Neutral Citation Number: [2021] EWHC 2580 (Ch)

Appeal Nos: CH-2020-000239 & CH-2020-000240
Case Nos: BR-2019-000949 & BR-2019-001086

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

**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**ON APPEAL FROM DEPUTY ICC JUDGE AGNELLO QC**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th September 2021

**Before** :

**THE HON. MR JUSTICE MELLOR**

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**RE: MR WILLIAM LUTTMAN-JOHNSON**
**Between :**

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| **WILLIAM LUTTMAN-JOHNSON** | **Applicant/ Respondent** |
| **- and -** | |
| **WEST SUSSEX AGRI LIMITED** | **Respondent/ Appellant** |

**RE: MR LEON MEKITARIAN**
**Between :**

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|---|---|
| **LEON MEKITARIAN** | **Applicant/ Respondent** |
| **- and -** | |
| **WEST SUSSEX AGRI LIMITED** | **Respondent/ Appellant** |

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**Ms Lexa Hilliard QC** (instructed by **Mishcon de Reya**) for the **Appellant**
**Mr Henry Warwick QC** (instructed by **Keystone Law** ) for **Mr Luttman-Johnson**
**Mr Mekitarian in person**

Hearing date: 30th April 2021

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# Approved Judgment

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

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on Monday 27th September 2021.

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THE HON MR JUSTICE MELLOR

## Mr Justice Mellor :

1. This is my judgment on two Appeals by West Sussex Agri Limited (**WSA**) against Orders made by Deputy ICC Judge Agnello QC (**the Judge**) dated 10 September 2020 by which she set aside statutory demands dated respectively 18 June 2019 and 16 May 2019 served on the two respondents to these Appeals, Mr William Luttman-Johnson (**WLJ**) and Mr Leon Mekitarian (**LM**). The Judge set aside both statutory demands and ordered WSA to pay the costs of WLJ and LM, with their costs from 1 August 2019 up to and including the hearing before her on 15 and 16 July 2020 to be assessed on the indemnity basis.

2. The Judge delivered her judgment on the applications to set aside on 10 September 2020. On that date, she made her orders as to costs and refused permission to appeal, giving some fairly extensive reasons for her refusal which, in certain respects, amplify the reasoning set out in her judgment. WSA was granted permission to appeal by Michael Green J on 9 December 2020. By his further Order dated 26 January 2021, the parties compromised WSA's application for a stay of the order for the payment of interim costs upon WSA paying the sum into its solicitors' client account to be held pending final determination of these Appeals or further Order.

3. The bulk of this judgment deals with what I will call WSA's Main Appeals, by which WSA suggests the Judge erred such that I should rule that the statutory demands should stand. I deal with the Main Appeals as one appeal. In the alternative to its Main Appeals, WSA appeals two points on costs and I deal with the appeals on costs at the end.

## General Background

4. The statutory demands were, respectively, for the sum of £45,008,591.97 (WLJ) and £44,306,869.34 (LM) **(the Debt)** which WSA claims is due under the terms of a guarantee executed on 4 March 2013 **(the Guarantee**). The small difference in the amounts claimed arises because the dates of the statutory demands for each of WLJ and LM are slightly different and therefore there is a slight differential in interest claimed.

5. The Guarantee was executed in favour of Eastern Counties Finance Limited **(ECF)**, a finance company that later changed its name to Privilege Project Finance Limited **(PPF)**. WLJ and LM agreed by clause 1 of the Guarantee to pay on demand:

> "all money which is now or shall at any time or times after this date be due or owing or payable to you from the Customer under or in respect of any dealing, transaction, agreement of engagement whatsoever ….".

6. The "Customer" was Crouchland Biogas Limited **(CBL)** a company that was in the business of owning and managing a biogas plant. WLJ and LM were shareholders and directors of CBL.

7. Clause 16 of the Guarantee contained a primary obligor clause as a separate and independent condition.

8. Over a period of some 4 years to 30 June 2017 ECF advanced some £37.7m (including interest) to CBL. On 7 August 2017 joint administrators were appointed to CBL. On 29 December 2017 ECF assigned to WSA the debt owed by CBL to ECF and the Guarantee. On 10 January 2019 CBL entered compulsory liquidation.

## The proceedings before the Judge

9. The applications to set aside the statutory demands were dated 5 July 2019 (WLJ) and 11 July 2019 (LM). Directions were given for the applications to be heard together. WLJ filed two witness statements dated 5 July 2019 and 7 February 2020. LM filed three witness statements dated 11 July 2019, 7 February 2020 and 13 July 2020. WLJ also indicated that he relied on LM's first two witness statements. WSA filed a single witness statement in opposition dated 10 December 2019 made by Chris John Bamforth, a director of WSA. Mr Bamforth was unable to dispute much of what was said by WLJ and LM because he was not involved in the events in question and had no access to those involved in the events from 2012 to around the end of 2014. Mr Bamforth did have access to a Mr Bob Boucher who was involved in events in 2015.

## Applicable principles

10. WLJ and LM applied to set aside the respective statutory demands under r 10.5(5)(b) and (c) of the Insolvency Rules 2016 by which the Court may grant the application [to set aside] if: 'the debt is disputed on grounds which appear to the Court to be substantial.'

11. The parties were agreed on the key authority. The previous version of this rule – r 6.5(4) of the Insolvency Rules 1986 - was supplemented by para 12.4 of the Practice Direction – Insolvency Proceedings which referred to 'a genuine triable issue'. These provisions were considered by the Court of Appeal in *Collier v P & MJ Wright Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643, in an appeal from a judge who considered himself bound by the judgment of Mr Roger Kaye QC in *Kellar v BRR Graphic Engineers,* in which the Deputy Judge had expressed the view that this rule was plainly intended to set a lower threshold than applicable to an application for summary judgment. In that context, Arden LJ (as she then was) stated in this passage (which was also cited and applied by the Judge in this case):

> Mr Roger Kaye QC does not explain in what way the test of real prospect of success would here differ from that of genuine triable issue. I note that, in the recent case of *Ashworth v Newnote Ltd* [2007] EWCA Civ 793 at [33], Lawrence Collins LJ, with whom Buxton LJ agreed, regarded the debate as to a difference between "genuine triable issue" and "real prospect of success" as involving "a sterile and largely verbal question", and that there is no practical difference between the two. I do not consider that the passage that I have cited above from the judgment of Mr Roger Kaye QC should be followed. I accept that the refusal to set aside a statutory demand is a serious step, but so is the grant of summary judgment. The court cannot grant summary judgment under CPR 24.2 unless it is satisfied that the party against whom the order is to be made has no real prospect of success. To have a real prospect of success a party must have a

> case which is more than merely arguable (see *The Saudi Eagle* [1986] 2 Lloyd's Rep 221). If the *Kellar* test were applicable, the court would have to apply a lower threshold than real prospect of success, and that would mean that it would be enough on an application to set aside a statutory demand if the dispute were merely arguable. However, that approach would give no real weight to the word "substantial" in the Insolvency Rule; nor would it give any meaning to the word "genuine" in the Practice Direction. In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it was inherently implausible or if it was contradicted, or was not supported, by contemporaneous documentation (see also per as Lawrence Collins LJ states in *Ashworth* at [34]). But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material difference on disputed factual issues between real prospect of success and genuine triable issue.

12. Since this is a summary judgment type test, it follows that the Court should not engage in any sort of mini-trial process i.e. seek to resolve any disputes of fact.

13. In terms of the approach I should take on these Appeals, the parties were agreed these are 'true appeals' so that the Court will only interfere with the decision below if the judge has erred in law or otherwise in principle: see Carnwarth J in *AIB Finance v Alsop* [1998] BCC 780 at 783F. This is a familiar test which has been explored in greater detail in the context of appeals from decisions of the UKIPO - see the decision of Mr Daniel Alexander QC (as the Appointed Person) in O-017-17 Talk for Learning, reported as *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 at [14]-[52]. His conclusions were approved by Arnold J (as he then was) in *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch). I proceed on the basis that, before I can interfere in the decision of the Judge below, I must identify a distinct and material error of principle and/or conclude that her decision was plainly wrong.

