



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**Cause No.: FSD 88 of 2017 (RPJ)**

**IN THE MATTER OF THE COMPANIES LAW (AS REVISED)  
AND IN THE MATTER OF MIDLAND ACRES LIMITED (IN OFFICIAL LIQUIDATION)**

**IN CHAMBERS**

**Appearances:** Mr. Ben Tonner QC and Ms Sally Bowler of McGrath Tonner on behalf of the Appellants  
Mr. Alex Potts QC, Mr Erik Bodden and Mr Jordan McErlean of Conyers Dill and Pearman LLP on behalf of the Joint Official Liquidators

**Before:** The Hon. Justice Parker

**Heard:** 1 December 2021

**Draft Judgment Circulated:** 10 January 2022

**Judgment Delivered:** 19 January 2022

**HEADNOTE**

*Appeals against rejection of proofs of debt by JOLs-burden and standard of proof-approach to evidence in absence of contemporary documentation-CWR 2018 O.16-de novo hearing-assignment and novation*

**Introduction**

1. By a summons dated 6 October 2021 Suresh Prasad (“Prasad”) and Antonio Rossano (“Rossano”) (together the Appellants) appeal the rejection of their proofs of debt by David Griffin and Andrew Morrison, the Joint Official Liquidators (“JOLs”) of Midland Acres Limited (“the Company”). Midland Mining Limited (“Midland Mining”) was joined as an



Appellant by consent in its capacity as assignee of the debts referred to in Prasad and Rossano's proofs of debt.<sup>1</sup> On 28 September 2020, Prasad and Rossano had submitted proofs of debt in the respective sums of US \$12,524,398 and US \$1,567,313.

2. Prasad and Rossano's case is that they loaned significant sums of their own money to Stratford Lakes & Gardens C.I. Ltd ("Stratford Lakes"), in order to fund its acquisition of the shares in the Company. They assert that the liability under those loans was later assigned to the Company. Prasad also alleges that he advanced significant sums of his own money to assist the Company with its ongoing expenses.
3. The JOLs are not satisfied that these advances ever took place, nor that the liability was transferred to the Company, and accordingly the JOLs oppose the application.

Ben Tonner QC appeared for the Appellants. Alex Potts QC appeared for the JOLs.

### **Relevant factual background**

#### 1998-2008

4. Much of the factual background is set out in the affidavits of Prasad 6, 7 and 8. At all material times, Prasad has been the director and shareholder of Winfair Ltd ("Winfair").<sup>2</sup> At all material times, Mr Ben Torchinsky who passed away in 2013, was a director of Brasco Limited ("Brasco") and Rabsco Inc ("Rabsco"). Both of these companies invested in other companies.
5. One of these companies, Stratford Lakes, was incorporated in the BVI on 30 January 1998. Prasad's evidence is that Stratford Lakes was a special purpose vehicle incorporated in order to acquire a shareholding in the Company, now in liquidation.<sup>3</sup> At all material times, Prasad was a director of Stratford Lakes and he later became a director of the Company.

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<sup>1</sup> See Suresh Prasad 8 dated 19 November 2021 at §40.

