

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

CLAIM NO. BL-2020-001343

B E T W E E N :

- (1) LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)
(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN
AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS OF LONDON CAPITAL &
FINANCE PLC (IN ADMINISTRATION))
(3) LONDON OIL & GAS LIMITED (IN ADMINISTRATION)
(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH
(JOINT ADMINISTRATORS OF LONDON OIL & GAS
LIMITED (IN ADMINISTRATION))**

Claimants

-and-

- (1) MICHAEL ANDREW THOMSON
(2) SIMON HUME-KENDALL
(3) ELTEN BARKER
(4) SPENCER GOLDING
(5) PAUL CARELESS
(6) SURGE FINANCIAL LIMITED
(7) JOHN RUSSELL-MURPHY
(8) ROBERT SEDGWICK
(9) GROSVENOR PARK INTELLIGENT INVESTMENT LIMITED
(10) HELEN HUME-KENDALL**

Defendants

**EXPERT JOINT STATEMENT
OF MR PAUL GRAINGER AND DR CHUDOZIE OKONGWU
DATED 9 NOVEMBER 2023**

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1. Introduction

1. This is the joint expert statement of Mr Paul Grainger (“**PG**”) who is instructed on behalf of the Defendants 5 & 6, Paul Careless and Surge Financial Limited respectively, and Dr Chudozie Okongwu (“**CO**”) who is instructed on behalf of the Claimants, the Joint Administrators of London Capital & Finance PLC (“**LCF**”) and London Oil & Gas Limited (“**LOG**”) and those two companies themselves (together, the “**Experts**”).

1.1. The Experts’ Reports

2. The Experts have each prepared reports to the Court, which the Experts refer to as:

- PG1, being the report produced by PG dated 28 July 2023; and
- CO1, being the report produced by CO dated 29 September 2023.

3. The Experts’ instructions from their instructing solicitors are set forth in their respective reports.¹

1.2. Meeting of the Experts

4. On 23 October 2023, the Experts and members of their staff met to discuss their reports on the above issues on a without prejudice basis and to identify the areas of common ground and disagreement between them.

5. The Experts and staff working under their direction subsequently exchanged additional information on a without prejudice basis.

2. Structure of this Joint Statement

6. The remainder of this joint statement consists of the Experts Declaration and a schedule based on an agreed agenda for the meeting of the experts that sets out the areas on which the Experts agree and disagree.

¹ CO1, paras. 12-13, and PG1, paras. 1.1-1.3.

3. Expert Declaration

7. We, the undersigned experts, individually confirm that we understand our duty to the Court and have complied, and will continue to comply, with it.

8. We, the undersigned experts, individually confirm that we are each aware of, and have complied with, the requirements of CPR Part 35, Practice Direction 35, and The Civil Justice Council's Guidance for the Instruction of Experts in Civil Claims 2014.



Mr Paul Grainger
Complyport Limited
9 November 2023



Dr Chudozie Okongwu
AlixPartners UK LLP
9 November 2023

4. Schedule

Agenda Item 1:			
<ul style="list-style-type: none"> Whether there was a generally accepted market rate for the set of services which are said to have been provided by Surge 			
Part A – Matters Agreed			
<u>No.</u>	<u>Agreed issue or matter</u>		
1.	The Experts agree that, at the outset of the relationship between LCF and Surge, there was no generally accepted market rate for the set of services which are said to have been provided by Surge.		
Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger’s comments</u>	<u>Dr Okongwu’s comments</u>
1.	Whether LCF and Surge established a market rate	PG holds the opinion that the package of services required by LCF was not provided by any other single service provider at that time. Surge packaged a range of services required by LCF and set fees for them. In a process of negotiation, Surge and LCF effectively set a market rate for the package of services that Surge provided to LCF (and later to Blackmore).	CO does not agree with PG that LCF & Surge established a market rate. PG’s opinion that LCF & Surge established a market rate relies on an assumption that they were acting as reasonable parties in an arm’s length transaction. CO’s view is that PG1 provides no support for this assumption. ²

² CO1, para. 49.

Agenda Items 2-3:			
<ul style="list-style-type: none"> Whether there are firms who offer a similar (or more/less extensive) set of services to those which are said to have been provided by Surge, and how the fee rates for those service providers compare to those charged by Surge 			
Part A – Matters Agreed			
<u>No.</u>	<u>Agreed issue or matter</u>		
1.	The Experts agree that there are other service providers that provide <i>at least some</i> of the set of services which are said to have been provided by Surge.		
Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger's comments</u>	<u>Dr Okongwu's comments</u>
1.	Whether third-party marketers, fund managers, and private credit funds are relevant comparators	PG holds the opinion that at the relevant time, the other potential service providers referred to, who provided some of the services required by LCF, did not provide the full range/package of services required and/or were unwilling to provide services to issuers of mini bonds. In this context, they are not relevant comparators	In CO's view, third-party marketers and placement agents, fund managers, and private credit funds offer similar, or more extensive, services to those said to have been provided by Surge, for substantially lower fees. ³ CO cannot opine on whether all or most of these service providers were willing to work with mini-bond issuers.

