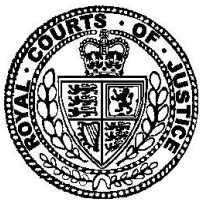

Neutral Citation Number: [2023] EWHC 3048 (Ch)
CR-2021-000583

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF BV9 LIMITED (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 06/12/2023

Before :

I.C.C. JUDGE JONES

- -

Between :

BV8 LIMITED

Applicant

and

(1) BV9 LIMITED (IN ADMINISTRATION)
(2) DAVID SHAMBROOK
(3) ANTHONY JOHN WRIGHT
(Both in their capacity as Joint Administrators)

Respondents

- -

Mr Andrew Mace (instructed by Ellisons Legal LLP) for the **Applicant**
Mr Christopher Boardman K.C. (instructed by Addleshaw Goddard LLP) for the **Respondents**

Hearing dates: 4 and 5 October and 14 November 2023

- -

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.

.....06/12/23.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) Introduction - The Appeal and Its Ambit

1. On 26 March 2021 Mr Shambrook and Mr Wright were appointed Joint Administrators of BV9 Limited ("BV9") by Kookmin Bank Co. Ltd as the trustee of Arumdree UK VAT Private Investment Trust No. 1 and of Arumdree UK VAT Private Investment Trust No.2 ("Kookmin"). Kookmin is the major creditor of BV9's administration and holds a qualifying floating charge now crystallised.

2. This application is an appeal by BV8 Limited ("BV8") pursuant to ***Rule 14.8 of the Insolvency (England and Wales) Rules 2016*** ("***the Rules***") of the Administrator's decision to reject a "Proof of Debt" dated 20 May 2021 for a sum of £1,074,036.91.

3. The Proof of Debt describes the sum claimed as:

> *"… BV8's earned interest margin on assignment of the loan books from BV8 to BV9 on 24/06/20 and 31/08/20 in accordance with Arumdree/Kookmin facilities."*

4. Following the Proof is a document entitled "Retained Interest Margin" which set out in tabular form (amongst other details): the value of the debts assigned by BV8 to BV9; the interest earnings recorded from the loan book of BV8, which after deduction of interest paid produced a "surplus interest margin" of £1,161,958.38; and below that a figure for "Xero Inter Company Balance" of £1,105,227.08.

5. It is apparent from its wording that the Proof of Debt is concerned with a liability resulting from the assignment of debts giving rise to an interest margin to which BV8 claims to be entitled in accordance with the lending facilities provided by Kookmin.

6. In contrast to the wording of the Proof of Debt, however, the claim was put by Mr Mace on behalf of BV8 in his skeleton argument and the appeal was presented as follows:

> *"The Applicant's claim in the administration of BV9 originates from payments made by the Applicant to BV9 on 16 December 2020. On 16 December 2020 the Applicant made three payments to BV9 in the amounts of £688,742.54, £500,000 and £500,000 respectively".*
>
> (I wish to make clear that there is no criticism of Mr Mace for this different presentation. The reality is that the change was required to reflect the true nature of BV8's case as pursued on this appeal, as will appear in more detail below.)

7. The skeleton argument asserts that the three payments totalling £1,688,742.54 paid to BV9 comprised: £1,074,036.91 as a loan from BV8 and £614,705.63 representing sums owed by BV8 to BV9. The £1,074,036.91 is stated to have comprised two distinct elements: (i) £790,149.64 representing BV8's own money; and (ii) £283,887.27 which

was BV8's money because that sum represented the money it had been entitled to receive in respect of interest/fees and other charges earned on its third party, property investor/developer loans up to the dates of their assignment to BV9.

8. It is to be noted in those circumstances, even at this early stage of the judgment, that ***Rule 14.4***, using the word *"must"*, prescribes that the content required for a proof of debt should include (amongst other requirements) details of: (i) how and when the debt or liability was incurred; (ii) documents substantiating the debt; and (iii) any deductions which should be made for subsequent payments, discounts and set-off in accordance with ***Rules 14.24 and 14.25***.

9. ***Rule 14.4*** is drafted in mandatory terms because it is plainly important that a proof is sufficiently detailed to enable the office holder to adjudicate upon the claim bearing in mind that they will not have personal knowledge of the facts and matters of the claim. In addition, such detail will support a fundamental facet of the adjudication process, namely that it should be an efficient system which minimises costs to avoid depletion of the realisations which will otherwise be available for distribution. If the proof is rejected, it will of course be that detailed proof which will be the subject of any appeal under ***Rule 14.8***.

10. A fundamental issue for this appeal, therefore, is whether the altered formulation of the claim can be relied upon on the appeal applying the Rules and/or within the context of fairness and the overriding objective if, as the Administrators assert but BV8 disputes, the change occurred shortly before the trial of the appeal without prior warning. BV8's counter-assertion is that the Administrators have had for a reasonable time the knowledge to understand that the formulation within the skeleton argument is the real claim even if they did not appreciate that to be the case until receipt of the skeleton argument shortly before trial as they assert.

11. In principle the answer to that issue is binary. However, the position is not as simple as that because the Administrators have explained that they want if possible to avoid being in the position of having to consider whether there can be an amended or a new proof based upon the wording within the skeleton, if the Proof of Debt would otherwise be dismissed on its wording. That is complicated because there is and can be no concession. That is because their position is that they have been unable to respond by undertaking investigations and by filing evidence which draws attention to the positive and negative facts concerning this new approach to the claim. They (as they assert) have been taken by surprise by this change of course.

12. As a result, they urge a definitive decision to the extent possible to avoid further costs and delay to completion of the administration but they flag up that such a decision would have to be reached without such investigations and evidence. It follows, however, that such a decision can only be made if further investigation and evidence is unnecessary. In this regard, it is to be remembered that they are not acting in their own interests but are seeking to ensure the interests of all creditors are protected. That too is the position of the Court when exercising its overall supervisory jurisdiction over the conduct of the insolvency.

13. Taking all those matters into consideration, I consider it right, as asked, to try to address the underlying issue of whether a debt has been proved on the balance of probability by BV8 even if the Administrators are correct in their case that the Proof of Debt is incorrectly framed and that a different cause of action is now relied upon. However, I can

and will do so only to the extent that this can be done taking into account the existing evidence and law.

14. As a result of this approach, it is insufficient simply to contrast the nature of the two claims and decide whether, as appears from the natural meaning of the wording, the Proof of Debt is so significantly different from the case advanced in the skeleton argument and as presented on the appeal that the Application must be dismissed.

15. It follows that it is necessary to look at the background to Kookmin's lending to BV8, the terms of the assignments and any other connected agreement, and the circumstances in which the payments on 16 December 2020 were made. In doing so there is the potential for this judgment to identify issues and/or facts which have not otherwise been considered relevant to the appeal. They will have to be considered if their existence might lead to the conclusion that no definitive decision can be made without further investigation and evidence. It is made clear for the avoidance of doubt (and to avoid having to mention it on each occasion) that when that occurs, such consideration will always be without prejudice to the parties' right to plea that the Court should not determine matters which they have not raised or argued.

16. Unfortunately, to add to the complications, it also has to be observed in this introduction that the nature of BV8's case changed further during submissions. Based upon an "inter-company" account that had only been produced with a fourth witness statement, supposedly as evidence in purported reply (arguably surrejoinder), the claim moved to or towards a claim for an account rather than a loan and debt. This was based upon the existence of a running inter-company account between BV8 and BV9 which started with the sums owed by BV8 to BV9 when the assignments were executed.

17. In all those circumstances, I consider the description of the appeal by Mr Boardman K.C. on behalf of the Administrators as an ever changing movement of the goal posts to be appropriate. This too will need to be taken into consideration when deciding how far this judgment can go beyond the content of the Proof of Debt. I have to observe that this is not how an appeal should play out and the risk of unfairness to the interests of the other creditors will be borne in mind.

18. As to that, the final introductory point is that in reality this becomes a dispute between BV8 and Kookmin. In practical terms, the outcome of the appeal will decide whether BV8 is entitled to the distribution of a substantial part of the prescribed part (as defined in ***section 176A of the Insolvency Act 1986***) in circumstances of the other creditors entitled to a share being owed no more than a sum in the region of £20,000. If the appeal fails, it will be Kookmin who benefits as the secured creditor. Yet Kookmin has played no part in this appeal, even though it is not unusual in such circumstances for the opposing creditor to be joined as a respondent or interested party. Nor has Kookmin become a witness for either side. It is to be assumed Kookmin has appreciated there is an appeal based upon the terms of the Proof of Debt and that it has chosen to leave matters to the Administrators, albeit that as office holders they would normally take a neutral approach ensuring the Court has all relevant information and arguments to consider. It is not to be assumed that they have appreciated the changes in claim and presentation of the appeal. Realistically, it would be too late for them to do anything about it if they had. This is the scenario relevant to unfairness.

