Neutral Citation Number: [2020] EWHC 2572 (Ch)

IN THE HIGH COURT OF JUSTICE **CASE NO: CR-2020-LDS-000588**
BUSINESS AND PROPERTY COURT IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF HIGH STREET ROOFTOP HOLDINGS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Date: 30 September 2020

Before:

Mr Andrew Sutcliffe QC, sitting as a Judge of the High Court

- -

BETWEEN:

STRATEGIC ADVANTAGE SPC
(for and on behalf of HSG Rooftops SP)

Applicant

-and-

HIGH STREET ROOFTOP HOLDINGS LIMITED

Respondent

- -

Mr Hugo Groves and **Mr Matthew Maddison** (instructed by **Walker Morris LLP**) for the Applicant
Mr Christopher Boardman QC (instructed by **Clyde & Co LLP**) for the Respondent

Hearing date: 28 August 2020

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Approved Judgment

I direct that pursuant to CPR PD 39 a para-6.1 no official shorthand notes will be taken at this judgment and the copies of this version is handed down may be treated as authentic

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 a.m. on Tuesday, 30 September 2020

MR ANDREW SUTCLIFFE QC:

Introduction

1 This is an application by Strategic Advantage SPC (the **Applicant**) for an administration order in relation to High Street Rooftop Holdings Limited (the **Company**). The Applicant applies principally on the grounds that it is a debenture holder and that events of default have arisen in relation to loans which it made to the Company, entitling it to appoint an administrator under paragraph 14 of Schedule B1 to the Insolvency act 1986 (**Schedule B1**). The Company contends that the application should be refused essentially on two grounds. First, that no event of default has arisen because the underlying contract was varied or the Applicant is estopped from relying on its terms. Second, that the Company's financial position is such that the Applicant will be repaid in full so the solvency requirement has not been met and any discretion should be exercised against the making of an administration order.

2 The application notice is dated 10 July 2020. The application came before HHJ Klein on 16 July 2020 who refused the Applicant's request for an immediate administration order, gave directions for filing of evidence and made an order for costs against the Applicant.

3 The hearing took place remotely before me on Friday, 28 August 2020. Mr Hugo Groves and Mr Matthew Maddison appeared for the Applicant and Mr Christopher Boardman QC appeared for the Company. The parties were unable to complete their submissions that day and I gave them an opportunity to file further submissions in writing, a process which was completed by 11 September 2020. The Company also filed further evidence to which I refer later in this judgment. A large amount of evidence has been filed on both sides. I shall refer to some of it. I have read all of the witness statements filed and the exhibits where relevant and I have taken it all into account in reaching my conclusions.

Background

4 The Applicant is a segregated portfolio company incorporated as an exempted company in the Cayman Islands on 28 March 2018. It carries on business providing secured term loan facilities. Such facilities are almost exclusively funded by Korean blue-chip investors. It has created a number of "segregated portfolios" for the purpose of its business activities including HSG Rooftops SP through which it made loans to the Company. The Applicant's current directors are JinHwan Lee and Heesuk (Shawn) Jee (**Mr Jee**).

5 The Company is a private limited company registered in England and Wales under company number 11309176. It was incorporated on 13 April 2018 and is a wholly owned subsidiary of High Street GRP Limited. Its sole director since

incorporation has been Gary Ronald Forrest (**Mr Forrest**). The Company is part of a group of companies known as the High Street Group (the **Group**) founded by Mr Forrest in 2006 and made up of three divisions (namely, High Street Residential, concerned with development of residential apartment buildings across the UK, High Street Hospitality, which owns a number of hotels, bars and restaurants, and All Saints Construction, which is a building contractor).

6 In early 2018, Mr Forrest was introduced to Hypa Asset Management Limited (**Hypa**) and spoke to its two directors Simon Welsh (**Mr Welsh**) and Marc Hounsell (**Mr Hounsell**) about the possibility of obtaining funding for the Group's rooftop development business. Hypa had authority to act on the Applicant's behalf. By March 2018 it had been agreed that the Applicant would make a loan of approximately £26 million which was the amount the Group required at the time for its rooftop projects.

7 On 13 June 2018, the Company entered into a facility agreement (the **Facility Agreement**) which provided for funding not exceeding £100 million to be made available to the Company by the Applicant in tranches. The Company was to use the money borrowed under the Facility Agreement to make loans to wholly owned subsidiaries of the Company for the development and sale of rooftop residential properties (clause 3.1). The first tranche of £17,885,000.00 was to be made available by 15 June 2018 and the second tranche of £9,033,909.36 was to be made available by 15 July 2018 (clause 5.1). Interest was payable on the sums drawn down under the facility at the fixed rate of 16.5% (clause 6.1) and those sums were to be repaid by the Company to the Applicant 18 months from the drawdown date of each tranche (clause 7.1), namely, by 12 December 2019 and 13 January 2020 respectively. By clause 12, the Company's failure to repay these amounts on their due dates constituted events of default.

8 The facility was secured by fixed and qualifying floating charges created by a debenture dated 13 June 2018 (the **Debenture**). The Debenture was registered within 21 days of its creation in accordance with s.859A of the Companies Act 2006. By clause 12.16 of the Facility Agreement, at any time after an event of default has occurred which is continuing, the Applicant was entitled by notice to the Company to cancel all its outstanding obligations under the facility and declare the Debenture to be enforceable.

