph 18 of Lord Neuberger's judgment. In particular, he emphasised the fifth of the conditions which needed to be satisfied for the implication of a term, namely, that it "must not contradict any express term of the contract". Lord Neuberger returned to that requirement at paragraph 28, where he said that, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied.

42. Mr. Robins supported his citation of Lord Neuberger by referring to what Lord Clarke had had to say in *Autoclenz Limited v. Belcher* [2011] UKSC 41, reported at [2011] 4 All ER 745, at paragraph 20, and to what Lord Hoffmann had said in *Johnson v. Unisys*

Limited [2001] UKHL 13, reported at [2003] 1 AC 518, at paragraph 37.

43. Mr. Robins submitted that because of the express terms of clause 6, there could not be an implied condition either as to the deed itself or as to the release of Holdings becoming effective. To imply a conditional release of the guarantor which would be effective only if the tenant itself was released would, on Mr. Robins's submission, contradict the word "unconditionally" in clause 6 that the parties had chosen to use in their deed. Mr. Robins submitted that the parties, by their wording, had released Holdings from its guarantee, even if the other parts of the deed were to prove ineffective. Mr. Robins relied not only upon the wording of clause 6, but also upon the wording below clause 8, which made it clear that the document took effect on the date stated (of 6th August 2015). Mr. Robins submitted that Deutsche Bank could not seek to rewrite the bargain that the parties had signed up to; rather, Deutsche Bank's remedy was to sue its solicitors, Blake Morgan, for negligence in connection with the terms of the deed.

44. The fact that the express wording of clause 6 negatived the implication of the implied condition asserted by Deutsche Bank was an end to the argument; but Mr. Robins submitted that the implied condition did not satisfy the other requirements of the law either. In particular, it did not pass the business necessity test. Because the release was expressed to be unconditional, the fact that other parts of the deed did not have effect, because of the absence of Co-Operative's consent, was said to have no bearing on the release of Holdings.

45. Mr. Robins addressed the common mistake argument at paragraphs 35 to 48 of his written skeleton. Again, I will not reproduce in this extemporary judgment what Mr. Robins there had to say. In his oral submissions, Mr. Robins asserted that the common mistake argument was merely a different way of putting the implied condition point. Because the release was expressed in clause 6 to be unconditional, if it turned out that either surrender was ineffective, that did not affect the efficacy of the release. One did not change the result by changing the legal characterisation of the point from an implied condition precedent to a common mistake argument.

46. Mr. Robins took me to passages from the 32nd edition of *Chitty on Contracts*, Volume 1, at paragraphs 6-011, 6-016, 6-023, 6-030 and 6-062. The thrust of his submission was that the construction of a contract without reference to mistake remained an alternative route by which the court might reach a conclusion. When courts applied the process of construction to a case in which, factually speaking, the parties had entered the contract under a shared misapprehension as to the surrounding facts, they were said to be normally merely applying an alternative formulation of the doctrine of common mistake. Normally, the outcome would be the same, whichever approach was applied.

47. Mr. Robins took me to the leading case of *Bell v. Lever Brothers Limited* [1932] AC 161. He took me to the judgment of Lord Atkin at pages 224 to 225. There, Lord Atkin

discussed the alternative mode of expressing the result of a mutual mistake:

> "It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties - namely, that the contract could not be terminated till the end of the current term. The question of the existence of conditions, express or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made."

48. A little later in the passage, Lord Atkin stated that the formulation of Sir John Simon of the proposition should be recorded:

> "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void *ab initio* if the assumption is of present fact and it ceases to bind if the assumption is of future fact."

49. A little later, Lord Atkin said that the proposition did not amount to more than this: that if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true.

50. Mr. Robins also took me to the formulation of Scrutton LJ, in the Court of Appeal, [1931] 1 KB 557, at page 585. The effect of those authorities was said to be that common mistake is an alternative formulation to Mr. Gaunt's implied condition precedent.

51. The threshold question in any case where common mistake is asserted is whether the contract itself expressly provides that one party or the other is to bear the risk of a particular matter not being true. If it does, then the contract covers the situation and there is no scope for the invocation of the doctrine of common mistake. One starts and ends with the contract.

