Neutral Citation Number: [2020] EWHC 1607 (Ch)

Case No: CR-2019-005359

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
CHANCERY DIVISION

IN THE MATTER OF FINNAN DEVELOPMENTS (RAYNES PARK) LLP (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am 24 June 2020.

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

Date: 24/06/2020

Before:

MR HUGH SIMS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

ANTHONY PETER DAVIDISON
(as liquidator of Finnan Developments (Raynes Park) LLP)

Applicant

- and –

(1) SEAN PATRICK FINNAN
(2) STEPHEN FINNAN
(3) PAUL CHRISTOPHER JOHN CAPRA
(4) FINNAN DEVELOPMENTS LIMITED
(5) FINNAN LAND & PROPERTY LIMITED

Respondents

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JONATHAN TITMUSS (instructed by **Howes Percival LLP**) for the **Applicant**
STEVEN THOMPSON QC (instructed by **Keystone Law Ltd**) for the **Third Respondent**

Hearing date: 2 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Hugh Sims QC:

Introduction

1. This summary judgment application arises out of a claim made by a liquidator, Anthony Peter Davidson ("the Liquidator") for alleged wrongdoing by members of a limited liability partnership, Finnan Developments (Raynes Park) LLP ("Finnan LLP" or "the LLP"). In particular the Liquidator seeks to recover monies and/or seek compensation in relation to payments which were made by the LLP to the respondents many years before the LLP entered into liquidation, but when its trading life was close to an end. The central issue, so far as this application is concerned, relates to what provision should be made in relation to a contingent liability and whether, with a suitable provision, the LLP was insolvent or likely to become insolvent as a result of entering into a settlement agreement with a retiring member, the third respondent, Mr Paul Christopher John Capra ("Mr Capra"), under which it agreed to pay him £1.35m.

2. By application notice dated 16 January 2020 Mr Capra seeks reverse summary judgment against the Liquidator, and asks for the dismissal of the £1.35m misfeasance claim against him. Mr Capra contends that, applying the summary judgment test under CPR 24.2, Mr Davidson has no real prospect of succeeding on his claims against Mr Capra, and there is no other compelling reason for those claims to be disposed of at trial. The test to apply under CPR 24.2 is well traversed (see *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (Lewison J, as he then was), approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24] (Etherton LJ). There are five particular principles which are worth having in mind for this application:

    a. The test is whether or not there is a real prospect of success on the claim or issue, the burden being on the person seeking summary judgment to show that;

b. This is not to be assessed solely by reference to what is before the court, but also on the basis of evidence which can reasonably be expected to be available at trial;
c. The court should not conduct a " mini-trial", and so seek to resolve issues of fact which are substantial and best left to trial;
d. Even where there is no obvious conflict of fact at the time of the application, the court should hesitate about making a final decision where there is reason to believe a fuller investigation into the facts would add to or alter the evidence available and so affect the outcome;
e. Where however there is a short point of law, or an issue which does not involve any substantial dispute of fact, which can be disposed of summarily, the court should grasp the nettle, or pluck the flower, and decide it.

3. In short, I am not satisfied that the entirety of the claims against Mr Capra are so fanciful, and lacking in merit, that they should be disposed of now, summarily. And there would be a real risk of this exercise becoming a mini-trial should I attempt to resolve all of the issues arising on the claims, on the evidence as it currently stands. Some of the claims, or bases for the claims, against Mr Capra do, however, fall into that category, as I explain further below (and which were to some extent conceded during the course of oral submissions). And the application has usefully identified a (if not the) key factual issue, relating to the value to be placed on a contingent liability, which needs to be focussed on by the parties, so far as the claims against Mr Capra is concerned, which should enable a more expeditious and efficient disposal of the dispute.

4. I will now set out the relevant background facts, to set the context for the claims against Mr Capra, dealing with factual matters which are uncontroversial, or not a matter of serious controversy. I will then turn to identify the issues arising, and the further facts relevant to those issues, focussing on facts which are controversial, and explaining the reasons for my determination of the issues.

5. Given that I do not intend to give summary judgment on any issues which involve contentious issues of fact which cannot easily be resolved, I have restrained myself from a lengthy recitation of the factual background to the case, which may obscure, rather than illuminate, my core reasoning.

The factual background

6. The LLP was incorporated at Companies House on 4 March 2008 under the Limited Liability Partnerships Act 2000 ("the 2000 Act"), as a limited liability partnership (under partnership no. 0C335253). It was incorporated for the purpose of acquiring and developing a freehold site at 213 Worple Road, Raynes Park, London, SW20 8QY ("the Property"). The Property was purchased on 28 March 2008 for £2.42m, with the benefit of a loan from Investec Bank Plc of £2.5m and loan capital introduced by members of the LLP: £205,566.07 from Mr Capra and £205,566.07 from the other members of the LLP.

7. On the same date, on 28 March 2008, the LLP entered into a limited liability partnership agreement ("the LLP Agreement") to set out the basis on which the LLP

was to be organised and the rights and obligations of the members of the LLP ("the Members"). The Members, all of whom were defined as designated members, entitled to participate in the management of the LLP, were the first respondent, Mr Sean Patrick Finnan ("Sean Finnan"), his brother, Mr Stephen Finnan ("Stephen Finnan"), the second respondent, Mr Capra, the third respondent, and Finnan Developments Limited ("Finnan Developments"), the fourth respondent. Whether all of the Members were involved in the management of the LLP, and the extent of their involvement, is of some controversy. I shall refer to the first, second and fourth respondents as "Finnan" for short. In broad terms, the LLP Agreement provided for a 50:50 split between Mr Capra and Finnan, both as to capital contributions and the sharing of profits and losses. However in time Mr Capra came to contribute more than Finnan and the parties agreed to vary their entitlements accordingly, seemingly on a pro rata basis, as reflected in the accounts signed off during the period leading up to 2013.

8. The fifth respondent, Finnan Land & Property Limited ("Finnan Land & Property") is a subsidiary of Finnan Developments. It was the recipient of four payments, which commenced on 12 August 2013, which the Liquidator seeks to recover, totalling £896,860. These payments occurred after the date of Mr Capra's resignation from the LLP, and the Liquidator does not seek to suggest he should be liable for these payments.

9. The LLP Agreement defined the business of the LLP ("the Business") as the obtaining of planning permission for and the development and disposal of the Property (or such other business as may be determined in accordance with the LLP Agreement). The development involved the creation of commercial units on the ground floor of the Property, which were let to Costa Coffee and Sainsburys on or about 1 March 2012, and nine flats above that, which were sold, with the freehold, during the course of 2013. The LLP entered into voluntary liquidation on 8 November 2016 when the Liquidator was appointed. Its only business activity, during the period from September 2013-2016, appeared to be its involvement in an arbitration dispute with the main contractor, G&S Construction Limited ("G&S").

10. According to the estimated statement of affairs signed by Sean Finnan shortly before the liquidation, on 4 November 2016, it has a net estimated deficiency of just over £3m, which is almost entirely made up of a debt owed to G&S. That debt is based on certain arbitration awards made in its favour against the LLP between 2013 and 2017, which I shall refer to further below. G&S and the LLP had entered into a contract executed on 8 October 2011 in the form of a JCT Design and Build Contract 2005 Revision 2 (DB) for the design and construction of the retail units and dwellings and associated works ("the Contract"), which included an arbitration clause. The Contract was not in the bundle before me and nor, at present, does the Liquidator have all the documents which were referred to in the arbitration.