14. WLJ and LM relied on numerous and varied grounds in support of their applications to set aside, but the main grounds were founded on their claims that they were induced to enter into the Guarantee on 4 March 2013 in reliance on two sets of representations which were referred to as (i) the Guarantee Representations and (ii) the Funding Representations.

15. WLJ and LM alleged that the Guarantee Representations were made by Matthew Smart (**MS**), an officer of ECF at a meeting on 4 March 2013 immediately prior to the Guarantee being executed. The representations were:

i) The Guarantee was simply a formality;

ii) The Guarantee would be required by certain pension funds only; and

iii) The Guarantee would never be called upon.

16. At [20] the Judge held that she found it difficult to accept the evidence in relation to the Guarantee Representations on its own as being sufficient for her to be satisfied that the Debt was disputed on grounds which were substantial. The Judge, therefore, was not persuaded to set aside the Statutory Demands on the basis of alleged Guarantee Representations.

17. The Judge's finding on the Guarantee Representations is not at all surprising. Albeit in a somewhat different context (in the sense that the promissory estoppel was said to work the other way around), a very similar set of alleged misrepresentations were described by Henderson LJ in *Harvey v Dunbar Assets Plc* [2017] EWCA Civ 60 as giving rise to an inherently implausible case and one in which it was simply not credible that an experienced man of business executed a guarantee on the footing that he was engaging in 'a solemn farce' and that the guarantee would never in any circumstances be enforced against him. Furthermore, there was no Respondent's Notice from either WLJ or LM seeking to reverse the Judge's finding on the Guarantee Representations.

18. The alleged Funding Representations, set out in the Judgment at [10], were that:

i) ECF had access to funding from pension funds who were already investing in the biogas sector, and the funds required were available;

ii) The existing personal finance in respect of Crouchland Farm (WLJ had a personal loan outstanding with HSBC for £2.2m) would be refinanced by ECF; and

iii) Subject to approval of CBL's business plan and a valuation from Savills, ECF would provide a facility entitling CBL to draw down, as and when required, up to 70% of the valuation secured against the assets of the CBL business; and

iv) Such funding would be made available to CBL in accordance with the project timetable identified in CBL's business plan (repeated in subsequent telephone calls between MS and LM) and in order to meet the capital expenditure requirements projected in that plan.

19. The Judge found at [22] that the evidence concerning the Funding Representations was:

> "sufficient to support the case put forward by the Applicants that they would not have signed the Guarantees without the specific representations made by Mr Smart relating to the funding issues, upon which they both assert they relied upon."

**The Appeals in summary**

20. On these Appeals, WSA contends that the Judge misdirected herself when reaching the finding I have just mentioned. Furthermore, WSA contends that the Judge failed to take into account either at all or sufficiently, alleged inconsistencies and contradictions

in the evidence, and that she misunderstood contemporaneous documents. It is true that the judgment below contains some mistakes and inconsistencies. However, it is clear that WSA's main ground of appeal is based on the related contentions that, the Funding Representations notwithstanding, WLJ and LM either repeatedly affirmed the Guarantee after they knew the Funding Representations were untrue, or alternatively, WLJ and LM are estopped now from asserting the Funding Representations as a defence.

21. In this regard, WSA pointed out that only the Third and Fourth Funding Representations were relevant. The First Funding Representation was not relied upon at all and the Second appears only to have related to WLJ's loan. As to the Second Funding Representation, on 20 June 2013, ECF did provide WLJ with a loan in order to refinance his personal lending owed to HSBC. Accordingly, WSA says the Second Funding Representation was true. WSA also says that if the First Funding Representation was relied upon, its affirmation (and estoppel) arguments apply equally to all the representations relied upon.

22. Having assessed all the points which WSA put forward in its Appellant's Notice, as supplemented by Ms Hilliard QC's Skeleton Argument and her oral submissions, it is clear that WSA's best arguments are affirmation and estoppel. Affirmation is, prima facie, a powerful argument in the circumstances of this case. However, I have come to the conclusion that the Judge made no material error when making her findings on the affirmation arguments: indeed I come to the same overall conclusion as the Judge. Accordingly, I will express my views briefly and necessarily they must be taken to be tentative views only in view of the fact that these issues will have to be explored in much greater detail at a trial, following disclosure and cross-examination.

## Undisputed Facts

23. In terms of the facts, much of the ground is undisputed. This is partly because there is no evidence from anyone at ECF who was involved at the time and partly because, on an application or appeal of this nature, the party in the position of WSA cannot dispute facts asserted by WLJ and LM for fear of creating 'substantial grounds' and has to accept them (obviously for the purposes of this application/appeal only). There is a dispute of fact over certain events in 2015 and I deal with those separately below.

24. Accordingly, I will set out the undisputed essential facts (leaving aside, as I indicated, the dispute over what occurred in 2015). As usual, these are best related in chronological order. They are drawn from the evidence of WLJ and LM and a few contemporaneous documents. WLJ points out that since CBL was put into administration, he has not had access to the books or company records of CBL and his request for access made to the administrators was declined. He prepared his evidence on the basis of '*the limited number of documents that are within my possession*'. Accordingly, I have kept in mind that there might be other documents which may be obtained from the liquidators in due course.

25. In 2008, WLJ started to build a small biogas plant at his farm. The build was financed by a personal loan of £2.2m from HSBC. The plant was commissioned in 2010. WLJ describes that plant as operational but incomplete. It generated electricity but had no access to the gas network. He sought investment to develop the biogas business further. He began discussing the way forward with 'an experienced agribusiness man' – LM.

26. In April 2011, WLJ incorporated CBL, evidently with a view to building a much larger biogas plant which would inject methane into the grid. For that purpose, CBL needed to link its (larger) plant to a gas injection site and also needed to build a $CO_2$ recovery plant to capture that by-product. At incorporation, WLJ was the sole director and shareholder. LM joined the board of CBL in November 2011 as Managing Director. Together they began detailed discussions in December 2011 with a company called Scotia Gas Network (SGN) to convert the existing plant to gas production, link it to the gas grid and build a $CO_2$ recovery plant. WLJ says that by early 2012, he and LM had developed a Business Plan and began to seek funding for the project from various sources. WLJ says that 'after long and fruitless discussions with a number of potential funders', he was advised to contact ECF. A meeting was arranged with ECF's Managing Director, Mr Smart at WLJ's home in Suffolk on 9 July 2012.

27. At this meeting, the business plan was explained to Mr Smart, including that CBL had a total funding requirement (at that time) of about £12m. In his first witness statement, WLJ continued:

> 'Given that significant capital expenditure would be needed at the beginning of the project, CBL was looking for a credit facility on which it could quickly draw significant sums on request. I also explained to Matthew that, as part of this project, I would need to refinance the personal loan that I had taken out with HSBC and that was at that stage secured on the land and assets at the Farm. I was struggling to make the necessary payments and it was a clear and obvious threat to the business if HSBC foreclosed on the land upon which the biogas plant itself was located. The situation with HSBC urgently needed resolving or the whole project was under threat I will deal with this below in more detail but assurances as to the fact that HSBC would be refinanced in a timely manner were central to my dealing with ECF and ultimately (along with other representations) in signing the guarantee.'

28. According to WLJ's evidence, Mr Smart indicated he was interested in providing funding. He explained that ECF had access to a number of pension funds who were in the business of supporting green energy projects, and that ECF was financing a number of similar biogas plants. He said he was willing in principle to provide the required finance facility to CBL on two conditions: first, his 'biogas expert', a Mr Danielsen, needed to scrutinise and sign off on CBL's business plan; second, Savills needed to provide a business valuation to underpin the borrowing decisions which funders would need to make. Once the business review and valuation stages were completed, Mr Smart promised to send a draft formal loan agreement.

29. WLJ and LM decided to go ahead with Mr Smart's conditions. On 16 August 2012, representatives of Savills visited the farm. WLJ says there was both a formal instruction letter and a business plan which included their development proposals, including details of the significant capital expenditure required in the early stages of the project, with a timetable for the plant being operational by April 2013. Mr Smart visited on the same occasion. WLJ says he asked Mr Smart

> '…..several times if money was an issue and if he was confident that he would have the money. He assured me he did and that it was not an issue. From our conversation I formed the clear impression that he had access to virtually unlimited funds and that his funders were reliable.'