52. In support of that proposition, Mr. Robins took me to statements in *The Great Peace* [2002] EWCA Civ 1407, reported at [2003] QB 679, in the judgment of Lord Phillips, the Master of the Rolls (speaking for the Court of Appeal), at paragraphs 80 through to 82. There, Lord Phillips said that the doctrine of common mistake fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party, and the parties have not expressly, or by implication, dealt with their rights and obligations in this eventuality. Lord Phillips cited an observation of Steyn J in the

case of *Associated Japanese Bank (International) Limited v. Credit du Nord SA* [1989] 1 WLR 255 at 268 B-C. The observation of Steyn J was this:

> "Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake."

53. At paragraph 81, Lord Phillips referred to the comment of Hoffmann LJ in *William Sindall plc v. Cambridge County Council* [1994] 1 WLR 1016 at 1035 that such allocation of risk can come about by rules of general law applicable to contract, such as "*caveat emptor*" in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser.

54. At paragraph 82, Lord Phillips said this:

> "Thus, whilst we do not consider that the doctrine of common mistake can be satisfactorily explained by implied term, an allegation that a contract is void for common mistake will often raise important issues of construction. Where it is possible to perform the letter of the contract, but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible, it will be necessary, by construing the contract in the light of all the material circumstances, to decide whether this is indeed the case."

55. Mr. Robins took me to Hoffmann LJ's judgment in the *William Sindall* case and also to the judgment of Gloster J in the case of *Standard Chartered Bank v. Banque Marocaine* [2006] EWHC 413 (Comm). He took me to paragraphs 1, 3, 6, 7, 11, 13, 14 and 16. He pointed to the fact that at paragraph 27 Gloster J had rejected the application of the doctrine of common mistake in the circumstances of that case. She said:

> "In my judgment, even on the assumption that there is a credible evidential basis for the assertion that the funds advanced under the promissory notes were not intended to be used for the stated purpose and were not in fact used for the stated purpose, there is no room for the application of the doctrine of common mistake in the circumstance of this case. In the language of Lord Atkin in *Bell v. Lever Brothers,* the fact that the funds were not, on the assumption which I have made, applied for the stated purpose

> does not make the risk assumed under the participation agreement essentially different from the risk that the parties thought was being shared. Nor on any basis do the circumstances come within the test formulated by the Court of Appeal in *The Great Peace*. It cannot be said that the non-existence of the state of relevant affairs, i.e. the non-existence of the proper application of the funds advanced under the promissory note, or the non-existence of the truth of the representation, renders performance of the acceptance agreement impossible."

56. At paragraph 28, she said that it was impossible to characterise compliance with the stated purpose of the loan evidenced by the promissory notes as a vital attribute of the consideration provided under the risk participation agreement.

57. As Steyn J (as he then was) said in *Associated Japanese Bank International Limited v. Credit du Nord SA* at page 268:

> "Where the contract in question allocates the risk of mistake to one of the parties, there is no scope for the application of the doctrine of common mistake."

58. At paragraph 29 Gloster J said that in her judgment, the risk in the instant case had clearly been allocated, in respect of its participation, to a particular party.

59. Mr. Robins submitted that if it was not conditional on anything, then the release remained effective. In a nutshell, the short point was said to be that if one believes a state of affairs, and enters into a contract on the basis of that belief, releasing a third party from liability, and the contract expresses the release to be unconditional, then it is not conditional on the state of affairs being true. The release continues to be effective even if the state of affairs is not true. Here, the parties had assumed the risk of X not being true by giving an unconditional release. There was, therefore, no room for the doctrine of mistake to apply because the contract covered the situation. The common mistake argument was thus an alternative formulation of the implied condition argument and suffered the same fate. Deutsche Bank could not say that Holdings' release was conditional on the efficacy of the surrender of the Superior Lease because clause 6 said in terms that the release was unconditional. The deed took effect, and the release was unconditional, and the court could not rewrite the parties' bargain for them. Those were Mr. Robins's submissions.