11. G&S was, at least ostensibly, set up by Gareth Fishburn, a builder, who became its sole director and shareholder. It was appointed as the main contractor for the development of the Property. I say ostensibly as there has been some speculation as to who the "S" in "G&S" is a reference to, and whether it is a reference to Sean Finnan, and whether G&S was ultimately controlled by Sean Finnan/Finnan, as the arbitrator concluded in his awards; indeed he goes so far as to suggest the LLP

directed G&S. I ignore that for the purposes of this application as the findings in the arbitration awards do not bind Mr Capra, who was not a party to them or involved in them to any material degree (at least not after 9 August 2013).

12. Originally it was anticipated that Finnan Developments would project manage the development work at the Property, as reflected in clause 3.3 of the LLP Agreement in the following terms: "*As part of its contribution to the Business Finnan Developments Limited and its directors agree to use all its reasonable endeavours to project manage the development of the Property*". However, it did not have planning expertise, and Mr Capra introduced Mr Tim Garland-Jones of Garland Group Limited as someone who could assist in this respect, who was a planning consultant Mr Capra had worked with on previous developments. Planning permission was obtained for the development and works commenced. Mr Garland-Jones remained involved in project management thereafter. He has, unfortunately, since passed away, after the key events in question. Mr Capra was also a non-executive director of Garland Group Limited and had some association with their offices, though Mr Thompson QC, representing Mr Capra, was keen to stress before me the limited nature of that role. It is contentious how involved Mr Garland-Jones was, in the build, and how much Mr Capra knew as a result, though I have my doubts as to how critical this is likely to be, ultimately. Whilst Mr Capra refers to the Raynes Park project being "Sean's baby", he accepts he became more involved from the summer of 2012, due, he says, to the lack of action on the part of Sean Finnan, or his brother, Stephen Finnan. The latter had a successful career as a professional footballer, and had a number of development ventures with his brother, though they subsequently fell out. Sean Finnan was adjudged bankrupt on the petition of Stephen Finnan on 18 July 2019. His trustee in bankruptcy has taken no active part in these proceedings.

13. After planning permission was obtained building work commenced. Problems occurred with the development, including a dispute involving a sub-contractor in relation to groundworks, and G&S entered into insolvent administration on 22 May 2012, before the development was completed, at the end of that year. The development had to be completed by other contractual arrangements.

14. The arbitration was brought by G&S, acting by its administrators, as claimant, by notice dated 9 April 2013, against the LLP, as defendant. The notice identified the particulars of the disputes referred to arbitration as follows:

"(i) The unpaid sum of £213,341.09 owed prior to 22 May 2012 and the administration of the Claimant;
(ii) The sum to be paid following completion of the Works and making good of defects;
(iii) The Price to be paid for the Works and variations;
(iv) The sum to be paid as loss and expense due to the Claimant for time related costs;
(v) Extension of time."

15. In response the LLP indicated it had its own cross-claim or counterclaim for liquidated damages for delay, and for the cost of completing and making good the works. The latter is in part reflected in issue (ii) in the arbitration notice. The

former overlaps with the issues (iv) and (v). The LLP also threatened an application for security for costs, though did not pursue that.

16. By 9 August 2003 G&S had applied for, and the arbitrator had made, a provisional award (award no 1, dated 11 July 2013), requiring the LLP to pay G&S a sum of £175,000, plus VAT, into an escrow account, on the basis that this represented a reasonable proportion of the sum which the arbitrator considered was likely to be awarded to G&S. In addition (by award no 2, dated 2 August 2013), the arbitrator required the LLP to pay the sum of £10,000 as a further provisional sum on account of costs. I shall return to consider the parties' contentions in relation to these awards, and later awards, in more detail below, but suffice it to say here that the LLP had been required to pay, and paid, the sum of £222,000 (inclusive of VAT) into an escrow account, and the precise amount which would be required to be paid to G&S remained to be determined. The extent of this contingent liability as at 9 August 2013 is a key factual dispute. That date is significant since it is the date Mr Capra retired and ceased to be a member. At this time no-one appears to have had in contemplation that the liability to G&S would grow to the extent it did. I will consider further below how the liability grew, and what analysis was given to an estimate of this liability and the amount.

17. By 2013 Mr Capra had decided he wished to retire from the LLP. His relationship with Mr Sean Finnan, who had brought him into the project, principally, he suggested, as an investor, had become strained. Mr Stephen Finnan was largely a silent partner, and investor, in the venture, and Mr Sean Finnan was the main protagonist Mr Capra had to deal with. Moreover, the LLP's Business was almost complete by 2013. The building work was practically complete. I shall refer to certain correspondence which passed between Mr Capra and Finnan during this period, the interpretation of which is contentious on the issue of insolvency, below. I simply note here that by 9 August 2013 only one of the 9 flats remained to be sold.

18. Before that sale had occurred, Mr Capra negotiated an exit from the LLP on the terms set out in a settlement agreement dated 9 August 2013 ("the Settlement Agreement"). The Settlement Agreement provided for him to be paid the sum of £1.35m ("the Settlement Sum"), which was duly paid to him on 12 August 2013. The important point to note for present purposes is that the evidence of Mr Capra, which is not the subject of any substantial challenge on the part of the Liquidator on this point (and indeed is referred to and relied on in his responses to two notices to admit, dated 23 April and 19 May 2020), is that as at 9 August 2013 Mr Capra had introduced £1,651,144 to the LLP and this was treated in its accounts as loan capital. I will return to the significance of that designation as loan capital further below. The LLP had suffered net losses, of which £283,940 was attributed to Mr Capra. This resulted in a balance due to him on the capital account as at 9 August 2013 of £1,367,204. Accordingly, on the basis of evidence of Mr Capra, which is said to be subject to a non-admission on the part of the Liquidator, but which he appears to rely on as part of his case, the Settlement Sum resulted in repayment of a loan by Mr Capra to the LLP and a reduction in its liabilities by the same amount (or arguably slightly more). The Liquidator does seek to impugn the Settlement Sum payment, however.

The misfeasance claim

19. By an application notice issued on 9 August 2019 (later amended on 18 October 2019) the Liquidator commenced these proceedings, on behalf of the LLP, under section 212 of the Insolvency Act 1986 ("IA 86"). As is well known this is a summary provision available to an office-holder which does not give rise to any fresh cause of action, and which requires an underlying breach of duty to the relevant underlying company, or here limited liability partnership, to be established.

20. Under section 14 of the 2000 Act, the provisions of the relevant sections of the IA 86 and the Insolvency (England and Wales) Rules ("IR 2016") apply to limited liability partnerships. The Limited Liability Partnership Regulations 2001 (SI 2001/1090) ("the 2001 Regulations"), modify the provisions of the IA 1986 to make them operate effectively in the context of an insolvent limited liability partnership. The IR 2016 apply directly to LLPs without specific modification but are to be read, as per regulation 10 of the 2001 Regulations, as having such modifications as are appropriate to the context.

