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Case Nos: CR-2022-004783, BR-2024-000159 and BR-2024-000172

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF MARTIN DAWN PLC
AND IN THE MATTER OF RONALD MARTIN (A Debtor)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 25 February 2025

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

Between:

RONALD MARTIN	**Applicant**
- and -	
McLAREN CONSTRUCTION LIMITED	**Respondent**

And Between:

McLAREN CONSTRUCTION LIMITED	**Petitioner**
- and -	
MARTIN DAWN PLC	**Respondent**

- -

Ms Faith Julian (instructed by Lewis Silkin LLP) for Mr Ronald Martin and Martin Dawn plc
Ms Rowena Page (instructed by Osborne Clarke LLP) for McLaren Construction Limited

Hearing date 12 November 2024

- -

JUDGMENT

This judgment was handed down remotely at 10.30am on 25 February 2025 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

Introduction

1. This was the final hearing of a contested winding-up petition and of two applications to set aside two statutory demands; in substance, each case concerned the same debt. The alleged debtors were Martin Dawn Plc ("**the Company**") and Mr Ronald Martin ("**Mr Martin**"); their case was that the sum claimed is subject to a genuine and substantial dispute and/or cross-claim, and that the statutory demands should be set aside and the petition dismissed.

2. Essentially, McLaren Construction Limited ("**the Petitioner**") claimed to be owed about £7.9 million under a Loan Agreement which it made with the Company on 23 October 2020 ("**the Loan Agreement**"); furthermore, in respect of the same debt, it claimed that Mr Martin was personally liable to it on the terms of a Guarantee of the same date ("**the Guarantee**").

3. The Company and Mr Martin relied on the operation of a term or terms to be implied into the Loan Agreement, according to which, on their case, the debt is not yet due and owing, and in any event, on cross-claims against the Petitioner arising out of its alleged involvement (in particular, as a conspirator) in breaches of contract said to have been committed by McLaren Living Limited ("**Living**") under another contract (to which none of the Petitioner, the Company or Mr Martin were parties) also made on 23 October 2020 ("**the Promotion Agreement**") between Living, Arran Overseas Global Limited ("**Arran**") and Jetbury Investments Limited ("**Jetbury**", and together with Arran, "**the Owners**").

4. The Promotion Agreement concerned the potential development of certain property in Essex ("**the Land**") of which Arran and Jetbury were at that time the owners; Arran was incorporated in the BVI (but having been struck off the register in the BVI on 1 May 2024, has since been dissolved) and Jetbury in Cyprus; both were understood to be owned by Mr Martin. The Petitioner's directors at all material times were Mr Maurice Archer and Mr Philip Pringle; the directors of Living were Mr Matthew Biddle, Mr John Gatley, and Mr Craig Young.

The Background

5. Mr Martin is a property developer by profession. Until 2024, he was also the chairman of Southend United Football Club ("**SUFC**"). SUFC's stadium is at a site known as "**Roots Hall**".

6. In 2009/2010, Mr Martin was approached by Mr Kevin Taylor, the founder of the McLaren group of companies, and chairman of the Petitioner. At about that time, through a corporate vehicle, Mr Martin had acquired a site at "**Fossetts Farm**" (also in Southend) in respect of which he had obtained consent to build a retail park. He apparently planned to redevelop the Roots Hall site (and had obtained consent to do so), in partnership with Sainsbury's Supermarkets Limited, and to relocate the football club's stadium from Roots Hall to Fossetts Farm. It was in that context that Mr Taylor approached Mr Martin.

7. A relationship began to develop. By February 2011, Mr Martin had invited the McLaren group to tender for work at both Roots Hall and Fossetts Farm. The first transaction was entered into in June 2011: McLaren Construction (UK) Limited loaned Roots Hall Limited £1.2 million, in return for which Roots Hall Limited agreed to afford McLaren Construction (UK) Limited and the Petitioner certain rights in relation to future tenders for the proposed work at Fossetts Farm.

8. In late 2013, Mr Martin (or rather, companies controlled by him) entered into a further transaction with other McLaren parties, in relation to a site he was promoting for development with Redrow Homes, in the Cheltenham area. As part of that transaction, the loan to Roots Hall Limited was rolled over and extended, and certain McLaren parties were granted further rights in relation to future construction contracts.

9. By 2020, consideration was being given to an opportunity to develop the Land for residential purposes. Although the Land was within the Green Belt, it was proposed in or around 2020 that a new local plan for the area would be adopted and that together with neighbouring land (known as the "**HO20 land**") it would be removed from green belt status and planning permission granted for the development of new housing. The Company retained Iceni Projects Limited ("**Iceni**") to evaluate the site from a planning perspective.

10. In that context, on 23 October 2020, following discussions between Mr Martin, Mr Young and Mr John Gatley (the CEO of "McLaren Property"), three agreements were made: the Loan Agreement, the Guarantee and the Promotion Agreement.

The Loan Agreement

11. The parties to the Loan Agreement were the Petitioner, the Company, Mr Martin, Martin Dawn (Cheltenham) Limited ("**Cheltenham**"), and Martin Dawn (Leckhampton) Limited ("**Leckhampton**").

12. The Recitals to the Loan Agreement recorded that:

    12.1. Cheltenham was indebted to affiliates of the Petitioner (by original loan and novation); Mr Martin acted as guarantor for those loans, and the Company had provided limited recourse share security in support of them; the total sum outstanding was £7 million;

    12.2. in consideration of the parties entering into the Agreement:

        12.2.1. the Petitioner would make available:

            (i) a loan to repay the existing indebtedness of £7 million, known as the "**Refinancing Loan**". By Clause 2.2, the Company was obliged to use the Refinancing Loan for on-lending to Cheltenham to settle its existing liability;

            (ii) a loan to accrue in line with the accrual of the "Development Management Fee" payable under the Promotion Agreement, known as the "**Deemed DMF Loan**". The Development Management Fee was, in effect, the fee payable to Living to promote the relevant site;

            (iii) a loan to accrue in line with the accrual of "Deductible Expenses" under the Promotion Agreement known as the "**Deemed DE Loan**";

12.2.2. the prior indebtedness would be repaid in full by means of the Refinancing Loan; and,

12.2.3. Mr Martin would enter into a new guarantee in support of the Company's obligations under the Loan Agreement, in addition to procuring the entry into certain other agreements (including the Promotion Agreement).

13. Accordingly, by Clause 2, the Petitioner agreed to make three loans to the Company as borrower ("**the Loans**"):

13.1. £7 million, for the sole purpose of discharging the "Existing Indebtedness" owed by various parties associated with Mr Martin to certain McLaren parties;

13.2. £600,000 for the sole purpose of meeting the Development Management Fee; and,

13.3. £650,000 for the sole purpose of meeting Deductible Expenses.

14. Under Clauses 3 and 4, the Loans were capable of drawdown only after "**the CP Date**", being the date on which the conditions precedent were satisfied (as set out in a schedule to the Loan Agreement). The conditions precedent required, amongst other things, the execution of the Promotion Agreement and the Guarantee.

15. Under Clause 6, the Loans were repayable as follows.

15.1. at least in principle, depending on their amount, on the receipt of any "**Sale Proceeds**" (as defined by the Promotion Agreement) the Loans were to be reduced or repaid by the application of those Proceeds to the amount outstanding; and,

15.2. any outstanding balance was ultimately repayable on "**the Long Stop Date**", being the earlier of (a) the date of application of the final tranche of Sale Proceeds under the Promotion Agreement; (b) the date of any enforcement of the "Promotion Legal Charge"; (c) the date of exercise of the "Promotion Call Option"; and (d) the date falling 3 years after the CP Date. It was not disputed that the Long Stop Date was 23 October 2023.

