Neutral Citation Number: [2020] EWHC 3011 (Ch)

Case No: CH-2020-000108

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS

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

Date: 11/11/2020

Before:

MR JUSTICE ADAM JOHNSON

- -

Between :

Downing LLP	**Petitioner/ Appellant**
- and –	
Sanguine Hospitality Ltd	**Debtor/ Respondent**

- -
- -

Erin Hitchens (instructed by **Fladgate LLP**) for the **Appellant**
Jack Watson (instructed by **Freeths LLP**) for the **Respondent**

Hearing dates: 9 October 2020

- -

Judgment Approved by the court for handing down

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

Mr Justice Adam Johnson :

Introduction

1. The Petitioner and Appellant, Downing LLP ("*Downing*"), seeks an Order for the winding-up of Sanguine Hospitality Limited ("*Sanguine*"). Downing's Petition is based on a debt said to be owing under a Corporate Guarantee & Indemnity given by Sanguine dated 18 March 2013 (the "*Guarantee*").

2. At a contested hearing of Downing's Petition on 19 March 2020, ICC Judge Burton dismissed the Petition and made ancillary orders including an Order for the payment of costs by Downing on the indemnity basis. She thought that the debt allegedly due under the Guarantee was disputed by Sanguine on grounds which appeared to be substantial. Permission having been given by Falk J. on 5 June 2020, Downing now appeals the decision of ICC Judge Burton.

Background

3. I will set out some background before summarising the reasoning of ICC Judge Burton. This borrows from the witness statements served by Mr Colin Corbally for Downing and by Mr Matthews-Williams for Sanguine.

The Facility

4. Downing and Sanguine have had a business relationship stretching back over a number of years in connection with a number of property developments.

5. On 18 March 2013, Downing, Sanguine, and seven companies associated with Downing (referred to as "*the Lenders*") entered into a Facility Agreement ("*the Facility*") under which the Lenders agreed to advance loan funding to two companies involved in ongoing property developments, namely Dominions House Limited and London City Shopping Centre Limited ("*Dominions*" and "*LCSC*" respectively).

6. The Lenders – I will refer to them in this Judgment as the "*Original Lenders*", for reasons which will appear below – were defined in the Facility as *"... the lenders set out in Schedule 2 ... (Lenders and Lender means any of them as the context requires).*" Schedule 2 listed the seven relevant companies by name, all of them venture capital trusts associated with Downing.

7. As to the borrowers, Dominions was a company associated with a property development in Cardiff, and LCSC a company associated with a shopping centre development in London, which the parties have referred to as the "*Barbican project*". According to Mr Matthews-Williams' evidence, both the Cardiff project and the Barbican project were undertaken by Downing and Sanguine in connection with another individual, Mr Paul Bolton.

8. Under the Facility, the seven Original Lenders agreed to advance a total of £1.25m, split as to £890,000 for Dominions and £360,000 for LCSC. Each Lender advanced a discrete amount in relation to each project. Under the Facility these sums were repayable on the "*Final Repayment Date*", defined to mean:

> " … *the earlier to occur of:*

> *(a) the date falling 18 months after the date of this agreement; and*
>
> *(b) the date falling 4 weeks after Planning Permission is granted and any judicial review period has expired*."

9. Under (a), the relevant date 18 months after the date of the Facility was 18 September 2014.

10. It is clear from a review of the Facility document that it was part of an overall package of commercial arrangements entered into at about the same time, including a series of security documents.

The Guarantee

11. Among these security documents was the Guarantee. The Guarantee was executed between Sanguine on the one hand, and Downing as "*Security Trustee*" on behalf of the Original Lenders on the other.

12. Clause 2 of the Guarantee set out Sanguine's principal undertaking, as follows:

> *"In consideration of the Security Trustee and the Lenders entering into the Facility Agreement, advancing monies or giving credit or affording other banking facilities to the Borrowers, or continuing to do so, or otherwise giving effect to the Facility Agreement, and subject always to clause 8.1, the Guarantor irrevocably and unconditionally guarantees to and agrees with the Security Trustee and the Lenders to pay to the Security Trustee within 10 Business Days of demand in writing all the Liabilities together with all costs, fees and expenses due or incurred by the Security Trustee resulting from a breach of the Guarantor's obligations under this guarantee."*

13. "*Liabilities*" was defined broadly to mean:

> *"… all monies and liabilities which from time to time … are due and owing or incurred from the Borrower to the Security Trustee and the Lenders … .*"

14. I should also mention clause 6.1.1 of the Guarantee which provides:

> *"The liability of the Guarantor under this Guarantee will not be discharged or otherwise affected by … any arrangement, including any extension, modification or renewal of the Facility Agreement or change in the Liabilities which the Security Trustee or Lenders may make with either of the Borrowers or with any other person … "*

Maximum Limit

15. The Guarantee also had an unusual feature, and in order to understand it, it is necessary to mention a further property development which Downing and Sanguine were involved in at the time, i.e., in 2013.

16. This was a development in West Bar, an area of Sheffield, known as the "*Hampton by Hilton Hotel Development*", but it is easier to refer to it as the "*Sheffield Development*". A limited liability partnership was incorporated in relation to the Sheffield Development, in which both Downing and Sanguine were members. That company was called WB Developments LLP ("*WBD*").

17. The reason for mentioning WBD is that the extent of Sanguine's commitment under the Guarantee was fixed by reference to the value of its interests in WDB.

18. This limitation was expressed in a number of provisions of the Guarantee, referred to in the Judgment of ICC Judge Burton. They start with clause 8:

> *"8.1 The liability of the Guarantor to make payments to the Security Trustee accordance with clauses 2 and 3 of this guarantee shall be limited in respect of each demand to the Maximum Limit on the relevant Demand Date as determined by the Security Trustee.*
>
> *8.2 Within 5 Business Days of a Demand Date, the Security Trustee shall notify the Guarantor in writing of the Maximum Limit ."*

19. I have already explained that Downing was the Security Trustee referred to in clause 8. "*Demand Date*" was simply the date of a demand made under the Guarantee. "*Maximum Limit*" was defined as follows:

> *" ... the amount determined by the Security Trustee to be the aggregate on any Demand Date of the value, as at the Demand date, of the Member's Interests, and*
>
> *LESS*
>
> *the aggregate of all previous payments received by the Security Trustee pursuant to this guarantee."*

20. "*Member's Interests*" was defined to mean:

> *" ... all the member's interests and any other rights, title and interests that the Guarantor may from time to time have (whether directly or indirectly) in [WBD]."*

21. Clause 16 of the Guarantee provided as follows:

> *" ... any ... notifications given by the Security Trustee ... under this guarantee will be conclusive and binding as to the items stated in it, except in the case of manifest error."*

22. Finally, I should mention that in addition to the Guarantee, it is common ground that on 18 March 2013, Sanguine also entered into a "*Charge Over Member's Interest*" (the "*Charge*"), by which it charged to Downing its interests in WBD. The Charge was registered at Companies House on 23 March 2013.