9 The Company did not make either of the capital repayments on their due dates. This constituted events of default under the Facility Agreement. By a waiver letter dated 17 January 2020 (the **Waiver Letter**), the Applicant agreed to waive the events of default upon various conditions being met by the Company, which included adhering to a specified payment schedule and providing audited and group accounts to 31 December 2018 as soon as they became available but not later than 31 March 2020. Those conditions were not met. On 22 June 2020 the Applicant revoked the Waiver Letter and notified the Company that the qualifying floating charge created by the Debenture had become enforceable. By its

solicitors' letter dated 2 July 2020, the Company asserted that the payment dates had been varied such that the Company was not in breach of any repayment terms. Further or alternatively, the Company contends that the Applicant is estopped from enforcing the Facility Agreement in accordance with its original repayment terms.

The statutory framework

10 Paragraph 35(2) of Schedule B1 provides that the court may make an administration order (a) whether or not satisfied that the company is or is likely to become unable to pay its debts, but (b) only if satisfied that the applicant could appoint an administrator under paragraph 14. Paragraph 16 provides that a person may be appointed as administrator under paragraph 14 if at the time of the appointment the floating charge on which the appointment relies is enforceable.

11 An instrument constitutes a qualifying floating charge if it satisfies the conditions set out in subparagraphs (2) and (3) of paragraph 14 of Schedule B1. The Debenture satisfies subparagraph 14(2) because (i) by clause 3.4 of the Debenture, the parties agreed that paragraph 14 of Schedule B1 applied to the floating charge created by clause 3.3 of the Debenture and (ii) clause 12.8 of the Debenture entitled the Applicant to appoint an administrator if the security constituted by the Debenture became enforceable. The Debenture satisfies subparagraph 14(3) because, by clause 3.3 of the Debenture, it relates to the whole or substantially the whole of the Company's property. Accordingly, there is no doubt that the Debenture is a qualifying floating charge.

12 There is disagreement between counsel as to whether, when an administrator is appointed under paragraph 35 of schedule B1, the applicant has to show that there is a real prospect of the statutory purpose of administration being achieved. The Applicant submits that an administrator appointed under paragraph 35 of schedule B1 is in a special position by reason of being a qualifying charge holder and does not need to satisfy the court that there is a real prospect of the statutory purpose of administration being achieved. Mr Groves relies on *Re St John Spencer Estates & Development Ltd* [2012] EWHC 2317 (Ch); [2013] 1 B.C.L.C. 718 where the Deputy Judge **(**Mr Robert Ham QC) said at [39]:

> I turn then to the exercise of my discretion. Given the enforceability of the debenture, the Bank submitted that it had a prima facie right for an order appointing the proposed administrators unless there are countervailing considerations. I agree. The purpose of the para 35 procedure is in my view to provide secured lenders with a simple and assured route to realise their security where the company is in default, and to enable any doubts as to the enforceability of the security to be determined in advance without the administrators being exposed to any risk that an appointment out of court was invalid.

13 However, this passage does not specifically address the point in issue which is whether an applicant appointing an administrator under paragraph 35 has to show that there is a real prospect of one of the statutory purposes of administration

being achieved. In my judgment, this remains as much of a requirement if an administrator is appointed under paragraph 35 as if the administrator is appointed under paragraph 11. In both cases, as required by paragraph 3, the administrator has to perform his functions with the objective of (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or (c) realising property in order to make a distribution to one or more secured or preferential creditors. The distinction between an appointment under paragraph 35 and an appointment under paragraph 11 is that, in respect of the former, the applicant does not have to satisfy the court that the company is or is likely to become unable to pay its debts. Paragraph 18, which sets out requirements for an appointment to be made out of court under paragraph 14, provides that the notice of appointment must be accompanied by a statement from the administrator that in his opinion the purpose of administration is reasonably likely to be achieved. I see no reason why the requirements for a qualifying charge holder's application for appointment of an administrator by the court under paragraph 35 should be any different to those for a qualifying charge holder's appointment of an administrator out of court under paragraph 14, especially since paragraph 35 expressly stipulates that the court must be satisfied that the applicant could appoint an administrator under paragraph 14. I therefore consider that, on its application to appoint an administrator under paragraph 35, the Applicant must show that there is a real prospect of one of the statutory purposes of administration being achieved.

Is the Debenture enforceable?

14 By clause 13.1 of the Debenture, the security constituted by the Debenture becomes immediately enforceable if an event of default occurs. By clause 1.1 of the Debenture, event of default has the meaning given to that expression in the Facility Agreement. It is clear from clause 12 of the Facility Agreement that the Company's failure to repay the monies due to be repaid by 12 December 2019 and 13 January 2020 constituted events of default. Accordingly, subject to the Company's defence that the repayment terms were varied or that the Applicant is estopped from enforcing the original repayment dates, I am satisfied that an event of default has occurred and that the Debenture is enforceable.

Has there been a variation of the contract or is the Applicant estopped from relying on its terms?

15 Mr Forrest's evidence is that a few weeks after entering into the facility, in early July 2018, it became clear that the rooftop developments would not proceed to completion quickly enough for the Company to meet its repayment obligation due to delays in obtaining planning permission. Mr Forrest says that he spoke to Mr Hounsell and proposed that approximately £20 million should be deployed instead on four Private Rental Scheme (**PRS**) development projects known as the Olympius Development, the Rodus Development, the Yona Development and the

Holloway Development (the **PRS Developments**). The practical completion dates for each PRS Development are predicted by Mr Forrest to be as follows: the Olympius Development (Hadrian's Tower): end of October 2020; the Rodus Development (Middlewood Plaza): end of July 2021; the Yona Development (Kent Street Baths): February 2023; the Holloway Development (Holloway Head): end of December 2022.