16. Clause 7.2 of the Loan Agreement addressed the effect of termination of the Promotion Agreement. It stated as follows:

> "*Mandatory pre-payment – Promotion Agreement*
>
> *(a) If the Promotion Agreement is terminated at any time directly as a result of a default…by the Promoter ("Promoter Termination") the* [Company] *shall immediately repay to the* [Petitioner] *the outstanding principal amount of the Refinancing Loan and the Deemed DE Loan together with all other amounts then due and outstanding under this Agreement. For the avoidance of doubt…if a Promoter Termination occurs, no corresponding amount of the Deemed DMF Loan shall be deemed to have accrued and be payable under this Agreement.*
>
> *(b) If the Promotion Agreement is terminated at any time other than as set out in paragraph (a) above, the* [Company] *shall immediately repay to the* [Petitioner] *the outstanding principal amount of all Loans together with all other amounts then due and outstanding under this Agreement*."

17. By Clause 8, Cheltenham and Leckhampton guaranteed each "Obligor's" obligations to the Petitioner by way of a "see to it" obligation (Clause 8.1(a)), a primary obligation (Clause 8.1(b)), and an indemnity (Clause 8.1(c)). The "**Obligors**" were Mr Martin (as personal guarantor), the Company (as Borrower), Cheltenham (as a corporate guarantor), and Leckhampton (also as a corporate guarantor).

18. By Clause 8.11, provision was made for the corporate guarantors to be released from their liabilities under the Agreement "*upon confirmation from the* [Petitioner] *of the satisfaction of the Release Condition*". The "Release Condition" was defined to mean: (a) the delivery by the Company of the latest audited financial statements of each corporate guarantor, such statements evidencing that "*neither Corporate Guarantor (a) has a total asset value in excess of its total liabilities… or (b) holds any assets"; and (b) the determination by* [the Petitioner] *(acting reasonably) that no corporate guarantor would, at any time, have or be reasonably likely to have a total asset value in excess of its total liabilities*".

19. The Loans were subject to an acceleration clause. They would become immediately due and payable if the Petitioner notified the Company in writing at any time after the occurrence of any of the events listed in Clause 11. Under Clause 11(g)(iii), such events included, amongst others, any of the Obligors entering compulsory liquidation and the time for challenging the winding-up order having passed and/or such challenge having been finally disposed of.

20. Clause 12.2 provided that all amounts payable under the Loan Agreement were to be paid without set-off or counterclaim.

The Guarantee

21. The parties to the Guarantee were Mr Martin and the Petitioner.

22. Amongst other things, pursuant to Clause 2.1(b), Mr Martin undertook to pay, within 10 days of demand, any sum due under the Loan Agreement and not otherwise paid by the Company as if he were the principal obligor.

The Promotion Agreement

23. The parties to the Promotion Agreement were, as I have said, Arran and Jetbury, as the owners of the Land, and Living, as the "Promotor". In essence, the Owners appointed Living, on an exclusive basis, to promote the Land to achieve a "Qualifying Planning Permission" for the Land's "Proposed Development" for residential purposes, and granted Living the right either to exercise a right of pre-emption, or to receive a defined share of the Sale Proceeds generated by a "Sale" of the Land.

24. By Clause 7.1 to 7.2 of the Promotion Agreement, Living thus agreed to use reasonable but commercially prudent endeavours to obtain a qualifying planning permission, and, amongst other things, to submit a draft planning strategy within 3 months of the Agreement; to promote the whole property for residential purposes; and to apply for planning permission within 12 months of the date on which the Agreement became unconditional. All conditions were satisfied or waived on 8 July 2021.

25. By Clause 7.3 it was at Living's "*absolute discretion*" as to whether it chose to submit and prosecute an appeal of any refusal of planning permission. Manifestly, there was no certainty about the outcome of the project.

26. Clause 15.1 contained a payment waterfall provision. In summary, it provided for any Sale Proceeds to be applied in the following order of priority.

    26.1. First, in discharge of the costs of sale.

    26.2. Second, in discharge of any VAT due.

    26.3. Third, in discharge of certain liabilities owed by the Owners and secured on the Land (in the sum of or about £1,820,000).

    26.4. Fourth, in discharge of the Development Management Fee due to Living.

    26.5. Fifth, in discharge of any outstanding indebtedness under the Loan Agreement, excluding (if paid or otherwise dealt with under the waterfall) the Deemed DMF and Deemed DE Loans.

    26.6. Sixth, in discharge of any "Deductible Expenditure" incurred by Living.

    26.7. Finally, in discharge of certain other costs.

27. "*Sale Proceeds*" were defined as "*all receipts generated by a Sale including (for the avoidance of any doubt) the value of any deferred payments, overage or uplift arrangements and other forms of consideration*".

28. By Clause 15.3, it was agreed that any balance of the Sale Proceeds would be divided 50:50 between Living and the Owners.

29. By Clause 23.1, the parties agreed to settle any dispute arising out of the agreement by referral to an independent expert.

30. By Clause 28, Living was permitted to terminate the Promotion Agreement if, amongst other things, it was advised by counsel of not less than 15 years' standing that there was a 50% or less prospect of achieving the grant of planning permission in respect of the Land. The Promotion Agreement did not provide that the identity of counsel should be agreed between the parties, or that the instructions to counsel should be agreed or even shared with the Owners.

31. By Clause 35.1 and 35.7, in the event of a material breach of the Promotion Agreement by Living, the Owners had the power to serve a notice of breach and, if not remedied upon expiry of 28 days, to exercise such rights of "step-in" and undertake such actions as may be reasonably required to discharge the relevant promotion objectives.

The Procedural Background

32. On 1 March 2023, Leckhampton was ordered to be wound-up on a petition presented by HMRC. The Petitioner's case was that this was an event of default under the Loan Agreement, entitling it to accelerate repayment of the Loans, and enforce the Guarantee.

33. Accordingly, the Petitioner demanded repayment of the Loans from the Company on 27 July 2023 in the sum of £7,876,059.69, and served a statutory demand on the Company on 10 August 2023.

34. In the meantime, demand was made of Mr Martin under the Guarantee on 3 August 2023. On 30 August 2023, he was personally served with a statutory demand requiring payment of the sum due under Loan Agreement ("**the First SD**"). In the First SD, the Petitioner relied on the winding-up order against Leckhampton as having accelerated the obligation to pay.

35. Mr Martin's application to set aside the First SD was made in the Southend County Court on 20 September 2023, three days out of time. Under the Insolvency Rules 2016, rule 10.4(2), he required an extension of time to bring his challenge. In the circumstances, I was willing to accede to that request - which was not actively opposed - all evidence having been filed and served well in advance of this hearing, and no prejudice having been suffered by the Petitioner.

36. On 1 September 2023, the Company's solicitors at that time (Gowling) wrote to the Petitioner, stating that the debt was disputed on genuine and substantial grounds, that further detail would be forthcoming, but that for the moment it sufficed to say that Leckhampton had been released as an Obligor under the Loan Agreement, and as such that the acceleration clause had not been triggered. In those circumstances, so it was said, no sums were due and owing under the Loan Agreement.

37. In any event, as I have said, 23 October 2023 was the Long Stop Date, and from that point, arguments about acceleration therefore became in substance academic (and were not developed in any particular detail at the hearing). Accordingly, further demands for payment were served on Mr Martin on 27 October 2023, and on that basis, on 13 November 2023 he was personally served with a second statutory demand requiring payment of the Loans under the Loan Agreement, plus further interest ("**the Second SD**"). He applied to set aside the Second SD on or around 30 November 2023, again in the Southend CC.