³ CO1, Section 3.

Agenda Item 4:			
<ul style="list-style-type: none"> With regards to the 25% (or 22.5%) commission rate, agreement/disagreement on whether the required returns per year on LCF's lending (to fund payment of the Surge Fee, meet the obligations towards the Bondholders, and pay the "Lender Interest" to LCF) far exceed the "target return" that LCF stated to investors, as well as high-yield corporate debt yields and the performance of the corporate loan market 			
Part A – Matters Agreed			
None			
Part B – Matters Not Agreed			
No.	Agreed description of issue or matter	Mr Grainger's comments	Dr Okongwu's comments
1.	See above Agenda Item 4.	<p>My instructions, provided by Kingsley Napley, are to provide expert evidence as per the Order of Mr Justice Miles dated 24 May 2022, which states:</p> <p><i>"In the period from 2015 to 2019, what was the ordinary market rate (or, in the absence of a relevant market, the rate that would have been agreed between reasonable parties in an arm's length transaction) for services of the type specified in paragraph 5(3) of the Defence of the Fifth and Sixth Defendants?"</i></p> <p>This matter therefore falls outside of the scope of my instructions.</p>	<p>As noted above, in his instructions, CO was asked to address the economic feasibility and economic implications of Surge's commission rate.⁴</p> <p>It is CO's view that a legitimate commission rate of 25% (or 22.5%) is not credible as it implies required rates of return on LCF's lending⁵ that, at the time, far exceeded:</p> <ul style="list-style-type: none"> the "target return" that LCF stated to investors; the yields on high-yield corporate debt; and the performance of the corporate loan market.⁶

⁴ CO1, paras. 12-13.

⁵ LCF's lending to borrowers required to fund payment of the Surge Fee, meet the obligations towards the Bondholders, and pay the "Lender Interest" to LCF.

⁶ CO1, Section 2.

Agenda Item 5:			
<ul style="list-style-type: none"> With regards to PG1's comparison of Surge's annualised fee rates with those of a (hypothetical) fund manager. 			
Part A – Matters Agreed			
None			
Part B – Matters Not Agreed			
No.	Agreed description of issue or matter	Mr Grainger's comments	Dr Okongwu's comments
1.	Whether a 5% initial fund charge is at the higher end of the spectrum based upon the FCA's "Asset Management Market Study"	<p>The reference in my report to fund charges was intended not as a comparison of economic value of different types of charges, but as a simple illustration of the practice of taking fees for the provision or administration of financial products and services by way of up front fees, periodic fees or a combination of both.</p> <p>The reference to the FCA Asset Management Market Study published in 2017 is inappropriate. Mini bonds were not an FCA regulated financial product and did not fall within the scope of the Asset Management Market Study.</p> <p>The FCA Asset Management Market Study focused on investment funds provided to and marketed to retail clients. These were products and services that were regulated by the FCA</p>	<p>As stated in CO1, a 5% initial fund charge is at the higher end of the spectrum based upon the FCA's "Asset Management Market Study".⁷</p> <p>The 5% initial fund charge emanated from PG's own report, PG1. PG1 uses this assumed 5% initial fund charge in its comparison of the Surge Fee to fees of a hypothetical fund manager.⁸ PG1 uses this comparison to conclude that "the fee agreed between LCF and Surge, when apportioned over the period of time for which service delivery was expected, is not significantly out of line with the fees for similar services offered by other service providers, if the greater scope of services provided by Surge is considered".⁹ Therefore, in CO's view, the reference to the FCA Asset Management Market Study published in 2017 regarding initial fund charges is relevant.</p>

⁷ CO1, para. 37.

⁸ PG1, paras. 10.18-10.21.

⁹ PG1, para. 12.4.

Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger’s comments</u>	<u>Dr Okongwu’s comments</u>
2.	Whether the Grainger Report’s calculation of an annualised fee rate for Surge accounts for either the time value of money or credit risk	<p>The reference in my report to fund charges was intended not as a comparison of economic value of different types of charges, but as a simple illustration of the practice of taking fees for the provision or administration of financial products and services by way of up front fees, periodic fees or a combination of both.</p> <p>As stated in response to Agenda Item 4 B 1 above, such analysis is outside of the scope of my instructions.</p>	<p>As stated in CO1, PG1’s calculation of an annualised fee rate for Surge does not account for either the time value of money or credit risk.¹⁰</p> <p>This calculation of an annualised fee rate for Surge emanated from PG’s own report, PG1. PG1 uses this annualised rate to conclude that “the fee agreed between LCF and Surge, when apportioned over the period of time for which service delivery was expected, is not significantly out of line with the fees for similar services offered by other service providers, if the greater scope of services provided by Surge is considered”.¹¹</p>
3.	Whether the hypothetical 7.25% fee rate (for the hypothetical fund manager) is a cumulative fee rate over a 3-year term, while the calculated 8.33% fee rate (for Surge) is the annualised fee paid	<p>The reference in my report to fund charges was intended not as a comparison of economic value of different types of charges, but as a simple illustration of the practice of taking fees for the provision or administration of financial products and services by way of up front fees, periodic fees or a combination of both.</p> <p>As stated in response to Agenda Item 4 B 1 above, such analysis is outside of the scope of my instructions.</p>	<p>As stated in CO1, the hypothetical 7.25% fee rate (for the hypothetical fund manager) is a cumulative fee rate over a 3-year term, while the calculated 8.33% fee rate (for Surge) is the annualised fee paid each year and that therefore they are not strictly comparable. When adjusted to set them both on an annualised basis, Surge’s fee rate is more than three times as large.¹²</p> <p>These figures and comparisons emanated from PG’s own report, PG1. PG1 uses this comparison to conclude that “the fee agreed between LCF and Surge, when apportioned over the period of time for which service delivery was</p>

¹⁰ CO1, Section 4.2.2.

¹¹ PG1, para. 12.4.

¹² CO1, Section 4.2.3.

Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger's comments</u>	<u>Dr Okongwu's comments</u>
	each year		expected, is not significantly out of line with the fees for similar services offered by other service providers, if the greater scope of services provided by Surge is considered". ¹³

¹³ PG1, para. 12.4.

Agenda Item 6:			
<ul style="list-style-type: none"> Whether the services offered by Surge to LCF and Blackmore were the same / similar 			
Part A – Matters Agreed			
1.	The Experts agree that the services offered by Surge to LCF and Blackmore were very similar.		
Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger's comments</u>	<u>Dr Okongwu's comments</u>
1	Comparison of services	<p>As Surge and LCF effectively negotiated a framework package of services to support mini bond issuers and in doing so, effectively set a fee benchmark or market rate, it is not surprising that the services required by LCF and Blackmore and offered to each by Surge are similar.</p> <p>I was not instructed to carry out a detailed comparison of the services provided by Surge to both LCF and Blackmore and so have not carried out a detailed comparison.</p>	CO has not carried out a detailed comparison of the services provided by Surge to both LCF and Blackmore. However, as noted in CO1, ¹⁴ the contracts appear very similar and Mr Careless himself admits that “Surge’s role in Blackmore was exactly the same as what we did for LCF”. ¹⁵

¹⁴ CO1, para. 46.

¹⁵ Witness Statement of Paul James Careless, para. 24.

Agenda Item 7:			
<ul style="list-style-type: none"> Whether LCF and Surge effectively established a market rate for Surge's services by acting as reasonable parties at arm's length 			
Part A – Matters Agreed			
1.	The Experts agree that the written drafts of a contract between Surge and LCF remained unexecuted		
Part B – Matters Not Agreed			
No.	Agreed description of issue or matter	Mr Grainger's comments	Dr Okongwu's comments
1.	Whether there is evidence for PG1's assumption that "LCF and Surge... were each acting as reasonable parties in an arm's length transaction"	<p>I have not been provided with any evidence that indicates that there were any constraints on the negotiations between Surge and LCF relating to</p> <ol style="list-style-type: none"> 1) the package of services required by LCF, 2) the services that Surge could provide and was willing to provide and 3) the fees at which Surge wished to charge for such services and that LCF was willing to pay. <p>Both of Surge and LCF were free to terminate negotiations at any time prior to the commencement of service provision.</p> <p>In the absence of any evidence to the contrary, I must assume that in such negotiations, Surge and LCF were acting as reasonable parties, where negotiations were carried out at arm's length and good faith.</p> <p>It would also appear that whilst a written contract was</p>	As stated in CO1, PG1 provides no support for the assumption that LCF and Surge were each acting as reasonable parties in an arm's length transaction. ¹⁶ PG's conclusions are premised on this unsupported assumption.

¹⁶ CO1, para. 49.

Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger's comments</u>	<u>Dr Okongwu's comments</u>
		not executed, there was a de facto common law contract in place between Surge and LCF between 2015 and 2019. During this period, services were provided to LCF by Surge and payment was made by LCF to Surge for those services. The services and payment for services were subject to terms agreed but not written. This would appear to meet the conditions for a contract to exist as there is offer and acceptance of service, payment of consideration and an intention by both parties to enter into a contract.	