The Amendment and Restatement

23. That was the original position in early 2013, but some changes came to be made in 2014. The background has not been fully examined, but these seem to have been prompted by at least two factors. One was the decision by Mr Bolton, one of the original participants, to retire; the other was slower than expected progress in relation to the Cardiff and Barbican projects.

24. Thus, the Facility was the subject of an "*Amendment and Restatement*" in August 2014. A number of changes were effected:

    i) An Amendment and Restatement Agreement was entered into on 7 August 2014.

    ii) Although originally the Facility had been one agreement, by means of the Amendment and Restatement, the arrangements were formally divided, and in addition to the Amendment and Restatement Agreement, two separate facility agreements were entered into, one covering the advances to Dominions (the "*Dominions Facility*") in respect of the Cardiff development, and one covering the advances to LCSC (the "*LCSC Facility*") in respect of the Barbican development.

    iii) The group of Lenders under these arrangements was different (the "*New Lenders*"). The overall number of Lenders was reduced from 7 to 6, and of those 6, only 5 had been Original Lenders under the Facility, with one new Lender added. The six New Lenders were each parties to both the Dominions Facility and the LCSC Facility.

    iv) Presumably to reflect the different stages of the two projects, the overall amount advanced to Dominions for the Cardiff project was reduced from £890,000 to £700,000, whereas the overall amount advanced to LCSC for the Barbican project was increased from £360,000 to £550,000.

    v) Additionally, however, as regards LCSC, the LCSC Facility provided for the payment of further sums by LCSC to the New Lenders, namely a "*Renewal Fee*" of £400,000, and a "*Redemption Fee*" of £300,000. This brought the total amount payable by LCSC to £1.25m.

    vi) The overall amount thus payable under the Amendment and Restatement was increased to £1.95m - £700,000 by Dominions in respect of the Cardiff development, and £1.25m by LCSC in respect of the Barbican development.

    vii) A further change as regards the LCSC Facility was that, as the Amendment and Restatement Agreement explained at Recital (B), *Dominions* was to guarantee "*the first £400,000 of the principal amount of the Barbican Loan (as*

amended)". This was then reflected in the language of the LCSC Facility at clause 8.1, headed "*Guarantee*".

viii) The Final Repayment Date in respect of both the sums due from Dominions and those from LCSC was extended by a year to September 2015.

2014-2019

25. What happened next is rather obscure. It seems that at some point the loan to *Dominions* in respect of the Cardiff development was repaid. At any rate there is nothing to suggest that anything is presently due and owing.

26. As regards LCSC, Mr Matthews-Williams in his Witness Statement says that planning permission *was* eventually obtained in relation to the Barbican development, but only much later, in November 2017.

27. Under the terms of the LCSC Facility on their face, the sums due from LCSC should therefore have been repayable to the New Lenders in September 2015, i.e., the amended Final Repayment Date.

28. Payment to the New Lenders did not happen at that point, however. Despite that, no action was taken either by the New Lenders or by Downing. Some limited information has been given about this, because an email has been produced from Mr Corbally to Mr Matthews-Williams dated 2 February 2016, in which Mr Corbally said:

> *"Further to our conversation, I am happy to confirm that we are happy for the loans to remain outstanding until the end of this year. This is subject to continuing satisfactory progress and no significant issues arising in the meantime."*

29. Mr Matthews-Williams also said the following in his evidence:

> *"Furthermore, CC (who is Head of Investment Strategy at [Downing]) verbally confirmed on a number of occasions that [Downing] was happy for the Barbican Loan to remain outstanding and would not just be called in without a reasonable period of notice being provided."*

30. The detail of what happened during 2017 and 2018 is not at all clear on the evidence, however. This time-period is not really dealt with by either side. What we do know, however, from the Skeleton Argument of Sanguine's counsel, Mr Watson, is that two of the six New Lenders were dissolved during the Autumn of 2017, and a third was placed into liquidation. Mr Matthews- Williams's evidence is that he was also told at one stage that the loan to LCSC had been written off. Mr Corbally says he cannot recall that but in any event, the fact that the loan may have been written off in the books of (presumably) the New Lenders does not remove LCSC's obligation to pay.

31. After that long period of inactivity, the next relevant event according to Mr Matthews-Williams was that on 1 March 2019, Sanguine's solicitors wrote to Downing to set out a number of queries relating to a separate development, namely the Doubletree

Hotel at Hoole Hall in Chester. Sanguine says that the distribution of sale proceeds in connection with that development was mismanaged by Downing, and that that gives rise to claims against Downing and/or other entities under its control.

Demand of LCSC

32. Shortly thereafter, on 22 March 2019, Fladgate, solicitors for Downing and "*the Lenders"*, sent a "*Letter of Demand*" to LCSC. Mr Matthews-Williams says that this letter came completely out of the blue. The implication is that it was sent in retaliation for Sanguine's letter in relation to Hoole Hall of 1 March.

33. The *Lenders* referred in Fladgate's letter were identified in a Schedule as the seven *Original Lenders*. Consistent with this, the *Letter of Demand* referred to the *original* 2013 Facility, and so referred to an overall amount of £1.25m split between the Cardiff and Barbican developments. It also specified the relevant Final Repayment Date as having been the original repayment date of 18 September 2014. It demanded payment from LCSC, however, of £550,000 (i.e., the loan amount due under the *LCSC Facility*), together with accumulated interest of £256,190.

