Neutral Citation Number: [2022] EWHC 716 (Ch)

Case No: **CH -2021-LDS-000006**

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

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG
Date: 4 April 2022

Before :

HH JUDGE DAVIS-WHITE QC

(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

MANSOOR MALIK — **Applicant/ Appellant**

- and -

THE NATIONAL BANK OF RAS-AL-KHAIMAH — **Respondent**

- -

- -

Mr Paul French (instructed under the Direct Access Scheme) for the **Appellant**

Ms Bridget Williamson (instructed by International Debt Recovery Limited) for the **Respondent**

Hearing date: 19 July 2021

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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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HH JUDGE DAVIS-WHITE QC

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Hand down: This judgment was handed down by circulation to the parties and to BAILII. The deemed time of handing down is 10:30am on 4 April 2022.

HH Judge Davis-White QC :

Introduction

1. This is my judgment on a rolled-up hearing being an application for permission to appeal and, if permission is granted, the substantive appeal against an order of District Judge Geddes, sitting in the County Court at Leeds, dated 18 February 2021. In addition, there is an application by the appellant to amend the grounds of appeal and to adduce further evidence. I apologise to the parties for the delay in producing this judgment.

2. The judgment appealed against followed a hearing on 21 September 2020 which hearing was then followed by a number of procedural applications, primarily to adjourn the hand down.

3. In her written judgment handed down on 18 February 2021 (the "Judgment") DJ Geddes dealt with an application dated 25 August 2020 to set aside a bankruptcy statutory demand served on the applicant (who is the appellant before me), Mr Malik ("Mr Malik"), by the Respondent, the National Bank of Al-Khaimah (the "Bank"). That statutory demand (the "SD") was dated 3 August 2020. The Judge refused the application to set aside the SD. She extended the time for filing a notice of appeal until 29 March 2021. The Notice of Appeal is dated 29 March 2021 and was sealed on 30 March 2021. To the extent necessary, I further extend the time for filing a notice of appeal. The District Judge herself refused permission to appeal on 17 March 2021, the time for applying to her also having been extended.

4. Before me, Mr Paul French appeared for Mr Malik and Ms Bridget Williamson appeared for the Bank. Neither of them appeared below. I am grateful to them for their submissions both oral and written.

The Facts

5. The facts can largely be taken from the Judgment.

6. The SD claimed an indebtedness to the Bank in a sum of £90.176.52, the sterling equivalent of sums said to be owing in United Arab Emirates Dirhams for loans incurred in the United Arab Emirates (the "UAE"). The sums are said to be owing in respect of three different contracts as follows:

Personal credit card	£15,851.04
Business Loan	£57,279.46
Business card	£16,946.02

7. I then pick the matter up in the Judgment:

> "[11] *....Mr Malik, a British National, lived for a period in Dubai, where he ran a pizza business called "Lucky's Pizza" between 2009 and 2016. It appears that he ran it as a sole trader, although under the law of Dubai where the business was located, sole traders have to have a Professional Trade Licence which registers details of the owner of the trading entity and assigns a unique reference number to the business. It is clear from the opinion of Mr Edge* [I interpose, the expert for the Bank] *that this does not confer on the business a separate legal identity.*
>
> [12] *Mr Malik took out a business loan and a business credit card with ...the Bank..and a personal credit card, which he asserts was only used for business expenditure.*
>
> [13] *In 2016 Mr Malik sold the business and the unique licence number assigned to Lucky's Pizza was transferred under local law to the new owner, a Mr Saleemi. The contract is in the bundle. Under its Eighth clause it provides that Mr Malik "will bear all the obligations arising from the sold premises in favour of third parties including rents, wages, salaries, charges, taxes, fines and consumption of water, electricity, telephone and all other expenditure related to the premises up to the date of registration of the sale with the official authorities and payment of these obligations is guaranteed by the second party with effect from this date to all government and nongovernment bodies." Mr Malik left the UAE to take up residence in the UK. Neither he nor Mr Saleemi then made payments under the loan or credit cards.*
>
> [14] *Under the agreement with the Bank to take out the personal credit card and the business credit card there was provision for the whole outstanding amount to become due on a default of the monthly payment or on termination of the agreement, which is deemed by clause 14.2 to be triggered in the event that Mr Malik leaves the UAE to take up residence elsewhere*.
>
> [15] *In relation to the business loan the agreement provided that the whole amount became due on default of the monthly instalment amongst other provisions. In addition, the contract required Mr Malik to inform the Bank of the sale of the business. He did not do so, nor did he inform them of his departure from the UAE, another requirement of the contract.*
>
> [16] *In short, in respect of all of the loans Mr Letheren's statement sets out a case for the monies becoming due by the time that he sold the business and departed the UAE and that case does not seem to be seriously disputed by Mr Malik."*

The Judgment

8. Mr Malik said that the debt was disputed and that the SD should be set aside on that ground. As regards this, the Judge recorded that there was common ground between the parties as to the test that she should apply in this respect, clearly basing herself on r10.5 of the Insolvency (England and Wales) Rules 2016 ("IR 2016"). In particular,

the Judge referred to r10.5(5)(b): the debt is disputed on grounds which appear to the court to be substantial. The Judge summarised the position as follows:

> "[2] *It is common ground that the court should treat the test to set aside a statutory demand in the same way as an application for summary judgment, save that the onus is on the debtor to satisfy the court that he has an arguable case. The authorities relating to Part 24 of the CPR are well known and there is no dispute as to the approach the court should take. I am grateful for Counsel for their skeleton arguments citing relevant authorities and summarise the principles as follows:*
>
> *• Mr Malik need only show he has some realistic (as opposed to fanciful) prospect of success– that is a prospect better than merely arguable and not false, fanciful or imaginary*
>
> *• The court cannot embark on a mini-trial but neither must it simply accept everything that is asserted. If it is clear that there is no substance in asserted facts especially where they are contradicted by contemporaneous documents there may be issues which are capable of being disposed of summarily to save the cost and delay of a trial whose outcome is inevitable".*

It was not suggested before me that this summary was incorrect.