16 Mr Forrest says that he offered to return the funds if they could not be used for the PRS Developments but Mr Hounsell assured him that would not be necessary and confirmed that the funds could be used for the PRS Developments. Mr Forrest continues: "*By him confirming that the funds should be utilised for the [PRS] Developments I believe that Mr Hounsell was fully aware that the sums due under the Facility would be tied up in the [PRS] Developments and would, therefore, not be available for the purposes of repayment until such a time as each of the [PRS] Developments completed.*" Mr Forrest says that he believes his exchange with Mr Hounsell took place over text message but he no longer has access to his texts.

17 Mr Forrest says that he relied on the agreement he reached with Mr Hounsell in early July 2018 in allowing the Company, in early September 2018, to enter into onward lending agreements with other companies within the Group carrying out the PRS Developments (the **Onward Lending Agreements**). He also claims that the Applicant's execution of deeds of release in respect of part of its security in August 2018 and March 2019 and his execution of a personal guarantee on 11 December 2018 was conduct affirming or relying upon the agreement he claims to have reached with Mr Hounsell. He says that following a meeting in October 2018 with Alan Bate (**Mr Bate**) of Real Estate Associates Limited (a firm instructed to monitor the Company's financial performance and its ability to repay the loan and to report to the Applicant), the Company sent copies of each of the Onward Lending Agreements to Mr Bate, Mr Hounsell and Mr Welsh and that around this time he had a telephone call with Mr Hounsell who confirmed to him "*the repayment terms under the Facility would be amended to reflect the repayment dates under the Onward Lending Agreements*".

18 Mr Hounsell's account of his dealings with Mr Forrest is very different. He denies ever having agreed with Mr Forrest that the Company could use the loans made under the facility for the purpose of the PRS Developments and was not even aware until late September 2018 that they had been so used. He refers to a letter written by Mr Forrest to Mr Welsh on 30 July 2018 in which Mr Forrest confirms receipt of the second tranche of monies on 10 July 2018 pursuant to the Facility Agreement and confirms that the first payment date in relation to the second tranche was 6 months from 10 July 2018 i.e. by 10 January 2019, and that the redemption date in relation to that tranche is 10 January 2020 i.e. 18 months from 10 July 2018 (i.e as stipulated in clause 7.1 of the Facility Agreement). In that letter, Mr Forrest made no reference to the fact that the money was to be utilised

for the PRS Developments nor (more significantly) to the fact that it would not be repaid until such time as each of the PRS Developments completed.

19 On 10 and 11 August 2018, there was an email exchange between Mr Hounsell and Mr Forrest in which Mr Hounsell asked for and received an update on the planning approvals for the rooftop developments and Mr Forrest agreed to meet with one of the Applicant's investors in London at the end of August in response to Mr Hounsell's suggestion that: "*It would be a good time to update them on the rooftops also to present PRS*". Mr Hounsell says that these emails demonstrate that, as at 11 August 2018, he believed that the funds were still to be utilised for the rooftop developments and his reference to the meeting being a good time to "*present PRS*" was to Mr Forrest also using the meeting as an opportunity to present a new application to the Korean investment committee for a separate funding facility in respect of the PRS Developments.

20 Mr Hounsell says that Hypa and the Applicant only became aware that the Company had utilised the funds for the PRS Developments on 28 September 2018 when Mr Welsh received an email from Mr Bate in which Mr Bate gave details of information he had received from the Company regarding the allocation of funds provided under the facility to the PRS Developments (as opposed to rooftop developments) and raised concerns about this.

21 It is Mr Hounsell's evidence that after Hypa discovered that the Company had unilaterally decided to utilise part of the funds advanced under the Facility Agreement for its PRS projects, he was copied into an email from Mr Bate dated 11 October 2018 in which Mr Bate stated that the Applicant's solicitors (Fladgates) would *"very shortly be proposing some changes to the facility agreement reflecting the current application of the funds [by the Company]*". He says that the purpose of making these changes to the Facility Agreement was merely to regularise retrospectively the use of the funds for the PRS Developments (which would have been subject to approval from the Korean Investors), and to increase the Applicant's security and that it was never Hypa or the Applicant's intention to extend the repayment deadlines. He denies ever having stated to Mr Forrest that the Facility Agreement would be amended to reflect the repayment dates under the Onward Lending Agreements and he refers to a number of contemporaneous emails from Mr Forrest in which Mr Forrest made representations as to how the Company would be able to repay the sums advanced as provided under the Facility Agreement (in particular, from funds obtained through refinancing agreements being entered into with other funders) and at no point was it suggested that the Company would be unable to repay until the PRS Developments were completed.

22 Mr Hounsell further says (and I accept) that the deeds of release relied on by the Company as conduct affirming the oral agreement alleged by Mr Forrest were entered into by the Applicant in order to enable the Company to raise funds otherwise secured by the Debenture from which to repay the Applicant. The deed

of partial release in respect of the Olympius debenture was executed in reliance on a written promise by Mr Forrest in his email dated 9 March 2019 that £7.6 million would be repaid from Olympius to the Company within 3 working days of the refinance by the Bank of London and the Middle East plc (**BLME**) which amount would then have been available for repayment to the Company. It is not known what has happened to any monies advanced by BLME but it is clear that no part of such monies has been paid to the Applicant.

23 Mr Hounsell accepts that the suggestion that Mr Forrest provide a personal guarantee was made by him in an email dated 4 December 2018. However, as is clear from that email, this suggestion was made in an attempt to dissuade the Applicant from calling an event of default as a result of the Company's use of the funds for the PRS developments. Mr Hounsell informed Mr Forrest that this might *"lead to everything calming down"*, and enable the Applicant to *"raise the funds for the PRS* [Developments]" from other investors, thus in turn enabling the monies advanced under the Facility Agreement to *"return to the rooftops company"*. There was no suggestion in that email that the provision of a personal guarantee would secure an extension of the repayment dates under the Facility Agreement to align with the completion dates of the PRS Developments. Even Mr Forrest's evidence does not go that far: he states (paragraph 41 of his witness statement) that he entered into a personal guarantee "*as a means of appeasing the investors and enabling all parties to move forward amicably*".