B) Background to the Proof of Debt

19. The background to BV8's claim, which I am satisfied is established by the evidence, is that it and BV9 were special purpose vehicles set up to provide as their respective businesses VAT and other bridging finance to property investors and developers. Their intended profits would be based upon the difference in interest rates between the loans they made and the cost of the finance lent to them by Kookmin upon the terms of their respective facility agreements made in June 2019 for which they respectively provided security in the form of floating charges.

20. In principle, Kookmin could have lent only to BV8. The reason for BV9, however, was that Kookmin's off-shore status meant that its interest entitlement would have to be paid to it subject to deducted withholding tax unless the loan was for 364 days or less. To avoid that consequence, the intention was for BV9 to have an equivalent, secured borrowing facility. It would be granted at the same time as BV8's but would only be available to draw down when BV8's loan period expired (i.e. at the end of the 364 days qualifying period). For convenience I will call this summary of those background facts "the Tax Scheme".

21. Pursuant to the Tax Scheme, BV8 borrowed from Kookmin (as trustee) in two tranches secured by a floating charge: £12,380,000 as Tranche 1 ("T1") on 27 June 2019 under a facility agreement with Arumdree UK VAT Private Investment Trust No. 1; and £7,653,386.36 as Tranche 2 ("T2") on 30 August 2019 under a facility agreement dated 28 August 2019 with Arumdree UK VAT Private Investment Trust No. 2. BV8 used the facilities to lend money to third party investors/developers building up its loan book business. Those loans could be for periods shorter or longer than the 364-day term applying to BV8's loans under the facility agreements. The BV9 facility agreements made on 26 June 2019 effectively mirrored BV8's but subject to the above-mentioned delayed drawn down.

22. The terms of the facilities required BV8 and BV9 respectively (amongst other matters) to use the sums borrowed *"to fund capital expenditure requirements insofar as such requirements relate to the provision by the Borrower of VAT loans"* (clause 3). In addition, *"not to enter into any obligations or incur or permit to subsist any financial indebtedness … other than under the facility agreement [and specified connected documents]*" (clause 9.3.6).

23. The evidence explains that the structure of this two company Tax Scheme envisaged (as considered to be required for tax avoidance purposes) that BV9's facility would not necessarily be used to enable BV8 to repay its borrowing. That would not occur, for example, if BV8 was able to repay Kookmin from its own or third party funds. Bearing in mind that was an ingredient required for the Tax Scheme and that this judgment is not concerned with its validity as a successful scheme, it is in fact apparent from the evidence that in reality BV8 expected to be superseded by BV9.
Plainly that would not just mean BV9 repaying BV8's loans. It would mean BV9 having to receive BV8's loan book business.

24. Indeed, although remembering paragraph 15 above, bearing in mind the floating charges, it is not unreasonable to anticipate that BV8 would have to assign all its assets, as well as liabilities, to ensure for its own benefit as well as to satisfy Kookmin that the assets providing security remained secured subject to the terms of BV9's floating charge. This would reflect a succession required to implement the Tax Scheme.

C) The Nature of the Appicant's Debt/Liability Claim C1) As Presented in the 1st Witness Statement of Mr Smith

25. The background having been established, it is next necessary to identify the nature of BV8's claim in the context of the issue of whether the claim changed from the debt claimed in the Proof of Debt and whether, to the extent it did, the Administrators were already aware this was the intended claim as BV8 alleges ("the Paragraph 25 Issue").

26. Moving to the period when BV8's 364-day loan needed to be repaid, the first witness statement of Mr Smith, as a director of BV8, states as follows (noting that the assignment to which he refers concerned the T1 lending but there was a similar board resolution recorded within a minute dated 26 August 2020 referring to T2 and the passage in practice equally applies to T2):

> *"28. The way the refinancing was achieved in practice was BV8 executed the Assignments on 24 June 2020 and 26 August 2020 in respect of each of its Borrower Agreements in favour of BV9 …*
>
> *30. … whilst interest and other charges accrued [under the loans made by BV8 to the developers] payment was not required until the end of the loan period …*
>
> *32. In order to deal with this [i.e. the sums representing the interest and other charges due to BV8 as at the date of the assignments but not to be paid to BV8 until later] it was agreed the Borrower Agreements would be assigned to BV9 but in consideration of doing this BV9 would be responsible for paying BV8 the interest and charges which had accrued during the term of BV8's facility. There was an intercompany amount owing from BV9 to BV8 calculated in this regard in the amount of £1,074,036.91 which comprised interest payments and other amounts owing to BV8 at the time of the Assignments."*

27. Pausing there, it is noted that Mr Smith specifically stated that the £1,074,036.91 was calculated as the sum owed to BV8 because of BV9's agreement to pay BV8 the interest and charges accrued upon the third-party developers' loans but not yet payable at the date they were to be assigned to BV9. In other words, this is consistent with what as stated within the Proof of Debt rather than formulation of the claim in Mr Mace's skeleton argument's, and there is no reference to any 16 December 2020 payment and loan or to any inter-company account.

28. His witness statement continues:

> *"33. The circumstances of the Assignment [by BV8 to BV9] dated 24 June 2020 ("T1 Assignment") were confirmed in board minutes of BV8 on 24 June 2020 (the "24 June Minutes") (Pages 47 to 49 of Exhibit AS1.) [with equivalent board meeting minutes for the 26 August 2020 Assignment]*
>
> *34. The 24 June Minutes provided:*
>
> *'3. PURPOSE OF MEETING*
>
> *3.1 The Chairman reported that the purpose of the meeting was to consider and if deemed fit, to approve:*

> *3.1.1 the repayment of the loan facility entered into by the Company with Kookmin Bank Co. Ltd, as the trustee of Arumdree UK VAT Private Investment Trust No.1 in the form of collective Investment Trust for UK VAT Bridge Loan (the "Lender").*
>
> *3.1.2 the repayment to be made by assignment to BV9 Limited, a company (registered in England and Wales with company number 12009247) having its registered office at 6 The Centre, The Crescent, Colchester Business Park, Colchester, Essex, CO4 9QQ of all loans outstanding on 24th June 2020 funded under the facility agreement entered into by the Company with the Lender. The consideration paid by BV9 Limited for the assignment being a sum equal to the aggregate value of the outstanding net loans plus facility fees, interest, default interest and legal fees less loan processing fees received and interest rebates payable on the date of assignment shown in the Assignment Schedule.*
>
> *3.1.3 the Company transferring to BV9 Limited, on behalf of the Lender, a sum equal to £12,380,000 due to the Lender under the Facility less the consideration due to the Company from BV9 Limited on assignment of the outstanding loans shown in the Assignment Schedule …*
>
> *35. Thus it was clear that payment was expected from BV9 in respect of the assignment: "being a sum equal to the aggregate value of the outstanding net loans plus facility fees, interest, default interest and legal fees less loan processing fees received and interest rebates payable on the date of assignment shown in the Assignment Schedule".*

29. The following points are to be made from this minute:

a) The minute plainly links the assignments to BV8's right to be paid interest and charges accrued by the date of assignment to the Kookmin loans.

b) Kookmin would not be repaid directly. BV8's repayment was to be effected by the assignment of the relevant third party investor/developer loans to BV9. This is a potentially confusing proposition but one which required BV8 to transfer (in the case of T1 with the equivalent applying to T2) £12,380,000 to BV9 less the consideration BV9 had to pay for the assignments.

c) That raises the questions: (i) why would BV9 pay consideration and what would be its effect upon its financial position bearing in mind its liabilities to Kookmin; (ii) was there a professional valuation of the business including goodwill being transferred inherently with the assignments; and (iii) could this agreement ever result in a debt being owed by BV9 to BV8 as claimed in the

Proof of Debt when it appears to envisage BV9 receiving a balancing payment from BV8?

d) The answers as the case is presented in the evidence referred to so far, all concern the claim to the interest margin claimed in the Proof of Debt. There is nothing to suggest the evidence has anything to do with lending on 16 December 2020.

30. However, contrary to sub-paragraphs 28(a) and (b) above, it is BV8's case on the appeal, and is a fact, that Kookmin's loan was reduced by a direct payment to it of £987,686.58 on 16 June 2020. The purported board minute relied upon by BV8 for a board meeting held on 24 June 2020 refers to this sum as an interest payment. It records that BV8 had itself earnt £1,640,460.44 as interest paid or accrued on its loan agreements with the investor/developer, third parties. In addition a purported board minute of 26 August 2020 records that a payment was made to Kookmin by BV8 in the sum of £612,270.91 on that date, representing interest due on 30 August 2020. Again, this did not represent money paid to BV9.

31. In fact BV8 accepts on this appeal that there was no transfer of funds to BV9 until 16 December 2020. Instead, it is asserted that BV8 retained all funds which might have been transferred and operated an inter-company running account as exhibited to Mr Smith's fourth witness statement.