9. The main issue raised by Mr Malik as the ground of substantial dispute was a question of the law of the UAE. As regards this, the Judge had expert opinions provided pursuant to an Order made by Deputy District Judge Whitehead on 21 September 2020. I shall return to that Order later in this judgment. Returning to the Judgment:

> " [4] *Mr Malik has argued that under Article 46 of the relevant Code* [of the UAE] *the debts of the business were transferred to the new owner of Lucky's Pizza (by operation of law rather than explicitly under the contract for sale, which I have seen, is very brief and does not expressly deal with this issue).*
>
> [5] ***Article 46*** *says this*: *1. Any person to whom the ownership of the commercial concern shall pass, subrogates, by force of law, the disposing person in all the rights and obligations arising from the contracts related to the commercial concern, unless otherwise [agreed[1]] or if the contract is based on personal considerations. 2. The second party to the contracts referred to in the preceding paragraph may, however, within ninety days from the date of notification of the disposal, request the cancellation of these contracts provided he has serious reasons to justify such cancellation and provided that he notifies the new owner, within an adequate period, of his wish thereto*.
>
> [6] *I have also had cause to consider* ***Article 47****, which says*: *1. The person to whom the title to the commercial concern has passed, shall fix a date for the creditors, whose debts precede the date of the transaction, to submit a statement of their debts in order to settle them. Such date is to be published in two daily*

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[1] The Judge noted in a footnote at this point: *"See both expert opinions. This word has been omitted from the translation from the Arabic and should be inserted to make sense of the article."*

papers issued in the State one of which is in Arabic and with an interval of one week between the two issues. The date fixed to the creditors may not be less than ninety days from the date of publication. The new titular of the title to the commercial concern shall be liable for the debts whose owners have submitted a statement thereof within the stated period, if they have not been settled within the said period. 2. The new owner of the commercial concern shall be discharged of the debts whose owners did not submit a statement in their respect within the period as fixed in the preceding paragraph. 3. The disposing party shall remain liable for the debts, related to the commercial concern, which have arisen prior to the publication of the disposal unless he is discharged thereof by the creditors.

[7] *Foreign law is a matter of fact for the English Court but it is well settled that foreign law must in general be proved by expert evidence. "Quite simple words may well be terms of art in a foreign statute". It is not for the Judge to conduct their own research into the foreign law. However, the court is entitled to reject expert evidence as to foreign law where the expert is lacking in objectivity, the evidence is "patently absurd" and/or where "the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning" and where no or insufficient evidence of foreign law is adduced, the court applies English law. I have been provided with an extract from Dicey, Morris & Collins on the Conflict of Laws 15th ed. from which the above principles are drawn.*

[8] *Although neither party has addressed me explicitly on the definition of a "debt" I am satisfied that it is well-established in English law that:*

- *A debt is a sum of money due to be paid under an agreement*
- *A sum of money owing does not become a debt until it is due and action could be taken to recover it.*

[9] *I have no reason to believe that a debt in the law of Dubai has any other meaning. Neither Counsel, nor the experts are explicit about the definition (probably because it is so well established). I have no reason, therefore, not to apply the English definition and the sense in which the word has been used throughout the paperwork strongly implies that the parties also consider the meaning to be clear.*"

10. Where in this judgment I refer to numbered articles it is to the relevant numbered articles of the relevant UAE Code. (That code is Federal Law 18 of 1993 (as amended) being the UAE Commercial Transactions Law (CTL), often referred to as the UAE Commercial Code).

11. As I have said, DDJ Whitehead had made an order permitting the parties to adduce expert evidence by way of report. That order was dated 21 September 2020 and, as regards experts, provided (in part) as follows:

"*1. Expert evidence shall be dealt with as follows:*

*(a) The parties each have permission to instruct an expert on the issue of the effect of Article 46 of the United Arab Emirates Federal Law No 18 of 1993 ("**Art 46**") on the prohibition on assignment in the written agreements between the Applicant and the Respondent.*

(b) Each expert may address the effect of Art 46 generally to the extent that is considered reasonably necessary to clarify the expert's evidence under subparagraph (a) above.

(c) By 19 October 2020, the parties will exchange the reports of their respective experts.

(d) By 2 November 2020, each party may put written questions to the other party's expert.

(e) *By 16 November 2020, the experts will reply to any written questions."*

12. The background to that order is the then written evidence before the DDJ. The witness statement of Mr Malik in support of the application rested on article 46 of the relevant UAE code. He said, in summary, that the effect of article 46 was to transfer relevant liabilities arising under the Business Loan and the Business Credit Card to the transferee of the business. As regards the personal credit card liability, he said that too was, on the facts, a relevant business liability which passed under article 46. In this context he relied upon a decision in another case involving a bank, which had also served a statutory demand in similar circumstances against Mr Malik, where DJ Pema had decided that similar arguments on article 46 (but apparently not article 47) were such that the statutory demand should be set aside. On that occasion Mr Malik had relied on an expert report from a Mr Waheid (and the relevant bank had apparently relied upon an expert report of Mr Edge, but which focussed on article 46 and especially the meaning of "personal considerations" as referred to in that article).

13. The witness statement of Mr Christopher Letheren, solicitor in the firm of International Debt Recovery Limited engaged by the Bank, also rested the defence on article 46. In this respect he relied on a generic expert report by Mr Ian Edge a barrister practising in England and Wales dated 11 February 2020 dealing with a number of issues regarding contracts of the sort entered into in this case and the UAE law regarding their validity and enforceability. As regards article 46, Mr Letheren made the points that:

(1) in circumstances where the Business Loan and Business Card were in effect personal credit facilities which were not necessary for the continuation of the business, they would fall to be personal considerations in any event (falling within the proviso in the latter part of article 46(1));

(2) In any event, article 46 did not operate because the relevant agreements all included "non-assignment" clauses and therefore the debts could not pass under article 46.

14. Accordingly, and following the order of DDJ Whitehead, the parties filed expert reports. DJ Geddes had before her the expert reports of Mr Ian Edge, for the Bank, dated 19 October 2020 and of Mr Shoeb Saher, for Mr Malik, dated 19 October 2020.