21. It is common ground therefore that section 212 applies to limited liability partnerships, by virtue of regulation 5 of the 2001 Regulations, modified, as here quoted:

> *(1) This section applies if in the course of the winding up of [an LLP] it appears that a person who–*
>
> *(a) is or has been [a member] of the [LLP],*
>
> ...
>
> *has misapplied or retained, or become accountable for, any money or other property of the [LLP], or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the [LLP].*
>
> ...
>
> *(3) The court may, on the application of…the liquidator…examine into the conduct of the person falling within subsection (1) and compel him–*
>
> *(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or*
>
> *(b) to contribute such sum to the [LLP's] assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.*

22. Mr Titmuss, for the Liquidator, accepted that for an applicant to succeed under section 212 IA 86 ordinarily they must show a loss to the company in liquidation (or in this case LLP) caused by the relevant breach of duty (see the discussion in *Re E D Games Ltd* [2009] EWHC 223 (Ch) (Jonathan Gaunt QC at [16]). However, it should be noted that section 212 may also be said to encompass the scenario where there is a misapplication, as is plain by the wording in subsection (1) above, which might result in the requirement of an order to repay, restore or account without reference to the loss to the company (or LLP) (see also *Re Palmier Plc (in*

liquidation); Sandhu v Sidhu [2009] EWHC 983 (Ch) at [185] (Proudman J). This is important to have in mind in the context of the situation where it is alleged a duty is owed to creditors, not simply to the members/shareholders.

23. The Liquidator's application notice sets out the following claims against Mr Capra (I have omitted the claims solely relating to the other respondents, and highlighted Mr Capra's name, by underlining, in the quotation below):

"The Applicant seeks the following declarations:
1. Sean Finnan, Stephen Finnan, Paul Capra and/ or Finnan Developments Limited ("Finnan Developments ") failed to comply with their obligations pursuant to clause 8.1 of the Limited Liability Partnership Agreement to ensure that Finnan Developments (Raynes Park) LLP (Finnan LLP") maintained accurate books and records and/ or filed accurate accounts.
AND as to the payment of settlement agreement and/ or the payment of £1.35m to Paul Capra consequent upon that settlement:
2. Sean Finnan, Stephen Finnan, Paul Capra and/ or Finnan Developments breached their express and/ or implied duties to act in the best interests of Finnan LLP in approving the settlement agreement with Paul Capra which provided for payment to him of the sum of £1.35m.
3. Finnan LLP, upon the proper drawing of the accounts was insolvent at the time that the settlement agreement was entered into and / or became insolvent as a consequence of the payment funds pursuant to that settlement.
4. Sean Finnan, Stephen Finnan, Paul Capra and/ or Finnan Developments were under a duty to and failed to act in the best interests of creditors when approving and/or entering into the settlement agreement between Finnan LLP and Paul Capra in that the same preferred Paul Capra or otherwise.
[5 omitted]
6. Paul Capra placed his own interests above those of Finnan LLP in entering into a settlement deed that saw his loans repaid in priority to any other creditors.
[7 omitted]
8. The sum of £1.35m paid to Paul Capra is held by him on trust for the Applicant.
[9-13 omitted]
And / or generally
14. Sean Finnan, Stephen Finnan, Paul Capra and/ or Finnan Developments have acted in breach of their duty of good faith to Finnan LLP; and/ or
15. Sean Finnan, Stephen Finnan, Paul Capra and/ or Finnan Developments are in breach of their duties to Finnan LLP such that the powers of the Court contained in section 212 of the Insolvency Act 1986 are engaged."

The summary judgment application, and some pruning

24. The summary judgment application was issued by Mr Capra on 16 January 2020. This is stated to be for the reasons set out in Mr Capra's first statement and Mr Scholey's first statement, which were filed in relation to the misfeasance claims and in support of the application. This tended to leave the precise basis for the application somewhat opaque, but in the course of correspondence, the provision of further evidence, and submissions, the basis for the application has been made clear,

and the critical issue is assessment of the contingent liability to G&S for the purposes of assessing solvency.

25. It can be seen that some of misfeasance claims are widely drawn and capable of including a multitude of alleged sins. The grounds on which those claims are pursued are set out in further detail in the Liquidator's first statement. Various alleged duties and breaches are also set out there. Reflecting the width of the different possible causes of action being pursued against Mr Capra, Mr Titmuss, in his skeleton argument, referred to the relevant duties owed by Mr Capra as including the express contractual duties under the LLP, fiduciary duties to the LLP and the common law duty to exercise reasonable skill and care.

26. During the course of oral submissions it became apparent, however, that of the claims, focussing on those set out in the application notice, paragraph 1 had no real life or vitality as an independent ground, so far as Mr Capra is concerned, unless it was an opaque reference to the need to make a provision in relation to G&S. Whilst Mr Titmuss' skeleton argument contains a bare assertion of such a breach, at paragraph 53 i. of his skeleton, it was not articulated to me what grounds there were for contending that the accounts drawn up before Mr Capra resigned were inaccurate, or that he failed to ensure accurate books and records were kept. Mr Titmuss, for the Liquidator, advanced his submissions instead on the basis that the key failing was the failure to recognise and make provision for the contingent liability to G&S (see paragraph 53 ii. of his skeleton). But this duty to make a provision (accepted by Mr Capra for the purposes of this application) had nothing to do with inaccurate maintenance of accounts before Mr Capra resigned. Given that the arbitration notice was not served until 2013, after the 2012 accounts were signed off, I do not see the argument that they should have contained a provision and the 2013 accounts had not yet been prepared.

27. The Liquidator's case is more, therefore, that a designated member, discharging their duties, ought to have considered the contingent liability to G&S, and placed a value on it before negotiating terms of exit which involved them being paid out. And if they had, that this would have shown that a payment out to Mr Capra of £1.35m was likely to result in the LLP becoming insolvent, if not actually insolvent, as a result of which they could or would not have caused or allowed the LLP to enter into the Settlement Agreement which required the LLP to do just that. This is what paragraphs 3, 4 and 6, read with paragraph 15, are seemingly targeted at, albeit formulated somewhat differently (and the latter paragraph in broader terms than Mr Titmuss advances the case). Those are the key paragraphs leading to the relief sought, pleaded at paragraph 8 on a constructive trust basis, also reflected in the relief prayer, paragraph 3. Equitable compensation is also being sought, as an alternative, at paragraph 1 of the prayer, requiring repayment of the sum of £1.35m, on a joint and several basis, against Sean Finnan, Stephen Finnan, Mr Capra and Finnan Developments.

28. So far as paragraph 2 of the misfeasance application notice is concerned, the particular clause which is relied on in the LLP Agreement in this case as suggestive of such express or implied duties is clause 14.1, which stated as follows:

"Each Member shall at all times devote such time and attention to the Business as may be necessary for the purposes of the Business; use all reasonable endeavours to promote the Business and show the utmost good faith to the LLP and the other Members in all dealings relating to the Business and affairs of the LLP and give the LLP and the other Members a true account of all such dealings."

29. This allegation, which is linked with paragraph 14 (again drawn in overly wide terms) also has no independent life or vitality because it is directed at the duties, either express or implied, owed to the LLP, not its creditors. A repayment of a loan causes no loss to a solvent LLP. It simply exchanges one asset – cash – for another asset, a reduction in a debt. That is why there exists the ability to attack unlawful preferential payments, under section 239 of the IA 86. But such a claim cannot be brought in this case because the transaction was more than two years before the liquidation of the LLP commenced, and so is outside the relevant time. The duty under clause 14.1 is not entirely irrelevant, however, as it may be viewed as a stepping-stone to an allegation that fiduciary duties are owed by the member to the LLP and, where solvency is in issue, this is displaced by the interests of the creditors.