38. On 29 November 2023, by order of ICC Judge Prentis, the Petitioner was substituted as petitioner on a winding-up petition originally presented against the Company by HMRC on 16 December 2022 ("**the Petition**") - this was the contested petition before the court.

39. On 13 December 2023, also on a petition presented by the Petitioner, Cheltenham - the other corporate guarantor under the Loan Agreement - was ordered to be wound-up by ICC Judge Burton, on the basis that it had failed to set out any dispute properly in evidence. Mr Martin represented Cheltenham personally, and although initially it sought to appeal that order, the appeal was discontinued, and a non-party costs order was made against Mr Martin personally.

40. The two Statutory Demands and the Petition sought substantially the same sums from the Company and Mr Martin. The marginal difference was that the Statutory Demands sought payment of interest and enforcement costs.

41. In consequence of their connections, on 13 February 2024, I ordered that the two applications to set aside the First and Second SDs ("**the Set Aside Applications**") be transferred from the County Court to be heard alongside the Petition in the High Court.

42. In respect of the Set Aside Applications was the following evidence:

    42.1. the 1st and 2nd statements of Mr Martin, filed in support of the First Set Aside Application, dated 20 September 2023 and 30 November 2023;

    42.2. the 1st statement of Mr Martin, filed in support of the Second Set Aside Application, dated 30 November 2023;

42.3. the 1st statement of Mr Young, filed in opposition to the Set Aside Applications, dated 12 January 2024;

42.4. the 3rd statement of Mr Martin, filed in reply to Mr Young's statement, dated 26 January 2024;

42.5. the 2nd statement of Mr Young dated 18 September 2024;

42.6. the 4th statement of Mr Martin, dated 21 October 2024.

43. The following were filed in respect of the Petition:

43.1. the 1st statement of Mr Martin (in opposition), dated 2 January 2024;

43.2. the 1st statement of Mr Young, dated 31 January 2024;

43.3. the 1st statement of Mr Martin dated 14 February 2024;

43.4. the 2nd statement of Mr Young, dated 18 September 2024 (and referred to above); and,

43.5. the 4th statement of Mr Martin dated 21 October 2024 (also referred to above).

Insolvency Proceedings: the Law in Respect of Disputed Debts and Cross-Claims

44. The court may grant an application to set aside a statutory demand if, amongst other things: (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt, or (b) the debt is disputed on grounds which appear to the court to be substantial: Insolvency (England and Wales) Rules 2016, rule 10.5(5).

45. Similarly, a winding-up petition will usually be dismissed if the petition debt is subject to a genuine and substantial dispute, or a genuine and serious cross-claim.

46. There is a wealth of authority on the meaning of the expression, "*genuine and substantial grounds*". Essentially, it means that the dispute must have "*a realistic as opposed to*

fanciful prospect of success, carrying some degree of conviction (and not merely arguable)": Ashworth v Newnote [2007] EWCA Civ 793, [2007] BPIR 1012 at [31-33].

47. In Angel Group Ltd v British Gas Trading Ltd [2012] EWHC 2703 (Ch) Norris J summarised the relevant principles at [22], noting in doing so that "*there is no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed….[T]he court will not allow this rule of practice itself to work injustice, and will be alert of the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination... The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application or summary judgment"*. Bare assertions will not suffice: In re Pan Interiors Ltd [2005] EWHC 3241 (Ch) *per* Warren J at [27].

48. In respect of personal insolvency, in Marwaha v Entertainment One Ltd [2023] EWHC 480 (Ch), Dame Sarah Worthington KC (sitting as a Deputy HCJ) summarised the principles as follows at [21]-[22]:

> "*[21] 'The legal test that should be applied by a judge in the case of IR 2016 r.10.5(5)(b) applications…is whether there is a "genuine triable issue" (Crossley Cooke v Europanel (UK) Ltd [2010] EWHC 124 (Ch), [2010] BPIR 516 at [16], with the applicant needing to show more than a merely arguable case but one that has a "real prospect of success" (i.e. the summary judgment test applied under CPR 24): see Collier v PJ Wright [2008] 1 WLR 643 at [21] per Arden LJ indicating the tests were aligned.*
>
> *[22] 'As with summary judgment applications, the court should not conduct a mini trial of the issues; on the other hand, the judge is likely to have to decide on the credibility of the factual assertions and is entitled to "grasp the nettle" and determine short points of law or construction where "the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument"; and such a case does not need to go to trial simply because "something may turn up" which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 at [12] and [14].*"

49. As to the meaning in this context of "*a genuine and serious cross-claim*", again there was no real dispute between the parties. For present purposes, the principles can be

summarised as follows (drawing from and amplifying the list set out by Mr David Stone, sitting as a Deputy High Court Judge, in Re LDX International Group LLP [2018] EWHC 275 (Ch) at [22]):

49.1. The cross-claim must be *'genuine or serious or, if you prefer, one of substance'* (Re Bayoil SA [1999] 1 WLR 147, at 155).

49.2. The court does not have to decide whether the cross-claim is valid; *'indeed I would go further and say that the court ought to stop short of deciding those questions. However, the court does have to go into the argument sufficiently to be able to form a view about whether the dispute to the debt or to the cross-claim is put forward in good faith and has sufficient substance to justify it being determined in a normal civil action'* (*per* Park J in Argyle Crescent Limited v Definite Finance Co Limited [2004] EWHC 3422 (Ch) at [9], cited with approval in Mullaley and Co Ltd v Regent Building Services Ltd [2017] EWHC 2962 (Ch) at [42]).

49.3. Further, *per* Etherton LJ (*obiter*) in Tallington Lakes Ltd v South Kesteven District Council [2012] EWCA Civ 1443 at [22], the threshold for establishing a genuine and substantial dispute is low, and may be reached even if, on an application for summary judgment, the defence could be regarded as *"shadowy"*. The same principle applies to establishing a genuine and serious cross-claim (see Re Pan Interiors Ltd [2005] EWHC 3241 (Ch) at [38]).

49.4. That is not to say that it is not incumbent on the debtor company to demonstrate, with evidence, that the cross-claim is genuine and serious. The court must be persuaded that there is substance in the cross-claim, and a '*cloud of objections*' contrived to justify factual inquiry will not do: *per* Hildyard J in Coilcolour Ltd v Camtrex Ltd [2016] BPIR at [35]-[36]. Neither will bare assertions – there is a minimum evidential threshold that must be met before it can be said there is a substantial dispute: Re a Company [2016] EWHC 3811 (Ch) at [33]; LDX International Group LLP v Misra Ventures Ltd [2018] EWHC 275.

49.5. Nevertheless, it is neither practical nor appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side. A lengthy hearing is likely to result in a wasteful duplication of court time (Tallington Lakes Limited v Ancasta International Boat Sales Limited [2012] EWCA Civ 1712 at [41]).

49.6. The cross-claim does not have to be one which the debtor company has been unable to litigate (as suggested in Re Bayoil), but any delay in prosecuting the cross-claim may, depending on the circumstances, throw doubt on the genuineness of the cross-claim (Popely v Popely [2004] EWCA Civ 463, [2004] BPIR 778 at [123]-[124], Pan Interiors at [39]).

49.7. Where there is any doubt about the cross-claim, the court should proceed cautiously. Winding up is a draconian order, and there is little prospect of the company reviving itself (Re Bayoil at 156).

The Alleged Dispute: the Alleged Implied Term/s

50. In support of their case that the sums claimed were subject to a genuine and substantial dispute, the Company and Mr Martin relied on the implication of a term or terms into the Loan Agreement.