15. As regards Mr Sahar's opinion, the Judgment records the following:

> *"[23] The Applicant obtained expert evidence from a lawyer based in the UAE a Shoeb Saher whose report is dated 19 October 2020. The summary of his advice is that under Art 46 all the rights and obligations attaching to a business will pass to the new owner so long as (a) the formalities associated with the transfer of the business have been met (b) the two exceptions to Article 46 do not apply. Those exceptions are where the vendor and purchaser agree otherwise or where the contract "is based on personal consideration", which Mr Saher says is not defined in the code and would be a matter of fact. Mr Saher says that the effect of Article 46 is that the prohibition on assignment contained in the contracts would not bite as Article 46 (with its force of law) overrides them.*
>
> *[24] Mr Saher cites a judgment of the Dubai Court of Cassation (no. 476/2018 in support of his conclusion that the debts passed (by force of law) with the other rights and obligations on the transfer of the business given that it is common ground that the contract between buyer and seller was silent on the point. That case said: the text of Articles 46(1) and article 47 of the [Code] states that when the owner of the commercial shop disposes this shop to another in the way prescribed by the law…the ownership of the shop transfer[s] to the new owner, and he subrogates the previous owner – by the force of law – in all rights, obligations and debts arising from the transactions prior to this transfer, whenever they are related to the commercial shop, and the latter shall be responsible for all transactions and debts on which the previous owner concluded; unless they agreed otherwise in the sale contract that the seller would remain responsible for the obligations. and debts prior to the disposition – and the stipulation in Article (63) of the aforementioned Law was that everyone to whom the ownership of a trade name is transferred according to the transfer of the ownership of the commercial shop succeeds his predecessor in the obligations and rights that arranged under this name and every agreement to the contrary shall not apply to the right of third parties except from the date of its registration in the Commercial Registry and notification of the concerned parties thereof"*
>
> *[25] The legal system in question does not operate with binding case law or precedent although it is common ground between the experts that cases may be used as a guide to how disputes might be determined in the courts.*
>
> *[26] Mr Saher concludes firstly that the restriction on assignment clause in the Loan Documents will not have any impact on the transactions pursuant to Article 46 (because that Article has the force of law which cannot be overridden by an agreement between one of the contracting parties to the sale and a third party) and secondly that if the business was sold properly: then all the rights and obligations attaching to the Business shall pass to the new owner except as provided in two exceptions (i.e. if agreed otherwise or if based on personal considerations). There is no dispute between the experts that the formalities required to effect the sale were carried out properly."*

16. As regards Mr Edge's report, the Judge said the following:

"[27]. The Respondent obtained its expert evidence from Mr Edge, a UK based lawyer with considerable experience in UAE law. Mr Edge disagrees with Mr Saher on the point of whether the terms and conditions of the contracts between the Bank and Mr Malik could disapply Article 46. He says that the fact that the provisions of that Article are not mandatory – and therefore not a matter of public policy – it is open to parties to agree to disapply them and this would include one party and the third party Bank, not just parties to the sale and purchase of the business. It seems to me, however, that this particular dispute between the experts does not go to the heart of the issue.

[28] At paragraph 20 he says this: It may be noted that the issue in the present case is not whether the Respondent Bank's loan and credit card contracts with the Applicant were transferred to the new buyer, thereby giving a right to the Bank to decide whether it wanted to continue those contracts with the new buyer, which is what Article 46…envisages, but whether the debts arising out of those contracts are transferred to the buyer of the business. ***Article 46…is completely irrelevant to this issue"*** *[my emphasis].*

[29] Mr Edge goes on to explain that **Article 47** of the code deals with business debts: *the seller of a commercial concern remains liable for the debts of the commercial concern entered into prior to the sale (Article 47(3) CTL) but the creditor may instead choose to prove their claim against the buyer by submitting a statement of debt within a fixed period (Articles 47(1) and 47(2) CTL). Of course, if the creditor does not choose to do so they may still sue for* their debt against the seller.

[30] Mr Edge cites a case of the highest court in the UAE – its Federal Supreme Court – 684/2006. In that case the buyer and the owner included within the sale agreement a requirement on the buyer "to honour obligation on any indebtedness to of the shop to banks and third parties" and on the basis the owner attempted to evade responsibility for debts. He failed on the basis that the contract had not undergone the formalities required for its provisions to take effect (it had not be notarised as is mandatory). Mr Edge comments: had the contract been valid then the buyer would have been bound to honour the bank debts of the business but this would have been because of the term in the contract of sale nor because they were transferred to the buyer by operation of law…
[31] Mr Edge is also of the view that the non-assignment clauses contained in the loan and credit card agreements bind Mr Malik and cannot be overridden by Article 46 (even if it applies) because that Article is not mandatory or a matter of public policy (that expression of principle being indicated by the freedom the Article includes to the contracting parties to agree to something different). In other words, Mr Malik was not free to contract with the buyer to take on the debts because he was bound by the non-assignment clause, which Mr Edge opines is a perfectly valid clause in UAE law.

[32] Mr Edge therefore concludes: under UAE law the Applicant remains indebted to the Respondent Bank under the Business loan; the Business credit card and the personal credit card and that these various debts were not passed to new owner of "Lucky's Pizza" on sale of the business neither by operation of law nor by agreement"

17. The Judge had no expert evidence on behalf of Mr Malik in any way challenging Mr Edge's assertion that article 47 applied (and that article 46 had no application) nor Mr Edge's analysis as to how article 47 operated.

18. After service of the expert reports, the Bank served questions on Mr Malik's expert, Mr Saher, as provided for under the September Order of DDJ Whitehead. Question 23 of those questions raised the issue of the relevance of Article 47. Mr Saher declined to answer the question on the grounds that it was outside the scope of his instructions.

19. The Judge then rejected a submission on behalf of the Bank that the expert report of Mr Saher should be rejected in its entirety on the basis that he had failed to answer questions properly put to him. The Judge considered that the number of questions asked was disproportionate and that the expert had taken the not unreasonable view that some of the questions went beyond his original instructions. In those circumstances, it would not be just to exclude Mr Saher's report.