<sup>2</sup> Prasad 7 at § 8c

<sup>3</sup> Prasad 7 at §13



6. On 2 March 1998, soon after it was incorporated Rossano asserts that he paid the sum of US \$225,000 to Stratford Lakes by two cheques<sup>4</sup>. Prasad's evidence is that Rossano paid a further US \$25,000, but the appellants are unable to locate this third cheque.<sup>5</sup>
7. On or around this date, Eric Bosch also loaned the sum of US\$100,000 to Stratford Lakes. Prasad's evidence is that Winfair repaid this loan on behalf of Stratford Lakes on 28 June 2002 through transferring a property to Mr Bosch.<sup>6</sup>In that way Stratford Lakes took on the debt to Winfair and therefore to Prasad.
8. Prior to this date, Stratford Lakes contracted with two of the (then) shareholders of the Company to purchase their shares, agreeing to pay interest on the sums due at the rate of 11.25% per annum.<sup>7</sup>
9. At around the same time, Prasad made a number of payments to the (then) shareholders of the Company (the Woods family) on behalf of Stratford Lakes, as well as a number of payments to Stratford Lakes itself.<sup>8</sup> Prasad's case is that these payments were in relation both to the acquisition by Stratford Lakes of shares in the Company and in relation to the ongoing operational expenses of Stratford Lakes.<sup>9</sup>
10. Prasad's evidence is that all of the payments to, or on behalf of, Stratford Lakes by himself, Winfair, Rossano, and Mr Bosch were loans to Stratford Lakes by those respective persons, rather than as payment for equity in Stratford Lakes, and that it was agreed and understood that the sums loaned to Stratford Lakes would be repayable with interest at the rate of 12% per annum, compounding annually.
11. In May 2000, Stratford Lakes required further funding. A different funder became involved. It is common ground that Mr Torchinsky agreed for Brasco to advance sums to Stratford Lakes, with Brasco then acquiring a shareholding in Stratford Lakes. These advances were recorded in promissory notes and later in an assignment agreement. Mr Torchinsky was a more prudent commercial operator than the appellants and properly documented the loans he was making.

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<sup>4</sup> These cheques were in fact issued by South Haven Ltd

<sup>5</sup> Prasad 6 at 19 b i

<sup>6</sup> Prasad 8 at §21

<sup>7</sup> Prasad 7 at § 20

<sup>8</sup> Prasad 8 at § 30

<sup>9</sup> Prasad 7 at § 17



12. On 31 May 2000, Stratford Lakes completed its purchase of 50% of the shares in the Company. At all material times since then, Prasad has been a director of the Company, together with Mr Eric Bosch.
13. Some years later, in or around June 2007, Mr Torchinsky agreed that Brasco would loan further sums to Stratford Lakes in order for Stratford Lakes to purchase the remaining 50% of the shares in the Company.<sup>10</sup> This advance was also recorded in a promissory note. On 14 and 15 September 2007, Stratford Lakes purchased the remaining shares in the Company.<sup>11</sup>
14. Prasad's evidence is that in the latter half of 2008 there was a consensus amongst the shareholders of Stratford Lakes (which had become the effectively the holding vehicle for the Company) that the debts to Prasad, Rossano and Mr Torchinsky (including for contractual interest) ought to be transferred to the Company, given that it was the trading vehicle. Prasad's evidence is that this was done for reasons of simplicity and that an oral agreement was made between the relevant parties to this effect on or around 20 August 2008.<sup>12</sup>

### **Observations**

15. Pausing there in the narrative, the relevant details of this alleged oral agreement, which is said to amount to a novation are not set out. No particulars of the alleged conversation are provided. No consideration is detailed nor any explanation given as to why a subsidiary would assume the debt obligation of its parent. The operating company was according to Prasad prepared to assume the debt, but no commercial reasons are given. It was not formally documented, but is recorded in the financial statements of the Company at the time.
16. Another initial observation to make is that the financial statements, which are provided by way of excerpts, do not reflect the totality of documentation that should be available to a company having regard not only to common law and good practice, but the provisions of the Companies Act<sup>13</sup> to give a true and fair view.

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<sup>10</sup> Prasad 7 at §26

<sup>11</sup> Prasad 7 at § 27

<sup>12</sup> Prasad 6 at § 21

<sup>13</sup> Section 59 requires every company to keep proper books of accounts including, where applicable, material, underlying documentation, including contracts and invoices in respect of the assets and liabilities of the company.