Agenda Item 8:			
<ul style="list-style-type: none"> • With regards to Surge’s profitability, agreement/disagreement that: <ul style="list-style-type: none"> • From 19 January 2015 to 30 September 2018 (the periods before LCF went into administration), the net profit margin was higher than 27.6%, ranging from 28.2% to 48.0% • When focusing on the period from 19 January 2015 to 30 September 2018 (the periods before LCF went into administration), the total costs were 64.8% of revenues and the net profit margin was 35.4% 			
Part A – Matters Agreed			
None			
Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger’s comments</u>	<u>Dr Okongwu’s comments</u>
1.	From 19 January 2015 to 30 September 2018, Surge’s net profit margin was higher than 27.6%	<p>My instructions, provided by Kingsley Napley, are to provide expert evidence as per the Order of Mr Justice Miles dated 24 May 2022, which states:</p> <p><i>“In the period from 2015 to 2019, what was the ordinary market rate (or, in the absence of a relevant market, the rate that would have been agreed between reasonable parties in an arm’s length transaction) for services of the type specified in paragraph 5(3) of the Defence of the Fifth and Sixth Defendants?”</i></p> <p>This matter therefore falls outside of the scope of my instructions.</p>	The 27.6% net profit margin is a calculation from PG1. ¹⁷ In CO1, CO is simply performing a similar calculation, but over a more limited time period (the period before LCF went into administration). ¹⁸ As such, in CO’s view, this calculation is responsive to a calculation in PG1.

¹⁷ PG1, para. 10.38.

¹⁸ CO1, para. 52.

Part B – Matters Not Agreed			
<u>No.</u>	<u>Agreed description of issue or matter</u>	<u>Mr Grainger’s comments</u>	<u>Dr Okongwu’s comments</u>
2.	From 19 January 2015 to 30 September 2018, Surge’s total costs were 64.8% of revenues and the net profit margin was 35.4%	<p>My instructions, provided by Kingsley Napley, are to provide expert evidence as per the Order of Mr Justice Miles dated 24 May 2022, which states:</p> <p><i>“In the period from 2015 to 2019, what was the ordinary market rate (or, in the absence of a relevant market, the rate that would have been agreed between reasonable parties in an arm’s length transaction) for services of the type specified in paragraph 5(3) of the Defence of the Fifth and Sixth Defendants?”</i></p> <p>This matter therefore falls outside of the scope of my instructions.</p>	In PG1, PG calculated the total costs as a percentage of revenues and the net profit margin over the period from 19 January 2015 to 30 September 2019. ¹⁹ In CO1, CO is simply performing similar calculations, but over a more limited time period (the period before LCF went into administration). ²⁰ As such, in CO’s view, these calculations are responsive to calculations in PG1.

¹⁹ PG1, para. 10.38.

²⁰ CO1, para. 52.

Agenda Item 9:			
<ul style="list-style-type: none"> • With regards to the economic benefits to Mr Careless specifically: <ul style="list-style-type: none"> • Whether Mr Careless received at least £8.6 million from Surge, either directly or in the form of other benefits, including at least £2.5 million in dividend payments • Whether a substantial portion of Surge’s costs, including with respect to marketing spend, were paid to the Connected Companies (paid to companies in which Mr Careless held a “person with significant control” (PSC) status at some point between 16 March 2015 and 7 August 2019) • Whether it is reasonable to assume that the Connected Companies earned profit margins on those payments • Whether any such additional profits should also be considered to gain a more comprehensive perspective of the overall profitability of Surge’s business and of the economic benefits to Mr Careless in particular 			
Part A – Matters Agreed			
None			
Part B – Matters Not Agreed			
No.	Agreed description of issue or matter	Mr Grainger’s comments	Dr Okongwu’s comments
1.	Economic benefits to Mr Careless and overall profitability of Surge’s business	<p>My instructions, provided by Kingsley Napley, are to provide expert evidence as per the Order of Mr Justice Miles dated 24 May 2022, which states:</p> <p><i>“In the period from 2015 to 2019, what was the ordinary market rate (or, in the absence of a relevant market, the rate that would have been agreed between reasonable parties in an arm’s length transaction) for services of the type specified in paragraph 5(3) of the Defence of the Fifth and Sixth Defendants?”</i></p> <p>This matter therefore falls outside of the scope of my instructions.</p>	In CO’s view, the economic benefits to Mr Careless are related to the issue of Surge’s profitability, which was introduced in PG1. ²¹

²¹ PG1, paras. 10.37-10.39.