32. Mr Smith also then states in his first witness statement:

> *"51. However, the Assignments cannot be viewed in isolation. For each assigned Borrower Agreement, BV8 provided BV9 with a copy of a redemption statement on assignment as evidence of the balance due from BV9. There was agreement from both BV8 and BV9 that the loans were transferring for value. That value being the obligation for BV9 to pay BV8 the net advance plus fees and earned interest and default interest where applicable up to the assignment date.*
>
> *52. This was reflected in the accounting records of both BV8 and BV9."*

33. It is unclear whether Mr Smith is identifying a new agreement or referring to the board meeting minutes. In any event, at paragraphs 54-56 he says this:

> *54. The schedule I produced for the Joint Administrators (Page 61 of Exhibit AS1.) shows total interest earnings of £2,761,915.87 with interest paid to Arumdree in June 2020 and August 2020 of £987,686.58 for Tranche 1 and £612,270.91 for Tranche 2, giving rise to a net surplus interest margin of £1,161,958.38 due to BV8 Limited. On assignment of the BV8 loan books to BV9 Limited, BV8 could have withdrawn the surplus interest margin from the funds transferred to BV9, but instead chose to transfer the full balance of funds to BV9 with the excess being remitted as a loan to BV9.*
>
> *55. The agreed intercompany balance in the books of BV8 and BV9 is £1,105,227.08, to which a further £7,740.00 was added reflecting the settlement by BV8 of Wright Hassall invoice 252913 relating to BV9's recovery of one of the debts under the Borrower Agreements.*
>
> *56. This results in total balance owing to BV8 [by BV9] of £1,112,967.08."*

34. Those paragraphs can now be construed, as a result of Mr Mace's submissions, as referring to the 16 December 2020 loan in the context of BV8 having kept an intercompany account rather than transferring funds to BV9 before that date. However, that is not what Mr Smith says. What he says is that BV8 earnt £2,761,915.87 from its third-party investor/developer loans. Out of that sum BV8 used £1,599,957.49 in June and August 2020 to repay T1 and T2 interest. That left a balance of £1,161,958.38 as BV8's interest margin. His evidence with its reliance upon interest margin remains

consistent with the Proof of Debt but not with the claim that the debt results from a loan made on 16 December 2020.

35. Furthermore, Mr Smith specifically states that BV9 could have withdrawn the £1,161,958.38 when the assignments were made *"from the funds transferred to BV9"*. On the face of it the funds transferred do not refer to the payments transferred on 16 December 2020. That was not at the date of the assignment. Yet it is now accepted on the appeal that no sum was transferred by BV8 to BV9 upon assignment. It is only then that he refers to an inter-company balance but without stating that when he referred to sums being transferred to BV9 he did not mean they were. He makes that reference without exhibiting any inter-company account. Nor could he. It is also accepted that the account referred to in the fourth witness statement (as the record now relied upon by BV8 to explain the money BV8 retained notwithstanding the assignments and the terms of the board minutes) was not created until after the administration began.

36. This is at best confusing and probably better described as misleading. In any event it is quite clear that the case detailed in the Proof of Debt and addressed within the evidence referred to above, a claim to an entitlement to *"the interest margin on assignment"*, is not the one pursued at the appeal.

37. It follows that it is correct to describe BV8's case identified above as having changed to the one set out in the skeleton argument of Mr Mace, namely that (irrespective of the wording used in the Proof of Debt in paragraph 2 above) the £1,074,036.91 claimed is comprised of two distinct elements:

    (i) £790,149.64 which represented BV8's funds in BV8's account; and

    (ii) £283,887.27 which BV8 was entitled to in respect of interest/fees and other charges earned on its third party, developer loans up to the dates of assignment to B9 which B9 recovered after the assignment.

38. As explained above, that is not how the claim was put in the Proof of Debt determined by the Administrators (see paragraph 2 above) and it is not in accordance with the paragraphs of Mr Smith's first witness statement set out above. The Proof of Debt and the evidence within the first witness statement addressed above are purely concerned with *"BV8's earned interest margin on assignment of the loan books"*; not with the transfer of BV8's own money as a loan to BV9 on 16 December 2020. Nor is there room for an intercompany balance in the original claim when what is claimed is the money BV8 was entitled to receive for earned interest and other charges as at the dates of assignment.

39. However, Mr Smith then went on to state:

> *62. The T1 Assignment and the T2 Assignment required BV8 to transfer the "Notional Cash Balances" to BV9. However, BV8 initially retained the cash balances and dealt with the amounts due to BV9 through intercompany accounting in the books of both BV8 and BV9. Any funds required by BV9 to advance loans were transferred by BV8 on behalf of BV9 and again dealt with through intercompany accounting in the books of both BV8 and BV9.*
>
> *63. On 2 December the balance on the BV9 account was £17,667.86 and BV9 had committed to advance loans in December totalling £1,549,449.21. To meet*

> *these loan advances it was agreed that BV8 would transfer all cash balances to BV9 including BV8's own Surplus Interest Margin. On 16 December BV8 transferred £1,688,742.54 to BV9. The transfers including BV8's Interest Margin were recorded through the intercompany accounting in the books of both BV8 and BV9 (my underlining).*
>
> *64. With the benefit of hindsight it would have been better had we put in place a written agreement to document the interest free loan, both Mr Funnell and I were in Scotland attending meetings on 16 December and the formal documentation of the loan was overlooked.*

40. Those paragraphs fail to disclose that the intercompany accounting records were not kept prior to the administration. They do not exhibit the account provided within the fourth witness statement because it was made after the administration commenced. Mr Smith in paragraphs 62-64 now relies upon another agreement (as underlined above) which is unparticularised, although apparently made on or after 2 December 2020. No such agreement has featured in the evidence before me on the hearing of the appeal.

41. That agreement is said to have been to transfer all cash balances including the amount BV8 was said to be entitled to as its interest margin. It may be a new transfer agreement but it too is nevertheless consistent with the claim in the Proof of Debt for recovery of that margin as opposed to the claim pursued via Mr Mace's skeleton argument. Paragraphs 61-64 of Mr Smith's evidence do not appear to present a new claim that when money was transferred on 16 December 2020, a substantial part was BV8's money and a loan of £1,074,036.91 was made. Whilst there is an opaque reference to it being better to document an interest free loan, that appears to refer to the interest margin said to have been transferred to and retained by BV9. Overall, therefore, the evidence remains inconsistent with the claim advanced in the appeal as set out in Mr Mace's skeleton argument or is at least confusing or misleading.

42. Mr Smith's witness statement moves on to address the subsequent signing of TR4s presented by the Administrators relied upon to support an estoppel preventing the Administrators from disputing *"the consideration for assignment of these transactions, and the whole portfolio, was not on the basis of BV8's calculations – being the value of the outstanding loans including interest and default interest as at the date of assignment"*. Estoppel was hardly mentioned at the hearing but this section of the witness statement cannot be thought to alter the conclusion that the claim identified by Mr Smith for BV8 in his first witness statement relates to margin interest and not to the approach identified in Mr Mace's skeleton argument.

43. In contrast, as explained, the case on appeal, as developed, is that three payments were made by BV8 to BV9 on 16 December 2020 totalling £1,688,742.54. This has been evidenced by bank statements. From that sum, £1,074,036.91 is allocated as set out at paragraph 36 above. Although that allocation distinguishes (as to £283,887.27) BV8's own funds (£790,149.64) from BV8's entitlement to interest margin, the practical position is that £1,074,036.91 was transferred from BV8's funds. That being so, it will be a loan subject to set off or cross-claim (whether within the context of an account or not) and there was no other agreement to explain the transfer.

44. As to the balance (£1,688,742.54 - £1,074,036.91) this is accepted to be money BV8 owed BV9 principally or wholly attributable to payments BV8 received from developers notwithstanding the assignment of their loans to BV9.

45. It is readily apparent that this loan claim is far removed in text and fact from the proof of debt and from Mr Smith's first witness statement as observed above. That is important because of: (i) ***the Rules*** as mentioned (ii) the issue whether the Administrators have had the opportunity to investigate and reach a decision upon that claim and/or to present relevant evidence; (iii) the fact that this divergence inherently raises issues of reliability concerning the evidence; (iv) the fact that the claim and, therefore, the appeal as now presented relies upon the outcome of an inter-company account to establish the £1,688,742.54 was a loan not repayment of debt owed to BV9 without the Court having been asked to take an account; and (v) the fact that approval of the account requires consideration and (presumably) the application of the terms agreed concerning the assignment of BV8's loan book to BV9.

C2) The Respondents' Evidence in Answer

46. The Respondents addressed in their evidence the primary case that the debt represented *"… BV8's earned interest margin on assignment of the loan books from BV8 to BV9 on 24/06/20 and 31/08/20 in accordance with Arumdree/Kookmin facilities"* and the alternative case relying upon estoppel.