51. In this respect, their case was that:

51.1. the Loan Agreement and the Promotion Agreement were related: for example, under Clause 3 of the Loan Agreement, the execution of the Promotion Agreement was a condition precedent to the availability of the Loans; under Clause 2 of the Loan Agreement, two of the three Loans (the Deemed DMF Loan and the Deemed DE Loan) were advanced to match (and were deemed automatically made in accordance with) the accrual from time to time of certain sums due to Living under the Promotion Agreement; and under Clause 6 of the Loan Agreement and Clause 15 of the Promotion Agreement, repayment of the Loans was, in certain circumstances (said by their counsel, Ms Faith Julian, to be "*in the first instance*") to be made out of, and from, the Sale Proceeds of the duly promoted Land;

51.2. the Company and Mr Martin were therefore said to have been "*wholly dependent upon Living complying with its obligations under the Promotion Agreement*", because without that compliance, and therefore without a sale of the Land, there would be no Sale Proceeds out of which to repay the Loans (whether as principal borrower, or as a guarantor); although the Loans were not only repayable out of the Sale Proceeds, it was, said Ms Julian, "*clearly the plan that they would be*";

51.3. in those circumstances, it was said to be an implied term of the Loan Agreement either:

51.3.1. that the Loans were not repayable for so long as the failure to obtain Sale Proceeds arose as a result of Living's breach of the Promotion Agreement; or,

51.3.2. that if and while Living "*suspended performance of its obligations*" under the Promotion Agreement, payment obligations under the Loan Agreement would be likewise suspended.

52. Although expressed as alternatives, it was said by Ms Julian that the two suggested implied terms were in substance designed to meet a single mischief, and to achieve much the same end, meaning that if and while Living failed to comply with its "*material obligations*" under the Promotion Agreement, the Company and the other Obligors (including Mr Martin) would not have to comply with their obligations under the Loan Agreement. In particular, that in those circumstances, the obligation to repay the Loans would be suspended – presumably, in principle at any rate, indefinitely.

53. The Company and Mr Martin complained that without one or other of the implied terms, although the Owners were prevented by the Promotion Agreement from promoting the Land themselves, Living could refuse to perform its obligations under the Promotion Agreement, and could instead, simply "*wait for the Long Stop Date to arrive*".

54. The alleged absurdity of the position in the absence of one or other of the implied terms was said to be illustrated by the operation of Clause 35.7 of the Promotion Agreement. As to that:

54.1. By Clause 35.7(a), under the heading "*Event of Default and Owner's Step in Rights*", it was provided that where the Owners served a "*Material Breach Notice*", they had the right, but were not obliged (once the period for rectification had expired) to exercise step-in rights, enabling them to take action to meet the Promotion Objectives (essentially, to take steps to achieve planning permission).

54.2. Under Clause 35.1, a Material Breach Notice could be served by the Owners, if Living, as the Promoter, was in material breach of its material obligations; moreover, a failure to remedy that breach within the 28 working day rectification period was an "*Event of Default*".

54.3. However, under Clause 35.6(a), upon an Event of Default (even if caused by Living) Living was able to declare that the "*Default Obligations Cost*" would become due and payable by the Owners within seven days of demand. The Default Obligations Cost meant the aggregate of a sum equal to the "*Promoter Loan*" and the "*Crystallised Deductible Expenditure*". The Promoter Loan meant any and all Loans provided under the Loan Agreement.

55. Accordingly, on that basis, in the event that Living breached or suspended performance of the Promotion Agreement, the Owners could not serve a Material Breach Notice (in order to exercise their step-in rights) without at the same time exposing themselves to an immediate liability (to pay sums due under the Loan Agreement) which, so it was said, contradicted the intention and plan of the parties to pay those sums from the Sale Proceeds.

56. Similarly, if Living caused the Event of Default, the Owners could terminate the Promotion Agreement under Clause 28.4(b), but, again, if the Promotion Agreement were terminated in that way (by the Owners by reason of the Promoter's default) the effect would have been to make repayment under the Loan Agreement immediately due (by the Obligors, expressly, under Clause 7.2(a) of the Loan Agreement).

57. It was therefore objected that although Living could in practice extricate itself from the Promotion Agreement without consequence, the Owners and the Obligors were reliant on the performance by Living of its obligations under the Promotion Agreement.

58. Accordingly, in short, the case advanced was that the parties intended to generate and use the Sale Proceeds to repay the Loans under the Loan Agreement, but that without one or other of the suggested terms, whilst Living could suspend performance under the Promotion Agreement (meaning that no Proceeds would be generated) the only contractually stipulated step available to the Owners in those circumstances would in itself expose them to an immediate liability to repay the Loans. The suggested terms were therefore "*so obvious that it goes without saying*", or were necessary to give the contract commercial coherence.

Implied Terms: the Law

59. A term can be implied into a contract on the basis that it is so obvious that it goes without saying, or is necessary to give the contract business efficacy (see Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 at [7]). If there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement: see Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379 (TCC) *per* Coulson J: "*An express term in a contract excludes the possibility of implying any term dealing with the same subject-matter as the express terms*".

60. The concept of necessity is strict: it is not established by showing that the contract would be improved by the addition of the implied term, but "*absolute necessity*" puts the matter too high, not least because necessity is judged by reference to business efficacy. It may be better to ask whether, without the term, the contract would lack commercial or practical coherence: Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742 at [21]:

"*21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266 , 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37 . First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408 , 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the*

parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 , para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

61. Although submissions were made by Ms Rowena Page, counsel for the Petitioner, in respect of the (inapplicability in this case of the) "*prevention principle*" - that a party to a contract should not be permitted to rely on his own breach if that breach has prevented his counterparty from performing, as explained in The Interpretation of Contracts, 8th Edition, at 6.127 *et seq* – Ms Julian did not frame the case advanced on the basis of those principles, and I have not found it necessary to apply or in this judgment to consider them, in order to decide the case.

Discussion

62. In my judgment, the case advanced by the Company and Mr Martin in respect of the proposed implied terms was completely hopeless, for the following reasons.

63. First, the suggested premise was plainly not correct: it was not true that the parties envisaged that the Loans would necessarily, or in whole, or even "*in the first instance*", be repaid from Sale Proceeds. That much was plain from the Loan Agreement itself, which provided, amongst other things, for final repayment of any outstanding debt/s by the Obligors on the Long Stop Date, which was on 23 October 2023, and which on that date imposed an immediate obligation to repay regardless of any progress or success in respect of the promotion and sale of the Land.

64. The most that could be said was that the use of Sale Proceeds was one circumstance in which all or some part of the Loans would come to be repaid; but there was never any certainty that the Land would be successfully promoted, or that it would be sold for enough (or soon enough) to repay the Loans in full. The effect of Clause 6 of the Loan Agreement and Clause 15 of the Promotion Agreement was to ensure that Sale Proceeds were – <u>if</u> generated – used for particular purposes, including Loan repayment; but it was not, conversely, that all of those purposes could <u>only</u> be met using Sale Proceeds. Moreover, were the suggested terms to be implied, and if Living failed to fulfil its contractual duties, the Obligors would <u>never</u> be liable to repay the Loans (in part comprising a refinancing of earlier debts). That outcome would be extraordinary – and certainly it would be an extraordinary outcome to achieve by means of an implied term.

65. Second, relatedly, the suggested terms did not in fact meet the mischief said to justify them: the gist of that problem was said to be that the Owners could not step-in and continue to promote the Land themselves without at the same generating an immediate obligation to repay the Loans, or an equivalent sum. However, first, it is important to appreciate that this does not describe what actually happened – no effort was made by the Owners to step-in or take alternative steps to promote the Land – the suggested mischief never eventuated; and second, the proposed remedy, the implied term/s, would not merely allow for the Owners to step-in without fear of generating a payment obligation under Clause 35.6(a), but would go much further, apparently making the Obligors indefinitely immune from any obligation to repay, regardless of whether or not the Owners exercised their right to step-in.