30. WLJ exhibited a copy of the Savills valuation dated 20 September 2012, which put a value on the business in the range between £35.5m and £38.7m. On 2 November 2012, ECF sent letters confirming it was willing (a) to offer CBL a credit facility of £2.25m and (b) to offer WLJ a credit facility of £2.4m to enable him to refinance his HSBC loan. As WLJ says in his witness statement:

> These were not the offers that we are expecting. Although discussions continued with ECF in order to try and obtain the credit facility that we had originally requested, we focused on the immediate need which was to finance a number of purchases of plant equipment including, crucially a Combined Heat and Power system ("CHP"). In support of these proposals, on 19 November 2012 ECF asked us to provide to provide Savills with an amended business plan containing updated details of proposed expenditure over time [Exhibit WLJ 2].

31. WLJ says that both he and LM chased Mr Smart over the following months on progress.

32. It appears from LM's evidence that on the basis of this offer, CBL placed an order (of circa £650,000) for the CHP generator. He says that ECF had elected without discussion to asset finance this purchase and LM says he was instructed to tell the supplier to invoice ECF direct.

33. In mid-January 2013, WLJ recounts that ECF paid suppliers some £650,000 for the CHP and it was delivered to the farm soon afterwards. This, he says, came as a surprise to WLJ and LM because they had not been given any notice of the purchase and no formal agreement relating to the purchase, notwithstanding what LM says in his witness statement. WLJ arranged to meet with Mr Smart in February 2013, but the meeting was postponed until 4 March 2013.

34. In the meantime, CBL signed a contract with SGN on 15 February 2013, said in a subsequent email to have become unconditional on 15 March 2013. The Judge regarded this 'onerous' agreement as providing support for the reliance by WLJ and LM on the Funding Representations. She accepted their assertions that, without those representations, 'it would have made no sense for CBL to execute the SGN agreement'. This point confirms that it is WLJ's and LM's case that the Funding Representations were made prior to the meeting on 4 March 2013, even if they also say they were repeated at that meeting.

35. The meeting on 4 March 2013 is central, because it is WLJ and LM's cases that it was at this meeting that the Guarantee Representations were made and the Funding Representations were repeated, having been made (on WLJ and LM's cases) multiple times in the months leading up to that meeting. WLJ says it took place in the boardroom of ECF's office in Chittering, Cambridgeshire. There was a discussion about progress on the project. WLJ says they explained they were waiting for funding which was

necessary if they were going to progress with the project. WLJ continues his account of the meeting as follows:

> 28. After a while, Matthew presented us with some papers to sign. I was disappointed to see that this was not documentation in relation to CBL's promised credit facility. Matthew explained, however, that whilst he did not have the necessary documentation at that moment a facility agreement would soon be forthcoming. He reassured us, however, that a first tranche of funds was being made available - namely £751,000 - and that this would soon be paid to CBL. He explained that the rest of the funds would then be available as and when required. Leon signed the first loan agreement. A copy of that loan agreement is at WLJ3/ 1.
>
> 29. Next, Matthew handed us an asset finance agreement in relation to the CHP that had already been delivered to the farm. Again, this was signed. I do not have a copy of that document.
>
> 30. Towards the end of the meeting, the discussion returned to the loan facility. Leon told Matthew that we had been expecting to sign the necessary facility agreement. Leon reminded Matthew that in accordance with the business plan a significant proportion of the available funds would be required in the first few months of the project in order to ensure prompt acquisition of specialist equipment that was built to order and that necessarily had long lead times. Matthew said that he understood the demands of project finance cash flow and promised to meet our requirements in full. He also agreed that it was important for the project that this facility was available soon. Leon particularly asked him whether CBL would be able to draw down sums of money as required, in accordance with the schedule that had been provided to Savills. He reassured us that it would.
>
> 31. I then specifically asked Matthew to confirm that the total amount available to CBL under the facility would amount to 70% of Savills's valuation, namely over £25 million. I remember saying words to the effect of: "*just to be clear, can we draw up to that amount as and when it is required*'. He said yes and we shook hands on this agreement.
>
> 32. I also asked him if the refinance of my HSBC loan would be available as soon as the final searches were complete. I think that the words with which I concluded this discussion were: "*Are we done on the searches on the Farm. Can I expect it to be refinanced imminently*". Again, he said yes.

36. In his evidence, LM refers to the meeting on 4th March 2013 as '*the completion meeting*'. LM says that no formal loan agreement was presented at this meeting, but Mr Smart said one would be forthcoming. LM's evidence continues:

> 30. At that meeting MS informed that us would [sic] only be receiving the sum of £751,000 (net) as a first tranche of money and the rest of the funds would be supplied to CBL when and as required. I informed MS that 70% of the project funds would be required in the first 2 months of the project to ensure a prompt issuing of orders for specialist equipment built to order, with long lead times.
>
> 31. MS said that he understood the demands of project finance cashflow and undertook to meet our requirements in full. It was mutually agreed that given the cost of ECF finance that a prompt execution was the only prudent and sustainable position for both funder and borrower.
>
> 32. These funds were lent on the basis of Savills valuation report on the business dated 19 September 2012. MS informed us that ECF would advance funds up to 70% of the Savills valuation, namely £26m. The arrangement seemed very informal and I was concerned about the lack of certainty in respect of how much would be paid and when but was reassured by MS that our drawdown schedule would form part of the formal loan agreement.
>
> 33. At the completion meeting, a rudimentary handwritten loan agreement was presented and used for the first drawdown amount. However, biogas loans are complex, large transactions. The usage of this type of document for high value loans for the building of a biogas plant is not valid or appropriate in the circumstances.

37. Following those quoted passages, LM then goes on to recount how the 'rudimentary paperwork' was completed for the loan and for the lease finance agreement for the CHP plant. At that point, he says, Mr Smart's assistant, Ms Scott came into the room and presented the personal guarantees for signature by LM and WLJ. Both say they were pressured to sign by Mr Smart and on the basis of the Guarantee Representations.

38. For the moment, I focus on the Funding Representations. Part of the case made by WLJ and LM is that these Funding Representations were made to them by Mr Smart on various occasions leading up to the 4 March 2013 meeting. Yet it must have been plain to both of them at that meeting that Mr Smart had not delivered the loan facility they say had been promised, on apparently numerous occasions. Even if the funding for the CHP plant is left on one side, this was the first occasion on which a loan was made direct to CBL to fund the project, yet they had plainly not been provided with a loan facility (whether of £26m or any other amount other than £751,000 net) from which they would be able to draw down the substantial funds required in the first two months of the project.

39. WLJ exhibits a handwritten letter which he says he sent the day after the meeting 'setting out the broader points that had emerged from the meeting'. This letter certainly supports that the Funding Representations were made at the meeting. The letter was described as 'curious' by Ms Hilliard QC (not least because all other communications

appear to have been by email), but for present purposes I must take that letter at face value.

40. Subsequent to the meeting, ECF registered a first charge and debenture over CBL's assets on 21 March 2013, and the payment of £751,000 was made to CBL on 22 March 2013. The refinancing of WLJ's HSBC loan was not forthcoming 'immediately'. Instead, it was not until HSBC appointed receivers to enforce its security against the farm in May 2013 that ECF provided WLJ with the personal loan to repay HSBC. CBL received second and third tranches of funds (each some £781,000 net) on 10 May 2013 and each, as I understand it, 'under another individual loan agreement'. As WLJ says 'This tided the company over for a while. But the board of CBL became increasingly concerned at the lack of any formal agreement and, of course, at the lack of cash flow which was vital to the success of the business.'

41. Because of that, LM wrote to ECF on 9 July 2013 setting out a detailed list of the drawdowns from the facility that would be required in order to complete the project. The email set out the required £5.236 million in six instalments from 1 August 2013 to 1 December 2013, plus a further £2.214 million for various lease agreements over the same period. WLJ says that by 1 December 2013, CBL had only received £5.4 million in total which was significantly less than the required funds to complete the project in a timely fashion. As WLJ says, 'the payments were made on an entirely ad hoc basis.'