17. It is unsatisfactory for Prasad to simply record in these documents that an unaudited balance sheet has been restated to include loans from directors and does not prove this is permissible or effective. Any interest accrued from any loans from directors would likewise require proof by way of underlying contracts and documents.
18. As I have said, Mr Torchinsky took a more prudent course by documenting the arrangements he made. By an assignment agreement dated 1 January 2009 between the Company, Stratford Lakes, Brasco, Rabsco, and Prasad, Brasco assigned the benefit of its loans to Rabsco and the Company agreed that it would assume the corresponding liabilities of Stratford Lakes (“the Assignment Agreement”).
19. Importantly, the Assignment Agreement contained representations by the Company, Stratford Lakes, and Prasad to the effect that the Company’s only “Private Borrowing” was from Brasco as at the date of the Assignment Agreement. The Assignment Agreement also records that interest is payable on the relevant loans at the rate of 12% per annum, compounding annually. The Assignment Agreement is not executed as a deed.

#### **Events after 1 January 2009**

20. Prasad’s case is that he and Winfair then made a number of further ad hoc advances to the Company to assist it in meeting its operational expenses, such advances being made on the same terms as the Company’s existing indebtedness to Prasad, Winfair, Rossano, and Brasco/Rabsco (that is, with interest payable at the rate of 12%, compounding annually).<sup>14</sup>
21. Some years later on 1 May 2017, Rabsco which was then controlled by the trustees of Mr Torchinsky’s trust<sup>15</sup>, petitioned for the compulsory winding up of the Company. The Company initially opposed the petition, with Prasad filing evidence on behalf of the Company in the apparent belief that the Company could be sold at a price which would pay off Mr Torchinsky’s debt and leave a surplus. In that evidence, Prasad admitted that the Company owed sums to Rabsco pursuant to the Assignment Agreement.<sup>16</sup>

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<sup>14</sup> Prasad 6 at § 14

<sup>15</sup> On 23 December 2013, Mr Torchinsky passed away

<sup>16</sup> Prasad 1 at § 29



22. Joint Provisional Liquidators were appointed over the Company by consent. In June 2020 Rabsco renewed its petition to wind up the Company and the JOLs were appointed on 7 September 2020.
23. On 28 September 2020, Prasad and Rossano submitted proofs of debt in the respective sums of US \$12,524,398 and US \$1,567,313. On the same date, there was a (purported) assignment of these debts by Prasad and Rossano to Midland Mining.
24. On 1 September 2021, the JOLs gave notice to Prasad and Rossano that each proof of debt was rejected. Following agreements to extend the time for doing so, Prasad and Rossano then issued the summons on 6 October 2021.
25. On 19 November 2021, there was a (further) assignment by Prasad and Winfair to Midland Mining of debts owing to them by the Company.<sup>17</sup> As stated above, Midland Mining has now been joined as an applicant for Prasad and Rossano by consent.
26. Directions were subsequently made by consent, and Prasad and Rossano filed Prasad 6 and Prasad 7 in support of the summons. The JOLs then filed Griffin 5 in response. Prasad and Rossano then filed Prasad 8 in reply.
27. After the hearing of this matter on 1 December 2021, further evidence was filed by the appellants: an affidavit of Paula Rossano dated 9 December 2021 and a second affidavit of Antonio Rossano dated 8 December 2021.

### **Appellants' case**

28. On behalf of the Appellants Mr Tonner QC submitted that they had discharged their burden of proof in demonstrating that, on the balance of probabilities:
  - a. Advances were made by Prasad, Rossano and Winfair as loans to Stratford Lakes, and later to the Company;
  - b. Contractual interest was payable in relation to those loans;

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<sup>17</sup> Prasad 8 at §38