20. The Judge then turned to the question of whether it was procedurally unfair to permit the Bank to rely upon article 47. This was in response to the submissions of Mr Fennell, Counsel then acting, for Mr Malik that it was too late and procedurally unfair for the Bank to rely upon article 47. The transcript of the hearing shows his position was as follows:

> " *This case has proceeded all the way though on the basis that it's article 46. That was the basis on which Mr Letheren engaged. That was the basis on which my learned friend approached it at the last hearing. It would be unjust – Mr Malik is still entitled to know what case he's got to meet and it's – it's not been properly set out by the other side, and their attempt to deal with that by putting it in an expert's report and, then, saying very little about it, is unfair to Mr Malik. If they're going to raise article 47 as their main case, they needed to tell us that properly in advance and we could have then come back to court and got proper directions.*"

21. Mr Fennell did not suggest that there should be an adjournment to enable Mr Malik to obtain further expert evidence with regard to article 47. Further, he accepted that (a) it had become apparent that the Bank was relying on article 47 and saying that it was that article which was relevant to the facts of the case and, as the Judge put it at the hearing, that that article pulled the rug out of the argument on article 46 on service of the expert report of Mr Edge and (b) that Mr Malik then needed to engage with the article 47 issue and (c) that Mr Malik had had time to engage with that issue.

22. The Judge dealt with the question of procedural fairness as follows:

> *"[39] Has there been procedural fairness if I am to be asked to consider the impact of Article 47 as well as Article 46? Mr Edge's opinion that Article 46 was irrelevant seems to have been a bombshell. Mr Fennell complains that the primary argument advanced by the respondent now in relation to Article 47 was one which appeared for the first time in the skeleton argument of Ms Dixon for this hearing and that it would be unfair to determine the application on this basis as a result.*

[40] Mr Fennell is right to say that Article 47 was not mentioned in Mr Letheren's lengthy witness statement or in the scope of the expert evidence commissioned by Deputy District Judge Whitehead which was explicitly limited to opinion on Article 46. I note that Mr Malik's previous proceedings focussed on Article 46 (and in particular whether the issue of whether the term personal consideration gave rise to a triable dispute) as did his witness statement in support of this application. However, this is due to Mr Malik's application to set aside the statutory demand being squarely based on the application of Article 46.

[41] The parties could (and perhaps should) have come back to court for permission to extend the scope of the instruction to include Article 47. I consider the questions put to Mr Saher to be disproportionate and to amount in places to cross-examination. Nevertheless, the applicant has had Mr Edge's report for two months and Mr Saher's responses to Mr Letheren's questions for over a month. In the circumstances Mr Malik has had every opportunity to seek to extend the scope of the instruction (or challenge the respondent to do so) or to ask his own expert to engage with the question about Article 47 or indeed to seek some other direction in relation to the admissibility of the opinion about Article 47 expressed by Mr Edge in the context of the directions of DDJ Whitehead.

[42] It follows that I do not consider there has been procedural unfairness to Mr Malik. Indeed Mr Saher's citation of the 2018 case flagged Article 47 up but then is not dealt with in any way by Mr Saher's commentary or his replies to questions. Moreover, whilst I may be of the view that Mr Letheren's questions are disproportionate and Mr Saher states on a number of occasions in his replies that the questions go beyond the scope of the instruction, he nonetheless attempts to answer the vast majority of the questions posed. Unfortunately, the question of the applicability of Article 47 is not one of the questions he chose to answer."

23. The Judge then went on to consider the question of whether there was an arguable defence to the Bank's claims or whether article 47 provided a clear answer, in the Bank's favour, to the question of Mr Malik's liability for the debts of his business after that business had been sold and transferred to another.

24. The judgment continues:

"[45] I ask myself whether it is plain that:

• Under UAE law sums in issue in this case are to be viewed as debts (whether business debts or personal debts)

• That the process under which responsibility for them might pass to a new business owner is governed by Article 47 rather than Article 46

• That as a result (or for some other obvious reason) Article 46 does not apply and there is no defence.

[46] The sums owing by Mr Malik have been universally described in these proceedings as "debts". There appears to be no real dispute on the fact that they arose properly under the various contracts between the Bank and Mr Malik or that they are due and became due before the sale of the business as a result of Mr Malik's failure to tell the Bank of his plans and/or his departure from the UAE. The focus has been entirely on whether Mr Malik has succeeded by the operation of Article 46 in divesting himself of those debts at the same time as obligations and rights under other contracts. I do not consider it is reasonably arguable to say that these were not "debts" as understood in UAE law (explained by Mr Edge) or indeed English law if the expert evidence is not sufficiently clear on this point.

[47] Assuming they are debts, therefore, does Article 47 apply or is it reasonably arguable that they are, nevertheless, governed by Article 46? Of course, Mr Malik has the opinion of Mr Saher to the effect that they are governed by Article 46 but I am not helped by Mr Saher's silence on the impact of Article 47. In his submissions Mr Fennell took me to Article 46 to demonstrate that it provides for contracts to pass to new owners on transfer of the business. He submits that the remedy for the other party to the contract is the ability to cancel the contract. There is nothing wrong with this submission, which accords with Mr Saher's advice on Article 46, but it still begs the obvious question of what happens to debts existing under the cancelled contract even if that was what the third party chose to do? If I accept Mr Edge's opinion – which is the only opinion I have on this particular point given Mr Saher's silence – Article 47 provides the mechanism for just this situation.

[48] Only if I considered Mr Edge's report to be lacking in objectivity, or his conclusions to be "patently absurd" or where "the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning" would I be entitled to reject his evidence on the operation of Article 47 on these facts. Whilst I note that Mr Edge has worked for another bank on a similar issue against Mr Malik I do not believe that in itself could suggest a lack of objectivity. I do not consider Mr Edge's opinion to be expressed without adequate reasoning. On the contrary, his opinion appears to flow from the plain meaning of Article 47 as he sets it out.

[49] I can find nothing in Mr Edge's opinion that would lead me to disregard his advice on the fact of how UAE law applies to this situation. It is clearly stated and makes sense when considered against the apparently plain words of Article 47(3) "3. The disposing party shall remain liable for the debts, related to the commercial concern, which have arisen prior to the publication of the disposal unless he is discharged thereof by the creditors". Here there is no dispute that the Bank holds Mr Malik liable and has not discharged him.

[50] Mr Saher's silence is unfortunate but cannot undermine the plain sense of the opinion expressed by Mr Edge that under the applicable law the debts remain those of Mr Malik: under UAE law the Applicant remains indebted to the Respondent Bank under the Business loan; the Business credit card and the personal credit card and that these various debts were not passed to new owner of "Lucky's Pizza" on sale of the business neither by operation of law nor by agreement.

[51] I have no reason to reject Mr Edge's opinion on the application of UAE law to this situation. In doing so, I also conclude that Mr Malik has failed to persuade me that he has an arguable case warranting the set aside of the statutory demand."