42. It is not necessary for me to relate the detail of the further ad hoc funding which was made available during 2014 and most of 2015. The Judge said that '*The funding facility as sought by the Applicants on behalf of themselves and CBL was not actually put in place until October 2015'* but this is incorrect. In fact, the Loan Agreement dated 1 October 2015 (but signed on 21 October 2015) offered a loan facility of £6.4 million '*bringing the total facility sanctioned to £26,766,771.96 as at the date of this facility letter*.' In other words, at that date the total of all the individual loans together with the £6.4m loan facility added up to that £26m+ figure. After that, there were two further loans (each of £560,000 net) paid on 5 and 23 October 2015. In total, as Table A to WSA's skeleton argument summarised, a total of 30 loans were paid by ECF to CBL from 21 March 2013 to 23 October 2015.

43. The Judge set out her reasons as to why the affirmation and estoppel arguments did not remove the existence of 'substantial grounds' for disputing the debts in these paragraphs of her Judgment. I have underlined particular passages to which I draw attention later:

> 28. The evidence does demonstrate (see the minutes of the board meeting dated 26 June 2014) that CBL had approached other funders, but remained with ECF accepting separate ad hoc funding. Arguments relating to why CBL kept on using ECF despite the breaches of the funding representations are of course relevant, but these are not, in my judgment, matters which can or indeed should be resolved at the hearing before me. These are in my judgment precisely the sort of matters to be raised at a trial. It seems to me that the assertion that, by their conduct the Applicants are no longer entitled to rely upon the representations made, requires a consideration of the facts as well as assessment of the evidence itself, including cross examination. In the current

circumstances, this does not seem to be a matter which can be and should be determined by me at a hearing to set aside a statutory demand. There may well be cases where the evidence is so clear that the Court can conclude that there is no merit in the case because there is clear evidence that the Applicants have been deprived of their entitlement to rely upon the representations. In this case, the evidence of the Applicants is such that they considered they had no choice but to continue with ECF. Whether that assertion by them is correct or not depends upon an analysis of evidence which would be available at trial. In my judgment, based on the evidence, that is not a conclusion I can make. The difficulty in my judgment for the Respondent in seeking to rely upon actions which it submits could have been taken by CBL, like finding another funder, is that this raises precisely the types of arguments which lean towards the dispute being disputed on substantial grounds. Such arguments cannot be determined before me unless I am able to be satisfied that I can reject as inherently implausible the evidence of the Applicants. I am not prepared to do so on this aspect. Whether the Applicants could have located other funders, whether they considered they had no choice but to continue with ECF, these issues are really matters for a trial.

……

37. Ms Hilliard makes the submission that by their conduct the Applicants clearly affirmed the personal guarantees and also the terms of the lending as had been provided by ECF. In their evidence, the Applicants point out that by the time that they sought in late 2015 further funding and were presented with the further funding agreement (seeking to consolidate all the funding to date), they were 'in so deep at that point that we had no choice but to sign it and took assurance from Bob Boucher.' Mr Mekitarian asserts that Mr Boucher had assured him that the personal guarantees would not be relied upon. In his evidence, Mr Bamforth refers to a conversation which he had with Mr Boucher which contradicts this. As I have already pointed out, this is a dispute which is not suitable to be resolved by me at this hearing. There is a dispute as to what was said by Mr Boucher which is not for me to resolve. As I have already dealt with above, the funding agreement entered into in October 2015 did not refer to the personal guarantees. It referred to corporate guarantees. Accordingly, in my judgment the agreement entered into by the Applicants and CBL in October 2015 is not a clear affirmation by them of the validity of the guarantees. I am not satisfied, contrary to Ms Hilliard's submissions that the Applicants lost their entitlement to rely upon the representations by reason of the execution of this later agreement.

> 38. Ms Hilliard's submissions relating to affirmation and the Applicants' conduct being such that they have lost their entitlement to rely upon the representations relies on more than the funding agreement signed in October 2015. She submits that if the Applicants were unhappy with the terms of the funding provided by ECF and the delays, they could have gone elsewhere. She submits that once the Applicants were aware that the representations made by Mr Smart were not true, they could have gone elsewhere in relation to future funding. They did not. Ms Hilliard referred me to a passage in Andrews and Millet, The Law of Guarantees, 7th Edition, paragraph 5 – 045, which states that the right to have a transaction set aside may be lost by express affirmation or by delay amounting to proof of acquiescence. The difficulty, in my judgment, is that this point of Ms Hilliard's is precisely the point which would be made at trial. It requires a court to consider the evidence in support of the loss of entitlement of the right to rescind as well as the evidence which seeks to rebut that loss. It is a fact sensitive exercise which the short passage quoted to me from Andrews and Millett also indicates has a discretionary element. The Applicants aver that they effectively had no choice but to continue with the funding from ECF. In 2015, when they signed the funding agreement, the evidence from them is that they had no choice by that stage. The evidence before me is not that the Applicants were aware that ECF did not have the funds to meet and comply with the funding representations until, it appears, January 2014. There is no evidence that alternative funding would have been available to CBL at that time. By then, with the delays which had occurred by reason of the funding shortages, it would have been in my judgment a considerably less attractive funding option for a lender, than back in 2012.
>
> 39. I am not prepared to conclude, by rejecting the evidence of the Applicants as incredible or implausible, that there was express affirmation or delay amounting to proof of acquiescence. These issues require consideration of the facts and the decisions made by the Applicants at different stages of the relationship as between them and ECF. In my judgment, the evidence before me does not lead to the conclusion that I can be satisfied that the debt is not disputed on grounds which are substantial because I am satisfied that the Applicants are no longer entitled to raise the defence to the claim.

**WSA's arguments on this Appeal on affirmation**

44. Regarding affirmation and relying on *Chitty on Contract* (33rd Edition), 7-133 to 7-135, and *The Law of Guarantees,* Andrews & Millett, (7th Edition), 5-045, WSA submitted the following principles were well established:

    i) If a misrepresentation is made to a representee giving him a right to rescind a contract; and

ii) After the representation is made, the representee discovers that the representation was not true; and

iii) After the discovery, the representee declares his intention to continue with the contract or does some act inconsistent with an intention to rescind the contract; then

iv) He is bound by the contract.

45. I was also referred to *Peyman v Lanjani* [1985] Ch 457, C.A. My consideration of that judgment indicates the principles relied upon by WSA are fine so far as they go, but are not a complete statement of the law. In that case the Court of Appeal had to identify the requirements for affirmation and whether they differed from those required to establish estoppel by conduct.

46. On affirmation, the critical point was stated by Slade LJ thus, at p500G:

> With Stephenson and May LJJ., I do not think that a person (such as the plaintiff in the present case) can be held to have made the irrevocable choice between rescission and affirmation which election involves unless he had knowledge of his legal right to choose and actually chose with that knowledge.

47. This is a point which can be pithily expressed as 'a party cannot waive a right without knowledge of that right'.

48. Slade LJ continued (at p500H to 501C):

> 'I would like to make a few observations as to the practical consequences of this court's decision on this point, as I see them. If A wishes to allege that B, having had a right of rescission has elected to affirm a contract, he should in his pleadings, so it seems to me, expressly allege B's knowledge of the relevant right to rescind, since such knowledge will be an essential fact upon which he relies. The court may, and no doubt often will, be asked to order A to give further and better particulars of the allegation: (see Rules of the Supreme Court O.18 r.12(4) ). In many cases the best particulars that A will be able to give will be to invite the court to infer knowledge from all the circumstances. However strong that prima facie inference may be, it will still be open to the court at the trial, after hearing evidence as to B's true state of mind, to hold on the balance of probabilities that he did not in fact have the requisite knowledge. In the latter event A's plea that B has elected will fail. Yet it should not be thought that injustice to A will necessarily follow. For if A has acted to his detriment in reliance of an *apparent* election by B, he will in most cases be able to plead and rely on an estoppel by conduct, in the alternative. If, on the other hand, A has *not* acted to his detriment in reliance on any such apparent election, justice would not seem to preclude B from sheltering behind his ignorance of his legal rights. These brief observations may

> perhaps serve to highlight the distinction between election and estoppel.' (emphasis in the original)

49. This passage not only explains the distinction between affirmation and estoppel (i.e. estoppel requires the addition of detrimental reliance by A, even if B did not make a properly informed election), it also highlights an important point about how an issue of affirmation should be identified.