47. They started with the proposition that BV8 and BV9 are bound by the terms of the Assignments not by the subjective understanding of any director both as a matter of legal principle and because of their entire agreement clauses. Mr Boardman K.C. referred to the following case law:

> *"The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth … The entire agreement clause obviates the occasion for any such search and the peril of the contracting parties … For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere …"* (per Lightman J in ***The Inntrepreneur Pub Company (GL) v East Crown Limited*** [2000] 2 Lloyds Rep 611 at [7] approved in ***MWB Business Exchange Ltd v Rock Advertising Ltd*** [2018] UKSC 24, [2019] AC 119 at [14].

48. The Deeds of Assignment make no reference to any payment being made from BV8 to BV9 or vice versa and confer no entitlement upon BV8 to the margin interest claimed. The entire agreement clause therefore precludes BV8 from seeking to introduce terms which add, subtract, vary or qualify the terms of the assignments, including the express, unconditional and absolute assignment of the Applicant's rights including to interest.

49. The Respondents also refer to the agreements between BV8 and its borrowers because they provide at section 3 of the sample agreement that interest and other fees and charges were to be deducted at latest two days after an agreement was signed.

50. The Respondents have not accepted the authenticity of the board minutes, insofar as they are nevertheless admissible as evidence of an oral agreement falling outside the terms of the assignments. In any event they observe that on their face BV8's board minutes for 24 June and 26 August 2020 establish the intention and understanding that BV9 was BV8's debtor in a sum of £4,121,443.88 (broken down as *"£2,304,282.20 plus £1,817,161.68 pursuant to clause 3.1.4 of the minutes at [197] and [205]"*).

51. In addition, they assert that payments made by BV8 to Kookmin of £987,685.58 on 15 June 2020 and £612,270.91 on 26 August 2020 were made to comply with the terms of their facility agreement not upon any different understanding as now asserted by the director, Mr Smith.

52. They note, as previously stated, that he did not write up BV9's accounting records until after the administration began. They put before the Court the conclusion that there was no inter-company liability owed by BV9 to BV8 at the time of assignment. BV8 was indebted to BV9.

53. Mr Boardman K.C. in his skeleton argument observed with reference to paragraph 61 of Mr Smith's statement (above), where he asserts that there was an obligation *"to transfer notional cash balances"*, that:

> *"This (unparticularised and uncorroborated) statement gives rise to numerous difficulties, not least because (1) the Applicant's obligation to make payment to the Company was not notional, (2) no intercompany accounts were drawn up until after the administration, (3) no evidence has been produced to substantiate the inter-company balances, and (4) this is not the basis of the Interest Margin claim in any event."*

54. The conclusion within Mr Boardman K.C.'s skeleton argument being: *"Accordingly, the documents relied on by the Applicant do not prove the Interest Margin claim as suggested by Mr Smith, or confirm the subjective understanding that Mr Smith claims. What they actually appear to show is that the Applicant was heavily indebted to the Company at this time."*

C3) The Respondent's Claim as Presented in the Reply Evidence

55. However, should the position be viewed differently as a result of the evidence in reply? Mr Smith provided three other witness statements to be treated as reply evidence answering two witness statements from Mr Shambook, an Administrator.

His second witness statement addresses the background considered above and endorses the fact that the Assignment Deeds were executed on the terms of an agreement between BV8 and BV9 made through their common directors, himself and Mr Funnell, and evidenced by the board meetings. He states (amongst other matters) that:

a) The transfer of loans by assignment, with a payment for a value representing the costs of providing the loan to the assignment date, was a recognised business practice.

b) BV8 and BV9 did not apply the express term of the lending to its third-party investor/developer borrowers that interest and other fees and charges were to be deducted at latest two days after an agreement was signed.

c) The inter-company account was drafted after the administration began to update the Xero accounting records of both BV8 and BV9 and the policies adopted within it are consistent with accounting entries for earlier years.

d) BV8 provided the Administrators with a slide pack of 6 October 2022 analysing and reconciling cash movements, although he acknowledged that board minutes had not been provided.

56. Within paragraph 16 he said this:

> *"The indebtedness of BV8 to BV9 was dealt with by intercompany accounting. Equally, BV8 ultimately 'over transferred' (i.e. lent) £1.1m of BV8 funds BV9 in December 2020 in order to facilitate a loan by BV9 to another borrower. BV8 and BV9 were related companies under common control and we had no reason to consider it inappropriate to operate in this way. The transfer of the additional £1.1m into the BV9 account for ease of administration, was an over-payment or loan to BV9 that it would return to BV8 when needed. Until then, it was effectively lent to BV9 as additional working capital."*

57. This paragraph was presumably part of the inspiration for Mr Mace's analysis within his skeleton argument. However, I cannot accept the submission that by this stage the Administrators should have appreciated that the Proof of Debt as drafted was no longer relied upon and that this paragraph is to be read as superseding all the previous evidence relying on a claim for recovery in interest margin. Its content is far from saying that payments made on 16 December 2020 included an amount of £1,074.036.64 which was a loan and is the true basis for the sum claimed in the Proof of Debt.

58. A third witness statement followed an order made on 21 March 2023 requiring service by BV8 of the board minutes dated 24 June 2020 and 26 August 2020 in their original electronic formats (with metadata) together with any related correspondence, accompanying documentation and communications evidencing their creation, circulation, approval and signing of. It addresses the board minutes to which I will refer further below and in doing so sets out facts which, if accepted, establish they were contemporaneous. However, it too does not say that payments made on 16 December 2020 included an amount of £1,074.036.64 which was a loan and is the

true basis for the sum claimed in the Proof of Debt. Nor does it present any intercompany account to justify such a claim. That did not occur until the next statement.

59. The fourth witness statement was also served pursuant to directions made on 21 March 2023. It should have been limited to reply evidence addressing the evidence of the Administrators concerning the documents produced with the third witness statement as explained above. In the course of that evidence, Mr Smith states (amongst other matters) that:

a) Upon assignment of the loans BV8 owed BV9 for T1 £2,956,080 (£4,557,671 - £763,684 representing accrued interest and £837,907 representing accrued fees) plus a *"residual balance"* of £1,601,591 from which BV8 paid Kookman interest of £987,686 leaving a *"residual margin"* of £613,905.

b) The £2,956,080 was transferred to BV9 by *"various intercompany transfers after accounting entries with the residual margin due to BV8"*, exhibiting a variety of documentation said to support this. He also states the position he considers would have arisen had Kookmin advanced funds directly to BV9, which it did not, concluding:

> *"18. The activities of Tranche 1 and Tranche 2 would have collectively resulted in earned profits and a cash balance in BV8 of £1,070,291 of which £790,148 relates to loans advanced and redeemed by BV8, which were never assigned to BV9.*
>
> *19. Whether the Korean loan to BV9 was advanced by physical movements of funds or intercompany accounting with BV8, the outcome should be the same.*
>
> *20. BV8 chose to loan this retained margin of £790,148 to BV9 to support its lending and is now being denied the right to claim this amount as an unsecured creditor. Had we retained these funds in BV9, BV9 would have had no claim to them. As such, the creditors of BV9 would be gaining a windfall if the unsecured claim of BV8 was denied."*

60. However, I also cannot accept the submission that this fourth witness statement should have caused the Administrators to appreciate the appeal no longer concerned the debt as described in the Proof of Debt and/or that the Administrators ought to have considered the evidence and responded in the event that they raised issue with any of the figures provided including the exhibits.

61. First, the witness statement does not abandon the Proof of Debt or seek in any way to amend it, and there has been no application to amend. Second, this was reply evidence not evidence permitted to raise a new case or evidence for which the Administrators were permitted a response in rejoinder. Third, insofar as it is said that this introduced the claim as described within Mr Mace's skeleton argument, the contrast between the clarity of his skeleton and the content of this statement is stark. Fourth, I agree with Mr Boardman K.C.'s submission that it was not for the Administrators then to decide to carry out further investigations and to critique the accounting evidence raising this new case. Fifth, this appeal has never been pursued on the basis that there should be an account taken.

62. To that I also add, as Mr Mace fairly accepted during closing submissions, the proposition that a Judge should now critique the figures without guidance, without there being an application for an account to be taken, without an account having been taken and in the context of this appeal and its one-day time estimate is unacceptable.

63. The estoppel referred to is in effect a reply to the Administrators' reference to the entire agreement clause and their decision rejecting the proof. Mr Mace's skeleton argument explains it as follows:

> *"On or around 17 June 2021 the Administrators required BV8 to sign a TR4 and Deed of Release in order to transfer security held by BV8 to BV9 in respect of one of the assigned Borrower Agreements. This was at a time when BV8's status as a creditor was clearly still live. BV8 required amendment of the documentation prepared on behalf of the Administrators to reflect the position that BV9 had a liability to BV8 – namely consideration was payable for the Assignments. The Administrators amended the documentation and it was executed by BV8 on 25 June 2021."*

C4) The Answers to the Paragraph 25 Issue

64. As stated, Mr Boardman K.C. has emphasised that the Administrators came to this appeal understanding it to be concerned with the existence or otherwise of a contractual right for BV8 to receive margin interest from BV9. They were not prepared whether in terms of evidence or for trial to address the new case presented in the skeleton argument.