Demand under the Guarantee

34. This was followed on 25 March 2020 by a letter from Downing to Sanguine, headed "*Corporate Guarantee and Indemnity - Letter of Demand*". This referred to the Guarantee and again to the *original* Facility, and also to the seven Original Lenders. It referenced the letter sent by Fladgate to LCSC on 22 March 2019, and said that the sum demanded by that letter - £806,190 – had not been paid. It thus made a demand of Sanguine itself under Clause 2 of the Guarantee, up to the Maximum Limit. It said that Downing would notify Sanguine of the Maximum Limit within five business days, as required under Clause 8.2 of the Guarantee.

Administrators appointed to LCSC

35. On 27 March 2019 Downing, in its capacity as holder of a floating charge, proceeded to appoint Administrators over the business and operations of LCSC.

Notification of the Maximum Limit

36. On 29 March 2019, Downing sent a letter to Sanguine notifying it of the Maximum Limit. The relevant part of the letter is as follows:

> *"In accordance with clause 2 of the Guarantee, we calculate the Maximum Limit (as defined in the Guarantee), being the value, determined by Downing on the Demand Date (as defined in the Guarantee), of the interests of Sanguine in WB Developments LLP, less any payments received by Sanguine under the Guarantee, as being £660,025."*

Statutory Demand and Petition

37. Downing served a statutory demand on 12 April 2019, and issued its Winding-Up Petition on 25 May 2019.

Calculation of Maximum Value: the Controversy

38. Before turning to the Judgment of ICC Judge Burton, it is useful to explain the particular controversy which has arisen between the parties in relation to the calculation of Maximum Limit.

39. No calculation is set out in Downing's letter of 29 March 2019, but there is one in Mr Corbally's Witness Statement dated 4 September 2019. That is based on the net asset value of WBD as at March 2019. The overall net asset figure given is £1,980,273. Included in this overall figure as assets of WBD are amounts totalling £4,180,776, payable to WDB from two related companies, namely West Bar BPRA LLP and West Bar Hotel Ltd.

40. On the footing that Sanguine has a 33.3% ownership interest in WBD, the Maximum Limit is calculated as 33.3% of £1,980,273, or £660,091 (this is in fact slightly different to the figure in the 29 March 2019 letter). Thus, Downing assesses the value of Sanguine's Member's Interests as corresponding to 1/3 of the net asset value of WBD.

41. Faced with this, Sanguine points out that the WBD net asset figure used by Mr Corbally – roughly £1.98m – is in fact very far in excess of the net asset figure for WBD contained in its accounts for the period to 31 March 2019. Those accounts are unaudited but have been prepared by accountants and filed at Companies House.

42. WBD's balance sheet in its accounts shows net assets not of £1.98m, but of only £427,950. Moreover, according to note 8, WBD's assets include sums due from West Bar BPRA LLP and West Bar Hotel Ltd not of £4,180,776 (the figure relied on by Mr Corbally), but of only £2,632,975, made up as to £1,186,999 in respect of "*Trade debtors*" and as to £1,445,971 in respect of "*Development loans*".

43. Sanguine's case is that these discrepancies are surprising and are not properly explained. If the net asset figure in the accounts is used rather than Mr Corbally's figure, then the value of Sanguine's Member's Interests, even using Downing's methodology, would be only £142,650, not £660,091.

44. However, that is not the end of it, say Sanguine:

    i) The March *2019* accounts show a figure of £1,445,971 in respect of "*Development loans*." This shows the value of those particular assets having increased over the course of the year, because a year earlier, as at March *2018,* their value was only £1.1m.

    ii) However, there is a question whether this is correct, say Sanguine. They say that other evidence suggests the value of the "*Development loans*" went *down* during the year, not up.

    iii) They point to a spreadsheet produced by a Mr Levy, an accountant working for Downing, attached to an email dated 26 March 2019. This appears to show West Bar BPRA LLP making loan repayments to WBD during 2018/2019 of some £400,000.

iv) If that is right, say Sanguine, it is very surprising to see the asset figure for "*Development loans*" in WBD's accounts going up; if the relevant loans were repaid, that figure should have gone *down* instead.

v) If the 2018 figure of £1.1m is *reduced* by £400,000, rather than *increased* by £300,000, then the value for "*Development loans*" for 2019 comes to only £700,000, not £1.4m.

vi) That is especially significant, say Sanguine, because if correct it would require a reduction in the stated net asset position of WBD of some £700,000. That would be enough to make the overall net asset position negative, and would reduce the Maximum Limit to nil, even using Downing's methodology. Consequently, there would be no liability under the Guarantee.

45. Downing say that this all rests on a misunderstanding. They submitted as follows:

i) The difference in net asset figures between Mr Corbally's Witness Statement and that in WBD's accounts can be explained. The explanation is that in some circumstances, accounting convention recognises a difference between the face value of a loan (the amount in fact outstanding), and the *current* value of the loan. The current value will be lower than the face value, because in order to calculate current value, the face value is discounted to take account of the time value of money. The "*Development loans*" are loans of a type which, under FRS 11, fall to be treated in this way. I note that the figure at note 8 for "*Trade Debtors*" is also described as a *discounted* figure. At any rate, it is said that Mr Corbally's calculation of net asset value for WBD value relied not on *current* values, as shown in the accounts, but instead on the full amounts actually outstanding from West Bar BPRA LLP and West Bar Hotel Ltd. That approach produces the total figure for debts due of £4,180,776, which includes the "*Development loans*".

ii) For similar reasons, there is nothing suspicious in the fact that the figure for "*Development loans*" in the accounts increased, rather than decreased, between March 2018 and March 2019. That is explicable because the *current* value of long-term assets will fluctuate over time, and will naturally increase as time passes with the changing discount rate applied. Thus, there is nothing surprising in the overall figure increasing, even if, during the same accounting period, amounts have been repaid.

The Judgment of ICC Judge Burton

Maximum Limit

46. The main part of the Judgment of Judge Burton is headed "*Calculation of Maximum Limit*", and it is clear that against the background of the controversy mentioned above, she was addressed on a number of issues concerning the proper meaning of clause 8 of the Guarantee and the associated definitions.

47. Clause 8 is an example of a familiar provision, under which a contract confers a decision-making power or discretion on one of the parties. Such clauses are not without difficulty, however.