50. I will also cite here the next two paragraphs from the judgment of Slade LJ at p501D-G:

> Since Mr. Peyman had no knowledge of his legal right to rescind the restaurant agreement, until he consulted new solicitors, his conduct in entering into possession of the restaurant and paying £10,000 to Mr. Lanjani, for this reason if no other, cannot in my opinion have amounted to an *election* to affirm the contract; the only remaining question can be whether Mr. Peyman by that conduct has estopped himself from relying on his right to rescind.
>
> However, even if I am wrong in thinking that knowledge of the relevant legal right is a pre-condition to an effective election, the result on the facts of the present case, is, in my opinion, still the same for these reasons. Whatever knowledge may be requisite, the passages which I have cited above from the judgments in Clough's case, Scarf v. Jardine and the China Trade Corporation case [refs omitted], in my opinion make it quite clear that a person who has the right to rescind a contract cannot be treated as having elected to affirm it unless and until he has done an unequivocal act, or made an unequivocal statement, which demonstrates to the other party to the contract that he still intends to proceed with it, notwithstanding the relevant breach. An unequivocal act or unequivocal statement on the part of Mr. Peyman is no less necessary if Mr. Lanjani is to rely on an estoppel by conduct.

51. As for the passage from Andrews and Millett referred to by the Judge (at the start of 5-045), which I need not set out, it is clear that there is no discretionary element involved. When considering affirmation (or delay amounting to proof of acquiescence – which was not argued here), the Court has to make a judgment. The word 'may' in that context simply means affirmation may or may not be established.

52. Turning to the facts, WSA's case is essentially simple and runs as follows:

i) Combining the third and fourth funding representations, it is WLJ's and LM's case that Mr Smart on behalf of ECF promised to make available £26m of project funds (being 70% of Savills' valuation) as and when CBL needed it and it was this promise which induced their execution of the Guarantee;

ii) If that promise was made, both WLJ and LM knew it was untrue at April/May 2013 or December 2013 or January 2014. One might also add WLJ and LM

knew the promise was untrue at the date of the meeting on 4 March 2013, since it is WLJ and LM's case that the promise was made on occasions leading up to that meeting, it was at that meeting they were expecting to receive the promised funding arrangement and they received nothing of the sort.

iii) Despite knowing the promise was not true, WLJ and LM did not rescind the Guarantee but in fact acted in a manner which was entirely inconsistent with any intention to rescind the Guarantee because they continued to accept the individual loans made to CBL long after they knew that funding was not going to be made available to CBL as promised.

iv) In this regard, WSA point to:

a) the 26 individual loans made to CBL after May 2013 at different times down to 23 October 2015, totalling £19,182,574 (excluding interest);

b) the 19 individual loans made to CBL after December 2013 down to 23 October 2015, totalling £14,963,466 (excluding interest);

v) Contrary to §38 of the Judgment, a trial is not required to determine whether WLJ and LM affirmed the Guarantee.

vi) WSA submit that WLJ's and LM's own evidence demonstrates, beyond argument, that they affirmed the Guarantee after they knew the truth by continuing to accept loans on terms which were contrary to what was promised.

vii) WSA points to this passage in LM 1st witness statement at [43], endorsed by WLJ in his 2nd witness statement at [4] (I will call this the 'little choice' evidence):

> 'As we had already drawn down the first funds and had made project commitments on the strength of our loan facility, we resolved that we had little choice but to proceed and revisit this with ECF once the formal loan agreement was presented for signature.'

viii) WSA then submits that WLJ and LM did have a choice which was to rescind the Guarantee for misrepresentation. It then submits that no trial is necessary to investigate these facts which are clear and undisputed and rely entirely on the evidence of WLJ and LM.

53. These submissions gloss over a critical issue as regards affirmation, however. They also elide the choice to which LM refers at his [43] with the choice referred to by WSA in the next step of their submissions. They are not the same choice or, rather, it would be unsafe to assume they were the same choice. The choice referred to by WSA *assumes* that WLJ and LM knew they had the right either to affirm or rescind the Guarantee, but the evidence as to this is virtually non-existent.

54. The highest that WSA could put the point is that '*WLJ and LM do not suggest or claim that they did not know of their right to rescind the Guarantee for misrepresentation'*. This submission highlights the importance of the second point made by Slade LJ in the

passage I quoted from p501 in paragraph 48 above. The process of Statutory Demand served by WSA and WLJ's and LM's application to set aside involves no pleading of WSA's case on affirmation (or estoppel). WSA has not been required to plead WLJ's and LM's knowledge of their right to rescind. Furthermore, the point was not raised in any way in the evidence of Mr Bamforth, precisely because of his complete lack of involvement in the relevant events. Accordingly, WLJ and LM were not called upon, either in their evidence in chief or in reply, to address the point as to their knowledge of their right to rescind.

55. There are other circumstances which existed at the time to consider. First, WLJ and LM were surprised by the level of interest being charged by ECF. This was apparent from the very first individual loan of £751,000 net. Second, it is clear that CBL, WLJ and LM had legal advice over this period. Third, it is clear that the board of CBL considered whether alternative sources of funding might be available: in other words they considered whether they should switch horses. However, as the Judge said 'There is no evidence that alternative funding would have been available to CBL at the time'. Although I make no finding in this regard, I will proceed on the assumption that there were no alternative sources of funding available to CBL, because it is an assumption favourable to WLJ and LM.

56. Although, as it seems to me, the affirmation case made by WSA has force and may ultimately succeed, it is an issue which can only be resolved at a trial. However, the Judge twice seemed to indicate that the affirmation case could only succeed if she rejected WLJ and LM's evidence as incredible or implausible. However, WSA's argument on affirmation did not require this at all, and the reason I have concluded the affirmation issue can only be decided at trial is on the basis of an *absence* of evidence from WLJ and LM, for which they cannot be criticised on an application of this type.

**WSA's arguments on estoppel**

57. WSA bases its case on *Ormes v. Beadel* (1860) 45 ER 649 at [651], and this passage in the judgment of the Lord Chancellor (reversing the Court of appeal):

> "No case can be found to establish the doctrine, that if a voidable contract is voluntarily acted upon, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may still avoid it when, after abiding the event, it has turned out to his disadvantage."

58. WSA submits that is exactly the position in this case. WLJ and LM knew that the Funding Representations were untrue but did not rescind the Guarantee because it suited them to do nothing as long as ECF continued to finance CBL, albeit not on the terms that they had been promised.

59. This short passage from *Ormes v. Beadel* is recognisable as embodying the principle that a party may not both approbate (in this case, proceeding to take loans, on the basis of the Guarantee) and reprobate (once matters have turned out to their disadvantage, seeking to rescind the Guarantee). Although this is a powerful principle, it was not argued as such but only in support of the estoppel argument.

60. WSA also relies on *Peyman v Lanjani* again, citing Slade LJ at p501A-G (set out above) and this passage from the judgment of May LJ, starting at p495G, where he cited with approval from the judgment of the Supreme Court of Victoria in *Coastal Estates*:

> Nevertheless, even though in a particular case, such indeed as the present one, a party may not have had such a sufficient knowledge of his legal rights to bring into operation the doctrine of election, in this field there is understandably considerable scope for the creation of an estoppel. In this connection I respectfully adopt and agree with the following passage from the judgment of Sholl J. in *Coastal Estates Pty. Ltd v. Melevende* [1965] VR 433, 443
>
> > "If the defrauded party does not know that he has a legal right to rescind, he is not bound by acts which on the face of them are referable only to an intention to affirm the contract, unless those acts are 'adverse to' the opposite party, ie unless they involve something to the other party's prejudice or detriment, as e.g, if the defrauded party goes into possession of property sold to him by the contract, or accepts some other benefit thereunder. This is a form of estoppel, for the other party has in such a case acted to his prejudice upon a representation, made by the defrauded party's conduct that the latter is going on with the contract. The law does not require the representor in such a case to inquire of the representee whether he knows his legal rights."

61. In *Peyman v Lanjani*, although the Court of Appeal did not have to decide the point, May LJ was nonetheless clear that on the facts (at p496E) '*the plaintiff was in no way estopped from rescinding his contract with the first defendant as he sought to do when he was first properly advised*.' Slade LJ dealt with the point in more detail but was clear that the plaintiff's actions could not have led the first defendant and his legal advisers reasonably to infer that he did not intend to object to the particular defect in title that had arisen in that case (due to an impersonation of D1 by another Iranian, M), his formulation illustrating the objective nature of the assessment.