65. Taking all the matters above into consideration, the answers to the Paragraph 25 Issue are:

    a) There can be no doubt that this appeal must be approached from the bas-s that the claim as detailed in the Proof of Debt has been abandoned and superseded by a claim of a loan of £1,074,036.91 made on 16 December 2020. That claim requires an account of inter-company dealings from the date BV8 owed BV9 consideration for the Assignments to ensure BV9 was not entitled to all or part of that sum.

    b) The Administrators were entitled to approach this appeal upon the basis that the debt claimed was identified in the Proof of Debt. They are entitled to complain that the reformulation was first identified in Mr Mace's skeleton argument.

    c) The Court needs to consider whether this formulation can be determined in those circumstances bearing in mind paragraphs 11-18 of the "Introduction" above.

F) The Hearing – Assessment of Witnesses

66. It was Mr Smith who prepared and signed the Proof of Debt. He explained that he had been appointed a director of BV8 and BV9 on 24 June 2020 ahead of a board meeting and following a conversation with Mr Funnell. As a small company it did not normally hold formal board meetings and did not minute the passing of a resolution to appoint (notwithstanding the requirements of the Companies Act 2006, I note). His appointment followed his automatic discharge from bankruptcy on or about 3 June 2020.

67. I refer to this not because there is any issue raised concerning his appointment or any suggestion that he was involved in management whilst bankrupt but because it means his knowledge with regard to the management of BV8 and BV9 will have inevitably been limited. He explained that during the period prior to his appointment he had been involved to the extent of providing services to BV8 and BV9 but this would not have involved knowledge of or involvement in management decisions, at least not first hand. As a result, his oral evidence must be treated with caution as to its reliability insofar as he addressed matters outside his personal knowledge. It was Mr Funnel who was involved with management before 24 June 2020.

68. Mr Funnel has not given evidence other than providing two brief witness statements confirming the truth of Mr Smith's third witness statement and his attendance at the board meetings referred to in paragraph 4 of Mr Smith's fourth statement. He does not otherwise verify Mr Smith's evidence despite having been a director of BV8 and BV9 at all material times. This absence of verification and/or of substantive evidence from him is of obvious potential concern.

69. Mr Boardman K.C. in final submissions, as set out in his speaking note, directly challenged the reliability of Mr Smith based in particular upon answers given during cross-examination. There is much to be said for the points he makes but in the light of the finding above, I need not specifically address those points unless and to the extent that they become relevant to the substance of the decision below. I will take a cautionary approach to the issue of reliability when addressing his evidence in any event.

70. The factual position as presented and explained by Mr Smith during crossexamination was (in summary) that: (i) BV8 repaid interest owed to Kookmin with its own funds; (ii) BV9 drew down its Kookmin facility for its own business derived and expanded from BV8's assigned business; (iii) subject to set off, BV9 owed BV8 the value of its assigned loan book calculated without the interest/fees and charges accrued before the date of assignment because they belonged to BV8; and (iv) subject to set off, BV9 owed BV8 the money it had been lent on 16 December 2020 amounting to £1,074,036.91 as he had previously explained and demonstrated to the Administrators by reference to the slides he had produced and as subsequently established by the inter-company account he had produced post commencement of the administration.

71. Evidence was also given by Mr Shambrook and by Mr Wright as joint administrators of BV9. Bearing in mind the nature of this hearing and the fact that they as office holders will not have personal knowledge of the relevant events, I need not address their position as witnesses other than to generally observe that they gave their evidence in the manner to be expected of officers of the Court as provided in ***paragraph 5 of Schedule B1 to the Insolvency Act 1986***.

G) The Evidence and the Findings of Facts

G1) The Background Facts

72. The starting point for determination of the facts is the background which led to the facility agreements made between BV8, BV9 and Kookmin. Paragraphs 13-17 above need not be repeated other than for me to confirm that I accept those facts and matters have been established by the evidence before me.

73. It is an interesting background. First because it is cast around a need to give effect to the Tax Scheme. As a result, the evidence includes the statement that it was understood when entering into the facility agreements that BV8 might not need BV9 if, for example, it was able to raise third party funding to refinance or repay its lending at the end of the 364 day period. That was understood to be a necessary feature sustaining the Tax Scheme because it meant or demonstrated that the two facilities were not inextricably linked so that they should in truth be treated as one loan for longer than 364 days.

74. This judgment is not concerned with whether the tax avoidance was effective. For the purposes of this judgment it can and should be recognised that the reality at the time the facility agreements were made was that BV8 and BV9 through common directors expected BV9 to supersede BV8 and use its facility to replace BV8's. That being so, it must follow that it was also anticipated that BV8's business, assets and liabilities would be transferred to BV9. After all, the only reason for there being two companies was to ensure that there were two separate facilities for the same future trading. First BV8 and then its replacement by BV9. If BV9 was to take over BV8's lending it would need

BV8's business and assets to enable it to trade and BV8 would need to ensure BV9 paid its extant liabilities. Further, BV9 and Kookmin (and indeed BV8) would need BV9 to hold the same assets as BV8 to ensure that the security granted by BV9 matched the security BV8 had provided for its (now taken over) facility.

75. As matters turned out, there were no third-party lenders and BV8 relied upon BV9's facility. How the succession which caused the original arrangements was achieved in practice should have depended upon the contractual arrangements between BV8 and BV9 for which each company's directors should have reached board decisions by resolution. In doing so the respective directors should have acted in compliance with ***the Companies Act 2006***, including: their ***section 171 and 172*** duties; the requirements to avoid conflicts of interest and to declare interests under ***sections 175, 176 and 182-185***; and their obligations to have decisions recorded.

D2) The Contractual Documentation

76. Therefore, turning first to the contractual documentation. For the purpose of the Court's findings, this is to be construed objectively (a reasonable person using the language of the contract test) applying the background knowledge (known and assumed) available to the parties to the agreements at the time of their execution. The subjective intentions of the parties will be disregarded. Instead, the natural and ordinary meaning of the words will be applied to the relevant part of the contract but within the context of the contract when read as a whole. The overall purpose of the contract and provision will be considered and commercial sense applied in that context taking into consideration the above-mentioned background knowledge.

77. The contractual documentation (which of course does not in any event include the respective board minutes which can only be evidence of the agreements to which they expressly or impliedly refer) consists of:

    a) The facility agreements entered into with Kookmin.

    b) The deeds of assignment between BV8 and BV9 for each investor/developer loan assigned. These are in standard form and it is agreed that the Court should rely upon as a specimen form the deed dated 24 June 2020 ("the Deed of Assignment").

78. The Deed of Assignment is simply that, an assignment from the effective date by BV8 to BV9 of the specified debt with accruing interest. The deed identifies the borrower and quantifies the liquidated debt due and owing to BV8. There are warranties, an indemnity and further assurances which have and do not feature. There is an obligation for BV8 to give notice to the borrower of the assignment. There is the above-mentioned entire agreement clause, a term excluding ***the Contracts (Rights of Third Parties Act) 1999*** and a law and jurisdiction clause.

79. The debt assigned in the specimen is £3,740,668.80 and there is an additional document (not referred to in the deed) which provides its breakdown including the gross loan advance, the loan processing fee and calculated *"default interest"*. The calculation is of the interest to be paid for the loan for the remaining term after the assignment.

80. I have summarised the whole of the Deed of Assignment and the further document in the previous paragraphs because it is notable that the following are missing:

    a) There is no contractual term within an entire agreement clause deed requiring BV9 to provide any form of consideration for the assignment. Based on the terms of the Deed of Assignment, the consideration is the execution of the deed.

    b) There is nothing to reflect the agreement relied upon by BV8 requiring repayment to it of interest/fees and other charges accrued at the date of the assignment.

81. On the face of it, therefore, the Deed of Assignment (applying the entire agreement clause) produced the result that BV9 would receive the assigned debts from BV8 without payment. BV8 would be left to repay its liabilities from its own funds (including the monies lent by Kookmin) and retain any other assets it may own. It would have the opportunity to start a new business (its existing loan book business having been assigned) or enter into liquidation and be dissolved after distribution of

    its realised assets. In any event this claim, whether as framed in the Proof of Debt or in Mr Mace's skeleton argument, would not arise unless the money BV8 lent on 16 December 2016 would have existed and be lent in the circumstances of the scenario envisaged from the Deed of Assignment alone.

82. The facts establish, however, that BV8 only repaid Kookmin interest not the principal of its loans. That leaves the question, therefore, of the nature of the arrangement between BV8, BV9 and Kookmin concerning repayment of BV8's loan notwithstanding the terms of the Deed of Assignment.