60. I reject those submissions, essentially for the reasons that were given by Mr. Gaunt and Mr. Sefton. They address the implied condition argument at paragraphs 16 through to 19 of their written skeleton argument. Mr. Gaunt submits that the deed contains an implied term if it is so obvious that it went without saying, or if it was necessary for business

efficacy, or, to put the test a different way, if the contract would lack commercial or practical coherence without it. He submits that it is so obvious that it went without saying that the parties did not intend the deed to take effect if Hayes did not have the right to take the surrender of the Superior Lease. He submits that if the parties had been asked: "What do you intend to happen if Hayes does not have the right to take the surrender, which will be ineffective?" they would have replied that the rest of the transaction was to fall away as well. To answer any other way would be to ascribe to them a false belief that the transaction had some other commercial purpose, which was somehow not contingent on the surrender of the Superior Lease, and that Deutsche Bank would have been willing to release the guarantee even if it was not itself being released from its own corresponding rental obligation. Put another way, and adopting what was said by Lord Neuberger at the end of paragraph 27 of the *Marks and Spencer* case, the deed would lack all commercial and practical coherence without the condition precedent. It was commercially inconceivable for Deutsche Bank to have intended to release Holdings from its guarantee irrespective of whether Hayes was able to take a surrender of the Superior Lease. Deutsche Bank, as everyone knew, had no occupational interest in the property; and, for so long as Sentrum or Holdings remained solvent, it had no financial interest in it either. Sentrum or Holdings were liable to Deutsche Bank for precisely the same rent that Deutsche Bank was liable to pay to Hayes. Mr. Gaunt submitted that Deutsche Bank can only have intended to release Holdings if it was itself going to be released from its own corresponding rental obligation.

61. The answer to Mr. Robins's reliance upon clause 6 of the deed was set out at paragraph 19 of Mr. Gaunt's skeleton. There, he says that Holdings seeks to answer this by pointing to the word "unconditionally" in clause 6 of the deed. But that is not an answer to the point. If it was a condition precedent that Hayes had power to effect the surrender, then clause 6 had no effect. The word "unconditionally" bites only if the release takes effect; and the failure of the implied condition precedent means that it does not take effect.

62. Mr. Gaunt, in his oral submissions, referred to Holdings' argument that clause 6 was separate, independent and severable and only involved Deutsche Bank and Holdings. He acknowledged that clause 6 was really the whole point at issue between himself and Mr. Robins. He submitted that the deed was a composite package which was not to be divided into separate elements; rather, its provisions interrelated. He took me through the deed. The fundamental purpose of the transaction was said to be expressed in Recital (G): "The parties have agreed that the Superior Lease and the Lease are to be surrendered in accordance with the terms of this deed". The release of the guarantee from Holdings was said to be purely consequential upon the surrenders. Clauses 2 and 3 dealt with the surrender of the Superior Lease and the Underlease respectively. Clause 2, by stating that it was in consideration of the releases by the Superior Landlord pursuant to clause 5, cross-referred to the release of Deutsche Bank. Clause 3, by stating that the surrender of the Underlease was in consideration of the releases by Deutsche Bank pursuant to clause 6, cross-referred to that clause. The surrenders in each of clauses 2 and 3 were expressly in consideration of the releases set out in clauses 5 and 6. Clause 6

released both the tenant (Sentrum) and also the tenant's guarantor (Holdings). Whatever clause 6 meant in relation to the tenant's guarantor (Holdings) it also meant in relation to the tenant (Sentrum). The release of the guarantor was simply consequential upon the release of Sentrum as tenant. The words "unconditionally and irrevocably" appeared in clauses 4 and 5, relating to the release of the Superior Landlord and of the Landlord, as well as in clause 6, relating to the release of the Tenant and the Tenant's Guarantor. If clauses 2 and 3 did not have effect, any releases in clauses 4 and 5 were also not intended to have effect.

63. What Mr. Robins was not doing was construing the deed as it stood, construed as a whole. "Unconditionally and irrevocably" did not mean what Mr. Robins said they meant, which was that, in any event, even if clauses 2 and 3 were ineffective, the releases in clauses 4, 5 and 6 came into play. The phrase "unconditionally and irrevocably" had to have the same meaning in all three clauses.

64. The underlying purpose of the deed was quite clear. It was all premised on the surrender of the Superior Lease. If the Superior Lease was not being surrendered, the fundamental purpose of the whole transaction was defeated. Everything assumed a state of affairs where the Superior Lease went.

65. Mr. Gaunt accepted that, on an issue of interpretation, one cannot look to the subjective intentions of the parties or to their negotiations; but he submitted that it was permissible to look at the circumstances in which the deed came to be executed. If one were to look at eight e-mails, to which he took me, they merely established what one could distil from the deed itself; that was that the fundamental basis was that Deutsche Bank was let off the rent, so the underlessee (Sentrum) and its guarantor (Holdings) were also let off their liabilities under the Underlease.