62. WSA submits that, even if WLJ and LM did not know of their right to rescind the Guarantee for misrepresentation, they are estopped from denying that they affirmed because, as a consequence of not rescinding ECF acted to its detriment by continuing to advance funds to CBL for many months without any indication from WLJ or LM that they would challenge the Guarantee when it was called upon.

63. I think this formulation is a little confused. The estoppel, if there be one, acts against WLJ and LM asserting their right to rescind the Guarantee for misrepresentation, even if the end result is the same. Nonetheless, on this part of the case, WSA asserts an estoppel by conduct.

64. In order to found any estoppel the representation must be clear and unequivocal. In this case, the representation relied upon is by conduct. The conduct in question is the fact that WLJ and LM directed CBL to continue to accept numerous individual loans, the £6.4m loan facility finally conferred in October 2015 and then the final two individual

loans of £560,000 net on 5th and 23rd October 2015, after WLJ and LM knew the relevant Funding Representations were not true.

65. So, on this hypothesis, the Guarantee was voidable by WLJ and LM. After the 4 March 2013 meeting, both of them continued to chase MS for the promised funding facility (which was not forthcoming) but instead they accepted a series of individual loans. No doubt they did so, hoping everything would turn out to their advantage i.e. the plant would be built, commissioned and would start to generate profits to pay off the loans. Unfortunately that did not materialise and it has turned out to their disadvantage.

66. The conduct in question is clear, but what would this conduct have conveyed to ECF, viewed objectively.

67. For WSA's asserted estoppel to be established, the representation conveyed by this conduct must be that WLJ and LM were proceeding with the contract – the contract in this instance being the Guarantee. I entirely accept that this scenario is more complicated than that under consideration in *Peyman v Lanjani*, in that the loan facility/loans were made to CBL and the Guarantee was given by WLJ and LM as directors and shareholders of CBL, but that difference does not seem to be material.

68. I refer to LM's 'little choice' evidence. I have considered whether this evidence represents an after the fact rationalisation of the position at the time, but it is not expressed as such and I consider I must take it at face value i.e. as a statement of what LM (and WLJ) thought at the time. So WLJ and LM understood they had a choice, whether to abandon taking any further loan(s) from ECF and seek the necessary funding elsewhere, or to continue with ECF even though they were not getting the funding which they had been promised. Undoubtedly this was not an easy choice to make and in fact, LM says they felt they had no choice but to continue with ECF. This was no doubt because of a combination of factors including (a) the lack of available funding elsewhere for this project; (b) the fact that, to a degree, they were already tied into ECF through (i) the CHP financing; (ii) the loan made to WLJ to allow him to pay off the HSBC loan and (iii) at least the first individual loan made to CBL on 4 March 2013. I say 'at least', because as time passed after 4 March 2013 with only further individual loans being made by ECF to CBL, the choice became even more difficult.

69. In this regard, it is clear that WLJ and LM were in possession of all the relevant facts, even if, on the assumption I have made above, they may not have had a precise understanding of their legal rights.

70. On these facts, there was clear detriment. ECF continued to advance very significant loans to CBL presumably on the basis that the Guarantee was in place.

71. However, the element which has caused me the most pause is the requirement for a clear and unequivocal representation. On this aspect of the case I have changed my mind in the course of preparation of this judgment. It can be argued that WLJ and LM's conduct conveyed a clear objective representation that they were proceeding with the Guarantee. On the other hand, it can also be argued that their conduct might have said nothing about the Guarantee, because it depends what knowledge ECF had (via MS) at the time.

72. Perhaps not surprisingly, due to the nature of the application to set aside and this appeal, the submissions I received did not explore this aspect of the case. WSA simply said there was a clear estoppel and WLJ and LM took the understandable position of supporting the decision of the Judge for the reasons she gave.

73. On this aspect of the case, I have been assisted by consideration of *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions* [2002] EWCA Civ 1253 (Tuckey and Carnwarth LJJ) and *IHC v Amtrust Europe Ltd* [2015] EWHC 257, a decision of HHJ Richard Seymour QC sitting as a Judge of the High Court, in which he applied *HIH*. In *HIH* the courts had to deal with the unusual situation where neither the (re-)insurer nor the (re-)insured were aware (until later) that insurance cover had (or even might have) been discharged as a result of breach of warranty (in that case, due to the number of films made). HIH asserted a waiver by estoppel on the part of Axa which meant that HIH had to show (at least) (a) a clear and unequivocal representation by Axa that it would not insist on its right to treat the reinsurance cover as discharged because of the reduction in the number of films which were made; and (b) such reliance by HIH on this representation as to make it inequitable for Axa to go back on it. The Court of Appeal upheld the decision of the judge at first instance (Jules Sher QC) on the basis he was right to conclude that Axa did not make a clear and unequivocal representation of the kind required to found the waiver alleged.

74. There were two interrelated points: the first was what knowledge was required and the second was the effect of Axa's conduct.

75. On the first point, Tuckey LJ (with whom Carnwarth LJ agreed) said this:

> '21. There is no dispute between the parties about the relevance of knowledge to waiver by estoppel and there was apparently no such dispute before the judge. Mr Hamblen Q.C. for Axa does not and did not submit that the representor has to have knowledge of the legal right upon which he will not insist. This is clear from the passages in *The Kanchenjunga* and *Superhulls* cited by the judge. Mr Hamblen submits however that the representation must carry with it some apparent awareness of the right upon which the representor will not insist. Mr Flaux did not dispute this and I do not think he could have done so because otherwise the representation would lack the necessary character to found the estoppel. As the judge put it "the essence of the plea must go to the willingness of the representor to forego its rights". Unless the representation carries with it some apparent awareness of rights it goes nowhere: the representee will not understand the representation to mean that the representor is not going to insist upon his rights because he has said or done nothing to suggest that he has any.
>
> 22. What I have said illustrates the difficulty in establishing this type of estoppel when neither party is aware of the right which is to be foregone. A representor who is unaware that he has rights is unlikely to make a representation which carries with it some apparent awareness that he has rights. Conversely a representee who is not aware that the representor has a particular

> right is unlikely to understand the representation to mean that the representor is not going to insist on that right or abandon any rights he might have unless he expressly says so.'

76. Tuckey LJ dealt with the second point a couple of paragraphs later:

> '25 Following the passage from *Superhulls* which I have quoted, Mr Flaux developed his case on representation by saying that Axa had adopted a course of conduct which was inconsistent with its right to treat the cover as discharged in circumstances which suggested that it was content to abandon any rights which it might enjoy as a result of the reduction in the number of films.
>
> 26 I cannot accept this argument. Axa's conduct is best characterised as silence or inactivity, not in the face of a claim but in the context of a continuing contractual relationship where on the information before us it is not possible to say precisely when the breaches of warranty actually occurred. As Chitty (para. 3 – 087) says:
>
> > Although a promise or representation may be made by conduct, mere inactivity will not normally suffice for the present purpose since "it is difficult to imagine how silence and inaction can be anything but equivocal". Unless the law took this view mere failure to assert a contractual right could lead to its loss; and the courts have on a number of occasions rejected this clearly undesirable conclusion.
>
> The only exception to this rule is where the law imposes a duty to speak or act, but no such duty is alleged here.'

77. I found this reasoning helpful because in this case I cannot make any assumption that WLJ and LM were aware of their right to rescind the Guarantee. Furthermore, their conduct can be characterised as mere silence or inactivity on the issue of the Guarantee. There is no positive evidence that they turned their minds to the issue of the Guarantee. Equally, as I pointed out above, it is difficult to be certain about what WLJ and LM's conduct in accepting the individual loans conveyed on an objective basis to ECF, in view of the lack of any evidence of the knowledge of MS.

78. I have come to the conclusion that I cannot find that the representation which WSA's case requires was made either clearly or unequivocally. I reach that conclusion somewhat reluctantly because of the force of the point I made above on approbation and reprobation. Whether that point has force will have to be assessed at trial in the light of all the evidence which may show the Funding Representations were not relied upon or not operative and/or that WLJ and LM affirmed. On the other hand, it may turn out that some of the other circumstances to which I adverted above, including the lack of any real choice open to WLJ and LM (cf 'voluntarily' in *Ormes v Beadel*), may have an impact on the analysis. All those points remain open for decision at trial.