83. I was referred to three emails between Mr Smith and Kookmin (its lawyers) sent on 22 May 2019. The 8-hour time difference if the lawyers involved were in Korea makes the sequence of three emails an issue. However, the net result appears to be at that time it was expected that BV9 would simply take over BV8's liability, using its own facility to do so and repay its borrowing two years after the facility granted to BV8. Kookmin appears to have accepted Mr Smith's email stated expectation that funds will flow from Kookmin *"to BV8, BV8 to BV9, then BV9 back to [Kookmin] at the end of the two year term"*.

84. It has not been investigated whether this email flow represented or created a binding agreement. However, if that was the position it would appear to present an agreement that is consistent with the background of the Tax Scheme set out above BV9. It would appear to envisage that BV9 would simply step into BV8's shoes, taking over BV8's business, assets and liabilities and provide the same security over the same assets in favour of Kookmin. There would be no room for BV9 to owe BV8 anything because BV8 would in effect become BV9. This could potentially explain why the Deeds of Assignment was in the form it was.

D3) The Board Minutes

85. That leads, however, to the board minutes Mr Smith produced with his third witness statement. They identify a different result based upon an oral agreement between the

two companies achieved by their common directors. It appears that the minutes were first produced as an attachment to an email sent on 17 March 2022. This delayed production has caused the Administrators to question their authenticity.

86. Mr Boardman K.C. during submissions was also extremely critical of Mr Smith's evidence concerning his answers to questions seeking an explanation for the failure to refer to and produce the minutes until March 2022. I agree that he has not provided a satisfactory answer whether during cross-examination or in his witness statements. However, the Administrators' concerns led to directions from the Court during case management for the metadata to be provided. In the light of the results, as set out in the evidence before me, I conclude on the balance of probability that these minutes are authentic, reasonably contemporaneous and record the resolutions passed by Mr Funnell and Mr Smith in the context recorded within them.

87. As mentioned above, BV8's minutes for the meeting held on 24 June 2020 concerning T1 provide as follows:

    a) The purpose of the meeting was to consider and approve, if appropriate: (i) repayment of the Kookmin T1 facility; (ii) *"the repayment … by assignment to BV9 … of all loans outstanding on 24th June 2020 funded under [BV8's Kookmin T1] facility agreement. The consideration paid by BV9 … for the assignment being a sum equal to the aggregate value of the outstanding net loans plus facility fees, interest, default interest and legal fees less loan processing fees received and interest rebates payable on the date of assignment shown in the Assignment Schedule"*; and (iii) BV8 transferring *"to BV9 … on behalf of [Kookmin, a sum equal to £12,380,000 due to [Kookmin] under the Facility less the consideration due to [BV8] from BV9 … on assignment of the outstanding loans shown in the Assignment Schedule"*.

    b) The purposes were each approved in stated compliance with the requirements of ***s.172 of the Companies Act 2006*** and on the ground that they were for the benefit of the Company.

    c) The following resolutions were passed: (i) to approve the assignments to BV9 of all outstanding loans owed to BV8 by the third-party investment/developers as shown in the Assignment Schedule; and (ii) to transfer £12,380,000 to BV9 less "the Consideration" (above) due to BV8 from BV9 for the assignments.

88. BV9's minute for its meeting held on 24 June 2020 were effectively the reverse of those minutes with BV9 resolving to accept the assignments and to provide BV8 with BV9's bank details to enable receipt of the transfer of £12,380,000 to be accepted *"on behalf of Kookmin"* being a sum *"due [to] BV9 from [Kookmin]"* less the Consideration.

89. Obviously, the minutes present a different scenario to the one identifiable from the Deed of Assignment with its entire agreement clause. They evidence an oral agreement providing (in summary):

    a) BV8 would repay the monies it was lent by Kookmin by assigning to BV9 its book of outstanding loans as at 24 June 2020 and paying to BV9 the resulting sum due from BV8 of £12,380,000 to BV9's Kookmin bank account, less the Consideration for the assigned loans.

b) BV8 would not repay Kookmin directly. BV8 would not transfer any assets or money to BV9 other than the assigned loan book. BV8 would not become a creditor of BV9.

c) The calculation for the Consideration was: *"the aggregate value of the outstanding net loans plus facility fees, interest, default interest and legal fees less loan processing fees received and interest rebates payable on the date of assignment shown in the Assignment Schedule"*.

90. The following observations can be made:

a) The contrasting content of the Deed of Assignment on its own would leave the £12,380,000 (less the Consideration) in the hands of BV8, which does not easily fit with the concept derived from the Tax Scheme of BV9 superseding BV8 and carrying on its business.

b) The difference between these terms and the Deed of Assignment might be attributable to the Deed being understood to be a mechanism achieving the assignment in the context of this agreement which is, in effect, a sale of BV8's business agreement.

c) However, the retention by BV8 of the Consideration is also inconsistent with the succession concept.

d) There is no evidence from Kookmin to identify what it understood the contractual arrangement to be as between it, BV8 and BV9 including as to whether it also had agreed the terms evidenced by the minutes. The position of Kookmin had to be relevant. Whilst BV8 and BV9 might agree what they wanted between themselves, they had to consider the fact that BV8's loan facility had to be repaid whether by direct payment or by drawing down BV9's facility. For example, if BV8 retained the Consideration, it would have to be used to pay Kookmin direct unless there was agreement that BV9 had the funds to achieve that result using its or any other facility.

D4) The Assignments and Payment of BV8's Debt in Practice

91. What occurred in practice was different to the Deed of Assignment read on its own and to the terms of the agreement evidenced by the minutes whether read with the Deed or not: (i) BV8 repaid Kookmin a substantial sum of interest directly; (ii) BV9 became an assignee of the loan book without BV8 transferring any money to BV9's account; and (iii) BV8 now asserts that a running account was kept to address the sums paid to or for the benefit of BV9 from the £12,380,000 less the Consideration which it did not transfer together with any sums received from the investor/developer borrowers who paid BV8 sums due to BV9 following assignment or vice versa.

92. Ignoring the running account to which Kookmin was not party, in the light of that scenario BV8 would have had to address the issue of how the principal debt it owed Kookmin would be repaid at the end of the 364-day term. By implication (this not having been the subject of evidence or submissions but in round terms reflecting the agreement understanding or anticipation set out in the emails between Mr Smith and

Kookmin (its lawyers) sent on 22 May 2019), Kookmin would have accepted the repayment of BV8's borrowing by debiting BV9's facility with the sum outstanding, the £12,380,000. It is also to be assumed that Kookmin would not have released BV8's floating charge until assured that BV8's assets had been transferred to BV9 at least to a value with which Kookmin was content for the purpose of BV9's security.

93. The obvious problem insofar as either side wishes the Court to decide this appeal outside the terms of the Proof of Debt is that whilst those facts appear clearly relevant when considering a claim based upon the board minutes, they have not been addressed within the case presented by BV8. The issues of what, if anything, was agreed with Kookmin relevant to the oral agreement evidenced by the board minutes and what if anything would flow should there have been a breach of the BV8 facility agreement with Kookmin cannot be answered in the form of findings of fact.

94. In addition, there is the feature that the failure to transfer any money to BV9 would have meant that BV9 was borrowing more than it would otherwise have done under its Kookmin facility. It would have incurred a liability for doing so. This would or ought to have been apparent to Mr Smith and Mr Funnell when reaching the oral agreement evidenced by the minutes and they would or ought to have recognised the resulting conflict of interest when reaching decisions for both companies. Indeed, that conflict plainly arose insofar as there was to be any money retained by BV8.

95. This too has not been considered. Nor has the issue whether the Consideration represented market value bearing in mind that the loan book also represented a business and the assignment potentially should have included value for the resulting assignment of goodwill.

96. Normally it is not for a Judge to identify matters which have not been relied upon by the parties. However, I refer to them here because I am being asked to consider determining the claim as identified within Mr Mace's skeleton argument in circumstances of the Administrators not having considered verification of the account provided by Mr Smith in his fourth witness statement and, therefore, presumably not having investigated and certainly not upon this appeal having addressed such matters.

97. There is no doubt that Deeds of Assignment were entered into and that BV9 continued in business as the lender to the assignors and, as I understand it, expanded its loan book business. However, that leaves the further question of what was and was not transferred to BV9 by BV8.