66. Third, none of the parties to the Promotion Agreement were parties to the Loan Agreement, and yet the proposed terms would have placed on the Petitioner an extremely onerous and uncertain obligation to police the performance by Living of its obligations under the Promotion Agreement in order to protect the Petitioner's own express contractual rights to repayment under the Loan Agreement, in circumstances where they are different companies with different directors, and the Petitioner had no rights under or in respect of the Promotion Agreement, whether to documents, information, or - crucially - enforcement.

67. Fourth, essentially, for present purposes, the Loan Agreement provided for repayment of the Loans from the Sale Proceeds, or on the Long Stop Date, or (by "*Prepayment*") in the event of the termination of the Promotion Agreement. However, an Event of Default under the Promotion Agreement, caused by Living, was not in itself a termination of the Promotion Agreement; instead, it afforded the Owners the right to terminate under Clause 28.4(b), which they were not obliged to exercise (and indeed, Ms Julian submitted that the "*implied terms address a scenario where Living is in breach, but the Promotion Agreement is not terminated*"). Although therefore the effect of an Event of Default was (if put on notice) to oblige the Owners to pay the Default Obligations Cost (under 35.6 of the Promotion Agreement) there was no effect in those circumstances - short of termination - on the obligations of the Obligors under the Loan Agreement – those obligations were unaffected. It follows that in those circumstances - said to be the very circumstances addressed - there was no need to imply a term into the Loan Agreement to protect the Obligors.

68. Moreover - as that suggests - the proposed terms would have entailed the implication of yet further terms into the Promotion Agreement, as well, apparently, as into the Loan Agreement: the complaint was that Clause 35.6 caused an unworkable injustice; in certain circumstances Clause 35.6 imposed payment obligations on the Owners; to avoid those obligations would require an additional term, inserted into the Promotion Agreement in direct contradiction of that which was expressly stated at Clause 35.6. A further example of consequential required changes was in respect of interest due under the Loan Agreement, if, for a period, Living "suspended" performance but then subsequently (and satisfactorily) resumed.

69. Ultimately, put simply, the contracts worked perfectly sensibly without the implied term/s: basically, if Sale Proceeds were generated, they were to be used in a particular fashion, for particular ends, including Loan repayment; if not, or if the Proceeds were insufficient to satisfy those ends, the Loans were to be repaid by other (unspecified) means; that outcome is wholly unsurprising. The complaint concerned the effect of terms which were negotiated and expressly agreed, and which were included in detailed written contracts drafted by and with the advice of lawyers; not only were the suggested terms unnecessary and impractical, but they would have contradicted express terms, and produced a commercially absurd outcome.

The Alleged Counterclaim: Unlawful Means Conspiracy

The Law

70. "*A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so*": Kuwait Oil Tanker v Al Bader [2000] 2 All E.R. (Comm) 271 at [108].

71. Thus, the ingredients of a claim in unlawful means conspiracy are:

71.1. a combination or agreement between a given defendant, and one or more others;
71.2. an intention to injure the claimant;
71.3. unlawful acts carried out pursuant to the combination or agreement as a means of injuring the claimant;
71.4. causing loss suffered by the claimant.

72. The principles governing the tort were summarised by Cockerill J in FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm) at [93-95]:

"*94. The elements of the cause of action are as follows:*

i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time,

but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111].

ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover:

> *a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB:*
>
> > *"[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".*
>
> *b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466; see also OBG v Allan [2008] 1 AC 1 at [164-165].*
>
> *c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166].*

iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan, referring to cases where:

> *"The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."*

iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57].

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy.

95. However, a person is not liable in conspiracy if the causative act is something which the party doing it believes he has a lawful right to do: Meretz Investments NV v ACP Ltd [2007] EWCA Civ 1303; [2008] Ch 244 , per Arden LJ (paragraphs [126]- [127]) and Toulson LJ (paragraph [174]); Digicel v Cable & Wireless [2010] EWHC 774 (Ch) at Annex I, paragraphs [117]-[118] (Morgan J)."

73. It was common ground that a breach of contract by one of the conspirators may constitute "*unlawful means*": see Racing Partnership Ltd v Done Brothers (Cash Betting) Ltd [2021] Ch 233 (CA) at [155].

74. Combination or agreement is to be understood loosely: a contractual or express agreement is not a requirement. Rather, "*it is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end*": Kuwait Oil Tanker at [111]. The "*combination*" will ordinarily need to be inferred from evidence of what each defendant did and knew at various stages of the conspiracy.

75. A company can conspire with another company, a shareholder can conspire with a company in which he is a shareholder, and a director can conspire with a company of which he is a director.

The Background

76. The commercial collaboration in part reflected and embodied in the Loan Agreement and the Promotion Agreement failed to unfold as successfully as was no doubt hoped.

77. Under Clause 10 of the Loan Agreement, the Company agreed to procure, by no later than two months after 23 October 2020, that "*the Horseshoe Pre-Construction Agreement*" be entered into with McLaren Construction (South Limited) "*or such other entity in the McLaren group as may be proposed by* [the Petitioner]*"* That Agreement was defined as being the pre-construction agreement to be entered into by Elounda LLP (a company associated with Mr Martin) and McLaren Construction (South) Limited, or such other entity in the McLaren group as may be proposed by the Petitioner, in respect of the "*Horseshoe Works*" – which meant the proposed development of a new stadium at Fossetts Farm.

78. In due course, on or around 15 January 2021, a pre-construction agreement was executed in relation to the construction of the first phase of the proposed new stadium. Although some works were provided by McLaren Construction (South) Limited under that agreement (in return for payment) it was ultimately decided, according to Mr Martin's evidence at any rate, that its proposals for further works were uncompetitive, and in the event, no McLaren party was included in the final tender list for the substantive construction works at Fossetts Farm.

79. Furthermore, progress under the Promotion Agreement was slow, and in time stopped altogether.

79.1. By the end of 2021, Living was preparing to submit an outline planning application. This was timed to coincide with the adoption of a new "*Local Plan*" for Castle Point, the area in which the Land is situated.

79.2. That Local Plan was deemed to be "*sound*" in early March 2022 by the Inspectors' Report commissioned to examine it. However, on 23 March 2022, the Council voted against the adoption of the Plan, such that the Land remained in the Green Belt. Planning permission could therefore only be obtained in "*very special circumstances*".

79.3. Nevertheless, it was hoped that this stipulation could be met, not least because the Council had accepted in their reporting that the land in question (incorporating the Land) did not fulfil a Green Belt function, and Living could point to a need for the construction of additional housing. In particular, Castle Point was required to demonstrate a 5 year supply of deliverable housing sites, plus a 20% buffer. In the context of a successful planning appeal brought by Legal & General Affordable Homes, in relation to a refusal in respect of another Green Belt site, the Council had admitted that in January 2022 it could not demonstrate a 5 year supply, and that even in February 2023 the supply figure was 1.86 years.

79.4. However, in early April 2022, according to Mr Martin, he was told by Mr Young, a director of Living, that Mr Young no longer shared his confidence in the

promotion of the Land, and was *"looking to terminate the Promotion Agreement"*.

79.5. After that, on Mr Martin's evidence, "*all work on the project appears to have stopped, and no application has ever been submitted*".

80. The case advanced was that instead of performing the Promotion Agreement, Mr Young attempted to persuade Mr Martin to terminate it, and enter into a new agreement, in particular in connection with the proposed work at Fossetts Farm.

80.1. On 29 June 2022, in an email to Mr Martin, Mr Young referred to a prior, superseded contract (of 9 December 2013) by which certain parties associated with Mr Martin had been obliged to offer certain construction contracts to McLaren parties**.**

80.2. On around 26 July 2022, Mr Martin and Mr Young met in person. Mr Martin's evidence was that Mr Young *"remained intent on tearing up the Promotion Agreement and instead becoming involved with the proposed development at Fossetts Farm - and in that regard he was maintaining that the McLaren group of companies had a pre-emption right to carry out the works"*.