25. Finally, by way of postscript, the Judge noted that the credit card debt had been consistently argued by Mr Malik to be a business debt that would not transfer by reason of article 46. However, it did not matter whether it was or was not:-

"*If it is a personal debt (as appeared to be supported by his own act of having allegedly gone to the bank to attempt to settle it) then it would not be caught by Articles 46 or 47 but would be due under the contract itself. If it is a business debt it would fall to be considered with the other debts and would be governed by Article 47 in the same way. Either way it is due and owing and there is not a reasonably arguable case to avoid it."*

The Appeal, amendment to grounds and further evidence

26. The grounds of appeal as set out in the Notice of Appeal are three:

(1) CPR r35.4: In essence it is said that the Bank failed to seek permission to adduce expert evidence concerning article 47 and that the Judge misdirected herself in saying that the parties could (and perhaps should) have come back to court to extend the scope of the permission to adduced expert evidence; the obligation to do so lay on the Bank.

(2) Procedural unfairness: in previous (unrelated) proceedings on a similar point Mr Edge had relied only on article 46, the case had proceeded on the basis that the dispute was about article 46, had an application to vary DJ Whitehead's order been sought then Mr Malik would have sought permission to adduce his own expert evidence, that expert evidence was now to hand (though it had not been at the time of the hearing before the Judge) and had it been available to the Judge she would have found for Mr Malik.

(3) The appellant's own contractual documents include the Credit Shield insurance terms. The judge erred in fact in concluding otherwise.

27. The third ground needs further explanation to make it comprehensible, but I will seek to explain it when considering it in more detail later in this judgment.

28. By an application dated 17 June 2021, Mr Malik sought permission to amend his grounds of appeal (in case the current grounds did not cover the ground that he now wished to assert) and to adduce further evidence, that being the further expert report of Mr Saher dated 11 February 2021, drafted as an answer to a question 23 raised by Mr Letheren and referred to in the second ground of appeal.

29. The amendment to the ground of appeal for which permission is sought is that the District Judge misapplied herself in law in that having determined that there was a genuine dispute of fact, she proceeded to determine that dispute of fact whereas the

mere fact of there being a dispute of fact was sufficient to form the basis upon which to set the statutory demand aside.

30. As regards the amendment to add in a ground of appeal I consider that the further ground was not covered by the existing grounds of appeal and that if it is to be advanced permission is needed. The point is really a quite separate point that the Judge decided that the point of foreign law was one that she could determine and that she erred in so doing. There is an argument as to the extent to which there was a dispute between experts given the state of the expert evidence before the Judge and that sought to be relied on before me but I shall address that later. There has been plenty of time to consider the further ground raised before me and the parties were prepared to deal with it. I grant permission to amend the Notice of Appeal and to rely upon the further ground. I will refer to such ground as Ground 2A, to be considered after Grounds 1 and 2.

31. As regards the application to adduce further evidence, I accept that the *Ladd v Marshall* [1954] 1 W.L.R. 1489 principles remain the starting point. I also accept that under the CPR those principles must not be applied too rigidly, the overriding objective being the bright line, but that the principles are of "powerful persuasive authority" (*Shabir v Al Saud* [2009] EWCA Civ.353; [2009] 2 Lloyd's Rep. 160 esp at [52]). I also accept that on interim applications (especially under CPR Order 24), the first principle (the evidence could not have been obtained with reasonable diligence for use at [the hearing]) needs to be applied against the background of the particular circumstances (see e.g. *Price and others v. Flitcraft and other* [2020] EWCA Civ 850 esp at [44] to [47]).

32. I am not persuaded by Mr French's submission that the new evidence was not readily available because the court would not have permitted it to be used given the limits on the order of DDJ Whitehead (restricting permitted expert evidence to evidence dealing with article 46).

33. However, I consider that the evidence should be allowed in for the following reasons which are all reasons why the first limb of the *Ladd v Marshall* principles should not be applied too rigidly as a determinative factor on the facts of this case. As will be apparent from my discussion of the evidence in due course, I consider that the other two limbs of the test are clearly satisfied as regards the new evidence.

34. First, there was plenty of time for the Bank to seek further evidence itself and at least in the alternative to seek permission to rely upon it. As I explain below, I consider that the Judge was correct to say that it was not procedurally unfair to permit the hearing to go ahead on the basis of the expert evidence from the Bank raising the article 47 point even though permission was in effect given to adduce it at the hearing. This was in the light of the time Mr Malik had had to react to such evidence. The same can be said of this situation. There was no application to adjourn to permit further evidence to be adduced by the Bank.

35. Secondly, the parties were well prepared to argue the appeal on the assumption the new expert evidence was admitted.

36. Thirdly, the decision appealed is in the context of an application to set aside a statutory demand. In the bankruptcy context, the court's role is somewhat different from that in the run of ordinary litigation. The bankruptcy process involves a statutory demand (with the ability to apply to set it aside) and, if the statutory demand is not set aside, then a hearing of the petition. At that stage the court has to be satisfied that the relevant debt is due. Similarly, there is an ability to appeal a bankruptcy order but there is also an ability to apply for an annulment on the basis that the order ought not to have been made (see s282 Insolvency Act 1986). There is also generally an ability to apply for a review of an order under s375(1) Insolvency Act 1986. In those contexts, the approach is best summed up by what was said by Patten J, as he then was, in *Ahmed v Mogul Eastern Foods* [2007] BPIR 975, as discussed by Nugee J (as he then was) in *Hayes v Hayes* [2014] EWHC 2694 (Ch); [2014] Bus LR 1238. In the latter case, Nugee J, having referred to a paragraph of the judgment of Patten J in the *Ahmed* case said:

> *"[52] He then went on to say, at para 24:*
>
> > *"For my own part, I would not wish to import into applications under section 282, a rule equivalent to that in Ladd v Marshall [1954] 1 WLR 1489. It seems to me that the correct approach in all cases is the one which was taken by Millett J in relation to applications under section 375 in his decision in In re A Debtor (No 32—SD—1991) [1993] 1 WLR 314 where he distinguished an application under section 371(1) from appeal and said, at pp 318—319: Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made on the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of fresh evidence, whether or not it might have been obtained at the time of the original hearing. The matter is one of discretion, and where the evidence might and should have been obtained at the original hearing that will be a factor for the court to take into account; but the rationale for the rule in Ladd v Marshall that there should be an end to litigation and that a litigant is not to be deprived of the fruits of a judgment except on substantial grounds, has no bearing in the bankruptcy jurisdiction.*
>
> *[53] After that survey of the authorities it seems to me that they support the following propositions: Firstly, that if all that is involved is a re-run of exactly the same arguments on exactly the same material as before the court on an application to set aside a statutory demand, the court will not generally entertain the same material on the hearing of the petition. Secondly, if there is something new, whether that be something new in the form of evidence or something new in the form of arguments, some new material before the court, that is a matter which can and no doubt should be taken into account by the court. Thirdly, the strict application of the criteria in Ladd v Marshall [1954] 1 WLR 1489 do not apply, but the fact that matter was not put before the court on the previous occasion is something which the court can take into account in the exercise of its discretion."*

37. Whilst I am dealing with an appeal and not a review, the issue is whether a defence is arguable with reasonable prospects of success and the Judge was wrong to decide that it was not. The argument is one of foreign law. It is undesirable that I should ignore the new evidence and, if I would otherwise decide that the appeal should fail, leave the prospect of the matter being revisited again, at more cost and taking up more court time which will affect other litigants, either on a review application or at the final hearing of a bankruptcy petition. I would also not wish to encourage an alternative scenario of a new statutory demand, further evidence and the whole matter being argued again.

38. Fourthly, the issue in this case is one of foreign law. Although this is a question of fact and traditionally determined by hearing expert evidence, the courts now take a more flexible approach to how they should deal with issues of foreign law as is helpfully set out in the Commercial Court Guide (11th Edition 2022) at H3.3

"*H3.3 In particular (and without limitation):*

(a) The Court can direct an exchange (simultaneous or sequential) of expert reports, an experts' meeting and joint memorandum, and (if strictly required) supplemental reports following the joint memorandum, from experts to be called to give oral evidence at trial if their evidence is not agreed.

(b) The Court can direct such an exchange of reports (etc), but on the basis that the experts will not give evidence at trial although their evidence is not agreed, or do so only on some of the matters covered by their reports although their evidence on other matters is also not agreed, with the advocates making submissions at trial by reference to the reports and foreign law materials filed.

(c) The Court can limit the expert evidence to identification of the relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources, with the advocates making submissions at trial as to the relevant content of foreign law by reference to the sources thus identified.

(d) In some cases, the Court may be prepared to take judicial notice, or accept the agreement of the parties, as to the nature and importance of sources of foreign law, and have the advocates make submissions at trial as to the relevant content of foreign law by reference to the sources thus identified, providing the source materials from their own researches."

39. In this case, if the further expert evidence is allowed in (which includes case authority), there is a real possibility that the court will be able to decide the point of foreign law on the basis that the exercise that it carries out would be no different to that which would occur at a trial and the point may also be a straightforward one. However, in any event, it would be a waste of court time simply to put the consideration of such evidence to another hearing on another occasion.

40. Accordingly, I give permission for the supplemental report of Mr Saher to be received into evidence.

Grounds of Appeal 1 and 2

41. These can be taken together. They have largely been rendered academic by reason of my decision to allow in the further expert evidence of Mr Saher. However, I deal with them for completeness.

42. I do not regard the Judge as having erred in not recognising that the order of DDJ Whitehead required the Bank to apply for permission to adduce into evidence the expert report of Mr Edge so far as it relied on and dealt with article 47. The passage of the judgment complained of in the ground of appeal: *"The parties could (and perhaps should) have come back to court for permission to extend the scope of the instruction to include Article 47"* has to be read in context and together with the remainder of the relevant paragraph ([41]) of the judgment. Later in that paragraph the judgment continues:

> "*In the circumstances Mr Malik has had every opportunity to seek to extend the scope of the instruction (or challenge the respondent to do so) or to ask his own expert to engage with the question about Article 47 or indeed to seek some other direction in relation to the admissibility of the opinion about Article 47 expressed by Mr Edge in the context of the directions of DDJ Whitehead."*

43. It is clear from the paragraph as a whole that the Judge was under no illusions about the procedural position and was not labouring under a misapprehension that it was for Mr Malik to seek to vary the order of DDJ Whitehead so as to provide for expert evidence on article 47 to be admitted. What she was saying was that Mr Malik should have done something rather than just sat back and then, on the day, said that there was no direction for expert evidence on article 47, the Bank's evidence on article 47 should therefore be excluded and it was unfair to proceed in circumstances on such evidence. This is in circumstances where Mr Malik had not himself sought any order in good time, not made clear to the Bank that the relevant evidence of the Bank was inadmissible without further court order and that he would oppose one being made and where he had not prepared any evidence (or even identified that there could be expert evidence on his behalf) regarding article 47 which would counter that of the Bank.

44. The Judge clearly allowed the expert evidence of Mr Edge to be adduced. To that extent it was implicit that she varied the order of DDJ Whitehead or made a separate order with like effect. In my judgment, she was not wrong to do so. I have referred to the circumstances in the preceding paragraph. Added to them was the fact that no adjournment was even sought by Mr Malik so as to adduce further evidence. Any case that there was procedural unfairness would only have got off the ground if (a) Counsel had not had time adequately to prepare for the hearing and on the basis that the report of Mr Edge would or might be allowed into evidence or (b) Mr Malik had a real prospect of obtaining expert evidence which would undermine that of Mr Edge and there was a good reason why that had not been obtained earlier. As regards these matters (a) did not apply. As regards (b), in the circumstances there was no good reason why such evidence should not have been obtained earlier but the Judge did not even have relevant evidence or submission that the same could be obtained and no application for an adjournment to obtain the same in the event that permission was granted was ever

intimated at the hearing nor was a necessary adjournment to obtain such evidence, which would derail the hearing, put forward as a reason why Mr Edge's report should not be permitted to be adduced as evidence.

45. As I have said, my decision to allow into evidence the further evidence of Mr Saher and the agreement of the parties that I should address the question of the setting aside of the statutory demand taking that evidence into account (assuming that I do let it in, which of course the Bank resists) largely neutralises the complaints underlying grounds 1 and 2 of the grounds of appeal and makes them academic in any event.