30. So, the most important duty for present purposes is the alleged duty, as set out in paragraph 71 of the Liquidator's first statement, amplifying the claim, that if the LLP was insolvent or likely to become insolvent by the making of any of the transactions at issue, the Members, including Mr Capra, had a duty to consider the interests of creditors when making the decisions in question. This is a reflection of the principle which was the subject of recent consideration by the Court of Appeal in *BTI 2014 LLC v Sequana SA and Others* [2019] EWCA Civ 112, [2019] BCC 631, [2019] 2 All ER 784 (see in particular at [220] per David Richards LJ). An appeal from that decision is due to be heard by the Supreme Court. Mr Capra seeks to remove any potential uncertainty in that respect, for the purposes of this application, by an acceptance by Mr Capra should be treated as owing the duties as formulated in that case. Neither counsel sought to suggest to me that any potential uncertainty as to the precise formulation of the relevant test militated against granting summary judgment.

31. Given that Mr Capra was a member of an LLP, governed by the terms of the LLP Agreement, it was open for him to contend that the duty to creditors, recognised in relation to directors of limited liability companies, might not apply to him. The basis for such an argument could be made on two grounds.

32. The first is that Mr Capra was not in fact involved in the management of the LLP at the material time so as to give rise to fiduciary duties, or duties analogous to director's duties, including to creditors. Mr Thompson, representing Mr Capra, recognised, however, that this was a fact sensitive issue not readily capable of determination summarily in his favour, and so it was conceded for the purposes of the application that there was a real prospect of it being demonstrated that he was sufficiently involved in the management of the LLP at the material times in question, such as to give rise to such duties. This was realistic, as it can be seen Mr Capra was involved to some degree, certainly from the summer of 2012, and this included him signing off the accounts for 2012 at the start of 2013. With this

background in mind, exploring the precise boundaries of his involvement and the impact on his duties is not summary judgment material in his favour.

33. The second is that, in any event, where a limited liability partnership is concerned, it is not necessarily the case that they owe fiduciary duties, or duties analogous to director's duties, to the partnership.

34. By section 6(1) of the 2000 Act every member of a limited liability partnership is an agent of the partnership. But it is not every case where the member is acting as an agent. This case may be said to be a good illustration of that: it is difficult to see how Mr Capra was acting as an agent of the LLP when he signed the Settlement Agreement – he was acting for himself in that respect, not as agent for the LLP. Moreover, the law is not that every member necessarily owes fiduciary duties to the limited liability partnership; see *F&C Alternative Investments (Holdings) v Barthelemy (No.2)* [2012] Ch 613 (Sales J, as he then was). The scope of any fiduciary duty involves consideration of the nature of the relationship and the LLP agreement in each case (see *F&C v Barthelemy* from [217] and following). The particular clause which is relied on in the LLP Agreement in this case as suggestive of a fiduciary duty is clause 14.1, which I have already referred to above.

35. Mr Thompson, for Mr Capra, stressed, nevertheless, that it is not the case that the common law and codified fiduciary duties imposed upon company directors automatically fall upon members of LLPs as a matter of law. He suggested it is far from clear, and not covered by authority, whether the common law duty upon directors to take account of the interests of creditors in case of an actual or likely insolvency falls upon all members of an LLP in the same way.

36. It is not immediately clear to me why a duty to creditors should not apply to an LLP, nor indeed to the LLP in this case which contains a stepping stone towards such a duty as set out in clause 14.1 of the LLP Agreement, since the reasons why the courts have recognised the principle in a limited liability company context, to protect the interests of creditors where solvency is in issue, as discussed at some length in *BTI v Sequana* would seem to apply equally to partnerships, which also have the benefit of limited liability and are registered as such at Companies house. There would seem to be something of a lacuna in the law, so far as protection of creditors of limited liability partnerships are concerned, if this principle should not be taken to apply to an LLP. And it appears to operate in a corporate context free from any limitations in the articles of association, and as a matter of law. I note that in *Andrew McTear (Liquidator of CJ &RA Eade LLP (In Liquidation) v Christopher Eade, Richard Eade* [2019] EWHC 1673 (Ch) ICC Judge Jones proceeded on the basis that such a duty applied (see at [140]). On the other hand it may be said the point was not argued fully in that case, and there are fundamental differences between limited liability companies and limited liability partnerships which supports a divergence, or supports it in this case having regard to the terms of the LLP Agreement.

37. This is a relatively short point of law, which is capable of summary determination if it is genuinely contentious. However, I have not heard argument on the point, and there is no application by the Liquidator for summary judgment on that point currently before the court. I am also mindful of the fact that this may be said to be a live issue so far as the claims against Stephen Finnan is concerned, as well as the

corporate respondents, who have not taken any active part in this application (though I have been told they have been served with notice of it).

38. Mr Capra is in any event prepared to concede for the purposes of this application that he should be treated as owing a duty to the LLP to act in its best interests and, further, a duty to act in the best interest of the creditors of the LLP if it can be shown that, on 9 Aug 2013, he knew (or ought to have known) that the LLP was or was likely to become insolvent by reason of the Settlement Agreement. So this application may proceed on that basis.

The key battleground – the issues for determination

39. The key point, therefore, so far as Mr Capra is concerned, on this summary judgment application, is not a point of law, but a factual point: namely that there is no real prospect of the Liquidator establishing at trial that the LLP was insolvent at the time of the Settlement Agreement, or likely to become insolvent as a result of it (see paragraph 8 of his skeleton). This depends on Mr Capra persuading me that any provision which ought to have been made in relation to the contingent liability to G&S could not possibly be so high as to render the LLP insolvent, or likely to become insolvent, as at 9 August 2013 (see paragraph 96 of his skeleton). If he can satisfy me of that contention then, Mr Thompson submits, the whole claim must fail. I agree such a finding of fact would lead to that conclusion, but not the underlying premise for it: whilst insolvency might be a question of fact capable of resolution without the need for oral evidence, I do not think I can determine properly that issue of fact on this application, on the evidence currently before me. Nor am I am able to say that the inevitable consequence of any findings would mean that there is no claim against Mr Capra.

40. So far as the key threshold issue of solvency, during the course of submissions it emerged that there were three key differences between the parties on the issue of solvency, or insolvency:

41. Firstly, there was the question of how solvency or insolvency was to be defined in this case having regard to the terms of the LLP Agreement, accountancy principles applicable to LLPs, and the practices adopted by the parties in this case, as reflected in the accounts.

42. Secondly, there is a question of what provision should have been made for the contingent liability to G&S.

43. Thirdly, there is the question of whether or not any knowledge on the part of Mr Capra as to what Finnan, or Mr Sean Finnan might do, as the person who would effectively be running the show after he resigned, could be relevant to an assessment of solvency and whether Mr Capra had breached his duties.

44. At one extreme the Liquidator's case might have been interpreted as a complaint that what had happened was an improper informal winding up, having regard to the fact that the LLP's Business was almost complete, and leaving one creditor behind with an empty shell for it to pursue. Mr Titmuss confirmed however that was not his client's case. Whilst, therefore, this is not being advanced as a case where Mr Capra was party to an improper informal winding up, it is useful to understand what

might have to be done on an members' voluntary liquidation ("MVL"), as this may illuminate what duties may be owed one step removed from that.

45. In order for there to be solvent winding up, under an MVL, a director is required to sign a statutory declaration of solvency. This is under section 89 IA 86, and is to the effect that they have made full inquiry into the company's affairs and that, having done so, they have formed the view that the company will be able to pay its debts in full. This requires, as section 89(2)(b) provides, for a statement of the company's assets and liabilities to be drawn up, and section 89(2)(a) requires this to be within 5 weeks immediately before the date of passing of the resolution for winding up.