24 The Company submits that without disclosure, cross-examination and evidence from other witnesses, the court is not in a position to reach conclusions about whether it is Mr Forrest or Mr Hounsell who is telling the truth about these matters and that the court can only properly proceed on the basis that Mr Forrest's evidence is correct. I do not accept that submission for 3 principal reasons.

25 First, clause 15 of the Facility Agreement states as follows:

> *15.1 No amendment of this agreement shall be effective unless it is in writing and signed by, or on behalf of each party to it (or its authorised representative).*
> *15.2 A waiver of any right or remedy under this agreement or by law, or any consent given under this agreement, is only effective if given in writing by the waiving or consenting party and shall not be deemed a waiver of any other breach or default. It only applies in the circumstances for which it is given and shall not prevent the party giving it from subsequently relying on the relevant provision.*
> *15.3 A failure or delay by a party to exercise any right or remedy provided under this agreement or by law shall not constitute a waiver of that or any other right or remedy, prevent or restrict any further exercise of that or any other right or remedy or constitute an election to affirm this agreement. No single or partial exercise of any right or remedy provided under this agreement or by law shall prevent or restrict the further exercise of that or any other right or remedy. No election to affirm this agreement by the [Applicant] shall be effective unless it is in writing*.

26 By clause 15.1, the parties agreed that no amendment of the Facility Agreement would be effective unless it was in writing and signed by or on behalf of each

party to it or its authorised representative. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] A.C. 119, the Supreme Court held that the *"law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation"* (per Lord Sumption at [10]). There is nothing in writing signed by or on behalf of each party or its authorised representative evidencing an amendment to the Facility Agreement permitting the funds to be used for the PRS Developments or extending the repayment dates beyond 18 months from the date on which the funds were drawn down.

27 By clause 15.3, any failure or delay by the Applicant to exercise any right or remedy under the Facility Agreement would not constitute a waiver of the Applicant's rights or an election by the Applicant to affirm the agreement. Such non-waiver terms are enforceable and effective: see *GPP Big Field LLP, GPP Langstone LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm) per Mr Richard Salter QC at [203.3]. It is not therefore open to the Company to argue that any failure or delay by the Applicant to take action for breach of clause 3.1 (regarding use of funds) or an event of default constituted a waiver of the Applicant's rights or an election to affirm the agreement.

28 Second, the consequence of the no oral variation clause in the contract means that the Company has to fall back on the doctrine of promissory estoppel. The requirements of promissory estoppel are summarised in Snell's Equity 34th Ed. at 12-018 as follows:

> *Where, by his words or conduct one party to a transaction, (A) freely makes to the other (B) a clear and unequivocal promise or assurance that he or she will not enforce his or her strict legal rights, and that promise or assurance is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by B to have that effect, and, before it is withdrawn, B acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it. B must also show that the promise was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and A either knew or could have reasonably foreseen that B would act on it…*

29 The availability of an estoppel defence in the context of a "no oral modification clause" was addressed in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* (supra). Lord Sumption said at [16]:

> *…the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe* (emphasis added)

30 In *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541, Lord Bingham said at [9]:

> *…in seeking to show inducement or encouragement Actionstrength can rely on nothing beyond the oral agreement of St-Gobain which, in the absence of writing, is rendered unenforceable by section 4. There was no representation by St-Gobain that it would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that it would confirm the agreement in writing.* (Emphasis added)

And Lord Walker said at [51]:

> *…what passed between the parties (as pleaded by Actionstrength and as set out in Mr Sutcliffe's witness statement) did not amount to an unambiguous representation that there was an enforceable contract, or that St-Gobain would not take any point on section 4 of the Statute of Frauds* (emphasis added)

31 In my judgment, even accepting (contrary to Mr Hounsell's denial) that the representations alleged to have been made by Mr Hounsell to Mr Forrest were in fact made, none of them constitutes a sufficiently unequivocal representation that the variation to the Facility Agreement was valid notwithstanding its informality. In particular, Mr Forrest does not allege that Mr Hounsell (or anyone else on Hypa's or the Applicant's behalf) represented to him that the Applicant agreed to vary the dates for repayment of the two tranches from 18 months after draw down to coincide with the dates for repayment under the Onward Lending Agreements. The highest at which the Company's case can be put is that the Applicant agreed that the funds could be used for the PRS Developments as opposed to rooftop developments. Mr Forrest's own evidence goes no further than to say that Mr Hounsell confirmed to him that the funds could be used for the PRS Developments. He does not say that Mr Hounsell also confirmed to him that the repayment dates were extended in line with the Onward Lending Agreements. Indeed, all he says is that he believed Mr Hounsell was "*fully aware*" that the sums due under the facility would be tied up in the PRS Developments and would, therefore, not be available for the purposes of repayment until such a time as each of the PRS Developments completed. This falls far short of an unequivocal representation on which the Company was entitled to rely that the repayment dates would be extended in the manner alleged by Mr Forrest.

32 Moreover, I am satisfied that the contemporaneous emails and documents exchanged between the parties are in fact inconsistent with the representations alleged to have been made by Mr Hounsell. It is notable that the Company has not been able to produce any written evidence to support its contention that the Applicant or its agent Hypa represented that the repayment dates had been amended in the manner now being alleged.