80.3. Following that meeting, in an email sent to Mr Martin on 28 July 2022, Mr Young proposed that the Loans be repaid by 31 December 2022, notwithstanding that they were not yet due, and that McLaren be awarded "*the build contract for the stadium and associated works at Fossetts Farm*".

80.4. On 3 August 2022, Mr Martin replied, saying amongst other things, "*It was your idea to promote Thundersley, which I cooperated with. None of it was ideal for me but I went along with it, only to now learn you have no interest, according to Matt, in taking it forward. We still believe in the scheme and the security still represents, as it always did, a route of repayment for McLaren. When we spoke on Monday I advised the contractual obligation, on us both, remain. Whilst I can agree with you that I am probably better placed to pursue the opportunity, can you tell me why you think* [the Promotion Agreement] *is not live?"*

80.5. In his reply, sent on the same day, Mr Kevin Taylor (chairman of the McLaren group) replied "*Lots in your note*", and then, in relation to the work at Fossetts Farm, "*our London teams … build extensive residential schemes and always manage to hit the customers budget (if realistic!!)"*.

81. Under Clause 28.1(b) of the Promotion Agreement, Living was entitled to terminate the Promotion Agreement at any time, in the event that it was informed by counsel of not less than 15 years' standing that there was a "*50% or less prospect of achieving*" planning permission in respect of the Land.

82. In August 2022, Mr David Manley QC was instructed by Iceni (as agent for Living) to advise on that question. His Opinion was dated 12 August 2022. His conclusion was that the chances of successfully obtaining planning permission in respect of the Land were 50% or less. He reached that conclusion taking into account various matters including the shortfall in housing land supply, to which he attached "*significant weight*"; the fact that, notwithstanding the "*acute*", "*clear*" and "*pressing*" housing needs, the Government "*has historically said that the unmet need for…conventional housing alone is unlikely to amount to very special circumstances justifying development in the Green Belt*"; the recent refusal of planning permission for a similar site notwithstanding that it was for 44 affordable homes (as opposed to a mixed purpose development) and had been recommended for approval by the case officer; the fact that, by the time a final determination was made on the planning application or any appeal, a statutory obligation would have arisen to achieve a 10% biodiversity net gain, noting that "*my client has indicated that any such gains would need to be off-site and they don't know if they can be achieved*"; and the fact that the site was a Local Wildlife Site, such that harm must be mitigated or as a last resort compensated for or planning permission should be refused.

83. Subsequently, on 16 August 2022, Mr Robert Walton QC advised in writing on behalf of Mr Martin and Arran, also in respect of the proposed development of the Land (which he noted was part of "*housing allocation HO20, all of which was proposed to be removed from the Green Belt*"). He recommended that the HO20 landowners join forces to submit a planning application, stating that "*there must be a very strong prospect that Officers will recommend that permission is granted, but as things stand…there must be a high risk that the Council will refuse to grant permission*".

84. On 1 September 2022, Living purported to terminate the Promotion Agreement in accordance with Clause 28(1)(b), in reliance on Mr Manley's opinion**.**

85. Mr Martin and Arran then instructed Mr Walton to review Mr Manley's Opinion, and to advise on whether he had proceeded on a correct understanding of the Council's current 5 year housing land supply. Mr Walton's opinion was that Mr Manley's opinion might have been different had he been made aware that the Council's actual housing supply was thought by third parties to have been around 1 year (*"a truly appalling position"*) not 4 (as had been stated in the Council's most recent AMR); his conclusion was that Mr Manley would need to revisit his opinion to take account of that information, *"particularly given that it appears that his overall conclusion was relatively finely balanced"*. Having said that, he did not advise that the prospects of obtaining planning permission were in fact greater than 50% (and indeed, did not state any specific opinion on prospects at all).

86. On 26 September 2022, Gowling Solicitors, on behalf of the Owners, wrote to Living to say that in circumstances where relevant factual information had not been provided to counsel, Clause 28(1)(b) had not been satisfied, and that the termination notice was invalid.

87. There followed a period of discussion, which ended (without resolution of the parties' differences) in March 2023. On 13 March 2023, Mr Martin wrote to Mr Young and said that the delay in promoting the Land was *"seriously undermining the prospects of planning. … The longer we leave promoting* [the Land]*, by submission of an application, coupled with the increased traction by the LA in identifying alternative sites to fulfil their housing needs, the more diluted our prospects become"*.

The Alleged Conspiracy

88. Against that background, the case advanced was that (at least) the Petitioner and Living conspired together with an intention to cause financial loss to the Company and Mr Martin (and others) and pursuant to that combination carried out unlawful acts, thereby causing the Company loss.

89. Essentially, it was said that once the Council had rejected the Local Plan, all enthusiasm for the project evaporated, and instead, that the McLaren parties became intent on

extricating themselves from the Promotion Agreement, and demanding repayment of the Loans as soon as possible.

90. It was said that the Petitioner and Living are connected and share personnel (Mr Young gave evidence on behalf of both companies), and that it was to be inferred, therefore, that the Petitioner and Living conspired together to preclude the successful promotion and sale of the Land, to extricate Living from the Promotion Agreement, and thereby to trigger repayment of the Loans from another source.

91. It was further said that the Petitioner and Living used unlawful means to do so: namely, breach by Living of the Promotion Agreement and/or by the Petitioner procuring a breach (by Living) of contract (again, the Promotion Agreement), and by attempting to exert "*unlawful pressure*" on Mr Martin and/or parties associated with him, in relation to future construction contracts (in the event, as I explain below, the need to show arguable unlawful means was met by the acceptance that there was an arguable breach of contract by Living).

92. Finally, it was said that at the very least, an intention to injure the Company was to be inferred from the inevitability of loss: the Petitioner and Living could not breach the Promotion Agreement without causing loss to the Company (and Mr Martin, as guarantor). Had Living complied with its obligations under the Promotion Agreement, it was "*likely that planning permission would have been forthcoming*", that the value of the Land would have been significantly enhanced, and that the Company "*could have repaid the Loans*". In failing to do so – in other words, in failing to promote the Land - and so by the operation of their conspiracy, the Petitioner and Living caused the Company and Mr Martin loss in a sum which was said to exceed the sums otherwise due to the Petitioner.

Discussion

93. For the purposes of these Applications only, the Company accepted (or more accurately, accepted that it could not, on these Applications, prove otherwise):

    93.1. that Living "*may*" have breached the terms of the Promotion Agreement by failing to promote the Land; and,

93.2. that had it been applied for and/or had there been an appeal, planning permission in respect of the Land "*may*" have been granted.

94. Nonetheless, in my judgment, the allegation of unlawful means conspiracy causing loss in a sufficient sum, was not arguable, broadly for three reasons: first, it was inherently unlikely that there was such a conspiracy; second, there was no evidence of a relevant combination, and third – fundamentally, leaving aside issues of oral or further or potentially disputed evidence – it was plainly incapable of generating a claim in a sufficient sum.

Loss

95. I shall deal first with the third point, concerning loss.

96. It could not be seriously doubted that there was no certainty that planning permission would ever have been granted in respect of the Land – at most, there might have been a substantial chance of some sort, but a chance well short of 100%: the Company and Mr Martin did not contend otherwise.