46. This may usefully inform how the court should approach an allegation relating to a failure to make provision for a contingent creditor where the company/LLP's business is close to cessation, and one of the original directors/designated members wishes to exit before that final completion of the venture with them being paid out. In my judgment the court should not go so far as to suggest a full enquiry is necessary, but it is difficult to argue against the proposition that reasonable enquiry would be required, consistent with such enquiry as a reasonably prudent director/designated member would undertake. In my judgment, in relation to a construction dispute of the type in issue here, where there is no in-house expertise on the point sufficient to make a reliable assessment, that would require the input of a third party construction industry professional, most likely lawyer. In addition, such reasonable enquiry would be likely to be similar to the enquiry required at an accounting year end when consideration is being given as to whether or not a provision is required. Having carried out the reasonable enquiry test and obtained the results, it does not follow, if the allegation is not that there was an improper informal winding up, that the court should apply the test as to whether the director/member is able to form a view that the company will be able to pay its debts in full, which would apply on a winding up scenario. Instead, the test should be that suitable account, or provision is made for the liabilities estimated as a result of that reasonable enquiry, including in particular the contingent liability, in this case, to G&S.

47. So far as the relevant accounting provisions are concerned, the applicable accounting standard is set out in FRS 12 (Provisions, Contingent Liabilities and Contingent Assets). FRS 12 was effective for accounting periods ending on or after 23 March 1999 up to accounting periods beginning before 1 January 2015. FRS 12's objective is to ensure that a provision (a liability that is of uncertain timing or amount) is recognised only when it actually exists at the balance sheet date. A provision should be recognised when: 1. an entity has a present obligation (legal or constructive) as a result of a past event; 2. it is probable that a transfer of economic benefits will be required to settle the obligation; and 3. a reliable estimate can be made of the amount of the obligation. The amount recognised as a provision should be the best estimate of the expenditure required to settle the present obligation at the balance sheet date.

48. Contingent liabilities and contingent assets are not recognised as liabilities or assets. However, a contingent liability should be disclosed if the possibility of an outflow of economic benefit to settle the obligation is more than remote, and in particular it is probable a transfer will be required to settle the obligation (i.e. it is more likely

than not to transpire) and a reliable estimate can be placed on that (the quantum can be estimated reliably).

49. Those general principles are not, or ought not to be, controversial. But the difficulty in disposal of this issue on the current material is that no contemporaneous assessment was made by Mr Capra, or any of the other Members of the LLP of the estimated value of the contingent liability to G&S as at 9 August 2013 or shortly before then. And no expert evidence has been adduced by either side from either a construction lawyer, or an accountant, which would enable the court to have any confidence as to what that figure would be, and what provision ought to be made. The Liquidator is himself an accountant, but he cannot provide opinion evidence in his own cause. Mr Capra adduced evidence from the accountant/bookkeeper at the time, Mr Scholey, but it was recognised in oral submissions his evidence could only be relied on as evidence of fact and Mr Thompson eschewed any reliance on it for any other purpose.

50. This is the key factual enquiry in this case (aside from any arguments there may as to the true extent of Mr Capra's involvement and whether, therefore, he owed any relevant duties at all). Mr Thompson, for Mr Capra, nevertheless sought to suggest I could safely conclude it was fanciful that a provision needed to be made for a sufficient sum which would render the LLP insolvent or likely to become insolvent as a result of the Settlement Agreement. Mr Titmuss, for the Liquidator, argued the contrary and said his client intended to adduce expert evidence on the issue, which would be available at trial. Both of them relied on, in making those submissions, to some extent, to the arbitrator's awards, though they, perhaps predictably, invited me to draw very different conclusions from them. I have my doubts as to how much weight can be placed on those awards either way. To the extent they are relied on as indicating evidence which is likely to be available to be adduced at trial, or reflecting best evidence, I can see that point, though the focus for the enquiry is on the evidence available as at 9 August 2013 on the basis of a reasonable enquiry by a designated member at that time. I shall now turn to consider further those competing submissions, as well as others, by reference to the three key sub-issues between the parties on insolvency, as I have summarised them above.

<u>The submissions & analysis on the three key solvency/insolvency sub-issues</u>

<u>Sub-issue 1: accountancy practice in relation to loans</u>

51. The first dispute between the parties concerns how solvency or insolvency is to be defined in this case, having regard to the terms of the LLP Agreement, accountancy principles applicable to LLPs, and the practices adopted by the parties, as apparently reflected in the accounts.

52. Starting with the terms of the LLP Agreement, clause 9 provided as follows as regards contributions of capital:

"9.1 The Members have contributed the total sum of capital in the proportions specified in Part I of Schedule 2 on incorporation of the LLP.

9.2 At incorporation of the LLP, each of the Members acquired a share in the LLP in accordance with the amount or value of his contribution to the LLP on incorporation.
9.3 The Members may not be required to contribute any further capital on the insolvency of the LLP.
9.4 Subject to clause 9.3, the Members shall contribute any further capital which the Members unanimously determine as being required for the purposes of the LLP in accordance the proportions of capital contributions as set out in Part l of Schedule 2.
9.5 Where, in accordance with instructions a Member contributes capital to the LLP at any time after incorporation of the LLP, that Member acquires a share in the LLP in accordance with the amount or value of that contribution.
9.6 Subject to clause 10.2, the Members shall share any profits or losses of a capital nature, as certified by the Auditors, in the same proportions in which they share capital contributions as set out in Part 1 of Schedule 2.
9.7 No Member is entitled to receive interest on the amount of his proportion of the capital contributions to the LLP unless unanimously determined by all the Members
9.8 Where, in addition to his contribution to the capital of the LLP, a Member has made a loan to the LLP, the LLP shall pay that Member interest on the sum loaned at an interest rate of 2% above the base lending rate from time to time of the Bank.
9.9 In the event that a Member shall not contribute his required capital contribution in accordance with Clause 9.4 then without prejudice to the provisions of that clause that Member's share of profits and losses shall be adjusted accordingly."

53. I should also add, that clause 10.1 also provides for a sharing of profits and losses to be applied to current accounts in the following way:

    "Subject to clause 9.3 and clause 10.2, the profits and losses of the LLP shall be divided between the Members in the proportions set out in Part 2 of Schedule 2 and credited or debited to the Members· current accounts with the LLP as soon as the annual accounts for the relevant accounting year of the LLP are approved by the Members in accordance with this agreement."

54. Part 2 of Schedule 2 provides for a 50:50 split between Mr Capra and Finnan. Part 1 of Schedule 2 refers to nominal capital contributions; it does not reflect the substantial financial contributions made by the Members subsequently. Moreover, as I will explain further below, the use of the word capital in clause 9 does not readily incorporate contributions made by way of loan. That is clear from clause 9.8 which refers to a member making a loan to the LLP, in addition to his contribution to the capital of the LLP, and which suggests interest is due on the loan. The way the parties appear to have proceeded, by reference to the practice set out in their accounts, was somewhat different from this. This can be illustrated by considering the accounts for the year ended 31 March 2012.