33 Third, I regard the fact that Mr Forrest signed the Waiver Letter on behalf of the Company in January 2020 as fatal to the Company's attempt to rely on the doctrine of estoppel. The Company submits that the Waiver Letter never came

into effect because it was expressed to have effect "*from the date that we [the Applicant] confirm to you [the Company] in writing that we have received all of the documents and evidence set out in Schedule 1 until the date we revoke the waiver set out in this letter*". It is common ground that what were described in Schedule 1 as "*Conditions Precedent*" were all matters inserted for the Applicant's benefit, that at least some of those conditions were not complied with and that the Applicant never gave written confirmation that all of the documents and evidence set out in Schedule 1 had been received. The Company submits that since this provision was never waived by the Applicant the Waiver Letter never came into effect.

34 I do not accept this submission. The Waiver Letter was signed behalf of both parties and both parties thereby agreed to its terms. It accordingly came into effect. I accept the Applicant's submission that whilst the "Waiver" (as defined in the Waiver Letter) never came into effect because the conditions precedent were not fulfilled, those conditions were for the exclusive benefit of the Applicant and could therefore be waived by the Applicant when seeking to rely upon the terms of the Waiver Letter. Moreover, even if the Waiver Letter never came into effect, the result is the same as for breach of any of the conditions stipulated in the Waiver Letter, namely, the events of default that had arisen under the Facility Agreement (as acknowledged in the Waiver Letter) continue to occur.

35 The Waiver Letter provided for a conditional waiver by the Applicant of the events of default that had occurred pursuant to clauses 12.1, 12.2 and 12.3 of the Facility Agreement. The waiver was expressly conditional upon various conditions being met by the Company, which included making payments of £5,951,044 on 15 April 2020, £1 million on 15 May 2020 and £1 million on 15 June 2020. Not one of those payments was made. The other condition that the Company provide the Applicant with audited and group accounts to 31 December 2018 by 31 March 2020 (itself an indication of the importance attached by the Applicant to the production of those accounts) was also not met. In those circumstances, the Applicant was fully entitled to revoke the waiver and treat the events of default that had arisen under the Facility Agreement as continuing to occur. The Applicant was also entitled to rely upon the same events of default in notifying the Company that its qualifying floating charge created by the Debenture had become enforceable.

36 I also accept the Applicant's submission that the Waiver Letter, having been signed by both parties in January 2020, has great evidential weight in undermining Mr Forrest's assertions regarding the representations allegedly made to him in 2018 by Mr Hounsell. Had Mr Hounsell agreed with Mr Forrest that repayment of the sums due under the Facility Agreement only needed to be made on completion of the PRS Developments, Mr Forrest would not have signed the Waiver Letter which recorded that events of default had occurred, nor would he have agreed on the Company's behalf to the considerably more onerous repayment terms contained in the Waiver Letter.

37 Finally, the Company submitted that it was sufficient for it to have raised a bona fide and substantial dispute about whether the sums due under the Facility Agreement are payable and the Debenture is therefore enforceable. The Applicant submitted that it simply had to prove that the Debenture was enforceable on the balance of probabilities (relying on *Re Berkshire Homes (Northern) Ltd* [2018] Bus LR 1744, per Judge Hodge QC at [33], [38] and [53] in the context of proving a disputed debt for the purpose of establishing insolvency in an administration application). I do not consider that the Company's evidence does raise a bona fide or substantial dispute which needs to be determined at trial. I consider that the Debenture is enforceable by reason of the fact that the Company has clearly acted in breach of the Facility Agreement and/or the terms of the Waiver Letter.

38 In those circumstances, the Applicant is entitled to apply for an administration order pursuant to paragraph 35 of schedule B1 on the grounds that it is entitled to appoint an administrator under paragraph 14 of schedule B1. This being so, I do not need to consider the Applicant's alternative submission that it is entitled to apply for an administration order pursuant to paragraphs 10 to 13 of schedule B1 which would involve having to establish that the Company is or is likely to become unable to pay its debts, something that the Applicant does not have to do by relying on paragraph 35.

Is there a real prospect of achieving the statutory purpose?

39 In order to make an appointment under paragraph 14, the person making an appointment must file a statement by the administrator that *"in his opinion the purpose of administration is reasonably likely to be achieved"* (Schedule B1, para 18(3)(b)). The proposed administrators, Ben Woolrych (**Mr Woolrych**) and Paul Allen (of FRP Advisory Limited), have both signed Consents to Act which include such statements.

40 As mentioned earlier in this judgment, the Applicant submits that, for the purpose of an application under paragraph 35 of Schedule B1, the court need not go beyond the Consent to Act and determine whether there is a real prospect that an administration order will achieve one of the statutory purposes. I do not accept that submission so it is necessary to consider whether the Applicant has established that there is a "real prospect" that one or more of the statutory purposes might be achieved: see *In Re Harris Simons Construction Ltd* [1989] 1 W.L.R. 368 and *Re Lomax Leisure Ltd* [2000] B.C.C. 352 at 363.

41 Paragraph 3 of Schedule B1 sets out the purposes of administration, which are: (a) rescuing the company as a going concern, or (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration, or (c) realising property in order to make a distribution to one or more secured, or preferential, creditors. The subsequent

provisions of paragraph 3 make it clear that the administrator must first seek to achieve (a) unless it is not reasonably practicable or would not achieve as good a result as (b) for the creditors as a whole. If (b) is also not reasonably practicable, he may seek to achieve (c).