97. As to the evidence in that regard, although there were (or were potentially) differences of opinion between Mr Manley and Mr Walton in respect of the question whether the chance was more or less than 50%, neither of them suggested that the prospects of permission were anything approaching a certainty. Furthermore, the evidence was that since 2022 relevant decisions had gone both ways: there were examples of appeals having been dismissed, and of having been, at least in one instance, successful. As to the latter, on 26 May 2023, Legal & General were successful in having their planning application refusal overturned, and the Inspector "*afforded very substantial weight*" to the fact that the Council had persistently failed to deliver affordable homes at Castle Point.

98. It follows that the prospects of a sale of the Land (following permission) were also less than certain. Furthermore, in any event, it was not suggested that a sale would necessarily have generated proceeds in a sum sufficient to pay the Loans under the Loan Agreement in accordance with the payment waterfall provided for at Clauses 6 of the Loan Agreement and 15 of the Promotion Agreement.

99. Accordingly, there was, on the evidence, a substantial chance that even if Living had complied with its obligations, there would have been no grant of permission to develop the Land, and that even if there had been a grant, there would not have been a sale in a sum sufficient to repay the Loans in full.

100. In the event of a sale following the grant of planning permission - and assuming a sale for the minimum sum sufficient also to pay those liabilities to be paid in priority from the Sale Proceeds - the Company's liabilities to the Petitioner under the Loan Agreement would or ought to have been paid in full. However, a sale for more than that minimum sum would not have been of any benefit to the parties to the Loan Agreement: once the relevant liabilities were met in full, any remaining Proceeds were to be distributed elsewhere, again, in accordance with Clause 15 – there was no question of the Company or Mr Martin having a claim to any sort of surplus.

101. It equally follows that in order to enjoy, by these means, a 100% chance of payment in full of the Loans under the Loan Agreement, there would have to have been a 100% chance of planning permission and of sale in the minimum sufficient sum: a 95% chance of a sale for more than that (regardless of how much more) would have entailed a 95% chance of payment in full under the Loan Agreement, in just the same way as would a 95% chance of a sale for the minimum sum itself.

102. It therefore follows that the chance of a sale generating proceeds sufficient to meet the liabilities in full under the Loan Agreement cannot have been more (and in real terms was certainly less) than the chance of a successful grant of planning permission, which in this case, was substantially less than 100%.

103. I turn then to the proper characterisation of the loss allegedly suffered by the Company and Mr Martin, as victims of the alleged conspiracy.

104. As to that, plainly, neither suffered a loss by virtue of being asked to repay the Loans. Those were liabilities that existed in any event. What therefore was lost, if the case on conspiracy were otherwise made out, was a chance - dependent in large measure on the hypothetical acts and reactions of third parties - that planning permission would have been granted and that the Land would then have been sold for a price sufficient to repay or reduce the Loans under the Loan Agreement in part or full. The value of that claim

must be assessed as a "*loss of a chance*". In other words, this was not a case in which the alleged victims of the conspiracy would be awarded, were their claim to succeed, the whole sum (equal to repayment in full of the Loans) were they able to show that on the balance of probabilities, planning permission would have been granted, and the Land would have been sold for no less than the requisite minimum sum.

105. Much has been said and written about the loss of a chance doctrine, but for present purposes, there were three passages in McGregor on Damages, 22nd Edition, that stated principles of particular relevance, and in sufficient detail for the purposes of this case.

106. First, at paragraph 11-044:

> "*Before turning to the authorities which in modern times have cascaded over the law reports, it is important to address the question which has much troubled the courts, of how wide ranging is the loss of a chance doctrine. In short, when does a claimant have to prove on a balance of probabilities that a particular result would have come about and when need he prove only that a chance, which may be less than a probability, of achieving that particular result has been lost. The distinction is of immense importance, separating as it does the cases where the claimant will be awarded all or nothing and the cases where a percentage of loss will come their way. A broad summary of the overall position is made, with crystal clarity, by Andrew Burrows QC sitting as a High Court judge prior to his appointment to the Supreme Court of the United Kingdom in Palliser Ltd v Fate Ltd [2019] EWHC 43 (QB) at [27]. He said:*
>
> > *"The correct picture of the law on proof in relation to damages is therefore that where the uncertainty is as to past fact, the 'all or nothing balance of probabilities' test applies. Where the uncertainty is as to the future, proportionate damages are appropriate. Where the uncertainty is as to hypothetical events, the correct test to be applied depends on the nature of the uncertainty: if it is uncertainty as to what the claimant would have done, the all or nothing balance of probabilities test applies; if it is as to what a third party would have done, damages are assessed proportionately according to the chances."*

To this can be added two points. First, once a claimant elects to claim damages on the basis of a loss of a chance, it is not open to the claimant to seek to recover full damages by proving what a third party would have done on the balance of probabilities. The claimant must prove the loss of a chance by identifying factors that might have led to a different outcome. Secondly, as set out below, the all-or-nothing approach applies where the uncertainty concerns something that the claimant would have done, something that the defendant would have done, or something that a third party would have done if the third party was an agent for the claimant or defendant."

107. Then at paragraphs 11-048 to 11-050:

"*11-048 … When we are looking at past events we are necessarily in the realm of causation; the test is balance of probabilities and chances just do not matter. But when we are looking to the future we are concerned with the quantification of loss and here chances are all-important; an assessment of damages is entitled, indeed is required, to take into account all manner of risks and possibilities. …. It is therefore the case that a loss of a chance, and its assessment, is frequently involved in the quantification process, and this has always been so and long before Chaplin v Hicks was decided. In the quantification process, assessment of chances of a hypothetical fact are matters of evaluation rather than determinations of fact.*

11-049 Losses of a chance appearing in the process of quantification do not fall within the loss of a chance doctrine. Loss of a chance proper, as it may be termed, has a more limited field. It comes in before we get to quantification; indeed it comes in at the causation stage. How is this? It is because there are situations where the law has recognised, and has treated, the loss of a chance as a form of loss, an identifiable head of loss in itself. To take Lord Hoffmann's way of putting it in Barker v Corus (UK) Ltd "the law treats the loss of a chance of a favourable outcome as compensatable damage in itself". Causation is then established by showing that the claimant has lost the chance. This is shown on the balance of probabilities. This then makes for three stages in the enquiry: first, it must be ascertained whether loss of a chance is recognised as a head of damage or loss in itself; secondly, it must be shown that on the balance of

probabilities the claimant has lost the particular chance; thirdly, the lost chance must be quantified and the quantification is expressed in percentages and proportions.

11-050 At the third stage, namely quantification, it is now established that the court does not apply a balance of probabilities approach but instead estimates the loss by making the best attempt on the evidence to evaluate the value of the chances lost. This is a broad brush evaluative exercise with which appellate courts are reluctant to interfere. As Marcus Smith J said in Britned Development Ltd v ABB AB, after quoting from this paragraph as it existed in an earlier edition of this work, the quantification of damages does not proceed on the balance of probabilities but instead takes into account "all manner of risks and possibilities". It is what Popplewell J described in Asda Stores Ltd v Mastercard Inc as a "pragmatic approach". Although on appeal from Popplewell J the Court of Appeal considered that more precision was required than the pragmatic approach that Popplewell J had taken, when that case was decided by the Supreme Court, the court endorsed the broad pragmatic approach of Popplewell J, describing the assessment of damages as involving a broad axe even in some cases of financial loss just as it applies a broad axe in personal injury cases."