Ground 2A

46. The Judge did not have the benefit of Mr Saher's supplemental report which I have now allowed into evidence. As I understood the parties, it was not suggested that I should simply remit the matter to be re-heard with such evidence but rather the common position was that I should decide the question of whether there is a substantial dispute as to the debts on the article 47 ground.

47. Mr Edge's evidence is that:

(1) Article 46 deals with the transfer of contracts etc. on an ongoing basis. It does not deal with debts arising out of any contracts. They are dealt with by article 47 and article 46 is "completely irrelevant" to the issue of whether the debts in this case have transferred to the transferee of the business.

(2) Under article 47(3) a creditor of a debt existing at the time of transfer may enforce the debt after transfer against the transferor. However, there is also a right in the creditor to sue the transferee to the extent provided by articles 47(1) and (2).

48. Mr Saher's evidence is to the effect that articles 46 and 47 operate as follows:

(1) Existing debts of a business as up to the time of transfer of a business ("Existing Debts"), as other obligations, transfer to a transferee under article 46, but subject to article 47.

(2) Article 47 provides, as between transferor and transferee, that the transferor remains liable for debts of the business which existed prior to the transfer. However, as regards the rights of creditors, their right regarding such debts transfers to the transferee. However, the transferee is obliged to advertise in accordance with article 47(1). If it does so, then creditors who fail to submit a statement of their debts within the set period will lose their right against the transferee. If the transferee fails to advertise in accordance with article 47(1) then it will remain liable for the debts in question. However, in either scenario, the transferor will, as against the transferee, remain liable to pay any such Existing Debt unless the creditor in question discharges the debt. If the transferee pays the debt then it can seek reimbursement under article 47(3) from the transferor.

49. The authority relied upon by Mr Saher is a decision of the Abu Dhabi Court of Cassation of No 49 of 2009 (the "2009 Decision"). In that case, the key finding, which appears to bear out Mr Saher's position is as follows (in translation):

"Paragraph 1 of Article 46 of the Commercial Transactions Law provides that ((Any party to whom the ownership of the commercial concern shall pass, subrogates, by force of law, the disposing party in all the rights and obligations arising from the contracts related to the commercial concern, unless otherwise or if the contract is based on personal considerations)). Article 47 of the same law provides that: 1. The party to whom the title to the commercial concern has passed, shall fix a date for the creditors, whose debts precede the date of the transaction, to submit a statement of their debts in order to settle them. Such date is to be published in two daily newspapers issued in the State one of which is in Arabic and with an interval of one week between the two issues. The date fixed to the Paragraph 1 of Article 46 of the Commercial Transactions Law provides that ((Any party to whom the ownership of the commercial concern shall pass, subrogates, by force of law, the disposing party in all the rights and obligations arising from the contracts related to the commercial concern, unless otherwise or if the contract is based on personal considerations)). Article 47 of the same law provides that: 1. The party to whom the title to the commercial concern has passed, shall fix a date for the creditors, whose debts precede the date of the transaction, to submit a statement of their debts in order to settle them. Such date is to be published in two daily newspapers issued in the State one of which is in Arabic and with an interval of one week between the two issues. The creditors may not be less than ninety days from the date of publication. The new titular of the title to the commercial concern shall be liable for the debts whose owners have submitted a statement thereof within the stated period, if they have not been settled within the said period. 2. The new owner of the commercial concern shall be discharged of the debts whose owners did not submit a statement in their respect within the period as fixed in the preceding paragraph. 3. The disposing party shall remain liable for the debts, related to the commercial concern, which have arisen prior to the publication of the disposal unless he is discharged thereof by the creditors. The said provisions indicate that the lawmaker obliges the party to whom the title to the commercial concern has passed to take the actions specified by Paragraph 1 of the said Article 47. Such actions shall be specified to ensure stability of commercial transactions; to protect creditors who are existent prior to the sale in contracts related to the commercial concern; and to protect the party to whom disposition goes at the same time. Such actions shall entail a specific effect on the period within which the party to whom disposition goes shall be liable to the debts arise prior to transfer of title to it. If the party to whom disposition goes fails to take the said actions, it shall be liable to pay the previous debts owed to the former creditors prior to that disposition. However, the last paragraph of the said clause (47.3) provides that ((3. The disposing party shall remain liable for the debts, related to the commercial concern, which have arisen prior to the publication of the disposal unless he is discharged thereof by the creditors)). The lawmaker has differentiated between the relationship of the party to whom disposition goes with the creditors and its relationship with the disposing party. According to the law to whom disposition goes fails to take the stipulated actions, it will be liable to the concern-related debts arise prior to transfer of title to it. However, such debts shall remain owed by the seller, and the party to whom disposition goes may revert to it for recovery of the same as long as the debts have arisen prior to the publication of the disposal, unless it is discharged thereof by the creditors."

50. On the facts in that case, title to a commercial undertaking at a mall was passed by the appellant to the respondent. Part of the business transferred included a lease of the mall. Prior to the transfer in July 2003, the appellant had agreed to pay a certain proportion of the rent falling due under the lease. It issued two cheques to the owner of the mall. The cheques fell due before the date of transfer of the business. The cheques were held to be Existing Debts. The Appellant did not pay out on the cheques. The Respondent was obliged to make equivalent payments to prevent legal proceedings against the transferred business. The appeal court rejected the appeal of the appellant that the respondent had not advertised for creditors under article 47(1) and therefore remained liable for the Existing Debts. As against the appellant (the transferor) the transferee was entitled to rely upon article 47(3). A number of other challenges were also dismissed but they are not immediately relevant. What is significant is that the court appears to have drawn the distinction that Mr Saher draws between the position of the transferee of a business in relation to the creditors (where article 46 and 47(1) and (2) apply) and in relation to the transferor (where article 47(3) applies).

51. Mr Edge also relies upon an authority being Federal Supreme Court Case 684/2006. As Mr Edge puts it, that case raised the question of liability for a bank debt of a shop business when the business had purportedly been sold and transferred to a third party. I note that the first and second respondents were the original borrower and guarantor respectively and that the third respondent was the alleged transferee of the business.