48. In argument I was referred to two key authorities, namely *Socimer International Bank Ltd* v. *Standard Bank London Ltd* [2008] EWCA Civ. 116, [2008] Bus LR 1304, and *Braganza* v. *BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

49. In *Socimer*, a contractual provision gave a bank the authority to determine the "*value*" of certain securities. It was accepted (see at [94] and [119]) that "*value*" meant "*market value*", and the question was whether the bank was subject to an implied duty to identify the "*true"* market value (i.e., a purely objective standard); or an implied duty to take reasonable care (i.e., a negligence standard); or subject only to a more limited duty to act reasonably (in the *Wednesbury* sense) in the decision-making process. As a matter of construction, including in light of the fact that the agreement gave the bank sole discretion to provide a certificate of deficiency unchallengeable save in case of manifest error, the Court of Appeal thought the latter. In his judgment at [66], Rix LJ explained the content of the duty as follows:

> *"It is plain from the authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality."*

50. In *Braganza*, this formulation was quoted with apparent approval by Lady Hale in her speech at [22], although [24] she went on to explain that the test of reasonableness derived from *Associated Provincial Picture Houses Limited* v. *Wednesbury Corpn* [1948] 1 KB 223, 233-234 in fact has two limbs. The first limb focuses on the decision-making *process* – whether the right matters have been taken into account in reaching the decision. The second limb focuses on the *outcome* – whether, even though the right things have been taken into account, the decision reached is so outrageous that no reasonable decision-maker could have reached it. Sometimes the second limb is used as a shorthand for the *Wednesbury* principle, but that should not lead one to overlook the former. Baroness Hale then said at [29], using the more modern term "*rationality*" instead of "*reasonableness*":

> *"If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question."*

51. She then said:

> "*30. It is clear, however, that unless the court can imply a term that the outcome will be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose …*
>
> *31. But whatever term may be implied will depend on the terms and the context of the particular contract involved.* "

52. In this case, Sanguine submitted before Judge Burton, and before me, that Downing's obligation in exercising its decision-making power was to arrive at the "*proper*" or "*correct*" determination of value of its Member's Interests in WBD, or alternatively at a "*reasonable*" determination (which I understood to mean, a determination arrived at applying reasonable care).

53. Downing's argument was that the relevant provisions of clause 8 should be construed as conferring full decision-making power on Downing, subject only to a limitation that the power be exercised rationally and lawfully, in the public law sense. This was said to follow from the proper construction of the Guarantee as a whole including the provision in Clause 16 (see [21] above) which makes any notification given by Downing conclusive, save in the case of manifest error.

54. Downing's submission, recorded by ICC Judge Burton at [14] of her Judgment, was that applying such a *Wednesbury*-type test afforded it wide latitude in determining the value of Sanguine's Member's Interests, in the sense that its overall decision could be impugned only if it was a decision which no reasonable decision-maker could have made. The overall figure arrived at could not be characterised in that way, even accepting that it used figures for the "*Development loans*" different to those in the statutory accounts, because they were figures representing the actual amounts due, and it was rational to use those figures.

55. The Judge's conclusions on these critical points are set out at [18] and [19] of her Judgment, as follows:

> *"18. The guarantee failed to provide any machinery or principles on which the value of the Members' Interest should be determined. This was not a requirement merely to provide a figure in respect of outstanding indebtedness. Instead, the amount due depended upon calculating the value of a member's interest in an LLP. These courts are full of disputes between shareholders regarding the value of one another's interests in a limited company or enterprise and usually involve the provision of detailed, expert evidence. In my judgement, the absence of any machinery for such a clause is extraordinary, and immediately rendered any reliance upon the figure to be provided, speculative. The petitioner relies on its conclusive evidence clause and neither counsel referred me today to authorities where the courts have considered the efficacy of such clauses. The submissions before me relied, instead, on the application of Wednesbury principles to contractual decision-making provisions.*
>
> *19. The parties' positions could not be further apart. I do not know immediately whether it was reasonable on a Wednesbury principle approach for the petitioner to rely on the full value of its loan assets or whether in doing so, it committed a manifest error and can be shown consequently to have arrived at the figure demanded other than in good faith. It seems to me, particularly as a specialist in insolvency proceedings, that there are good reasons why accounting standards should apply*

> *some element of discount and that would be relevant for valuing a member's interest. But that is not the question I have to consider. The question before me is whether the debt is bona fide disputed on genuine and substantial grounds. The valuation of a member's interest in an LLP requires the application of accounting principles. In the absence of any principles or mechanics for valuation in the guarantee I am unable to determine whether the approach taken by the petitioner was so manifestly flawed that it failed on the Wednesbury principles and, as contended by the debtor, the correct figure should have been nil."*

Amendments to the Facility

56. The Judge was also influenced by the fact that the original Facility had been subject to the amendments made in August 2014. It seems that this point was undeveloped in submissions before her, but Mr Watson had more to say about it in his submissions before me. I will come back to that below. For now I record the Judge's observation at [22] of the Judgment that:

> *" ... the demand was based on a guarantee of a facility agreement that was substantially amended. It is unclear to me whether those changes were within the purview of the original guarantee."*

Estoppel

57. Sanguine also submitted that it had the benefit of an estoppel argument. This was based on assurances said to have been given on behalf of Downing and (presumably) the New Lenders, that they would not insist upon payment of outstanding amounts by LCSC. In support of that argument, Sanguine relied on the email from Mr Corbally referred to at [28] above. Sanguine argued that, in reliance on such assurances, it had undertaken work and incurred costs in seeking and indeed eventually obtaining planning permission for the Barbican project.

58. The Judge set out her conclusions in relation to the estoppel argument at [23] of her Judgment, as follows:

> *"Having decided that the debt is disputed on substantial grounds, the debtor's reliance upon estoppel might equally give rise to further grounds on which to dispute the petition debt which can appropriately be decided by the court in Part 7 proceedings where the judge would have the benefit of cross examining witnesses, rather than being required summarily to determine the issues as I would be required to do today. Such a claim lies outside the terms of the guarantee and it will be for the trial judge to determine whether the clauses relied upon within the guarantee nevertheless override, or are capable of overriding, the alleged estoppel."*

Cross-Claim

59. At [24], the Judge declined to express any view on the alleged cross-claim arising out of the Hoole Hall/Doubletree Chester matter.