- c. The liabilities of Stratford Lakes in relation to those loans was later assigned to the Company;
- d. The benefit under those loan agreements has now been assigned to Midland Mining.
29. As a consequence, the application should be allowed and the decision of the JOLs' to reject the proofs of debt should be reversed. He properly conceded that Prasad had not helped himself in terms of keeping records in the first instance or maintaining records, having first created them. He had however given evidence on oath, and was not being cross examined or accused of being dishonest. It is notable that the JOLs do not assert that the Appellants and Midland Mining are bringing a fictitious claim and have not applied to cross examine Prasad. In fact Mr Potts QC only went as far as suggesting Prasad was guilty of 'wishful thinking'.
30. There is a clear logic to the case and the narrative supports how Stratford Lakes acquired the shareholding in the Company and became its parent, and why various payments were made by Prasad, Winfair and Rossano to assist with operational expenses and then to keep the company ticking over so that it could be sold at a profit. It is also supported by various financial records and is the foundation for the petition debt owed to Rabsco. Where there are gaps in the records, Prasad's affidavit evidence fills them in.
31. Stratford Lakes was set up as a special purpose vehicle and without the sums paid into it by Prasad, Winfair, Rossano, Bosch and Brasco it would not have been able to purchase any shares in the Company. The logical commercial explanation for these sums is that they were loans which carried interest, or else none of these parties would be likely to see any return on their investment. Applying commercial common sense they could not have simply been gifts to the Company.
32. Further payments were then made by Winfair and Prasad to Stratford Lakes after the acquisition of 50% of the shares in the Company. The logical commercial explanation for this again is that these were loans to assist Stratford Lakes in meeting its operational expenses given its financial difficulties. There is a clear rationale for these liabilities of Stratford Lakes to have been assumed by the Company because the controlling minds of the relevant entities were the same, and Stratford Lakes was the sole shareholder of the Company. It made sense for the trading entity to be responsible for paying the ultimate owners in this way. It is also notable that a



number of further payments were made by Prasad to the Company after the assignment took place.

### **JOLs' case**

33. Mr Alex Potts QC submitted that the appeal should be dismissed. Prasad's affidavit evidence, on an objective analysis (and without requiring cross examination<sup>18</sup>), fails to satisfy the relevant legal and evidential burdens that rest upon the Appellants.
34. Prasad's evidence is, to a large extent, inherently unreliable; and the Court is entitled to draw adverse inferences against the Appellants, given the unsatisfactory state of the Appellants' affidavit evidence, including:
- a. its internal inconsistencies;
  - b. its inconsistencies with (and lack of support from) reliable contemporaneous documentary evidence;
  - c. its belated and evolving nature;
  - d. the implausible and unsatisfactory explanations for the obvious errors and omissions in the Appellants' affidavit evidence; and/or
  - e. the absence of any other reliable affidavit evidence from allegedly material witnesses.

### **The law**

#### **The rules relating to proofs of debt**

35. If a creditor is dissatisfied with the official liquidator's decision with respect to his proof, he may appeal to the Court for the decision to be reversed or varied: Companies Law (2020 Revision), Companies Winding Up Rules, 2018 ("CWR") O. 16, r. 17.

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<sup>18</sup> The Court has the power to reject unreliable affidavit evidence even in the absence of cross-examination. See *Banco Economico SA v Allied Leasing and Finance Corporation* [1998] CILR 92, per Smellie J at page 98 – 99 and Parker J's judgment winding up the Company in these proceedings, dated 7 September 2020, at §§ 32 to 34.





36. CWR O.16, rules 1 to 16 cover the applicable procedure. The following rules are particularly relevant:

CWR O.16, r. 2(3): “*the following matters shall be stated in a creditor’s proof of debt – (c) ... the basis upon which the creditor claims to be entitled to interest; (d) particulars of how and when the debt was incurred by the company...* ”;

CWR O.16, r. 2(4): “*copies of all the documents evidencing the existence and amount of the debt must be annexed to the proof of debt*”;

CWR O. 16, r. 2(5): “*the official liquidator may require the creditor to submit further and better particulars of his claim, including additional supporting documents*”; and

CWR O. 16, r. 2(7): “*the official liquidator may require that a proof of debt be verified by affidavit.*”

### **The principles relating to proof of debt appeals**

37. The principles to be applied by the Court in proof of debt appeals, pursuant to CWR O.16, r.17 to r.19 are addressed in a series of Cayman Islands cases<sup>19</sup>, following a number of English authorities<sup>20</sup>:

- a. Pursuant to CWR O.16, r.18(5), the appeal of a proof of debt: “*shall be treated as a de novo adjudication of the creditor's proof and the creditor may rely upon additional evidence in support of his claim, notwithstanding that he failed to make such evidence available to the official liquidator.*”<sup>21</sup>
- b. The burden of proof rests on the Appellants as the putative creditors to provide evidence to satisfy the Court that, on the balance of probabilities, their alleged debts are founded on real debts of the Company and if so, in what amount. It follows that a

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<sup>19</sup> *Re China Branding Group Limited (In Official Liquidation)* 23 January 2019, per McMillan J at §§33, 51-53 *Re Ardon Maroon Asia Master Fund (In Official Liquidation)* [2018] (2) CILR Note 1 and the full judgment of 17 July 2018, per McMillan J at §§51-53 (with respect to which the Court of Appeal dismissed an appeal by its judgment of 20 May 2020).

<sup>20</sup> *Home and Colonial Insurance Company, Limited* [1930] 1 Ch 102; *Re Van Laun* [1907] 2 K.B. 23; *Re Exchange Securities & Commodities Ltd. (In Liquidation)* [1988] 1 Ch. 46

<sup>21</sup> See also *Bhatti and Sons Incorporated and Libpak Incorporated v Wigh, Pilling and Mackey (Liquidators of Bank of Credit and Commerce International (Overseas) Ltd (in liquidation)* [2003] CILR 160 at §32, citing *Anklesaria v Bank of Credit & Commerce Intl. (Overseas) Ltd (1)* [1999] CILR at 277



claim based on tenuous or inadequate proof will not succeed<sup>22</sup>. There is no requirement for the official liquidator to justify his decision to reject the proof of debt<sup>23</sup>

- c. Unsurprisingly the starting point for any contractual analysis is the written legal agreements entered into by the parties. As Mr. Justice Leggatt observed in *Blue v Ashley* [2017] EWHC 1928, at § 49:

*“the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded”.*<sup>24</sup>

38. As an example of this principle, in *Hurlstone Investments Ltd. 13 October 1994* Smellie J (as he then was) dismissed an appeal against the rejection of a proof of debt relating to purported oral director’s loans in circumstances where the putative creditor relied on an unaudited balance sheet as evidence of the alleged debt owed to him.
39. The loans in that case were listed under “liabilities” as “shareholder loans” in the balance sheet. The balance sheet in question was unaudited, inaccurate and prepared by accountants on the appellant’s instructions, on the basis of information which the appellant (only) supplied.
40. Once the Court had discounted the balance sheet, all that remained of the appellant’s evidence was based upon bare assertion. As Smellie J noted at page 15 of the judgment:

*“Any suggestion that the applicant should be entitled to have the balance sheet accepted on the face of it, as evidencing proof of the debt to himself, must be fundamentally wrong.”*

### **Requirement for a Contractual Right to Interest to Prove in a Liquidation**

41. CWR O.16 r.11 provides that a putative creditor may only (i) prove for interest on its debt where such creditor has a contractual right to claim interest and (ii) interest may only be claimed up until the date of the commencement of the liquidation (being 1 May 2017 in this case, when

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<sup>22</sup> *Re Ardon Maroon Asia Master Fund, supra.*

<sup>23</sup> *Re Kentwood Constructions Ltd* [1960] 1 WLR 646, cited in *Anklesaria, supra*

<sup>24</sup> *See also Rasia (unreported) 28 July 2021 Parker J §§11 and 25*



the Petition was presented<sup>25</sup>). In other words, post liquidation interest is not generally recoverable<sup>26</sup>.