D5) The Inter-Company Account

98. Mr Smith states that he has addressed this with the Administrators prior to the appeal through the production of slides, the last one in the bundle being numbered "72" and by detailed correspondence. Few were drawn specifically to my attention and it is not for the Judge who determines disputes to be asked to produce an opinion upon the account from their own reading and without submissions concerning or indeed evidence vouching the figures relied upon. In and subject to that context, I note:

    a) Slides 1, 2, and 6 each appear to produce the case for T1 and T2 that BV8 as at the dates of their respective board minutes (24 June and 30 August 2020) had a

"notional cash balance" from starting facility advances of £12,380,000 and £7,653,386 for T1 and T2 of £4,557,671.55 and £2,103,159.37 (total £6,660,830.92) respectively produced by deducting their respective available Kookmin facilities from the amounts they had drawn down less the sums the investor/developers had borrowed. There is then added the *"BV9 Assignment Value"* (£9,423,920.31 and £6,618,882.38) to the notional cash balance to produce the *"Loan Book Value"* from which interest paid is deducted leaving a net loan book value to be deducted from the facilities' redemption figures to produce a *"BV8 retained surplus"* of £613,905.85 and £456,385.76 totalling £1,070,291.61.

b) Slide 3 is a bank statement of a business account entitled "T1 Funds Drawn by BV8" showing £186.70 on an unspecified date but also a credit on 26 June 2019 of £12,380.00 with a balance below that of *"0"* and a comment: *"That's all we can find. Try changing your date range?"*. Slide 8 is a similar document to slide 3 also showing £186.70 as available but in this case showing a 7 February 2020 credit from "BOL, Bridging Vat Limited Assignment Braintree transfer £62,823.10 leaving an account balance of £1,969,977.44. There are other, similar slides.

c) Slide 5 is entitled "T1 Loans Advanced by BV8" and Slide 7 "T1 Loan Redemptions Received by BV8". These set out details of the loans made and (i) interest earnt and redeemed prior to assignment, (ii) earnt to assignment and received post assignment, and (iii) interest earnt to assignment but recoverable post assignment with cumulative interest figures.

d) Those and the other slides would need to be addressed within an account if they are to be taken into consideration.

99. Mr Smith also relies upon schedules for T1 and T2 respectively. The former identifies an assignment balance totalling "-£10,075,717.85" representing the sums to be repaid for the "net loan", facility fee, interest including default interest but less interest rebate but deducting the loan processing fee. For T2 the total is "-£5,836,244.68" including partial redemption. These too are matters for an account.

E) Mr Smith's Evidence and the Inter-Company Account

E1) Submissions

100. Mr Mace in submissions sought to counter the matters set out above by relying upon: (i) bank statements showing transfers from BV8 to BV9; (ii) the fourth witness statement of Mr Smith including paragraph 18 which states the funds transferred to BV9; and (iii) the intercompany accounts at pages 769-772 of the bundle. Before referring to them, I will turn to Mr Boardman K.C.'s criticisms of Mr Smith's evidence concerning his production of slides, schedules, inter-company accounts and figures generally to justify the claim. I will address the main points as I see them but recognise the force of most of what is submitted within his speaking note.

101. The first point to note from those submissions is that BV9 should have its own records to establish what, if anything, was owed to BV8 or by BV8 to it. I need not here set out

section 386 of the Companies Act 2006 but the importance of compliance is evident not only from the criminal offence it creates but also from the fact that directors need to have accounting records sufficient to show and explain the company's transactions. Those records must be sufficient to disclose with reasonable accuracy, at any time, the financial position of the company at that time. This normally requires not only entries from day to day of all sums of money received and expended by the company (as well as its assets and asset transactions) but also records of the matters in respect of which the receipt and expenditure occurs. This should enable the directors to understand not just the figures but the company's transactions.

102. The second point is those records should have been available to the Administrators. They should not have to work their way through at the expense of BV9's creditors records subsequently produced seeking to justify a creditor's claim.

103. Third, although Mr Smith relied upon the existence of Excel information to enable him to write up the records, I accept Mr Boardman K.C.'s criticism that in reality this means he was writing up the Xero records from scratch at a time when a claim had to be established. The fourth point is that Mr Smith was indeed slow to admit that the records were written up after commencement of the administration. Fifth, that the purported inter-company account was not produced until the fourth witness statement. The sixth point is that in the context of common directors and BV8 claiming a significant sum with Mr Smith knowing BV9 did not have records as explained above, it was wrong of him to refuse to give access to the relevant accounts of BV8 taking into account the statutory provisions of ***ss235 and 236 of the Insolvency Act 1986*** and the common law duty to assist.

104. A seventh point is that there appears from his evidence to be a memory stick which may have substantial accounting information recorded. Its existence is not something which featured during the appeal to my recollection but if it contains information relevant to the slides, schedules and figures to justify the claim, then its contents should have been important.

105. Mr Smith strongly denied a contrivance but what he has done on this appeal is present a batch of calculations which have to be tested to the extent that they have not been vouched and their vouchers agreed with the Administrators. The points above also mean the Administrators and the Court would have to apply caution when assessing reliability upon the taking of an account. In particular when the appeal is based upon a claim in debt not upon an account being taken to determine an inter-company account.

E2) The Need for Caution

106. The need for caution was reiterated and emphasised by Mr Smith's evidence in crossexamination when asked whether the payments on 16 December 2020 were loans. BV8 transferred £1,688,742.54 to BV9 when, as Mr Smith stated, it needed £1,549,449.21 to fulfil its commitments to its third-party developer borrowers. As previously set out, Mr Smith's evidence is that this payment consists of a loan of £1,074,036.91 plus £614,705.63 representing money BV8 owed BV9 under the terms of the assignments because of payments it had received from third party developers to which BV9 as assignee was in fact entitled.

107. Mr Boardman K.C. was extremely critical of Mr Smith's answers when facing crossexamination questions addressing the fundamental issue of whether the £1,074,036.91 was a loan. I refer in particular to paragraphs 31-36 of his "Speaking Note". Those paragraphs refer to a number of important passages but my emphasis is upon the following explanation by Mr Smith, bearing in mind that he was slow to identify the payments as a loan preferring instead, at least initially, to emphasise a transfer that:

> "*We effectively reversed the position that we'd been operating before where BV8 was holding funds for BV9 and we paid everything across to BV9. And at that point, BV9 was holding funds for BV8 …*
>
> *they are transfers of the entire balance out of BV8, and part of that balance relates to earned and received interest that rightfully belonged to BV8 …*
>
> *No I'm not saying there is a loan agreement. I'm saying that between the parties … there was an agreement that we would put the money across and that is a loan because it was intended that it would come back at some point"*.

E3) Inter-Company Account Concerns

108. This leads to two factual concerns. The first is whether the transfer across can be shown to include money to which BV9 was not entitled. The second is that this "transfer everything across" approach potentially reflects a true agreement between BV8 and BV9 with or without but probably with the concurrence of Kookmin that the assignments would occur in circumstances of BV9 superseding BV8 with all assets and liabilities being transferred. Yet there is no evidence from Kookmin and (as mentioned) minimal evidence from Mr Funnel.

109. As to the first concern: The BV8 inter-company accounts produced after the administration start as at 24 June 2020 and on their face confirm that this appeal moved to a third approach by relying upon a "running account". These accounts show purported journal entries and the resulting (as appropriate) debit and credit with a *"running balance"* and a *"gross"* column. They record, for example, advances of loans, assignments to BV9 including transfers of interest on assignment and associated payments such as processing fees and legal fees.

110. As at 24 June 2020 the running balance stood at £8,355,687 and the gross (£38,051.87) before the entry of a debit (the debt owed by BV8 to BV9) of £12,380,000 leaving a running balance of (£4,024,313.00) and a gross figure of £107,450.

111. The inter-company accounts show the understanding of Mr Smith after the administration began that: from 24 June 2020 BV8 was treated as having obtained credit for the £12,380,000 by BV9 agreeing to it being set off against its existing, running debt and then the resulting debit balance being treated as an accounting entry without the requirement for the transfer of funds to BV9.

112. It also shows that he did not understand it to be necessary to deduct the Consideration from the £12,380,000 at that stage for the purpose of the inter-company account. Instead, he continued to operate a running balance by deducting from BV9 and crediting to BV8 assignments, advances of funds/fees and payments whilst deducting from BV8

and crediting to BV9 of items including assignments, repayments/payments/redemptions and interest transfers. The closing balance produces a credit to BV8 of £1,105,277.08 with total debits of £23,714,442.39 and credits of £24,819,669.47.

113. In principle this inter-company account will sustain a Proof of Debt amended to read: The sum of £1,105,277.08 is due and owing upon the running account between BV8 and BV9 for the period …." [not as interest margin or as a loan on 16 December 2023]. However, the problem with these figures from the Court's perspective is that their accuracy depends upon: the accuracy of the starting balance; the correct identification and application of the terms of the assignment; and the existence of the underlying documentation which has not been produced or vouched. The problem existing within the context, as Mr Boardman K.C. correctly identified, three different approaches within an appeal relying upon a Proof of Debt only claiming interest margin.

114. Mr Mace recognised those difficulties during his submissions and, whilst not making any concessions, submitted that the Administrators should work it out, as they should have done in the first place. He submitted that they need(ed) to do so in the interests of the creditors as a whole. I will address that submission in my decision below.