55. The accounts, and financial statements, for the period ending 31 March 2012 were signed by Mr Capra, as a designated member, on behalf of the LLP members, who had approved them on 21 February 2013. Those accounts were drawn up with the benefit of booking and accountancy input from Southern Accounting Services, who Mr Scholey worked for at the time. They were also the subject to audit by a firm of accountants called Wellden Turnbull LLP. On the profit and loss account it is

confirmed that the LLP made a loss during the relevant period of £193,401. That is as would be expected of a development project such as this; profits are generated at the end of the project when the sales occur. This loss is reflected however in a change to the capital contributions of the members, in the accounts, as reflected on the balance sheet, in the following way: There are net assets showing as being attributable to members of £1,441,706 on the balance sheet. The breakdown for this is provided in note 6 to the accounts as follows:

MEMBERS' INTERESTS

	Members' other interests Reserves £	Loans and other debts due to members £	Total £
Balance at 1 April 2011	-	1,122 407	1,122,407
Loss for the financial year available for discretionary division among members	-	(193,401)	(193,401)
Members' interests after loss for the year	-	929,006	929,006
Other divisions of loss Introduced by members	-	512,700	512,700
Balance at 31 March 2012		1,441,706	1,441,706

56. These numbers show that as at the beginning of the financial year the loans outstanding to members were £1,122m, which, after applying the loss for the year, were reduced to £929k, and was topped up by further contributions, mainly made by Mr Capra, of £512k, resulting in the balance at year end of £1.4m. This balances against the net balance sheet sum. However, so far as solvency is concerned, it is apparent that solvency is only generated, or preserved, if the Members' loans are reduced commensurate with any losses. Of course any gains made would be attributed to them in accordance with the proportion of contributions made. And the contributions made by the Members is entirely shown as being loans made by them against which the loss for the financial year is treated as available for "discretionary division among members". This practice is not consistent with how the LLP is drafted, but it is not disputed that it is an acceptable practice to adopt for an LLP, and this is reflected in certain specific financial practice standard relevant to LLPs. This issue is explored further in the responses to the notice to admit facts, already referred to above, which contain the following material requests and admissions:

57. The notice to admit dated 9 April 2020 invites the Liquidator to admit that (paragraph 2): *"As a matter of standard accountancy practice the net assets of a limited liability partnership (i.e. its assets less its liabilities) shown on its balance sheet must be equal its members' interests (whether that be loans owed to members or equity owned by them)."* The Liquidator's response to this notice is worth stating in full here:

*"This is not admitted - the issue is far more complicated than the request adverts to. Loans and other debts due to members are liabilities of the LLP and must be taken into account when assessing the solvency of the LLP. When deciding to pay amounts to [Mr Capra] in August 2013 the members only had available the accounts for the year ended 31 March 2012 (**"the March Accounts"**). The March accounts were prepared in accordance with the provisions applicable to limited liability partnerships' subject to the small limited liability partnerships' regime and in accordance with the Financial Reporting Standard for Smaller Entities (effective April 2008). The Statement of Recommended Practice, Accounting by Limited Liability Partnerships (**"the SORP"**) as revised on 31 March 2010 was applicable at the time the March Accounts were drawn up. The balance sheet formats referred to in the SORP are as set out in The Small Limited Liability Partnerships (Accounts) Regulations 2008 (SI 2008/1912) (**"the Regulation"**). The March accounts use balance sheet format 1 and 'Loans and Other Debts Due To Members' are item J in this format. Anything included within item J is a liability of the LLP. Anything classed as equity would be included in 'members' other interests' in item K of the balance sheet. In the LLP's balance sheet In the March Accounts there are no 'members' other interests'.*

The SORP goes on to state that member's capital and member's entitlement to profit will be classed as either equity or liability depending on the terms of the LLP agreement. The LLP agreement states at clause 10.1 that profits shall be divided 50% to P Capra and 50% to Sean, Stephen and Finnan Developments Ltd and amounts credited or debited to the members current accounts as soon as the annual accounts are approved. The LLP does not have an unconditional right to refuse payment.

Therefore in accordance with the SORP and the Regulations, the profits of the LLP are treated as a liability of the LLP in its balance sheet. The March Accounts show that the member's interests are a liability of the LLP on the basis that: (a) all of the members interests are included in item J - loans and other debts due to members and there is no amount shown for members' other interests; (b) Note 5 to the March Accounts states that all amounts included in loans and other debts due to members fall due within one year; (c) Note 6 shows that all profits/losses are allocated to loans and other debts due to members. No profit/loss is allocated to members other interests; (d) The report of members states that profits/losses are allocated and divided between members on approval of the financial statements. The LLP has no discretion over this policy."

58. I was taken to the relevant provisions of the SORP in oral submissions, and in particular starting at paragraphs 55 and following relating to presentation and disclosure in relation to Members' financial interests. The Liquidator's admissions are largely based on those paragraphs and reflective of them. In particular, however, I note at paragraph 63, that the SORP provides as follows:

"The notes to the accounts should explain where amounts in 'Loans and other debts due to members' (balance sheet item J) would rank in relation to other creditors who are unsecured in the event of a winding up. Details of any protection afforded to creditors in such an event which is legally enforceable and cannot be revoked at will by the members should be included in a note to the accounts. Where no such

protection is afforded in respect of items shown under balance sheet item K, that fact should be disclosed."

59. The accounts do not contain any disclosure of any protection afforded to third party creditors, that their debt will be paid ahead of the loans owed to Members. That notwithstanding Mr Thompson sought to persuade me that this is what had been agreed because the Members had duly reduced their capital account figures, in relation to loans, each year a loss was made. The logical consequence of those submissions is that he invited me to conclude that there was here enforceable protection afforded to third party creditors and they were to be viewed as having priority status, such that the loans to members had to be reduced first in the event of an insolvency. I am not satisfied that I can conclude that it is fanciful to suggest that this is not so. I say so for five main reasons.

60. The first is that the accounts are audited and if indeed there was such an agreement then you would be expect it to be stated.

61. Secondly, the wording in the accounts suggest a discretionary decision is being made as to division of losses amongst members. That is not the language of legally enforceable protection.

62. Thirdly, there is no such legal protection afforded by the terms of the LLP Agreement.

63. Fourthly, there is no contemporaneous documentation which shows that the Members recognised such a protection. In fact, if anything, the correspondence between them (see the letter from Mundays dated 17 July 2013 which I will consider further below) rather suggests the opposite.

64. Fifthly, simply because the Members agreed to allocate losses, so as to reduce the loans to them, after each accounting year end, during the course of the project in the manner set out in the accounts does not provide any strong protection for a third party creditor that they will do so at the end of the project and in particular in the event of an insolvency. The conduct of the Members in this case tends to illustrate that point. The cash in the LLP at the end of the project was all gone by the time the arbitration concluded.

65. I can see the argument that it may be said there is a binding agreement due to course of conduct, but it is, in my judgment, not a straightforward proposition and it is not obviously supported by the evidence adduced by Mr Capra. On the contrary I would go so far as to suggest the current state of the evidence indicates to me that the more likely conclusion at trial is that the loans were not reduced, and there was no enforceable requirement for third party debts to be paid first, at least until after the accounts had been drawn up and the loan accounts under members' interests were reduced and reported to the world as such.

66. So, posing the question as to whether or not the transaction event resulted in the LLP becoming insolvent or likely to become insolvent, it seems to me Mr Capra's case may have to embrace the different proposition that the Settlement Agreement rendered the LLP insolvent but it was likely to become solvent if he can show that

the accounting practice contended for was agreed by reason of course of conduct and/or would have been implemented. That is a very different proposition and it would be novel to suggest that in these circumstances no duty to creditors is owed. Whether the decision of the Supreme Court in *BTI v Sequana* provides any guidance on that issue remains to be seen.