79. Therefore, I entirely agree with the Judge that the assessments are fact sensitive. The undisputed facts here are not enough to get WSA home.

80. There were suggestions in WSA's submissions (perhaps implicit) that the Judge should have given more detailed reasons for her rejection of the affirmation and estoppel arguments. Such criticisms might have had more force if WSA had run fewer points. The Judge had a large number of issues to deal with. I have had the benefit of being able to concentrate on just two of the issues she had to deal with. For the reasons I have set out above, WSA's substantive appeal must be dismissed. WLJ and LM have established 'substantial grounds'.

**WSA's further arguments**

81. Around the end of July 2021, I distributed a draft judgment containing the reasoning essentially as set out above and I received the usual editorial corrections from the parties. In addition, WSA argued that my analysis was incomplete and that its affirmation argument extended to the circumstances in which the October 2015 Loan Agreement was executed. So I now turn to consider this part of WSA's Affirmation argument.

82. The October 2015 Loan Agreement was preceded by an important document – the Crouchland Biogas Ltd Updated Business Plan dated September 2015 – a copy of which was exhibited by WLJ to his first witness statement. The Business Plan is important in substantially setting the scene against which the Loan Agreement was executed. I should also mention that by this time, MS had departed from ECF under something of a cloud. WLJ learnt of this in November 2014. A new team had taken over at ECF – a David Head (previously with Barclays) and a Bob Boucher (previously with AIB). WLJ says they came to the farm and asked for information on the loans provided by ECF to CBL because 'they had no information whatsoever in their files.'

83. I record that WLJ exhibits this Business Plan as a paper prepared by LM in July 2016 'justifying capital investment. Although Bob [Boucher] confirmed after the meeting that had been agreed, this funding never materialised [ref to the Business Plan in his exhibit]'. However, the Business Plan records the additional funds being requested as totalling £6.4m (comprising capex of £5.2m and working capital of £1.2m). This is exactly the total granted in the October 2015 Loan Agreement (see below). There are numerous other indications that WLJ is wrong in placing this document in July 2016.

84. For present purposes it is important to note that the Business Plan starts, after an Executive Summary, with the heading 'Loan Funding History'. The text commences as follows:

> Having taken a first charge over the assets of the Company and personal guarantees from the two key Directors, ECF have advanced funds in various forms of asset finance and secured loans since May 2013 to date. There was a significant delay in the drawdown of required funds to complete the project during the period November 2014 to January 2015, and, as result, the completion of the installed plant and equipment took considerably longer, requiring more working capital to be used to cover start-up and construction losses. (my emphasis)

85. So, as WSA submits, this seems to be a clear acknowledgement that WLJ and LM did provide personal and enforceable guarantees to secure the funding provided by ECF to

CBL. If the personal guarantees were not enforceable, they would not have been referred to in this way. Furthermore, since WLJ had this document (of the documents he and LM had retained) to exhibit, I consider I must infer that WLJ and LM were well aware of this document at the time and it is highly likely that LM prepared it. If they had not seen it at the time, that is a fact which WLJ would have mentioned when exhibiting this document.

86. The October 2015 Loan Agreement (between ECF and CBL) bears a date of 1st October 2015 but was signed on the 15th and 21st October 2015. It grants a loan facility of £6.4m 'bringing the total facility sanctioned to £26,766,711.96 as at the date of this facility letter.' Clause 7.1 defines the security 'for the Loan and any other money owing… to the Lender by the Borrower' as detailed in Schedule 3. Schedule 3 lists, amongst other things, a debenture over the assets of CBL, a first legal charge of a new twenty-five year lease over land which is not identified, and then 'Corporate Guarantee'. WSA submits this is an obvious mistake since there was no corporate guarantee in existence (and the debenture over CBL's assets was referred to separately). So WSA says this referred to the personal guarantees given by WLJ and LM and is a (further) acknowledgement that the guarantees were regarded by them as binding security. If this had been as far as matters went, I would have been inclined to accept WSA's submission. However, the evidence went further.

87. Although LM does not address the wording in Schedule 3 directly in his evidence, LM refers to 'a detailed discussion' he had with Bob Boucher regarding this Loan Agreement 'and we discussed the matter of the historic personal guarantees signed with [MS] and I was told that ECF had no such agreements on file and that a personal guarantee for this amount would be totally inappropriate for a Director to sign in any event and that this new agreement superseded all that went before.' LM continued: 'The board [of CBL] noted that this new loan agreement did not require a condition for personal guarantees and understood from its wording that the past was consolidated and closed off. And therein any historic personal guarantees invalided [sic] with it.'

88. In his witness statement, WLJ relies on what he was told by LM. However, WLJ's account goes somewhat further. He says 'Bob explained that the list of security in Schedule 3 …did not include any personal guarantees. Leon queried what was meant by the reference to a corporate guarantee. Bob explained that this was not intended to refer to a personal guarantee but to CBL's warranty.'

89. Both WLJ and LM say that they only agreed to the Loan Agreement being signed by LM on the basis of these assurances from Bob Boucher.

90. In his evidence in answer, Mr Bamforth addresses the evidence of LM and WLJ on this point. He says he has had the opportunity of speaking with Bob Boucher (who he describes as a consultant with over 30 years of experience in the banking and financial service sector) who told him that 'he did not have any conversations about the Guarantee or the issue of personal guarantees.' Mr Bamforth also says that as a consultant, Mr Boucher did not have authority to approve lending or determine any terms of lending. Mr Bamforth also addresses the complexity point and says 'in his experience' the loan agreement was not particularly complex and given the value of the facility, it was one for which a lender would require personal guarantees in an effort to obtain as much security as possible from the borrower.

91. WSA also points to what occurred when an earlier statutory demand was served on LM. In his witness statement served in opposition to that demand, LM refers to the new facility in October 2105 but makes no reference to any meeting with Bob Boucher or any discussion about the Guarantee. WSA points out, correctly, that this is a notable omission. This point can only carry very limited weight because the Statutory Demand in question was served on the 19th December 2017 and in his witness statement in response, LM explains he was away from 18th December and only saw the demand on the 2nd January. His witness statement is dated 8 January 2018 and is short. He attempted to deal with the whole history in about 4 pages, and he clearly wanted the opportunity to address matters at further length. In the event, that was not necessary as PPF withdrew the demand, not least because on 29th December 2017, PPF assigned the debt owed by CBL to ECF to WSA.

92. There is a plain dispute of fact over the conversation which LM says he had with Bob Boucher. LM's evidence is clear, Bob Boucher's reported rejection is equally clear and they cannot be reconciled – one of these accounts is false. WSA submits that the evidence from LM on this point (which WLJ essentially repeats but also embellishes) is implausible and should be rejected. I recognise that the Judge rejected WLJ's and LM's case on the Guarantee Representations as providing them with substantial grounds, essentially, as I understand it, on the basis that their account concerning those representations was implausible. The curiosity is that the evidence suggests that MS was rather cavalier in his dealings (overpromising and under-delivering) whereas the new team at ECF (including Bob Boucher) introduced a new rigour to the business. This suggests that Bob Boucher was less likely to have had the conversation which LM says occurred. However, I am conscious that this analysis is well into mini-trial territory. I am also conscious that this incident can be characterised as or verging on another 'solemn farce' (cf Henderson LJ, as quoted above). The conversation related by LM may turn out to be fictitious (and embellished by WLJ), but the evidence from them is detailed and specific. Stepping back and looking at the whole history of the events in question I am also conscious that, in their evidence, WLJ and LM produced a series of explanations to address, in one way or another, each of WSA's affirmation and estoppel arguments. However, I am unable to determine whether their explanations represent the truth or whether they are the result of careful construction of a case to set aside these Statutory Demands.

93. I incline to the view that LM's account of his exchange with Mr Bob Boucher lacks plausibility, but I do not feel able on this appeal to reject LM's evidence as implausible. WSA's invitation to reject his evidence as implausible is a more palatable way of suggesting that LM is lying. I do not consider that such a finding can be made without a more detailed examination at a trial including cross-examination.