42. As Smellie CJ said in *Saad Investments Company Ltd (in Liquidation)* [2019] (2) CILR 828<sup>27</sup>, CWR O.16, r.12 is the statutory equivalent to a common law principle that interest will not continue to accrue once a company enters liquidation: per Selwyn LJ in *In re Humber Ironworks & Shipbuilding Co., Warrant Fin. Co.'s Case* (1869) L.R. 4 Ch. App. 643 at 646-647:

*“I think the tree must lie as it falls; that it must be ascertained what are the debts as they exist at the date of the winding-up, and that all dividends in the case of an insolvent estate must be declared in respect of the debts so ascertained.”*

#### **Novation or Assignment of Alleged Debts**

43. An assignment is a transfer of the benefit of a contract but not the burden; in order to transfer an alleged debt/obligation from an original debtor to a new party, the relevant agreement needs to be novated, requiring appropriate consideration and consent of all of the parties involved.
44. The UK Supreme Court recently dealt with the difficulties associated with proving an alleged oral novation, see *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, at §§ 60 to 69.
45. As noted in that case, the differences between novation and assignment were summarised in *The Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600 by Aikens J at paragraph 61:

*“... there are four main differences. First, a novation requires the consent of all three parties involved ... But (in the absence of restrictions) an assignor can assign without the consent of either assignee or the debtor. Secondly, a novation involves the termination of one contract and the creation of a new one in its place. In the case of an assignment the assignor's existing contractual rights are transferred to the assignee, but the contract remains the same and the assignor remains a party to it so far as obligations are concerned. Thirdly a novation involves the transfer of both rights and obligations to the new party, whereas an assignment concerns only the transfer of rights, although the transferred rights are always "subject to equities". Lastly a novation, involving the termination of a contract and the creation of a new one, requires*

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<sup>25</sup> S.100(2) Companies Law 2016 Revision

<sup>26</sup> Pursuant to CWR O.16, r.12, post liquidation interest is payable only in circumstances where there is a surplus after payment of the debts owed to ordinary unsecured creditors.

<sup>27</sup> At footnote 1 on page 832



*consideration in relation to both those acts; but a legal assignment (at least), can be completed without the need for consideration.”*

46. As to assignments, section 5 of the Property (Miscellaneous Provisions) Act (2017 Revision) provides that a party can effect an absolute legal assignment of a debt or thing in action, provided the assignment occurs by way of signed writing by the assignor and the assignee has notice of the assignment.
47. CWR O.18 r.9 separately provides that a creditor of a company in liquidation may assign the right to receive a dividend to another party provided proper notice is given to the official liquidators.

### **Decision**

#### Rossano

48. Mr Tonner QC asked for and was given some time to make proper enquiry of Rossano after the hearing. This resulted in further evidence. The further evidence from the Rossano's (Paula and Antonio 2) submitted after the hearing clarifies but does not change the position. The evidence is to the effect that in fact the amounts claimed in the proof of debt are sums owing to South Haven Ltd not to Rossano. Apparently Rossano's former wife Paula has been the sole shareholder in South Haven Ltd since 6 April 2010 when he transferred his equity to her. Rossano says he did not realise the importance of the discrepancy between him submitting the proof of debt in his personal name and the fact that the funds which were lent to Stratford Lakes were loaned and advanced by South Haven Ltd<sup>28</sup>.
49. In my view Rossano's evidence does not satisfy the burden of proof to the civil standard that he or South Haven Ltd lent US \$250,000 to Stratford Lakes on the terms he asserts. Neither does it (or Prasad's evidence) satisfy the assertion that there was a novation of any loan from Stratford Lakes to the Company.

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<sup>28</sup> Rossano 2, 8 December 2021