108. In respect of the proposition that uncertainties regarding the conduct of third parties are to be assessed proportionately in terms of chance, the central authority is the decision of the Court of Appeal in Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602. In respect of that decision, at 11-064, McGregor states:

"… *In his definitive judgment Stuart-Smith LJ distinguished between three types of situation or categories. In his first category fall cases in which the defendant's negligence consists in some positive act or misfeasance and the question of causation is one of historical fact. … Proof on the balance of probabilities prevails here. In the second category fall cases in which the defendant's negligence consists of an omission where causation depends not upon a question of historical fact but upon the answer to the hypothetical question what would the claimant have done if there had been no negligence. How the claimant would have reacted is again subject to proof on the balance*

of probabilities. In the third category fall cases in which the claimant's loss depends upon the hypothetical action of a third party, whether in addition to action by the claimant or independently of it. Here the claimant need only show that they had a substantial chance of the third party acting in such a way as to benefit them. In the case before the court, therefore, the claimants had to show on the balance of probabilities, before any recovery was possible, that they would have sought a degree of protection against the contingent liability; it was held that in this they succeeded. However, they needed to show only that there was a significant chance, which could be less than likely, that the third party would have been prepared to afford them this protection; the majority, Millett LJ dissenting, held that the loss of such a chance had been made out and it was assessed at 50 per cent. …"

109. In the present case therefore, on these principles, properly characterised, the claim in respect of recoverable loss would be as follows.

109.1. First, that Living (as an element of the conspiracy) acted in breach of the Promotion Agreement; that is a past event, involving only the parties to the contract, and would have to be proved on the balance of probabilities by the alleged victims of the conspiracy (including the Company and Mr Martin); in the present proceedings, for those purposes only, it was conceded that proof of breach was arguable.

109.2. Second, that by virtue of that breach, as a matter of causation, the victims of the conspiracy were deprived of the chance that planning permission would have been granted, that Sale Proceeds would have been generated in a certain minimum sum, and thus the Loans repaid; the benefit of that chance - the chance of an ultimately favourable outcome - was part of that for which the Owners contracted; again, that the breach caused the loss of that chance would be for the victims to prove on the balance of probabilities.

109.3. At the third stage however, dependent as it was (amongst other things) on the hypothetical acts of third parties (in particular, the Council) the valuation of that now lost chance would be expressed in terms of "*percentages and proportions*"; the claim would neither succeed entirely (on proof of a 51% chance of a

successful outcome) nor fail entirely (on proof of a merely 49% chance); the court would be compelled to conduct a broad brush evaluative exercise.

110. As to that exercise, in the present case, even if assumed that there was a seriously arguable case in respect of breach and causation, the value of the chance that the Sale Proceeds would have exceeded the minimum required sum was manifestly and significantly less than 100% - and certainly, perhaps unsurprisingly - there was not the evidence on which to base a conclusion that there was a real and genuine prospect of showing, at a trial, a 100% chance of complete success. In those circumstances, on any view, the Company and Mr Martin were unable to show that they had a genuine and serious counterclaim in the relevant sum.

The Evidential Basis of the Alleged Conspiracy

111. I turn next to the inherent probability or otherwise of the alleged conspiracy, and in that context, the evidence of a relevant "*combination*" of the alleged variety, and indeed, of the other required elements of a successful claim in conspiracy.

112. The essence of the case advanced was that the Company conspired with Living, with a view to ending or perhaps suspending or impeding any real progress under the Promotion Agreement (in breach of contract) in order to achieve, perhaps amongst things, the premature repayment of the Loans under the Loan Agreement.

113. That contention was however inherently unlikely for three reasons.

114. First, Living had a valuable interest in both achieving planning permission in respect of the Land, and performing its obligations under the Promotion Agreement, under which it was entitled to the Development Management Fee (in the sum of £20,000 per month, up to a maximum of £600,000). However, if the Promotion Agreement were to be terminated due to a breach by Living of its obligations, it would not be entitled to payment of the Development Management Fee: Clause 28.4(c) of the Promotion Agreement. Furthermore, had the Land been successfully promoted, and had Sales Proceeds been generated, Living had a contingent right to payment of a substantial sum under the payment waterfall at Clause 15 of the Promotion Agreement. It therefore had an obvious commercial interest in the fulfilment of its agreed duties.

115. Second, the Company stood to gain nothing of obvious substance from the alleged conspiracy. It already had rights against the Company and Mr Martin under the Loan Agreement; it had an incontrovertible route to repayment irrespective of the development of the Land – the Long Stop Date was 23 October 2023 (and indeed, before then, on 1 March 2023, Leckhampton had been wound up, and at the very least, the obligation to repay arguably accelerated). Moreover, had Sale Proceeds been generated, the Petitioner would have enjoyed some prospect of at least part repayment.

116. Third, the allegation was that Living ceased to act in accordance with its obligations in about April 2022. Mr Manley QC's (challenged) opinion was produced in August 2022. A winding-up order was made against Leckhampton on 1 March 2023. And yet, despite all of that, it was not until 27 July 2023 (less than three months before the Long Stop Date) that repayment under the Loan Agreement was demanded. Had the Petitioner been conspiring to deprive the Obligors of the benefit of the Sale Proceeds, and to accelerate their repayment obligations, it is likely that it would have acted to compel repayment at some much earlier point.

117. Also as an aspect of the broader context, according to its last filed Accounts, the Company was loss-making and insolvent. Its Accounts to 31 January 2020 reflected an annual loss of £2.549 million, and balance sheet insolvency in the sum of £1.556 million. The auditors' report concluded that there was material uncertainty as to its ability to continue as a going concern. Although (as long ago as January 2024) the Company was invited in correspondence to provide more recent draft accounts, it failed to do so. Moreover, it has been subject to three first Gazette notices for compulsory strike off in the last three years alone, and a total of eight since April 2010.

118. The evidence before the court therefore suggested that the Company is insolvent – nothing was done to displace that inference.

119. Finally, despite the allegation that it was worth at least £7.9 million, neither Jetbury (Arran having been dissolved), nor the alleged victims of the conspiracy, have sought to begin proceedings against Living, the Company or otherwise.

120. Turning then, against that background, to the alleged combination, the Company and Mr Martin failed to identify who is alleged to have conspired, or when. The case was stated

in terms of an assertion that the companies conspired "*through their respective directors*". However, whilst I acknowledge that presumably at some level there was or might have been a connection between the Petitioner and Living (and Ms Julian emphasised that Mr Young was authorised to give evidence for both), the evidence was that their Boards were differently comprised and they had no directors in common; and that neither did they share, according to publicly available records, a "person with significant control" (being McClaren Property Holdco Ltd in respect of Living, and McClaren Construction Group plc in respect of the Petitioner).

121. Accordingly, there was no evidence as to which of the five different directors were said to have conspired together; how it was alleged that they caused the relevant companies to join the conspiracy; or what steps were taken by the Petitioner.

122. It is correct that parties may not be expected to advance or know their whole case at the stage of an application to set aside a statutory demand, or in respect of a petition – particularly perhaps where the case is one in conspiracy, the features of which would tend by their nature to be kept secret – but nonetheless, they are expected to have some evidential support for the assertions they make, particularly necessary where those assertions are strongly contradicted by inherent likelihood. In this case, there was no evidence of the Petitioner having done anything at all concerning the alleged conspiracy.

123. Given the absence of any evidential support for the alleged conspiracy, combined with, and assessed in light of the contextual factors which I have described, and which taken together I consider comprise powerful reasons for scepticism, in my view, the conspiracy allegation was not one of real or genuine substance, carrying any real conviction: it was a bare assertion.

124. It was held in Re Tweeds Garages [1962] Ch 406 that where there is no doubt that the petitioner is a creditor for a sum that would entitle it to a winding-up order, a dispute as to the precise amount owing is not a sufficient answer to a petition to justify dismissal. That is the case here. Neither the Company nor Mr Martin can demonstrate to the requisite threshold that they have a counterclaim of sufficient substance, in a sufficient sum.

Conclusion

125. In conclusion, for the reasons stated, it follows that I will dismiss Mr Martin's applications to set aside the Statutory Demands, and make a winding-up order against the Company.

Date 25 February 2025