42 Accordingly, upon taking office, Mr Woolrych and Mr Allen would be under a duty to consider whether it is reasonably practicable to rescue the Company as a going concern. Not only would Mr Woolrych and Mr Allen be duty bound to conduct the administration with such objective (as officers of the Court), it would be contrary to the Applicant's commercial interest for the administrators to take any action which would diminish potential realisations.

43 Mr Boardman referred me to the following remarks of Mr Richard Snowden QC (as he then was) in *Re Integeral Ltd* [2013] EWHC 164 (Ch) at [69]:
It is of fundamental importance that any insolvency practitioner who is nominated as a potential administrator – an officer of the court – and who ventures his opinion to the court as to the prospects for an administration order, should do so carefully, with an independent mind, and on the basis of a critical assessment of the position of the company and the proposals put forward.

44 At the hearing on 16 July 2020, Judge Klein was critical of Mr Woolrych's letter in support of the application dated 9 July 2020. He observed that this letter was in identical terms to a letter Mr Woolrych had written in support of another administration application on the same day and was based not on the circumstances of the Company, but of companies generally. Judge Klein also noted that Mr Woolrych's letter referred to discussions with the Applicant's solicitors that had not been disclosed to the court and relied on Mr Jee's witness statement which in turn relied on Mr Woolrych's letter and so was circular.

45 Mr Jee provided no financial information about the Company other than the consolidated profit and loss forecast for the Group. In fairness to Mr Jee, he recognised in his statement that he was required (pursuant to rule 3.7(3) of the Insolvency Rules 2016) to provide details of the Company's financial position, specifying (to the best of Applicant's knowledge and belief) the Company's assets and liabilities including contingent and prospective liabilities and he did his best to comply with that obligation. He explained that no accounts had been filed at Companies House for the Company since the date of its incorporation on 13 April 2018 and that its accounts were overdue. He exhibited the consolidated profit and loss forecast for the Group to which I have referred which had been supplied to the Applicant by Mr Forrest in about Autumn 2019 and which he pointed out related to the Group as a whole and was merely a forecast. He said the Applicant had been informed the Group was undergoing its first full audit with PricewaterhouseCoopers (**PwC**) for the year ending December 2018 which was due to be received in mid-November 2019 but that such audit report had not been provided to the Applicant. He also referred to the fact that it was a condition of the Waiver Letter that the Company would provide the Applicant with audited

and group accounts to 31 December 2018 as soon as they became available, but no later than 31 March 2020, and had failed to do so. He then exhibited the charges registered in respect of the Company at Companies House and expressed the view that the Company was unable to pay its debts and was insolvent.

46 Following the hearing before Judge Klein, Mr Woolrych provided a witness statement in which he gives the reasons for his view that objective (a) is unlikely to be achieved but that either objective (b) or (c) are likely to be achievable. He refers to Mr Jee's evidence as the basis for his opinion that the Company appears to be insolvent on a cash-flow basis and, without replacement funding or facilities, will not be able to provide further finance to the Group or continue as a going concern. He expresses the view that the Company's business appears to be limited to recovering lending from other Group companies for the purpose of making a distribution to its secured creditor and states that, in the absence of any unsecured assets or any surplus assets recovered from other Group companies, he does not consider that a better result for the Company's creditors as a whole would be achieved than would be likely if the Company were wound up. However, if following their appointment, he and Mr Allen identify other assets (including any claims against third parties) which may result in a recovery for unsecured creditors, then objective (b) could still be achieved. He refers to the limited information available in relation to the loans which have been subsequently provided to the Group companies as evidenced by the Onward Loan Agreements and to the document issued to investors explaining the Group's distressed cash position as supporting his view that a shortfall on the secured creditor's lending is likely.

47 Mr Woolrych continues in paragraph 12 of his witness statement:

> However, I believe that it is reasonably likely that the granting of an administration order over the [Company] will achieve objective (c). Following the granting of an administration order, the Administrators would be in a position to investigate the ultimate destination/flow of the funds borrowed by the [Company] and in turn lent to group companies. In order to maximise the position for creditors, the Administrators would seek to take steps to recover the funds from across the group on the basis these represent inter-company debtor balances. Clearly, this recovery action will vary depending on the nature of security and terms of repayment however if the group has liquid resources we are not aware of this may result in a material recovery for the Applicant. In addition, I believe that the achievement of objective (c) would not harm the interests of the other creditors of the [Company] as a whole primarily because the [Company] does not appear to have any assets other than its security over Olympia [sic] Developments Limited (debenture security) and inter-company debtor balances from around the group. As there appears to be limited liquidity across the group, according to investor documents which we have considered, there is likely to be a significant shortfall to the Company under this security and recovery action; there therefore appears to be no real prospect of a return to unsecured creditors.

48 The Company criticises Mr Woolrych's evidence and submits that he has failed to exercise any independent analysis sufficient to persuade the court that there is a

real prospect that one of the statutory purposes will be fulfilled if the proposed administrators are appointed. I was referred to letters from the Company's solicitors dated 3 August 2020, to, respectively, the Applicant's solicitors and Mr Woolrych. These letters state that Mr Woolrych is mistaken in considering that funds will be more readily or effectively realised for the Company if it were placed into administration. They state that the Company's assets (namely the funding received under the facility) have been invested in the PRS Developments which will not realise any genuine commercial value until such time as those developments are completed. They say that the likelihood of the PRS Developments being completed on time and in a manner that achieves any realisation for the Company will be significantly impacted if an administration order is made. They also say that the Company has spoken to BLME and Topland Jupiter Ltd (**Topland**), the secured creditors of Group companies carrying out two of the PRS Developments, namely, Olympius Developments Ltd (**Olympius**) and Rodus Developments Ltd (**Rodus**), who have indicated that if an administration order is made in respect of the Company, they will exercise their enforcement rights in respect of their security and appoint receivers over the PRS Developments managed by those companies, being Hadrian's Tower in Newcastle and Middlewood Plaza in Salford. They point out that if this were to happen it would restrict any attempt by administrators appointed over the Company to have direct control over those developments and, in turn, any realisation in the developments for the benefit of the Company and its creditors. They say that the appointment of receivers by the secured creditors of Olympius and Rodus will cause further costs to be incurred which will be deducted before any distribution is made to the Applicant.