66. It was said to be clear that the whole point of the Deed of Surrender was for Deutsche Bank to escape liability under the Superior Lease. To achieve that, it was prepared to release the undertenant and the undertenant's guarantor. But the release of that guarantor was not a separate, stand-alone deal; it was merely a consequence of the release of the undertenant, Sentrum. Clause 6 coupled the release of the guarantor and the subtenant. The release of the guarantor was parasitic upon the release of Deutsche Bank from its obligations under the Superior Lease. Mr. Gaunt said that he could not improve upon the way in which his junior, Mr. Sefton, had expressed the matter at paragraphs 20 and 21 of the Defence:

> "The guarantee was clearly of considerable importance to Deutsche Bank, given the financial status and default of Sentrum. The only reason Deutsche Bank was prepared to release Sentrum Holdings from its guarantee, which Sentrum Holdings obviously and completely understood, was that Deutsche Bank was going to be released from its matching obligations under the Superior

> Lease at the same time. As Sentrum Holdings well knew, this was the only basis on which Deutsche Bank was prepared to execute the deed and the only basis on which Sentrum Holdings could realistically seek the release of its guarantee. It was an implied condition precedent to the deed that Hayes had the power to accept a surrender of the Superior Lease as well as that Sentrum had the power to surrender the sublease.
>
> (1) It is so obvious, that it went without saying, that Deutsche Bank was not prepared to release either Sentrum from its liabilities under the sublease or Sentrum Holdings from its guarantee of those liabilities if Deutsche Bank was not simultaneously going to be released from its matching liabilities under the Superior Lease.
>
> (2) If the deed were not to contain the implied condition precedent, then it would lack all commercial and practical coherence. It would have the effect, as Sentrum Holdings contends in its Defence to these proceedings, that Deutsche Bank would remain liable for the rent in the Superior Lease while at the same time it released Sentrum's liability to pay the matching rent under the sublease and Sentrum Holdings' guarantee liability. Sentrum and Sentrum Holdings understood, and any reasonable person in their position would have understood, that the release of Deutsche Bank from the Superior Lease was the fundamental commercial premise for the release of Sentrum and Sentrum Holdings from the sublease. This was necessary for the transaction to occur, and without it the transaction would be commercially and practically incoherent."

67. It was implicit in the whole transaction that Hayes had the power to accept the surrender of the Superior Lease from Deutsche Bank. That was the fundamental premise from which all else was to flow. The business efficacy test means that a contract will have the effect it is intended to have. The true formulation of the business efficacy test was said to be encapsulated in the question: would the contract have the effect it was intended to have without the implication, not whether it would have some other effect that was not intended? It is the intention which objectively the parties intended the transaction to have. Without the implication advanced by Deutsche Bank, the transaction would lack both commercial and practical coherence. Deutsche Bank would have been agreeing the release of Holdings as guarantor in return for absolutely nothing. If the parties had been asked, whilst still negotiating: "What if the surrender of the Superior Lease cannot take effect", it is inconceivable that they would then have said that the release of the guarantor of the Underlease would still go ahead.

68. Mr. Gaunt accepts that an implied condition cannot contradict an express term of the

contact; but he submits that one can have a condition precedent which prevents the whole contract coming into effect. The existence of a particular state of affairs can be a condition precedent to the contract coming into force at all. That is nothing to do with the doctrine of escrow. As with many contracts, the clauses in the deed providing for the various releases - clauses 4, 5 and 6 - were all conditional upon Hayes being able to accept the surrender provided for in clause 2. That condition was not fulfilled because that state of affairs did not exist, and the other terms of the deed did not come into play.

69. The legal analysis is to imply a condition precedent to the operation of the deed. After all, if one could express a condition precedent, then one could do so impliedly.

70. Mr. Gaunt pointed to the similarities between the present case and that of *Associated Japanese Bank International Limited v. Credit du Nord* [1989] 1 WLR 255. At page 258, between letters A and B, Steyn J had identified the central remaining question to be resolved as whether the plaintiffs were entitled under the guarantee to judgment in a particular sum with interest. The principal issues, to which most of counsel's submissions had been directed, related to the questions (a) whether the guarantors were excused from liability by the non-fulfilment of an express or implied condition precedent to the guarantee, namely the existence of certain machines; or (b) whether the guarantee was void *ab initio* by reason of a common mistake affecting the guarantees, namely the existence of the machines. Mr. Gaunt pointed to the precise wording of the guarantee (at page 261 letter B): By the guarantee, the guarantor had thereby 'unconditionally' guaranteed to and agreed with the recipient as follows.