F) Estoppel – The Evidence

115. Mr Mace also drew attention to the fact that Mr Smith in his first witness statement appears to suggest that an estoppel arises because BV8 made payments in reliance upon the existence of the running account with the directors of both companies accepting this *"intercompany accounting treatment"*. However, the directors were the same, the account not produced until after the administration and in any event the issue (insofar as it arises on this appeal) is whether the account is reliable.

116. This case of estoppel starts with an email sent 17 June 2021 on behalf of the Administrators requesting BV8 to sign a form "TR4" to transfer security it held to BV9 in respect of one of the assigned investor/developer loans for no stated consideration. By email 22 June 2021 BV8's solicitors asked for the consideration to be inserted as a requirement for its execution and identified the outstanding loans including interest and default interest as: *"D £3,740,688.80 (24/06/2020) [and] F £477,250.00 (30/08/2020)"*. There appears to have been a conversation on 24 June between the solicitors but the outcome was a form TR4 stating *"the assignment was made for consideration based on the value of the outstanding loans including interest and default interest as at the date of assignment"*. However, the email expressly stated: *"this shows that there was consideration (on the basis specified by your client) but does not include the value as this should not be necessary"*.

117. Mr Smith in that first witness statement goes on to state that had the Administrators informed him that they would be rejecting the Proof of Debt, BV8 would not have executed the form without prior payment of the debt owed by BV9.

118. I do not understand how he can have concluded that the correspondence referred to was linked to acceptance of the Proof of Debt. Indeed, if Mr Smith had had that in mind at the time, then BV8's concern should have been the fact that the correspondence made no reference to the Administrators' position concerning the Proof of Debt. He should

have been concerned that the Administrators would not quantify the debt (whether in the TR4 or in the emails) but were content to insert the amendment without quantification on the basis "specified by your client" without stating they agreed with the sums specified.

119. In any event, I find as a fact based upon the natural meaning of the email correspondence as a whole and the specific passages emphasised, that whilst it is correct that consideration was referred to as quoted, it cannot be said that the Administrators accepted the amount claimed. It is clear they included the amendment in accordance with what they had been told on behalf of BV8 meaning that it would apply to the extent that the figures provided were accurate or (by inference) to the extent that any other sum was accurate.

G) Closing Submissions

120. Both counsel provided speaking notes and I have already identified the key submissions made. In those circumstances, I will not set them out further but thank both counsel for their clarity.

H) Decisions

121. Based on the matters set out in the introduction, the findings of fact and observations above I have decided:

a) The appeal based upon the Proof of Debt which asserts a claim by reference to an unpaid interest margin of £1,074,036.91 must be dismissed as framed. It has been superseded by a claim which relies upon an unpaid loan made on 16 December 2020 and then by a claim for monies due upon the taking of an account of a running, inter-company balance.

b) Neither of the superseding claims can be read into the proof of debt or the evidence so that it can be reasonably argued that either of those claims were apparent from the evidence. The first of those claims only became apparent within the skeleton argument of Mr Mace. The second only emerging from it during submissions.

c) The case based on estoppel fails. As a finding of fact, there was no representation to be relied upon as asserted. It is a finding which is also made in the context of the directors of BV9, who were also the directors of BV8, having an obligation under ***the Insolvency Act 1986***, ***the Companies Act 2006*** and at common law to present to BV9 the correct statement of account between it and BV9 with supporting accounting records. If the figures they presented in the emails were inaccurate, which is yet to be determined but is the issue, whether in the context of vouching or in the absence of fulfilment of the obligation to account, they cannot rely upon the above-mentioned facts to found an estoppel.

122. I have been asked nevertheless by the Administrators to consider in any event whether I can determine if BV8 is a creditor of BV9 based upon the superseding claims and

the evidence as a whole and, if so, quantify the debt. I refer to paragraphs 11-18 of the "Introduction" above. I have considerable sympathy for that approach appreciating the intention to avoid further costs and delays in the conduct of the administration but I cannot do so.

123. That is because of a combination of reasons:

a) The Court only reaches decisions upon the matter before it and there has been no application to amend the Proof of Debt. It is incorrectly framed and a different cause of action (an outstanding loan or monies due upon the taking of an account) is now relied upon.

b) Whilst that could in principle be resolved, it cannot be in practice. That is because (as appears from "the Evidence and the Findings of Facts" above) there is insufficient evidence and there are too many investigatory matters, questions or issues which have not been addressed. This will be particularised in paragraph 125 below subject to paragraph 124.

c) Normally an absence of information and evidence or the existence of outstanding issues would not alter the fact that a Court must make a decision upon the case as presented to it. However, in this case the reason for that position is that the Administrators have not addressed the appeal from the perspective of the superseding claims. Their statutory role is to investigate, determine and on an appeal raise matters relevant to the interests of the creditors of the whole. That role would be overridden should a decision be made upon the material before this appeal.

d) Although the Court has an overall supervisory role and control of all insolvencies, it is not possible in this case to give directions to the Administrators simply because there are too many uncertainties (i.e. insufficient evidence) and there are too many investigatory matters, questions or issues which have not been addressed. Those uncertainties either need a decision from the Administrators that they are not of concern or require investigation by the Administrators and a decision from them as to the relevant outcome.

124. The following paragraph provides particulars of paragraph 122(b) above derived from "the Evidence and the Findings of Facts" subject to the context explained within subparagraphs (c) and (d) of paragraph 123. In other words, whilst the uncertainties prevent the Court from reaching a decision, it will be for the Administrators to decide whether any of them need to be addressed and, if so, what, if any consequence they have when deciding what further to do, if anything, concerning BV8's claims. In that regard, it is of course the case that the Administrators will be addressing such matters as agents for BV9 whilst performing their statutory functions and addressing the interests of the creditors as a whole. It is also emphasised that nothing within the particulars is to be read as a decision or direction of this Court.

125. The particulars of paragraph 122(b) explaining why this Court cannot on the issues and evidence placed before it reach a definitive decision are:

a) Once the Court has decided that the appeal as framed should be dismissed and in the absence of any application to amend, it is necessary to consider the consequences of the judgment concerning the ability of BV8 to now amend the

Proof of Debt or to be able to lodge a new proof of debt. Such matters are for the parties and the Court has not heard argument and been asked to address them.

b) If a decision was to be made upon the superseding claims, the Court would be faced with an inter-company account which has not been addressed by the Administrators. Assuming they were able waive that obligation, the Court will be left (as it is now) with an account which needs to be vouched. Even ignoring the concerns as to reliability previously expressed, the Court cannot simply look at the figures, see if they are mathematically correct and then decide the account. The underlying bases for the figures needs to be addressed but has not and cannot be.

c) For that purpose, a starting point from the Court's perspective would be to understand the opening balance and then to address the terms of the assignment to ensure these are applied to the running account. A problem that presents the Court is that it would be doing so without the full picture potentially to the detriment of creditors of BV9. That is because (as "the Evidence and the Findings of Facts" draw attention to) not only are there significant divergences between the Deed of Assignment, the contents of the board meeting minutes relied upon and what occurred in practice but also because there is an absence of apparent consideration (at the time and on the appeal) of the contractual obligations owed to Kookmin and/or of their contractual consequences.

d) For example, within the context of the Tax Scheme background and/or of dealings with Kookmin at or around the time of repayment of BV8's facility, questions arise as to whether:

   (i) there was a requirement for BV8 to transfer all of its assets and liabilities to BV9 to enable BV9 to supersede it as the owner of its business;

   (ii) there was a breach of contract with BV9 and Kookmin if/because BV8 retained all payments accrued but not falling due for payment as at the date of an assigned loan instead of paying them to BV9 to support its borrowing from Kookmin;

   (iii) there were requirements for assets subject to the floating charge granted by BV8 to remain secured for the purposes of the debt owed to Kookmin by BV9; and/or

   (iv) consideration was given by the directors of BV9 to any adverse consequences resulting for BV9 when deciding to enter into the agreement with BV8 evidenced by the minutes or by factual performance, such as interest to be paid should BV8 not transfer funds to BV9 and BV9's facility would be debited by Kookmin as a result.

e) Kookmin, who has not provided evidence, should be a party to the appeal based upon the superseding claims. As matters stand now, the Court would want the Administrators (subject to any submissions) to seek the views of Kookmin as to whether they wish such matters to be investigated and determined (bearing in mind the costs may reduce the dividend otherwise to be distributed to them) or whether, for example, they would wish to negotiate with BV8 or simply allow the proof of debt in the sum claimed (bearing in mind that in practice any dispute

is between them and BV8 affecting the amount to be paid as the "prescribed part" to the "detriment" of Kookmin as crystallised, floating charge holders - see paragraph 18 above).

I) Conclusion

126. Whilst I considered it right to try to reach a definitive decision as explained in paragraph 12 above, the only decision I have been able to reach is to dismiss the appeal. It is for BV8 to decide what it will do and for the Administrators to decide what, if any, further steps they should take in their role as office holders pursuant to their statutory functions and duties as a result of that decision.

Order Accordingly