52. Mr Edge goes on to say as follows regarding this case. The contract of sale included the following condition: "*.. the requirement of the [third party buyer] in the contract of sale of the [owner of the business] to honour obligation on any indebtedness of the shop to banks and third parties*". The transferor sought to evade liability to the bank on the basis of this provision (saying that the buyer was now liable for the bank debts) but the court held that the fact that the contract of sale was not notarised (a mandatory requirement) meant that the contract of sale was not valid so that the above term did not take effect. Had the contract been valid then the buyer would have been bound to honour the bank debts of the business but this would have been because of the term in the contract of sale not because they were transferred to the buyer by operation of law. The seller of the business was still liable for the bank debts but had tried to shift responsibility for them under the contract of sale to the buyer. On the facts of the case the seller's attempt to shift responsibility to the buyer failed, but only because the sale was not notarised.

53. On reading the case I am not persuaded that the analysis of Mr Edge is correct. I accept that the court held that the contract of sale was invalid and that the transferee was therefore not liable. However, that meant not just that the specific contractual term about responsibility for debts did not take effect but that also there was no transfer on which articles 46 and 47 could bite. What has been produced in this respect as regards the actual judgment of the Federal Supreme Court is little more than a headnote. The top of the headnote contains the following text:

> *"Although the business had changed its name and been sold to a new owner this did not impact the liability for the debt, as the proper procedures for registering and notifying the sale had not been followed."*

54. The case headnote also says that the court relied upon articles 42, 44 and 46. That suggests that the argument was that under article 46 the transferee would have been liable to the bank if the transfer had been valid (and would have had no recourse against the transferor under article 47(3) because of the separate agreement between transferor and transferee on incidence of the relevant debts). However, it was not so liable to the creditor bank because there never had been a relevant transfer by reason of non-compliance with articles 42 and 44 which provide:

> *"Article (42)*
>
> *Any transaction aiming at the transfer of ownership of a commercial concern or at the creation of a real right thereon, shall not be valid unless it is notarized or authenticated by a Notary Public and entered in the Commercial Register.*
>
> *Such transaction must include the following data:*
>
> *1) Names of the contracting parties, their nationalities and place of residence.*
>
> *2) Date and type of the transaction.*
>
> *3) Type and address of the commercial concern and those elements agreed to be included in the transaction.*
>
> *4) Price of the tangible and intangible elements separately, if the transaction is a sale, the portion of the price paid upon conclusion of the contract and the mode of payment of the balance.*
>
> *5) Specific covenants concerning the contracts and undertakings, if any, pertaining to the commercial concern.*
>
> *6) Agreements, if any, reserving to the seller the right of rescission or cancellation or the institution of a privilege.*
>
> *Article (44)*
> *1. Transfer of property of the commercial establishment shall take place, as concerns the contracting parties and third persons, as of the date of recording the transaction in the Commercial Register and the publication of its summary in two Arabic daily papers issued in the State, with an interval of one week between each, and after the expiry of the period fixed for filing the objection against the said transaction.*
>
> *2. In case the commercial establishment comprises elements subject to a special scheme of advertising or registration, and unless otherwise provided by law, advertisement made for the disposal of the trading premises does not replace the special advertisement or registration."*

55. Of course, it may be that the actual judgment will throw further light upon the matter but at the moment I consider that it is unlikely that it would persuade me that the legal position set out by the Court of Cassation in the case relied upon by Mr Saher is not arguable with a real prospect of success.

56. I have anxiously considered whether I can in fact determine the short point of foreign law. I have concluded that I cannot. I am concerned that Mr Edge has not in fact replied to the later evidence of Mr Saher. Further, there is a separate issue of UAE law between them as to whether a creditor with the benefit of an Existing Debt can "opt out" of the regime under articles 46 and/or 47 by making its debt non-assignable as the Bank says that it has done in this case.

57. Accordingly, and leaving aside the personal credit card issue, I limit myself to deciding that the defence raised under articles 46 and 47 is one that has a real prospect of success and is one that meets the test of r10.5 IR 2016 in that the debt is one disputed on grounds which appear to the court to be substantial. Further, it is appropriate to set aside the statutory demand.

58. In these circumstances and given that I have received new expert evidence which was not available to the Judge I do not need to consider whether or not she was correct on her analysis of articles 46 and 47 on the basis of the evidence as before her. The formulated new ground of appeal is, in any event, not quite accurate. The Judge did not decide that there was a dispute of fact. She decided that on the evidence before her there was not in fact a dispute of fact. Be that as it may, the real ground, namely that she got the analysis of the UAE law wrong and should have held that there was a substantial dispute on that point of (foreign) law was understood and the basis of submissions before me.

59. That leaves the question of the alleged personal credit card. The Judge's approach was that either the debt was personal (so that the article 46/47 point did not assist Mr Malik as that article just did not apply) or it was a business debt and so the article 46/7 point would be decided against Mr Malik. On either basis he would be liable. The appeal (though the appeal notice is opaque) seems to be on the ground that any liability was to be covered by insurance. However, the liability to pay out under the insurance would appear to be a liability of the "Insurance Provider". It is far from clear to me that an alleged failure by the Insurance Provider to pay out on the insurance can be placed at the door of the Bank and make the debt arising from the use of the credit card one that is substantially disputed. Further, on the evidence as it stands I cannot see any cross claim against the Bank. I would therefore not have allowed the appeal on Ground 3 as stated.

60. However, in the light of my findings, the position becomes one where the issue of whether the debt is personal or a business one becomes crucial but unresolved. In those circumstances, the basis of the Judge's decision on the credit card falls away and it follows that the defence in relation to that debt also raises a substantial dispute with a real prospect of success.

Disposition

61. I grant permission to appeal, and allow the appeal. The statutory demand will be set aside on the basis each of the three debts is the subject of a substantial dispute.

62. I invite the parties to agree a form of order, so far as they are able and taking into account r10.5(6) IR 2016. To the extent that any matters cannot be agreed there will have to be a further short hearing. So far as not agreed, I adjourn all consequential matters arising from this judgment (including for the avoidance of doubt, permission to appeal) to that hearing and I extend the time for lodging a notice of appeal to 21 days after the order giving effect to this judgment is sealed. The parties should seek to agree a time estimate for the further hearing (if one is necessary) and, in the event that a draft order dealing with all matters has not been agreed and lodged by then, should approach the court within 7 days of the handing down of this judgment to make arrangements for the listing of the same.