71. There, too, the words had been "unconditionally guarantee", yet they were not held to defeat the implication of a condition precedent.

72. Mr. Gaunt referred me to page 262 F through to page 264 E where Steyn J had dealt with the construction point. At page 263 E, Steyn J had said that if his conclusion about the construction of the guarantee had been wrong, it remained to be considered whether there was an **implied** condition precedent that the lease related to all four existing machines. He said that in the present contract, such a condition might only be held to be implied if one of two applicable tests were satisfied. The first was that such an implication was necessary to give business efficacy to the relevant contract, i.e. the guarantee. In other words, the criterion was whether the implication was necessary to render the contract (the guarantee) workable. That was usually described as the *Moorcock* test. But there was said to be another type of implication, which seemed more appropriate in the present context. It was possible to imply a term if the court was satisfied that reasonable men, faced with the suggested term, which was *ex hypothesi* not expressed in the contract, would without hesitation have said: "Yes, of course, that is so obvious that it goes without saying". That was the *Shirlaw v. Southern Foundries* test. Although broader in scope than the *Moorcock* test, it was nevertheless a stringent test; and it would only be permissible to hold that an implication had been established on that basis in comparatively rare cases, notably when one was dealing with a commercial

instrument such as a guarantee for reward. Nevertheless, Steyn J said that against the contextual background of the fact that both parties were informed that the machines existed, and the express terms of the guarantee, he had come to the firm conclusion that the guarantee contained an implied condition precedent that the lease related to existing machines.

73. Steyn J then went on to deal with the argument founded upon common mistake at page 264, letter C and following. At page 269, beginning at letter B, Steyn J applied the law to the facts. He said that it had been clear that in the case before him, both parties - the creditors and the guarantors - had acted on the assumption that the lease related to existing machines. If they had been informed that the machines might not exist, neither the plaintiffs for the defendants would for one moment have contemplated entering into the transaction. Steyn J accepted that that by itself was not enough to sustain the plea of common mistake. He was also satisfied that the defendants had reasonable grounds for believing that the machines existed. The real question was said to be whether the subject matter of the guarantee (as opposed to the sale and lease) was essentially different from what it was reasonably believed to be. The real security of the guarantors was the machines. The existence of the machines, being profit-earning chattels, made it more likely that the debtor would be able to service the debt. More importantly, if the debtor defaulted, and the creditors repossessed the machines, the creditors had to give credit for 97.5% of the value of the machines. No doubt the guarantors had relied to some extent on the creditworthiness of a Mr. Bennett. But Steyn J found that the prime security to which the guarantors had looked was the existence of the four machines as described to both parties. For both parties, the guarantee of obligations under a lease with non-existent machines was essentially different from a guarantee of a lease with four machines which both parties at the time of the contract believed to exist. The guarantee was an accessory contract; and the non-existence of the subject matter of the principal contract was therefore of fundamental importance. In Steyn J's judgment, the stringent test of common law mistake was satisfied, and the guarantee was void *ab initio*.

74. Mr. Gaunt submitted that the release of the guarantor in the present case was the release of an accessory contract. The incapacity of Hayes to accept, and of Sentrum to effect, the surrenders were said to be of fundamental importance. The ability of Hayes to accept the surrender did not exist. It had been believed by Deutsche Bank to exist. The words "unconditionally and irrevocably" in clause 6 of the deed did not negative the implication of a condition precedent. The deed could not be taken to mean that even if clauses 2 to 5 were ineffective, nevertheless Holdings was still released from its guarantee.

75. Mr. Gaunt pointed out that the case was going to go to trial anyway on the fraudulent misrepresentation point, and so Holdings' knowledge would fall to be investigated at trial. He submitted that it would be a bold course for the court to take to strike out a claim founded on a condition precedent, or on the existence of a common mistake, until the full facts were known. As I have already mentioned, Mr. Gaunt pointed out that it

was not Deutsche Bank which had to show that it was necessarily correct; rather, it was for Holdings to show that Deutsche Bank had no conceivable cause of action. The word "unconditionally" did not mean that there was no condition precedent when it was clear that there had been. The mistake argument was said to be very, very similar, but there was a separate and distinct doctrine of mistake which was capable of applying in a case such as the present if there were no condition precedent.