The Present Appeal

60. In her submissions before me, Ms Hitchens for Downing sought to challenge the conclusions of the Judge on (1) the Maximum Limit point, and (2) estoppel. Mr Watson submitted that the Judge's reasoning was correct on (1) and (2), and by means of his Respondent's Notice, also sought to uphold her overall conclusion on the grounds that (3) the Amendment and Restatement of the original Facility August 2014 had the effect of discharging the Guarantee, and (4) Sanguine had a valuable cross-claim arising out of the Hoole Hall/Doubletree Chester matter.

61. The parties were in agreement that the Judge applied the correct legal test, namely: was the debt underlying the Petition disputed on grounds which appeared substantial, and/or was there a genuine and serious cross-claim exceeding the amount of the debt? As to the approach to be adopted on appeal, Mr Watson characterised the Judge's decision as essentially an evaluative one, and drew my attention to the decision of the Court of Appeal in *Prescott* v. *Potamianos* [2019] BCC 1031, where it was said at [76] that:

> *"… on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion."*

62. It is convenient to deal first with the Judge's conclusion on the Maximum Limit point; then to consider the argument that the Guarantee was discharged; then then to look at the estoppel argument; and finally to consider the Hoole Hall/Doubletree Chester claim.

Maximum Limit

63. Before me, Ms Hitchens sought to challenge the Judge's reasoning on the Maximum Limit issue. Broadly, she made two points:

    i) She said it was not enough for the Judge to have concluded that there was a dispute as to the value of Sanguine's Member's Interests in WBD. Rather, she had to conclude that there was a real prospect of showing that the valuation arrived at was *so* unreasonable that no rational person could have come to it. The Judge had not explained why the valuation in fact arrived at was not within the permissible range of reasonableness.

    ii) She said that in any event, Sanguine's challenge would only be relevant if there was a proper basis for thinking that the value of its Member's Interests in

> WBD could be reduced to nil. Even using the figure for amounts due from related entities in the statutory accounts, however, one did not get to a nil valuation, but only to £142,650 (see above at [43]), which was well above the minimum £750 figure for inclusion in a statutory demand directed to a company. The Judge appeared to think that Sanguine's case was that the value of its Member's Interests could be reduced to nil even on the basis of the figures in the accounts, but that was not the case; Sanguine's submission was that one could reach a nil value only by looking behind the accounts, and there was no real prospect of that being justified.

64. I do not accept these criticisms of the Judge's reasoning. I say that for the following reasons.

65. *First*, Ms Hitchens' starting point is that the contractual discretion afforded to Downing gave it complete decision-making authority, subject only to it acting rationally in the public law sense. But there is an anterior question, which is whether that is the correct construction of the Guarantee. I accept that there is a good case for saying that it is, and indeed that was the result in *Socimer*. However, I do not feel that at this stage I can discount Mr Watson's contrary argument that properly construed, the Guarantee required something more, i.e. the identification of the *proper* value, or a value arrived at using *reasonable care*. In making this point, Mr Watson referred to the fact that in addition to the Guarantee, Downing had the benefit of security over Sanguine's interests in WBD (I have mentioned above at [22] the Charge entered into by Sanguine at the same time as the Guarantee), and said it was important that the "*value*" calculated under the mechanism in the Guarantee corresponded to the "*value*" over which Downing had security, because the commercial purpose overall was to ensure that Sanguine had no exposure to Downing over and above the secured amounts. This line of argument rather illustrates the fact that the proper construction of the wording of the Guarantee requires one to have regard to the overall factual matrix, including the commercial purpose and intent of the package of arrangements which Sanguine and others entered into on 18 March 2013. Here, I think ICC Judge Burton was correct to be cautious about forming a judgment as to the content of the decision-making duty without the benefit of such background, which it was not possible to examine fully in the context of the application before her. I remind myself of the direction given by Lady Hale in *Braganza* at [31], namely that " … *whatever term may be implied will depend on the terms and the context of the particular contract involved."*

66. *Second*, there is a related and indeed overlapping point, as follows. Even assuming that the decision-making power of Downing *was* limited only by the requirement to be rational in the public law sense, what was the decision it was required to make? It was required to determine the "*value*" of Sanguine's Member's Interests, but what does that mean, and does it (for example) mean the value obtainable on the basis of a hypothetical arms-length sale to a third party (i.e., market value), or something else? Although perhaps expressed in rather compressed form, it seems to me this is the point the Judge had in mind when at [18] she said that *" ... [t]he courts are full of disputes between shareholders regarding the value of one another's interests in a limited company or enterprise …* ", and when at [19] she observed that " … *there are good reasons why accounting standards should apply some element of discount and that would be relevant for valuing a member's interest*." Mr Corbally's approach to

valuing Sanguine's Members Interests is to take a *pro rata* share of net assets, including the *full* value of loan amounts owed by related entities to WBD. But it is not at all obvious that in arriving at this conclusion, he asked himself the right question. If the right question to ask, even if only subject to a public law filter of rationality, was, "*what is the market value of Sanguine's Member's Interests*?", that would seem to point one in the direction of determining the *current* value, calculated by reference to the discounted *current* value of WBD's loan assets, not their face value. Moreover, Sanguine's 33% interest in WBD was (and is) a minority stake. The market value of a minority interest in a business enterprise may well not be the same the value of a *pro rata* share of the net assets of that enterprise, even if one takes their current value. That is because a minority interest implies limited control, and that will often be reflected in the value of a minority stake being discounted. Disputes about this issue are common, and it seems to me this is what ICC Judge Burton had in mind in paragraph [18] of her Judgment when she spoke of the courts being full of disputes between shareholders. In any event, that is certainly a species of such dispute which is common in the courts.