Prasad

50. I have found his numerous affidavits to be unreliable and inconsistent in places. I have approached his evidence with caution because to a large extent it is unsupported by contemporaneous documentary material. By way of example, in Prasad 2 at §8(k), in response to the JPLs' request for further information in relation to loans described in the balance sheet as at 31 December 2017, as "*Loan-A. Rossano*", "*Loan S.P*", Prasad states that he "*cannot find these loan agreements or documents.*" This seems to me to be a most unsatisfactory premise from which to seek to discharge the burden of proof.
51. Prasad also stated at § 9 that: "*As will be clear from the exhibits [of various financial statements] to this affidavit, the Company has not previously utilised accountants nor has the Company been subject to any Internal or external audit.*" This clearly is a state of affairs which requires the court to approach the financial statements with a degree of close scrutiny as there has been no independent professional assurance or oversight.
52. In Prasad 3 at §12, Prasad informed the JPL's that the Company owed him an alleged debt in the sum of US\$8,187,238.00 as at 31 December 2017 per the Company's balance sheet exhibited at page 10 of SP-2 and that: "*I made my loan to the Company sometime before the end of 2004. This... has [been] on the balance sheets since the loan was made, unfortunately I unable to identify further documents in respect of this, which I think must in part due to flood damage in September 2004.*<sup>29</sup> *I have given the JPLs the documents I have been able to identify.*" I have to say that evidence stretches the bounds of credulity.
53. In fact Prasad admits in Prasad 6 that there are no executed written loan contracts or promissory notes at all which evidence the existence of alleged loans between himself and Stratford Lakes, or the Company<sup>30</sup> (or the contractual terms of any such alleged loans, including, for example, whether they might properly have been characterised as equity or capital contributions, or subordinated to outside creditors). There are similarly no loan contract documents between Mr

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<sup>29</sup> Hurricane Ivan hit the Cayman Islands in September 2004

<sup>30</sup> Prasad 6, §19 he admits that: "*I did not enter into a written loan agreement with Stratford Lakes that can evidence My Loan*". Similarly, at §26, Prasad admits that: "*The Claims are in relation to loans advanced to Stratford Lakes and the Company which were not documented in loan agreements: they were agreed orally and informally...*"



Rossano and the Company. The appellants ask the court to rely on their affidavit evidence and little more.

54. As to novation, Prasad's evidence<sup>31</sup> is not sufficiently probative to show that the alleged loans to Stratford Lakes were validly novated to become debt obligations of the Company. He recalls, for the first time in Prasad 6, that, on or around 20 August 2008, there was an oral novation agreement (apparently unsupported by any consideration) whereby the Company would assume the alleged loans from Stratford Lakes, to be repayable on demand, with 12% interest. He states, however, that "*I cannot find any board minutes or resolutions of the Company which record this decision by the Company*". Again to my mind this stretches credulity.
55. Most importantly in assessing the evidence I have come to the clear view that what contemporaneous documentation does exist is inconsistent with the appellants' narrative, however skilfully Mr Tonner QC attempted to portray it.

#### **The assignment agreement of 1 January 2009**

56. Prasad in his personal capacity, and the Company, represented and warranted in clause 4(b) that the Company did not have any borrowings from non-commercial lenders. This representation and warranty is obviously inconsistent with Prasad's current assertions that the Company was substantially indebted to him and/or to Mr Rossano by this date. As I have said there is no supporting evidence of an oral novation as Prasad asserts in August 2008.
57. The Court finds that this is a telling piece of contemporaneous evidence. There is a clear warrant and representation by the Company, by the shareholder company and by Prasad personally that as at 1<sup>st</sup> of January 2009, there is no other private borrowing which has not been subordinated or which even exists. There is also an entire agreement clause at § 8(c). It is also to be noted as Mr Potts QC points out there is no contemporaneous evidence which supports Prasad's assertion that he was owed money which would rank *pari passu* with Rabsco and Brasco and any indebtedness to him would be subordinate.
58. The court has previously considered this agreement in the context of the application to put the Company into liquidation. Prasad had argued that although the debts claimed by the petitioning

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<sup>31</sup> In Prasad 6 § 21 and 7 §29



creditor were admitted in full there was an oral waiver whereby there would essentially be a deferral in terms of the deadline for payment. Prasad's strategy in the liquidation, to argue that the provisional liquidators should facilitate the sale of the property at a price he thought was acceptable, so as to discharge the petitioning creditor's debt in its entirety is of course consistent with the notion that if he had any debt owed by the company it would be subordinated.