76. If Holdings did not know of the Co-Operative debenture, then there was a mistake common to Deutsche Bank and Holdings. Deutsche Bank would be getting nothing unless the surrender of the Superior Lease had gone through effectively. If that surrender was void, then Deutsche Bank would be getting nothing, and a clearer case of mutual mistake could hardly be found. Mr. Robins intervened to accept that, for today's purposes only, he accepted that Deutsche Bank would be able to establish a mistake on its part at trial. Mr. Gaunt submitted that the words "unconditionally and irrevocably" were not sufficient to allocate the risk of mistake to Deutsche Bank. If the words did not bear the meaning for which Mr. Robins contended on behalf of Holdings, then they did not serve to allocate the risk between the contracting parties.

77. In the course of his response, Mr. Robins indicated that the court was dealing with a fairly narrow point: the deed as it stood on its face. The court was not presently dealing with the proposed fraudulent misrepresentation claim, nor was it dealing with any claim for rectification. Mr. Robins took me through the terms of the pleaded Defence. He emphasised that the implied condition precedent related only to the power to accept a surrender of the Superior Lease. He reiterated his earlier submission that there had been two different models for dealing with a transaction of the present sort. Each element could either be conditional or non-conditional on the others. In the present case, each element had been intended to take effect independently and unconditionally. What blocked the effectiveness of the transaction in two of its three aspects did not operate to block the effectiveness of the third, which itself was not dependent upon the extraneous circumstance of the need for the Co-Operative Bank's consent to the surrenders. It was said not to be the deed that lacked coherence; rather, it was the emergence of an external factor that no one had expected and which produced a particular outcome on the wording of the deed. It was not a matter internal to the deed itself. Deutsche Bank could have avoided the outcome by expressing the effectiveness of the release of the guarantee to be conditional upon the effectiveness of the surrenders. Instead, the parties had said that each element was "unconditional". That word meant what it said. The wording was beyond doubt.

78. Mr. Robins also pointed out that Mr. Gaunt had not addressed his point upon the immediate effect of the deed. He submitted that Mr. Gaunt's arguments contradicted the closing words of the deed, which were that it took effect "as of this date".

79. Mr. Robins referred me to Recital (G) and to the initial letter of 8th December 2014 to which I had been taken by Mr. Gaunt. He submitted that that letter showed that the

release of the guarantee was a separate matter, not related to the surrender of the leases. Mr. Robins also made the point that if a principal debtor was released, then the guarantee itself automatically fell away; one did not need to have a separate release for the guarantor. He submitted that the very fact that Holdings was referred to in clause 6 of the deed indicated that the release of Holdings was freestanding and independent of the release of Sentrum as principal debtor.

80. As for Mr. Gaunt's reliance upon *Associated Japanese Bank*, Mr. Robins emphasised that the point that he had taken on the meaning and effect of the word "unconditionally" simply did not appear to have been taken by counsel in that case (Mr. Michael Crystal QC).

81. Those were the submissions. I have already indicated that I prefer the submissions of Mr. Gaunt to those of Mr. Robins. I accept the force of Mr. Gaunt's submissions. It seems to me that Mr. Robins attaches undue importance to the use of the words "unconditionally and irrevocably" in clause 6 of the deed, in so far as they relate to the release of Holdings. It seems to me that Mr. Robins's argument ignores the facts that the phrase "unconditionally and irrevocably" does appear elsewhere in the deed, in clauses 4 and 5, as well as in clause 6; and secondly, in clause 6 itself the phrase "unconditionally and irrevocably" applies to Sentrum as well as to Holdings. It seems to me that if the phrase bears the meaning assigned to it by Mr. Robins, then there is no answer to the point that Sentrum was also released from its liabilities as underlessee, notwithstanding the inefficacy of the surrender. I am entirely satisfied that that was not the intention of the parties. I am satisfied that the whole substratum of the Deed of Surrender postulates the efficacy of the surrender of both the Superior Lease and the Underlease. The failure of that substratum, in my judgment, infects the whole of the deed, including clause 6, and also the words relating to the wording and operation of the deed at the end of clause 8.