67. *Third*, it follows from these points that I do not accept Ms Hitchens' first challenge summarised at [63(i)], namely that Downing's assessment must stand since it cannot be said it was so extreme that no reasonable person could have reached it. I do not agree. This looks only at limb 2 of the *Wednesbury* reasonableness test (above at [50]), and ignores limb 1. One must look not only at the outcome, but also at the decision-making *process*, i.e. whether the decision-maker took the right matters into account or not. The difficulty is that one cannot properly assess limb 1 without being clear about the question to be addressed, because the nature of the question will define the inputs required to provide an answer. In the present case, the Judge said – and I agree – that there was a basic lack of clarity about the target the decision-maker was required to aim at. This makes it impossible to say whether the correct matters were taken into account or not. Arguably they were not, for the reasons already given above. If (for example) the correct question for Downing to have asked was as to the *current market value* of Sanguine's Member's Interests, then the valuation carried out arguably *was* irrational, since it took into account matters which were irrelevant (the face value of the loan assets rather than their current value), and failed to take account of other matters which *were* relevant (such as the fact that Sanguine's Member's Interest is a minority stake). I think the difficulty with Ms Hitchens' point is that it requires one to accept the overall *outcome* reached in this case as unquestionably rational (*Wednesbury* limb 2), but in circumstances where there is scope for argument about the nature of the decision to be made, and therefore about the decision-making *process* (*Wednesbury* limb 1). I think this is the point the Judge had in mind at the end of her paragraph [19], when she said: "*In the absence of any principles or mechanics for valuation in the guarantee I am unable to determine whether the approach taken by the petitioner was so manifestly flawed that it failed on the Wednesbury principles …*". By this she meant that there was no identifiable framework within which the rationality of the decision could reliably be tested. I think she was entirely correct to express that concern, and therefore to conclude that there was a substantial dispute about the debt.

68. *Fourth*, neither do I think one can shortcut matters and say that whichever approach is adopted must inevitably result in a "*value*" for Member's Interests which is above the relevant £750 limit, in particular because in order to arrive at a nil value one would

have to go behind the statutory accounts, and that is not justified. That is, in effect, the gist of Ms Hitchens' second point, above at [63(ii)]. Again, however, I am afraid I do not agree. For one thing, I think the same basic objection made by ICC Judge Burton applies: until one is clear about what the decision-maker was in fact required to do, it is difficult to be confident about anything, and indeed if the wrong question was asked (which arguably it was), then possibly no effective decision about the value of Sanguine's Member's Interests was made at all. For another thing, it may not be correct to say that one has to unwind the accounts to arrive at a nil value: even assuming they are accurate, assessing the market value of an interest in a business routinely involves a much broader range of inquiry into matters affecting marketability, such as the nature of the rights attaching to the interest in question, the viability of the underlying business model, the enterprise's trading history and prospects, and the conduct and behaviour of the other parties holding interests in it. One might say here that an outcome resulting in a nil value would be surprising, but the fact is that no valuation evidence has been produced and one simply does not know. The Court should not proceed on the basis of guesswork. Finally and in any event, certain matters within the accounts *might* require adjustment, on more detailed examination. The accounts are not audited, and are not sacrosanct. In argument, Mr Watson pressed his point mentioned at [44] above arising out of Mr Levy's spreadsheet. On the face of it, that is an issue which requires explanation, and which is not addressed in Downing's evidence. Ms Hitchens valiantly sought to fill the gap herself, by providing the explanation at [45] above, i.e. she said the difference between the spreadsheet data and the figures in the accounts was because of the accounting treatment applied to the "*Development loans"* under FRS 11. But that explanation was not set out in the evidence and in truth it is impossible to balance the figures without a properly set out reconciliation. There is thus a dispute about it, and one cannot gloss over that dispute by saying that the discretion conferred on the contractual decision-maker was very broad and subject only to a test of *Wednesbury*-type reasonableness or rationality, because even then it would be irrational as part of the decision-making process (*Wednesbury* limb 1) to take into account an inaccurate figure.

Amendments to the Facility

69. I have mentioned above the Judge's point that the demand made of Sanguine under the Guarantee was based on the original Facility, which had been substantially amended. She said it was unclear to her whether those amendments were "*within the purview of the original guarantee*."

70. Mr Watson developed this point before me. His basic submission was that the Guarantee was discharged when the Amendment and Restatement was entered into. That is because it represented an entirely new arrangement: looking at the substance of it, there was a new set of obligations on the part of LCSC and an entirely new loan facility, i.e. the LCSC Facility. Mr Watson relied on the doctrine in *Holme* v. *Brunskill* (1878) 3 QBD 495, to the effect that absent the surety's consent, any material variation in the underlying contract to which the principal is party will discharge the surety from liability under his guarantee.

71. Mr Watson said this conclusion was unaffected by clause 6.1.1 of the Guarantee – I will call that the *anti-discharge provision* – which (as noted above at [14]) provided that Sanguine's liability under the Guarantee would not be "*discharged or otherwise*

affected by … any arrangement, including any extension, modification or renewal of the Facility Agreement or any change in the Liabilities …". That in turn was because, however wide the language of that clause was, it could not capture the effect of new events which were outside "*the purview*" of the Guarantee, and the Amendment and Restatement was such an event.

72. In developing this point, Mr Watson relied on the so-called "*purview doctrine*". This derives from certain observations made by Lord Atkin in *Trade Indemnity Co. Ltd* v. *Workington Harbour and Dock Board* [1937] AC 1. I will explain the context below. The relevant passage in Lord Atkin's speech is at p. 21, where in discussing the language of an anti-discharge provision in that case, he said the following:

> *"The words 'any arrangement … for any alteration in or to the said works or the contract' are very wide. Probably they would have to be cut down so as not to include such changes as have been suggested as substituting a cathedral for a dock, or the construction of a dock elsewhere, or possibly such an enlargement of the works as would double the financial liability. An author of great authority [Rowlatt on Principal and Surety, 2nd Edn. (1926), p. 118], happily still with us, suggests that such words only relate to alterations 'within the general purview of the original guarantee.'"*

73. For her part, Ms Hitchens' submitted that the changes to the Facility effected by the Amendment and Restatement were not sufficiently material to lead to discharge of the Guarantee, even without having regard to the anti-discharge provision in clause 6.1.1, and certainly if one did have regard to it. That was because the addition of a new Lender had no material impact on Sanguine's position under the Guarantee, and neither did the fact that the overall amount of *LCSC's* liability increased. The important point was that *Sanguine's* liability was effectively the same: it continued to be capped, by reference to the value of its Member's Interests in WBD. Moreover, the sole director of Sanguine, Mr Matthews-Williams, was also a director of LCSC at the time of the Amendment and Restatement and was thus aware of its provisions.