67. The consequence of this is that, taking the figures which Mr Capra suggests in relation to the financial position as at 9 August 2013, that there is a real prospect of the Liquidator being able to show that a payment out to Mr Capra of £1.35m rendered the LLP insolvent on a balance sheet basis even if only a fairly modest provision were made for the G&S liability, reflective of the provisional payments ordered by and in the arbitration at that date. The Liquidator's response to the second notice to admit, dated 19 May 2020, articulates this case in the following terms, in response to the request to admit at paragraph 5 that "*The net assets of the LLP (attributable to its members) as at 31 March 2013 was £1,998,568*." articulates this case as follows:

"This paragraph is not admitted. The format of LLP balance sheets will always result in a bottom line figure of zero. That is achieved by varying the amounts said to have been leant [sic] to the LLP by members and in the event of losses accruing during any year (and not accounting period pursuant to the LLP agreement) the loans made by members are effectively written off to the extent necessary to account for those losses and bring the balance sheet back to a position of zero. It is therefore correct that the balance sheet shows net assets attributable to members of £1,998,568 but this is following the accounting adjustments to maintain balance. However, as at the date of the accounts in August 2013 the bottom line position (which appears to be agreed and which Mr Capra must have known) was that Mr Capra had injected £1,651,144, Sean Finnan, Stephen Finnan and Finnan Developments Limited collectively injected £942,817, creditors falling due within one year were owed £447,966 and £185,000 (plus VAT) was owed pursuant to the first arbitration award. That is in comparison to what appears to have been cash of around £1,700,000 held by the LLP and the value of one remaining unsold property of around £750,000. That is not taking into account the provision of £1m that ought to have been made. It is therefore incorrect to take the figure of £1,998,568 recorded in the accounts as the conclusion to the issue of solvency.

68. This case has a real prospect of success in my judgment. It illustrates that the liabilities were greater than the assets even if the only provision which is made reflects the amount of the provisional award made under award 1.

69. The Liquidator also goes on to make a valid point by reference to the 2013 accounts which Mr Capra has relied on in these proceedings in the next paragraph in that admission, as follows:

"It is of further importance to note that neither Mr Capra nor the other Respondents had access to either the accounts to 31 March 2013 or the management accounts to 9 August 2013 at the time that the payment was made to [Mr Capra]. In fact, the accounts to 31 March 2013 were only signed off on 15 April 2015."

70. That is a fair point. Equally however it is a fair point that the management accounts to 9 August 2013 were drawn up by Mr Scholey before these proceedings were commenced or even in contemplation. They appear to be based on a good faith assessment by him of the finances as at that date, save for the G&S provision. This was not included according to his evidence because Mr Scholey was not told about it or asked to consider whether a provision should be made for it. That he was not may be explained by reference to the fact that Sean Finnan seems to have thought the arbitration would lead to him recovering the provisional award monies. If that was a reasonable conclusion then it would follow no provision should be made.

71. The 9 August 2013 management accounts, retrospectively drawn, do illustrate, that on the assumption that a provision of £222k should be made for the G&S contingent liability (based on the sums awarded by the arbitrator in his first and second awards) then a payment out to Mr Capra of £1.35m would have been c. £78k more than he would have been entitled to, if the losses were shared according to contributions. Therefore this required an acceptance by Finnan that their loan contributions would be reduced by a greater sum, to remove any balance sheet insolvency. The Settlement Agreement does not expressly state that Finnan agreed to this and so again in my judgment this is not susceptible to summary disposal in favour of Mr Capra.

Sub-issue 2: the extent of any provision to be made in relation to G&S

72. The second sub-issue is what provision should have been made for the contingent liability to G&S. Mr Thompson advanced his submissions on the basis of an acceptance that a provision of the order of £222k should have been made, based on the arbitration award. Mr Capra is not bound to concede that sum and it remains an open question as to whether a construction lawyer would have advised that the prospects of success in the arbitration was greater or lesser than 50%. It is too easy to jump to the conclusion that they would necessarily have advised greater than 50% knowing how the arbitration went. The final award in the arbitration, award 8 (dated 10 March 2017), awarded G&S the sum of £926k plus costs of £1.5m (generated to such a high figure by a 100% CFA uplift). Interest on those sums has resulted in the sum growing. But all of that liability was not foreseen at the time, and Mr Titmuss for the Liquidator did not suggest that the benefit of hindsight in that respect could be held against Mr Capra. His position was more modest: The evidence was sufficient to demonstrate that there was a real prospect of showing a substantial provision should have been made.

73. Mr Capra stated in his evidence that "*At that time no-one thought an award in the Arbitration would be much above £200,000.*" The difficulty is there is no documentary evidence to show what enquiry was performed, if any, which justified such a belief, assuming in favour of Mr Capra for present purposes, it is true. This would, in my view, be a legitimate area for cross-examination at trial, if Mr Capra's evidence is to be taken as an indication that some reasoned analysis had been performed. If it is not to be so interpreted or amplified then, as Mr Thompson accepted, it leads to the open question of what a reasonable enquiry would suggest, which is not answered sufficiently by the evidence adduced by either side.

74. In the absence of any independent assessment of the issues by a construction lawyer – and there is no indication of a contemporaneous assessment notwithstanding the fact that there were solicitors representing the LLP at the time, and they appear to have consulted counsel – I accept the submission made by Mr Titmuss that the arbitration award, shorn of some parts of the evidential findings relating to Sean Finnan and the loan of monies from G&S to him/other Finnan entities, contained in award 6, provides a reasonable starting point, though not the end point, for consideration of what sums might be owed.

75. Mr Thompson sought to embrace this point in reply by taking the final awards, 7 and 8, and making certain deductions removing: (i) interest, (ii) the consequences of award 6, (iii) some arguable double counting, and (iv) recoverable VAT. He argues that once these deductions have been made the sum is less than £500,000. The significance of this submission is that if one were to accept the proposition that Mr Capra could properly have concluded the Settlement Agreement on the basis that the Finnan loans were to absorb any of the losses suffered on the arbitration, a liability provision figure less than £500,000 could be absorbed and solvency was preserved. On the other hand, a liability provision figure significantly higher than that would mean that the LLP had insufficient assets to be able to meet all of its liabilities, applying a discount for contingencies and future liabilities (applying the test in *BNY Corporate Trustee Services Ltd and others v Eurosail-UK 2007-3BL plc and others* [2013] UKSC 28, [2013] 3 All ER 271, [2013] 1 WLR 1408 (*"Eurosail"*)), because it would have been greater than the Finnan loan capital. That would be past the value "tipping point".

76. There are three main difficulties with that submission.

77. The first is that it only affects the outcome if sub-issue 1 is summarily determined in his favour. It has not been so decided.

78. Secondly, it requires me to engage in making various assumptions as to how the figures will turn out which could well prove to be incorrect. I cannot be satisfied that further evidence which is likely to be available (including third party valuation documents submitted to the bank, Investec, before they were repaid, in 2013, the documentation submitted to the arbitrator at the time, or otherwise available to the LLP, which has not yet all been gathered in, and expert evidence), will not substantially alter the figures.