82. In my judgment, the wording and operation of clause 6 is defeated by the failure of the underlying postulate, which is that the Deed of Surrender was capable of taking effect according to its terms. It was not, because of the need for the Co-Operative's consent, which was not given.

83. Whilst I acknowledge that this is not a case of frustration, in the course of formulating the test for frustration - that of a radical change in the obligation - Lord Radcliffe, in *Davis Contractors v. Fareham UDC* [1956] AC 696, at 729, used a Latin phrase which he translated as being "it was not this that I promised to do". I am satisfied in the present case that the release of the guarantor of the Underlease was intended to be conditional upon, and to take effect only if, the release of the surrender of the Superior Lease and the Underlease were effective. The release of Holdings as guarantor for the underlessee's obligations impliedly assumed the efficacy of the surrender of both the Superior Lease and the Underlease. The matter can be viewed in terms either of the implication of a condition precedent, or as an example of the operation of the doctrine of common

mistake.

84. In my judgment, the inefficacy of the surrender of the Superior Lease and the Underlease defeats the entire underlying purpose, substratum and efficacy of the whole deed, including the unconditional release of Holdings' guarantee, just as much as the release of Sentrum's covenants as underlessee.

85. I was referred to Gloster J's decision in *Standard Chartered Bank v. Banque Marocaine*. I was struck by what she had to say at the end of paragraph 27. There, she said that it could not be said in the case before her that the non-existence of the state of relevant affairs, i.e. the non-existence of the proper application of the funds advanced under the promissory notes, or the non-existence of the truth of the representation, rendered performance of the acceptance agreement impossible.

86. In my judgment, in the present case the incapacity of the parties to the deed to effect the agreed surrenders of the Superior Lease and the Underlease without the consent of the Co-Operative, which was neither sought for nor forthcoming, did render the whole of the Deed of Surrender impossible of performance, including the release of Holdings as guarantor of the Underlease.

87. I am also satisfied that this is not a case where the Deed of Surrender has allocated the risk of mistake to Deutsche Bank so that there is no scope for the application of the doctrine of common mistake. Again, that involves the error of reading too much into the use of the phrase "unconditionally and irrevocably".

88. Whether or not Deutsche Bank will ultimately prove to be right at trial, I am entirely satisfied that Deutsche Bank's case is not manifestly ill-founded. I am satisfied that Holdings has not demonstrated that it is, or that Deutsche Bank's case is devoid of any real prospect of success. For those reasons, therefore, I will dismiss the strike-out and summary judgment applications by Deutsche Bank.

89. I turn then, given that there is no issue as to the application to amend Deutsche Bank's pleaded case, to the expedition application. This was not addressed in terms in Deutsche Bank's skeleton argument. In the course of his oral submissions, Mr. Gaunt acknowledged that in asking for expedition, Deutsche Bank did not seek to prejudice Holdings in the conduct of its defence. He accepted that whatever timetable was to be proposed must properly accommodate the needs, in litigation terms, of both parties. Nevertheless, he submitted that this was a case in which there was a need for expedition. The basis for this was that one of either Deutsche Bank or Holdings remained on the hook for rent for the property. Deutsche Bank was not presently in possession; it was Sentrum that was, at least in terms of receipt of rents from the part sublet and physical possession of the remainder. If Deutsche Bank were to be held to remain on the hook,

then they would need to take immediate steps to recover possession, and to manage the premises and to let them, so as to mitigate Deutsche Bank's losses. If Deutsche Bank was right in its contentions, and Holdings was still on the hook as guarantor, then the problem would be one for Holdings. They would have the financial incentive to take over the management and letting of the premises. Whoever was to lose this litigation would be left with a problem. This was not just a money claim. The claim involved a property which needed to be managed and the vacant parts let. This was not simply a money claim by a large bank. The relief sought was declaratory in nature.

90. In his written skeleton argument, at paragraph 65(7), Mr. Robins had submitted that Deutsche Bank was merely seeking to obtain what was, in effect, an indemnity from Holdings against the sums that it was liable to pay under the Superior Lease. Mr. Gaunt objected to the use of the adverb "merely". He expressed Deutsche Bank's surprise that Holdings did not want to get on with this litigation. As confirmed this morning, Deutsche Bank's present information was that Sentrum was likely shortly to go into liquidation. If so, the question arose as to who should step in and manage the premises. It was important to know the answer to that question. If a liquidator of Sentrum were to disclaim the occupational Underlease, who should be applying for a vesting order; who would ultimately be liable for the occupational rent and costs of the premises? Those were all matters that cried out for an urgent answer.