59. In the Court's ruling at §§32 to 34 it held:

*“the agreement sets out the party's obligations in considerable detail. If there was an oral variation or waiver of this, as is alleged by the Company, a prima facie case would need to be established based upon credible evidence which corroborated the evidence of an oral waiver, which is raised only in the affidavit of Mr. Prasad. Mr. Prasad doesn't specify when, where, or in what circumstances the alleged conversation with Mr. Torchinsky took place, and there is no contemporaneous or indeed any surrounding evidence before or after to support the alleged conversation having taken place. The evidence there is before the Court supports the contrary position as advanced by the Petitioner. The previous course of dealings and the documentation of the terms of the loan to Mr. Prasad and the affidavit evidence from Mr. Messer, all point to the unlikelihood of the alleged oral waiver of variation of such significance. Moreover, promissory notes were signed evidencing further loans between the parties in October 2010 and November 2013, which would have provided an opportunity to document any alleged waiver in respect of the other loans made since the agreement, but they make no mention of it. To add the evidential position it seems inherently implausible that the Petitioner would have given up complete control over repayment obligations to return the debt under the agreement, the eventuality of whether and if so, when the Company sold, the Company would be in sole control of the timing and basis of its own sale.”*

60. Against this finding the Court is again faced with the subjective assertions of Prasad, for a narrative of loans made for which there is no independent or reliable corroboration other than his own documents and his own subjective views.

61. I accept Mr Potts QC's submission that it is clear from the assignment agreement of 1 January 2009 that so far as Prasad is concerned, at its highest, there might be a suggestion that any debt he claims is due to him was clearly subordinated to Mr. Torchinsky's debt.<sup>32</sup> For completeness, I do not accept Prasad's evidence in Prasad 8 that reliance should be placed on Mr Torchinsky's letter of wishes to the effect of *'Look after my friends and my business partners and don't cause them any trouble after I'm gone'* and that there was never any intention to hold anyone to what was recorded in the assignment agreement.

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<sup>32</sup> See §4



## Conclusion

62. The Appellants have not satisfied the Court on the balance of probabilities that they are owed the monies they claim or interest on those monies. There is a dearth of contemporaneous documentary evidence to support their narrative. Prasad has sought to fill in the gaps years later with affidavit evidence which is unsatisfactory. He had personal responsibility to maintain the books and records of the company of which he was a director so as to be able to show a true and fair view and it is clear to the Court this has not been achieved.
63. I also note the evidence of the JOLs<sup>33</sup>, which sets out in some detail the reasoning and views of professional officeholders appointed by the Court as to why the proofs of debt have been rejected after much back and forth and examination.
64. The court as a *de novo* assessment has approached the matter as an exercise in objective analysis. It has examined the material objectively having regard to the burden and standard of proof and applying commercial common sense.
65. Whilst this is an adjudication *de novo*, the JOLs' evidence in my view does have some weight in the sense that all of the analysis has been done by independent professionals. It also references the fact that there are no executed loan contracts with the Company or banking records evidencing receipt of the alleged loans, as well as commenting on the assignment agreement entered into on 1 January 2009.
66. It may well be the case that the appellants injected monies into the Company over time, and these contributions could well have been properly described at the time as capital contributions or represented as equity. I accept Mr Tonner QC's submission that they are unlikely to have been pure gifts. However, there is no reliable evidence that they are loans made on the terms asserted by the appellants or would ever rank as anything but subordinate to other debt in accordance with the contemporaneous documentation.
67. On the balance of probabilities, it has not been shown by the appellants that the alleged debts are founded on real or quantified debts of the Company. Nor has it been shown that there has

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<sup>33</sup> Affidavit of Mr. Griffin dated 9 November 2021



been a novation of any loan from Stratford Lakes to the Company. The claims are based on inadequate proof and cannot succeed. The appeals are therefore dismissed.



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**THE HON. JUSTICE PARKER**  
**JUDGE OF THE GRAND COURT**