94. As a separate matter, WSA also point to a draft Settlement Agreement between PPF and WLJ and LM in September 2017, the draft being signed by LM but not by WLJ or on behalf of PPF. WSA submits that in the draft Settlement Agreement WLJ and LM acknowledged and affirmed the validity of the Guarantee. WSA argues that since LM deployed the draft Settlement Agreement in evidence (and WLJ relied on LM's evidence) they waived privilege in the draft. WSA also argues that the Court is entitled to infer that during the negotiations to settle neither WLJ nor LM had made any allegation of misrepresentation.

95. The Judge dealt with this briefly in [44] of her judgment, saying that WSA was not entitled to rely on documents created for the purpose of a settlement which did not materialise. WSA attacks this reasoning on the basis the Judge overlooked the waiver which was impliedly accepted by WSA. In my view, however, even if I assume that privilege was waived, the fact that, in the draft Settlement Agreement, WLJ and LM acknowledged the Guarantee indicates only that they recognised they faced a potential liability. To attempt to assess their assessment of the strength of that potential liability by reference to the detailed terms of the draft Settlement Agreement is not a task the Court should undertake and certainly not on an appeal from an application of this nature. So the draft Settlement Agreement does not, in my view, assist WSA's affirmation argument at all.

96. Accordingly, WSA's further arguments do not alter the conclusion that WLJ and LM have established substantial grounds. Indeed they reinforce it.

**WSA's costs appeal**

97. Even if WSA's main appeal is rejected, it still says the Judge went wrong in her order as to costs, in two respects. Since WLJ and LM succeeded in setting aside the Statutory Demands, they were awarded their costs, and there is no separate appeal against that. On the first costs point, WSA say the Judge misdirected herself when she ordered that WLJ and LM's costs should be assessed on the indemnity basis from 1 August 2019 up to and including the main hearing on 15-16 July 2020 but not including the hearing on 10 September 2020.

98. In her judgment on costs, the Judge cited [10] from the judgment of Lindsay J. in *Kirkman-Moeller* [2005] EWHC 381 (Ch), which reads as follows:

> There are a number of issues as to costs, and the first is whether liability in costs on the alleged creditors' part should be on the standard basis or the indemnity basis. Mr. Toms draws my attention to *Excelsior Commercial v. Industrial Holdings* in the Court of Appeal [2002] EWCA Civ 879 para.39, which poses the test: Are the circumstances such as to take the case out of the norm? If the case is within the norm, then in the ordinary way the standard basis would be appropriate. If the case is out of the norm, then it may be that the indemnity basis would be the proper one. Here we are in a particular area where it is especially familiar to parties that to go ahead with prospective bankruptcy proceedings to be launched without a judgment or without a truly clear debt is a risky matter. It is perhaps more emphasised in the context of company winding up petitions than it is in the similar (but not wholly similar) proceedings in bankruptcy, but the notion is a familiar one and, as I have mentioned, Mr. Registrar Nicholls warned of that risk, quite rightly, in June 2004.

99. Based on this passage, the Judge reasoned that '*This is a case, as identified by Lindsay J, where the prospective bankruptcy proceedings are launched without a judgment or without a truly clear debt, and that is a risky matter*.' But, as the Judge seemed to indicate, that point alone did not entitle WLJ and LM to an order for indemnity costs.

The additional factors which the Judge relied upon were (a) the fact that when Mr Bamforth's evidence was filed and considered, WSA was not able to challenge the representations 'beyond saying they did not happen' and (b) [WSA] 'elected to run the risk'.

100. WSA says, in effect, that the citation from *Kirkman-Moeller* was incomplete. Ms Hilliard drew [11] to my attention, where Lindsay J. reached his conclusion:

> I think the case is taken out of the norm because once it was the case that in Denmark the case against Mr. Adamsen was examined and failed, that being a case which, on the best information I have, was identical to that of the case against Mr. Kirkman-Moeller, it was a risky venture, to put it no higher, on the part of the alleged creditors to persist with or, in this case, to begin and persist with statutory demands and hence prospective bankruptcy proceedings in this country. I think the proper basis of costs here would be the indemnity basis.

101. It is true that the Judge adverted to this point. Just before citing [10], the Judge said this:

> 'As Miss Hilliard pointed out, the facts are different. In that case in Denmark, there had already been a determination of the issues, and so one can readily see how that was out of the norm. But the general principles turn up from paragraph 10…'

102. However, it seems to me that the principle to be extracted from *Kirkman-Moeller* is that if there has already been a determination of *the same issues* sought to be fought in the UK, that will take the case out of the norm. But that was not this case. In terms of general principles, in [10], Lindsay J. did nothing more than refer to the standard *Excelsior* 'out of the norm' test. When [10] and [11] are read together, it is clear that the 'risky venture' which Lindsay J. had in mind was to persist with statutory demands in this country in a case which was identical to that which had been examined in Denmark and which had failed.

103. So I do not read [10] as establishing the intermediate principle which the Judge seemed to extract, that launching prospective bankruptcy proceedings without a judgment or without a truly clear debt is necessarily sufficiently risky to warrant indemnity costs. In this context, electing to run the risk adds nothing, so although the Judge did say the risk was not of itself sufficient, she then seems to hold that it was. Furthermore, the Judge seems to have lost sight of the fact that WSA effectively succeeded on the Guarantee Representations but also that WSA's case (at least in relation to the events from 2012-2014) did not involve a challenge to the evidence given by WLJ and LM. I acknowledge that there was a direct conflict in the evidence about the October 2015 Loan Agreement and on that, WSA did invite the Judge to reject LM's evidence as implausible.

104. Overall, I am satisfied the Judge did proceed on the basis of a misdirection. Therefore I set aside the order for indemnity costs.

105. The second costs point taken by WSA is relatively minor in the overall scheme of the costs incurred on these applications. The Judge ordered that WSA pay LM £4,000 on account of the £7,000 costs he claimed. WSA submits that the order was wrong in law because she failed to take account of or apply PD46, para 3.4 which provides that where a litigant in person claims costs, he is limited to £19 per hour unless he can prove financial loss. At that rate, even £4,000 on account equates to over 5 weeks of 8 hour working days.

106. It does seem highly unlikely that LM would be able to justify his claim to either £7,000 costs in total or even £4,000 on account. It does seem that LM was relying on WLJ and his lawyers making most of the running. Accordingly, I feel I must set aside this aspect of the Judge's Order, even though LM represented himself with considerable skill at the hearing before me and I have no reason to doubt he did the same before the Judge. I will substitute an interim payment of £2,000 on account of LM's costs.

107. During the hearing I asked about the practice of awarding costs on applications of this nature and whether costs were ever reserved to the trial if the statutory demand was set aside. I had in mind whether there was an analogy to be drawn between for example, a situation where although an application for summary judgment failed, the Court nonetheless considered the defence was shadowy and reserved the costs of the application to trial. I understood that the practice is that the costs of an application to set aside are to be dealt with and are not reservable to trial. I understand the logic behind this: as I understand it, once the evidence in support of an application to set aside has been served, it is up to the entity which served the Statutory Demand to form a view as to whether it would be able to overcome that evidence. In that sense, the proceedings concern a narrow issue which the Court determines one way or the other.

108. I can illustrate the point which caused me pause with a hypothetical example. Assume that the only reason the Statutory Demand was set aside was on the basis of some evidence which was established at the later trial to be false. Why should the applicant recover his costs of his application to set aside the Statutory Demand when the set aside was only achieved on the basis of lies? On this basis, I wondered whether I had power to reserve some or all of the costs of these proceedings to the trial of the proceedings which I understand will inevitably be brought if these Statutory Demands are set aside. However, WSA's appeal on costs (if its Main Appeal failed) was limited to challenging the award of indemnity costs and the point on LM's costs as a litigant in person. So I simply say that WLJ and LM's costs of the proceedings at first instance are to be assessed if not agreed on the standard basis, and LM's interim payment on account of costs is reduced to £2,000.

109. In the result, I have reached the same conclusion as the Judge on the Main Appeals, albeit by a slightly different route. I dismiss WSA's Main Appeals. I allow WSA's appeals on costs to the extent indicated above.

110. In the light of this judgment (and I apologise to the parties for my delay in delivering it) I invite the parties to agree an Order. If they cannot agree, I invite short written submissions on the points which remain in issue.