91. Mr. Robins had addressed the issue of expedition at paragraphs 62 through to 67 of his skeleton. Mr. Robins began by addressing the relevant case law on expedition, as set out in the review by Henderson J in the case of *JW Spear & Sons Limited v. Zynga Inc* [2012] EWHC 1374 (Chancery). Mr. Robins took me to paragraphs 14 through to 24 of that judgment. Mr. Robins emphasised what was said by Henderson J at paragraph 20, where he identified the following points as emerging from the authorities:

> "....first, the question of expedition is essentially one for the discretion of the judge; secondly, the court has to have regard to its wider responsibilities to other litigants, and it is not just concerned with the position of the parties in the case before it; thirdly, it is always relevant to have regard to the procedural history of the case, and delay may count against an applicant although it will not necessarily be conclusive; fourthly, because the question is one for the court, the attitude of the respondent may be, or indeed is, comparatively unimportant, unless the defendant can show that it would suffer some real prejudice if expedition were granted… That is not to say, however, that the defendant may not helpfully draw the attention of the court to matters which may be relevant.... Lastly, it is emphasised that the first question which always has to be answered is whether urgency is justified at all. That may aptly be termed a threshold issue, and it is only if it is answered in the applicant's favour that one gets on to the next stage of considering what degree of

> expedition would be appropriate. It can be seen, therefore, that the question is not simply one of comparing competing timetables which are put before the court, and expedition will be granted only if the threshold test is duly satisfied."

92. Mr. Robins's opposition on behalf of Holdings to the expedition application is founded upon the points: first, that there is no urgency, for the reasons set out at paragraph 65 of his skeleton, and, secondly, that an order for an expedited trial would cause irremediable prejudice to Holdings, which would be unfair and contrary to the overriding objective, for the reasons set out at paragraph 66. Mr. Robins invites the court to dismiss the expedition application and allow the matter to proceed to a case management conference in the usual way.

93. In his oral submissions, Mr. Robins reiterated his submission that this is really just a claim about money by a large bank. Deutsche Bank is clearly on the hook and the outcome of this claim will not affect that. All that Deutsche Bank is seeking is money from another party. Mr. Gaunt's submissions amounted to no more than the plea that Deutsche Bank did not want to take steps to mitigate its loss unless and until it could be demonstrated that it had no recourse to Holdings. That was said not to be urgency, but a matter of Deutsche Bank's own choice; it did not satisfy the threshold condition of urgency. Moreover, Deutsche Bank had been saying for three months, since 20th April 2016, that it would be applying for an expedited trial, and yet its application was not issued until 4th July, albeit it was then made returnable at the same time as the application which Holdings had issued on 10th June. Mr. Robins made the point that there had been no dash to the Applications Court for any order of expedition. Ultimately, the claim was one about money.

94. In his response, Mr. Gaunt made it clear that he was not suggesting any extremely truncated timetable but, without an order for expedition, a five-day case such as this would, he said, not get a hearing date for a long time. Mr. Robins indicated that a hearing date should be capable of being obtained in May or April 2017. Mr. Gaunt indicated that he was in no position to controvert that assertion. He did, however, submit that the situation was quite urgent for both parties, and the sooner that it was resolved the better.

95. There have been put before me today two alternative draft directions, one on the basis of expedition and the other on the basis that the trial is not expedited. If expedition is ordered, then it is proposed that the case should be set down for an expedited trial on the first available date after 1st February 2017. Without expedition, it is proposed that the date should be the first available date after 7th April 2017. Thus, we are talking about a difference of a little over two months.

96. In my judgment, the threshold condition of urgency has been satisfied in the present

case. This is a case which is not just about money, but about who should have to assume responsibility for the management of the premises. In my judgment, that does justify giving this case an element of priority, but not such an element as to prejudice Holdings in the conduct of its defence to the claim.

97. I propose to adopt the expedited form of the directions, subject to minor modifications; in particular, the change in listing category from A to B, which was discussed before I began to deliver this (now over-lengthy) extemporary judgment.

98. So, for the reasons that I have given, I dismiss Holdings' application to dismiss the claim as originally pleaded, and I make an order for an expedited trial.