49 Both Mr Forrest and Steven Brown, who is a qualified solicitor and the Group's in-house counsel (**Mr Brown**), gave evidence with regard to what they say will be the consequence of an administration order being made over the Company. There is little doubt that in the event of an administration order being made in respect of the Company, the secured creditors of Olympius and Rodus (namely, BLME and Topland) will be entitled to appoint receivers over the developments managed by those companies. Mr Brown asserts in his witness statement that an administration order would not enable the Company's administrators to realise property in order to make a distribution to one or more secured creditors because "*there is no provision within the Onward Lending Agreements for the loans to be called prior to practical completion of each of the development projects to which they relate*". That is not correct. It is clear from the terms of (1) the Company's Onward Lending Agreements with the other Group companies and (2) the loan agreements between those companies and their secured funders that, were an administration order to be made, the Company's administrators would also be entitled to demand early repayment of the loans made to other Group companies under the Onward Lending Agreements.

50 At the time of the hearing on 28 August 2020 the Company had not filed its own accounts for the period ended 31 December 2018, nor had it provided the

Applicant with audited Group accounts for the same period. Nor had the Company produced any documents showing the up-to-date financial position of either the Company or the Group. Instead, the Company relied on a witness statement from Joanne Bell (**Ms Bell**), the Group's finance director since January 2018. Ms Bell says that the Company's assets are its shareholding in Rodus (Rodus being a wholly owned subsidiary of the Company) as well as the monies due to it from each of the Group companies under the Onward Lending Agreements which total £26,950,000, broken down as to £8,000,000 from Olympius, £9,000,000 from Holloway Holdings (Birmingham) Ltd (**Holloway**), £4,000,000 from Yona Developments Ltd (**Yona**) and £5,950,000 from Rodus. She summarises the financial position of each of these development companies based on management accounts that have not been externally audited and states that Olympius' net asset position is £5,901,000, Holloway's net asset position is £2,822,000, Rodus' net asset position is £876,000 whilst Yona's net asset position is negative £6,000. Based on information provided to her by Mr Forrest, Ms Bell states that the Company will make repayments to the Applicant under the Facility Agreement upon receipt of the funds due from each of the development companies on completion of the PRS Developments which on her current analysis means that the Company will be able to settle its debt to the Applicant in full with a surplus of £31,000. Ms Bell produces a cash flow analysis for each of these development companies which contains estimates made by Mr Forrest of further funding he expects to receive as well as the income from sales of further units as yet unsold. Ms Bell also produces forecasts of the net cash available to the development companies at the date of completion of each of the projects and states that there would be a surplus in respect of each project as follows: Olympius £10,885,000 (based on the likely scenario predicted by Mr Forrest); Rodus £9,185,000; Yona £4,177,000 and Holloway £14,304,000. These forecasts rely upon information provided to Ms Bell by Mr Forrest about how the PRS Developments are progressing, the likely completion dates and the estimated return upon completion.

51 After the 28 August hearing, on 4 September 2020, at the same time as it filed further written submissions, the Company served a second witness statement of Ms Bell dated 4 September 2020 exhibiting the Company's accounts for the period ended 31 December 2018 which had been filed at Companies House on that date. In addition, Ms Bell exhibited (i) a letter from Stokoe Rodger LLP who are described as the Company's "external accountants" (with nothing provided by the Group's auditors PwC, according to Ms Bell for "*reasons connected with workload and Covid-19*"); (ii) draft 2019 statutory accounts and management accounts for the Company up to 30 June 2020; (iii) 2018, draft 2019 and management accounts for Rodus up to 30 June 2020; (iv) a cash flow analysis showing up to date values for each relevant development; and (v) a financial forecast for the Company following practical completion of the relevant developments and repayment of the Applicant's facility. The Company submits that these materials show the Company is solvent, that the PRS Developments

will generate the cash required by the Company to repay the Applicant in full and that the Company's shareholding in Rodus has substantial value.

52 Although the Company has not applied for permission to serve further evidence and no mention was made at the hearing on 28 August 2020 of the fact that it would seek to serve such further evidence, I am prepared to admit this evidence and have considered the written submissions of both parties as to its effect on the application. The Applicant's submissions at the hearing on 28 August focused principally on two matters. First, the fact that no accounts for the Company had been filed and there was no explanation for this breach of the Company's statutory obligations. Second, the fact that the Company had failed to provide sufficient evidence of its full up to date financial position. In its written submissions filed since the hearing, the Applicant submits that:

52.1 No proper details were provided either for the hearing on 28 August or in the materials filed subsequently with regard to the Company's liabilities. Ms Bell says that the Company's "*secured liabilities*" are stated to be £26,919,000 (i.e. the principal sum advanced under the Facility Agreement) but no account has been taken of, nor provision made for, the Company's liability to pay further interest to the Applicant as provided for by the Facility Agreement. The last interest paid by the Company was on 6 January 2020. As at 10 September 2020, the accrued but unpaid interest under the Facility Agreement amounts to between £2,135,771.72 (calculated at 11% per annum: equivalent to 16.5% for 18 months) and £2,912,415.98 (calculated at 15% per annum, including additional 4% p.a. default interest).