74. In any event, Ms Hitchens said that even if the new arrangements introduced by the Amendment and Restatement did fall outside *the purview* of the Guarantee, that would only mean that the Guarantee was unenforceable as regards the *new* obligations of LCSC undertaken by means of the *LCSC Facility*. Downing would still be entitled to enforce the Guarantee in respect of the obligations owed by LCSC under the original *Facility*, which exceed the minimum limit for a winding-up Petition. In making this point, Ms Hitchens relied on the *Trade Indemnity* decision, as interpreted by the Court of Appeal in *Hackney Empire Ltd* v. *Aviva Insurance Ltd* [2013] 1 WLR 3400.

75. Against the background of those submissions, I approach the matter as follows.

76. It is clear that the meaning and effect of the *purview doctrine*, and its inter-relationship with the doctrine in *Holme* v. *Brunskill*, is a difficult and controversial one. That is apparent from Rix LJ's analysis in *CIMC Raffles Offshore (Singapore) Limited* v. *Schahin Holding SA* [2013] 2 All ER (Comm.) 760, [2013] 2 Lloyd's Rep.

575, at [38]-[52]. For present purposes, however, I think I can approach the matter in a relatively straightforward way.

77. Where a guarantee is entered into in respect of specified obligations owed by a principal obligor to a co-contracting party, and then further arrangements are entered into between the principal obligor and that contracting party, a number of questions will typically arise.

78. One question is whether those further arrangements in fact fall within the *scope* of the guaranteed obligations. If they do not, then no claim can be made under the guarantee in respect of them. An example is *The Nefeli* [1986] 1 Lloyd's Rep. 339, in which Bingham J. found that an extension to a charterparty was an entirely new and extraneous matter which fell outside the scope of the disputed guarantee. Thus, there was no claim against the guarantor in relation to the extension: he had provided no guarantee in connection with it.

79. A related and overlapping question is not so much about the guarantee, but about the relationship between the new and the old arrangements.

80. One possibility is that because the new arrangements are entirely separate from the old (as in *The Nefeli*), the old arrangements simply continue as before. The obligations owed under them by the principal obligor are unaffected; and the guarantee continues to operate vis-à-vis those obligations, which are obviously within its scope (or purview, if that is something different).

81. This was in fact the result in the *Trade Indemnity* case, as explained by Jackson LJ in *Hackney Empire Ltd* v. *Aviva Insurance Ltd* [2013] 1 WLR 3400, at [72]-[77]. In *Trade Indemnity*, a guarantee was given in favour of an employer, to secure performance by a constructor of works under a construction contract. At some later point, the employer also advanced funds to the constructor, which was in financial difficulty, by way of loan. When the constructor became insolvent, the employer made claims under the guarantee, including in respect of the loan. The claim in respect of the loan failed, because the arrangement relating to the loan was an entirely new and extraneous matter, falling outside the scope of the guarantee; but in all other respects, the guarantor's liability under the guarantee remained (although in the event the claims against it failed because of what Jackson LJ in *Hackney Empire* called "*procedural vicissitudes"*: see at [77]).

82. Turning to the present case, it seems to me that the real nub of Mr Watson's argument is that it represents a variant on the *Trade Indemnity* example. He says it is a case where, once the new arrangements came into effect (i.e., the Amendment and Restatement, including the LCSC Facility), they entirely superseded the old (reflected in the Facility). The consequence is that the old arrangements dissolved: they were overtaken by the new. Moreover, since the new fell outside the scope (or purview) of the Guarantee, the Guarantee simply fell away, or become otiose.

83. It seems to me that this approach reflects the correct analytical structure. For present purposes, I think the question I have to ask is whether the result Mr Watson contends for is an arguable one. If it is, that is a further reason why the Petition debt is validly disputed.

84. In my view, there is an arguable point as to whether the *scope* of the Guarantee extends far enough to encompass the new arrangements, i.e., the Amendment and Restatement. There are factors pointing in both directions. The critical language is perhaps not that in Clause 6.1.1, but instead that in Clause 2. By Clause 2, Sanguine guaranteed payment of "*the Liabilities*", and this in turn was broadly defined to mean (my emphasis) "*all monies and liabilities which from time to time … are due and owing or incurred from the Borrower [LCSC] to the Security Trustee [Downing] and the Lenders*."

85. Thus, on the one hand, the Guarantee is expressed to be an *all monies* guarantee. This suggests it was intended to cover not only present but also *future* and *increased* liabilities of LCSC. On the other hand, however, the engagement in Clause 2 was with respect to all monies owed to Downing *and the Lenders.* At the time the Guarantee was executed, that was plainly a reference to the seven Original Lenders. The question is whether it was also intended to embrace obligations owed to any differently constituted group of "*Lenders*" which might emerge in the future, even if (as happened) it included some (but not all) of the original seven, plus an additional new one. Mr Watson says not, because the phrase "*the Lenders*" meant in context only the seven *Original Lenders*; and he says the correctness of that construction is emphasised by the opening words of Clause 2, which provide that the consideration for the Guarantee was the entry into of the Facility by Downing and "*the Lenders*", meaning the original seven only and not the later group of six.

86. It seems to me this is an arguable point of construction, and moreover one where the Court is likely to be assisted by an understanding of the factual matrix as it stood when the Guarantee was entered into. The Guarantee was part of a wider package of financing and security arrangements, which were not in evidence before the Judge and which have not been properly explained. It may well be that that wider context will shed light on the question of construction I have identified. Certainly, I think the Court should be cautious about concluding that Ms Hitchens is right, and Mr Watson is wrong, without access to that wider story.

87. Incidentally, if the correct question at this stage is as to the *scope* of the Guarantee, then in my view it does not really matter what Mr Matthews-Williams knew or did not know at the time the Amendment and Restatement was entered into in August 2014 (Ms Hitchens' point recorded at [73] above); that cannot affect that the question of the scope of the Guarantee, which involves looking at the factual matrix at the time when the Guarantee was entered into in March 2013.

88. That deals with the matter of the scope of the Guarantee.

89. For very similar reasons, I think it is also arguable that the effect of the Amendment and Restatement was to sweep away the original Facility, and to replace it with something new. It is true that one of the documents executed in August 2014 is the *Amendment* and Restatement Agreement, but I think Mr Watson is correct to submit that one must look at the substance not the form. Here again, the change in the configuration of the Lender group is arguably significant: it suggests a structure which in substance is new and different, rather than something which is merely a variation on the old.