79. Thirdly, there is uncertainty as to how you assess the "tipping point". Mr Thompson directed me to the following passage in Scholey 2 (para 26):

"By August 2013 the bank had been repaid and the commercial freehold and all the flats had sold with the exception of flat 8. The LLP had available £1. 78m cash at bank and the expectations of a further £0.75m from the sale of flat 8. A simple cash flow forecast as at 9th August 2013 would have been as follows;

Cash at Bank 9/08/2013 £1,780,807
Sale proceeds Flat 8 £744,250
Collection of debtors £67,037

£2,592,094

Payment of creditors at 9/08/13 -£447,966
Sale cost of flat 8 -£20,292
Award 1 & 2 -£222,000

Net cash available for distribution £1,901,836 + recoverable VAT £35,000"

80. His submission was that using these figures one could see the "tipping point" to insolvency only occurs when the provision is in the region of £600k, and having regard to the sum of £1.35m out to Mr Capra. However, Mr Thompson recognised those figures would need adjusting, because Flat 8 had not sold, so the sale figure of £744k could not be included, but instead the lesser figure included in the accounts based on the general accounting practice that property that is owned as stock in a property development LLP such as the LLP should be valued at the lower of cost (initial cost of acquisition plus the building and development costs) and net realisable value. So there are some adjustments which may need to be made to Mr Thompson's figures, and I have no great confidence as to the precise figures one should arrive at. I can see the force in the notion that it may well be the case that Mr Scholey's figures prove to be accurate and both parties may, subject to suitable adjustments, be best served by agreeing them. Short of agreement however it is not easy for me to say these points can safely all be determined summarily to arrive at a final figure now.

81. It might also be argued that some provision should be made for the costs of the arbitration (potentially both own and adverse costs, depending on the views taken on the merits). This overlaps to some degree with the second difficulty with this submission, and may be subject to independent expert evidence. I consider it likely the court would benefit from some independent review in this respect. This is a point to be considered with the parties following the hand down of judgment.

82. I should also note here that Mr Titmuss and the Liquidator relied to some extent on an exchange between the solicitors acting for Finnan, Mundays, and the solicitors then acting for Mr Capra, RadcliffesLeBrasseur, dated 17 July 2013. This letter was written in the context of negotiations concerning Mr Capra's exit from the LLP, and stated as follows (in the first three main paragraphs, with underling emphasis added by me):

"We are instructed that Flat 1 is likely to be available to exchange today or within the next few working days. On completion, that is expected to result in WSM solicitors holding in excess of £1 .9 million on client account on behalf of the LLP.

It has not been questioned by all parties but that there is a fundamental breakdown in the relationship between the members of the LLP and many points of dispute. We have previously proposed mediation which has not been responded to positively. In order to move matters forward however, we have been instructed by our clients on a without prejudice basis to propose that the parties agreed to withdraw a total of £1.1 million from the account of WSM after the receipt by WSM of the completion monies from the sale of flat 1. <u>We are instructed that will leave approximately £1</u>

million still held by WSM on behalf of the LLP which is more than sufficient to deal with any issues arising in connection with the arbitration.

The proposed split of that £1.1 m would be a payment of £600,000 to your client Mr Paul Capra and £500,000 to our clients, the differential of £100,000 representing a settlement payment to your client in respect of any and all monies he alleges to have contributed to or on behalf of the LLP whether by way of loan or incurred on behalf of the LLP or otherwise be due from the LLP to him by way of payment or reimbursement in excess of his share of the profits of the LLP to which is entitled under the terms of the LLP agreement."

83. It was suggested that this was good evidence a provision of £1m should have been made and this is what was in contemplation before Mr Capra negotiated a better deal for himself. I do not read the letter in that way.

84. First, it must be understood this letter was written in the context of a negotiation whereby the amount which Finnan would keep could be enhanced if Mr Capra took a lesser sum.

85. Secondly, the letter does not suggest a provision was going to be made in that sum, but instead that the sum of £1m was "more than sufficient to deal with any issues arising in connection with the arbitration". That may tend to show that Finnan thought it was more than sufficient, but it still begs the question by how much and on what basis.

86. So, overall, in my judgment, it is of limited evidential value. But in the absence of any other evidence showing what the figure should be, it may deployed to show that the G&S issue could not be said to be de minimis, and may have been viewed by Mr Sean Finnan as being sufficiently concerning to Mr Capra to throw into the negotiating mix. The question of whether Mr Capra thought or should have thought this was of concern is a legitimate line of enquiry in cross-examination. I have my doubts, however as to whether great reliance can be placed on the letter, partly for the reasons I have already given and also partly because both parties seem to have distanced themselves from reliance on Sean Finnan as an evidential source, having regard to some of the findings made against him as to his credibility by the arbitrator. It is also a legitimate line of cross-examination as to how much Mr Capra knew about the project, so as to inform what he ought reasonably to have known, informed by further independent advice, or otherwise. In any event this discussion tends to reinforce my view that this is mini-trial terrain.

87. Before concluding this section of my judgment I shall briefly deal with the parties' competing contentions as to how award 1 should be interpreted. The short point is, when the arbitrator was assessing the award, was he doing so on the basis of all the claims set out in the notice, or was he just doing so by reference to the only liquidated sum stated in it, namely the sum of £213,341.09 based on unpaid invoices – item no 1 on the arbitration notice. If it might be said that he was doing so by reference to the dispute overall, then this may be a building block for the submission that this is a fair proxy (taken with costs) for the sum which should be provided for in relation to G&S. If it is not to be so interpreted then it is less so.

88. I am more attracted to the submission that it was intended to be a provisional award for the whole dispute, but I think this takes Mr Capra only so far for two reasons. First, it depends on the evidence provided to the arbitrator. It is not clear to me what evidence was provided to the arbitrator at that time, and his award suggests he could not safely make any firm conclusions on certain points (such as the arguments as to extensions of time and liquidated damages). It is not certain this would be the evidence which a reasonable designated member would or should have had at their disposal at that time. Secondly, the test he was applying was a "reasonable proportion" of the sum he estimated was likely to be awarded. This is not the same test as FRS12, at least as I read the test. I can see arguments might be made using the test laid down in FRS12 which could assist both parties away from using the provisional award sum.

89. Overall, it seems to me these points are open to argument and change based on further evidence which may reasonably be expected to emerge. There are further evidential sources available to both parties in this respect, which may be obtained, seeking the assistance of the court if necessary, to gather in the necessary evidence so as to reconstitute the knowledge of the LLP at the material time. And that could then be the subject of independent expert review.

Sub-issue 3: the relevance of what Finnan would do next

90. The third sub-issue on the solvency issue is whether or not any knowledge on the part of Mr Capra as to what Finnan, or Mr Sean Finnan might do, as the person who would effectively be running the show after he resigned, could be relevant to an assessment of solvency and whether Mr Capra had breached his duties.

91. This issue overlaps with sub-issue 1. If it is the case that the LLP became insolvent on 9 August 2013, or was likely to become insolvent, 3 days later when the monies were paid out to Mr Capra, Mr Capra's case may have to embrace the different and novel proposition that the Settlement Agreement rendered the LLP insolvent but it was likely to become solvent if he can show that the practice contended for would have been implemented, such that entry into the Settlement Agreement should not, after all, be viewed as being a breach of duty. That gives rise to a novel proposition and questions of fact as to what Mr Capra knew in relation to Mr Finnan's intentions. It is not suitable for summary disposal.

Conclusions

92. In my judgment, save for the pruning points I have identified above, the threshold test for summary judgment has not been satisfied. The evidence currently before me is insufficient to support a safe finding that the Liquidator does not have a real prospect of showing that on 9 August 2013, when the Settlement Agreement was entered into, the LLP was either insolvent or likely to become insolvent due to the payment of the Settlement Sum.

93. I invite the parties to agree an order in respect of this judgment and shall deal with any consequential and case management issues following the hand down of judgment.