52.2 The further evidence raises more questions than it answers. The Company's balance sheet for the period ended 30 June 2020 exhibited at page 38 to Ms Bell's second statement, includes "*Prepayments*" as an asset in the sum of £9,680,300 and, unlike the previous account period, records no liability for "*Inter-Co Payables*" which had been a figure of £8,866,709). The result is to inflate the balance sheet from £25,001 to £9,777,789, without any satisfactory explanation as to how this has happened. The Company's filed accounts to 31 December 2018 show balance sheet insolvency of £74,125.

53 As to the Applicant's first point, it is undoubtedly the case that there is no reference to interest in the Company's filed accounts or in the other financial statements provided by the Company. On the basis that very substantial interest liabilities have already accrued and will continue to accrue and it is not explained how the Company could meet this obligation to pay interest, it seems to me that the inevitable conclusion is that the Company is already insolvent or likely to become insolvent.

54 As to the Applicant's second point, it is regrettable that no explanation has been provided either by Ms Bell or by Stokoe Rodger LLP for the substantial figures said to represent alleged prepayments and inter-company payables which have been (in the former case) included in and (in the latter case) omitted from the Company's balance sheet for the period to 30 June 2020. It is not satisfactory for this information to be put in evidence in a piecemeal fashion without any proper explanation, raising further questions as to the reliability of the Company's financial information.

55 The Company submits that the evidence which it has produced provides a proper basis for the court to conclude that the interests of the Applicant should be required to lie behind those of the Company, its shareholders and management, essentially because it can show that the Applicant is fully secured. The Company relies on what was said by Hoffmann J in *Re Imperial Motors UK Ltd* (1989) 5 BCC 214 at 217-8 (cited by Sir Geoffrey Vos C in *Rowntree Ventures Ltd v Oak Properties Partners Ltd* [2017] EWCA 1944 (Civ); [2018] BCC 135 at [21]) where the court held that it had jurisdiction to make an administration order but declined to do so on the basis that the secured creditor was "*sufficiently secured*" so that it could, by realisation of its security, "*achieve payment in full without the need for the intervention of a court of law*".

56 In my judgment, the facts of this case are very different from those considered in the *Imperial Motors* case. The figures produced by the Company both before and after the hearing on 28 August do not enable me to conclude with any confidence that the Applicant's debt is sufficiently secured. Moreover, I am satisfied that if the proposed administrators are appointed, there is a real prospect that one of the statutory purposes of administration will be achieved. On taking office the administrators are under a duty to consider whether it is reasonably practicable to rescue the Company as a going concern. They will be able to make that assessment only once they are in office and in possession of all relevant books and records. At present there is no visibility as to the true extent of the Company's liabilities, including its unsecured creditors. If neither objective (a) nor objective (b) proves possible to achieve, there is at the very least a real prospect of the administration realising property in order to make a distribution to the Company's secured creditors and thereby achieving the objective (c), namely, a return to secured creditors.

Discretion

57 Even though I am satisfied that the Debenture is enforceable and that there is a real prospect of the statutory purpose of administration being achieved, the Applicant still needs to establish that the making of an administration order is an appropriate exercise of the court's discretion.

58 The Company submits that I should exercise my discretion against the making of an administration order because there is nothing an administrator can do to

achieve a quicker completion of the PRS Developments or payment to the Company. Mr Boardman submits that this is a case where the risks entailed in making an administration order outweigh the rewards. He reminded me that administration is a process which Parliament enacted for the benefit of all company stakeholders, not just secured creditors, unlike the appointment of an administrative receiver which, following the Enterprise Act, is no longer a method of enforcement available to the Applicant.

59 Mr Brown's evidence is that the making of an administration order over the Company could have a hugely detrimental impact across the Group, with the potential loss of hundreds of jobs and the cessation of building of thousands of new homes as well as hotels and commercial properties. Mr Forrest emphasises that the funds owed to the Company are tied up in the PRS Developments and their value can only be realised on completion. He says the appointment of administrators will only cause unnecessary delay to the completion date of the PRS Developments as well as a reduction in the return to the Company as a result of the fees of receivers being deducted from the proceeds of sale and a reduction in their realisable value. He says that an insolvency event for one of the companies in the Group is likely to have wide ranging and serious implications for the rest of the Group which could be catastrophic for the individuals concerned, with some 300 full-time employees and 1,000 subcontractors being affected.

60 I am acutely conscious of these potential consequences of making an administration order. Nevertheless, it seems to me that it would be wrong to deny the Applicant its right to enforce the terms of the Debenture in circumstances where I consider that the Company's debt is far from sufficiently secured and on the balance of probabilities the Company is presently insolvent. The Company is not even able to demonstrate that it is in a position to meet its interest obligations, let alone its obligation to repay the substantial capital sums of £17,885,000 and £9,033,909.36 which became due for repayment on, respectively, 12 December 2019 and 30 January 2020. The Company's response is that it will in due course over the next 2 or 3 years receive monies from the other Group companies undertaking the PRS Developments which will be distributed to the Applicant as a secured creditor. In my judgment, a return to secured creditors is more likely to be achieved if licensed insolvency practitioners (rather than the existing management) are in control of the Company who can seek to ascertain full information regarding the financial position of the Company and take informed commercial decisions about safeguarding the Company's assets and achieving a return to secured creditors. I am therefore not persuaded that it would be right to exercise my discretion by refusing to make an administration order.

Conclusion

61 Accordingly, for the reasons summarised in this judgment, I grant this application.