90. Moreover, the change in the Lender group is only part of the picture. The changes effected in August 2014 were significant. Not only did they involve new, and separate, Facility Agreements being entered into by Dominions and LCSC, but also by that stage the commercial situation had changed materially. One of the original partners in the venture, Mr Bolton, had dropped out of the picture due to his retirement; the projects were delayed and further funding was needed; and the negotiations resulted in an agreement that LCSC would pay not only the substantial Renewal Fee but also the similarly substantial Redemption Fee. Among other changes, a new guarantee was given by Dominions, as to "*the first £400,000 of the principal amount of the Barbican Loan (as amended).*"

91. The upshot was an arrangement under which different overall sums were owed to a different group Lenders in respect of different liabilities, and with (it seems) modified security arrangements.

92. That being so, I think it at least arguable that after the entry into of the Amendment and Restatement, there was nothing left of the original Facility for the Guarantee to bite on. Indeed, it is more natural to think that the new arrangements were intended entirely to replace the old. In any event, I do not consider that that is a question which is properly capable of final determination on an application such as that before ICC Judge Burton. Again, it is a matter on which the Court is very likely to be assisted by a more detailed account of the commercial background as it stood in August 2014. At present the picture is sketchy and inconclusive.

93. To summarise, in my judgment ICC Judge Burton was again correct to be cautious on this point, and to regard it as a further reason why the Petition should be dismissed. I say that because in my view, it is arguable that the arrangements brought into effect by means of the Amendment and Restatement fell outside the scope of the Guarantee, but also had the effect of entirely replacing the original Facility, thus rendering the Guarantee otiose.

Estoppel

94. Sanguine's estoppel argument was at the forefront of Ms Hitchens' submissions. She challenged the Judge's reliance on this point on the basis that (1) the Judge did not identify any clear promise or representation by Downing; (2) the Judge wrongly assumed it was arguable that Sanguine had changed its position but in fact it had not; and (3) put at its highest, Sanguine's position was only that Downing would not call in the LSCS Facility and make a demand under the Guarantee without giving reasonable notice, and reasonable notice had been given.

95. The estoppel argument was very much a subsidiary aspect of the Judge's reasoning. That is clear from the opening words of paragraph [23] of her Judgment: "*Having decided that the debt is disputed on substantial grounds, [Sanguine's] reliance upon estoppel might equally give rise to further grounds on which to dispute the petition debt …*". Nonetheless, to the extent she did so, I consider the Judge was justified in viewing the estoppel point as an independent basis for concluding that the Petition debt was disputed on substantial grounds:

    i) At this stage, the question whether there was arguably a promise or representation, and whether there was a change of position by Sanguine (or

LCSC), has to be looked at in a common-sense way in light of the available evidence. Some matters are clear. These include the fact that, although the LCSC Facility was in principle repayable in September 2015, it was not repaid then, but no steps were taken to call in the outstanding sums for over three years, until March 2019. In the meantime, work continued on the Barbican project, and planning permission was eventually obtained in late 2017. In the Autumn of 2017, two of the New Lenders under the LCSC Facility were dissolved, and another one placed into liquidation. This broad picture is obviously consistent with the idea that by late 2015 Downing had decided to afford some degree of forbearance to LCSC, and that this state of affairs continued for a number of years afterwards. Mr Corbally's email of 2 February 2016, and Mr Matthews-Williams' evidence of what he was told by "*CC*" (see above at [29]), also fit into that overall picture. That being so, I do not feel able to accept Ms Hitchens' points summarised at (1) and (2) above. The available evidence *is* consistent with the idea that some form of representation was made to Sanguine and/or LCSC that the sums due under the LCSC Facility would not be called in, and is also consistent with the idea that in reliance on that representation, work continued, and thus costs continued to be incurred, in connection with the Barbican project.

ii) Ms Hitchens' point (3) is a stronger point, but it still does not persuade me that the Judge's overall evaluation of the estoppel issue was wrong. The thrust of Ms Hitchens' argument was that reasonable notice *had* been given, because the demand letter sent to Sanguine on 25 March 2019 was itself a notice requiring payment, and since a generous period of time passed between the date of that letter and the presentation of the Petition on 29 May 2019, there was no real prospect of Sanguine arguing that it had not had reasonable notice. The difficulty with this argument, however, is that it focuses exclusively on the position as between Downing and Sanguine, under the Guarantee. But there is also the position as between Downing and LCSC to be considered, under the LCSC Facility. After all LCSC, not Sanguine, was the borrower. Here, the position is that Downing made a demand of LCSC on 22 March 2019, followed by the appointment of Administrators over the business and operations of LCSC only 5 days later, on 27 March 2019. In the meantime, the demand under the Guarantee had been made after only three days, on 25 March, relying on LCSC's failure to make payment in the interim. Arguably, these time periods were inadequate, coming as they did after a long period of apparent inactivity. LCSC was given very limited time indeed to organise its affairs in a manner which might have enabled it to make payment. Mr Matthews-Williams' evidence is that it did not have the liquidity available to enable it to do so at such short notice, the implication being that, given time, things might have been different. That may or may not be correct, but either way gives rise to a factual issue which the Court cannot presently resolve.

Cross-claim

96. Having reached the conclusions expressed earlier in her Judgment, the Judge did not feel it necessary for her to deal with the question of the alleged counterclaims arising in connection with the Hoole Hall/Doubletree Chester matter. In light of the conclusions already expressed above, I adopt the same approach. I was addressed

only briefly on this topic, and given that I am already persuaded that the Petition debt is disputed on substantial grounds, it seems to me inappropriate to say more about the alleged counterclaim.

Conclusion

97. ICC Judge Burton was presented with a complex picture and had to conduct just the sort of evaluation contemplated by the Court of Appeal in *Prescott* v. *Potamianos* (see above at [61]). It is not for me to carry out that evaluation afresh, but only to try and assess whether there was some identifiable flaw in the Judge's approach. I can detect no such flaw. On the contrary, in my view the Judge's evaluation was entirely correct. In particular, she was correct given the obviously complex factual history to resist the temptation to short-cut a more detailed inquiry in favour of a summary determination. Her instinct was that the matters raised were better suited to resolution in Part 7 proceedings, and I agree. I therefore dismiss the appeal.