Neutral Citation Number: **[2021] EWHC 3255 (Ch)**

Case No: BR-2020-000403

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

IN THE MATTER OF AJAY AJIT PETER KERKAR
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
London EC4A 1NL

Date: 02/12/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

AJAY AJIT PETER KERKAR	**Applicant**
- and -	
INVESTMENT OPPORTUNITIES IV PTE LIMITED	**Respondent**

- -
- -

Simon Johnson (instructed by **Pennington Manches Cooper LLP**) for the **Applicant**
Adam Deacock (instructed by **Ince Gordon Dadds LLP**) for the **Respondent**

Hearing dates: 18 March 2021

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Approved Judgment

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

This judgment will be handed by email to the parties representatives. The time and date of judgment shall be 10.30am on 2 December 2021

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton:

Introduction

1. On 6 July 2020, Mr Kerkar applied to set aside a statutory demand dated 21 April 2020 served upon him by the Respondent, Investment Opportunities IV PTE Limited. Mr Kerkar was a director and group CEO of Cox & Kings Limited ("C&K") a well-known, substantial travel conglomerate. The Respondent is an investment entity for one of Ares SSG Group's investment funds.

2. The statutory demand claims that Mr Kerkar owes the Respondent £52,907,340.52 (the "Debt") pursuant to his guarantee of the obligations of Prometheon Holdings (UK) Limited ("PHUK"), one of the companies within the C&K group, under two facilities agreements (together, the "Facilities Agreements"):

    i) the first, dated 20 March 2019 for a term loan of €50,481,721 (which was amended and restated on 12 April 2019 to provide for an additional facility of €30m) made between PHUK as borrower, the Respondent and Pedibus Limited as lenders, Prometheon Enterprise Limited **("**PEL") and C&K as corporate guarantors and Mr Kerkar as personal guarantor (the "Euro Facilities Agreement"); and

    ii) the second dated 25 April 2019 made between PHUK as borrower, the Respondent as lender, PEL and C&K as corporate guarantors and Mr Kerkar, again as personal guarantor, this time for a term loan of US$30m (the "US$ Facility Agreement").

3. The statutory demand recites that on 22 July 2019, acceleration notices setting out events of default were served on PHUK demanding repayment of sums due under each facility agreement. On the same date, written demands were made of Mr Kerkar requiring him, pursuant to his guarantee obligations in clause 15 of each facility agreement, to pay the same amounts within five business days. Following Mr Kerkar's failure to do so, the statutory demand was served, setting out the total amount due including interest and expenses as at that date, converted to sterling, to arrive at the Debt.

4. It is not in dispute that PHUK is indebted to the Respondent in the sums claimed in the statutory demand, nor that Mr Kerkar gave the guarantees set out in paragraph 15 of each of the agreements. However, Mr Kerkar claims that the statutory demand should be set aside because the Respondent has acted with prejudice and bad faith towards him, such that he has a real prospect of setting aside the guarantees at trial and pursuing a claim for damages that are substantial against the Respondent in an amount at least equal to the Debt. He relies on rule 10.5(5)(a), (b) and (d) of the Insolvency (England and Wales) Rules 2016 ("IR2016").

5. Mr Kerkar claims that:

    i) Mr Maheshwari, whom he describes as "one of the founders and the controlling mind of" SSG Capital Management Limited ("SSG Capital") (a Cayman Island company and agent under the Euro Facilities Agreement), the

Respondent and SSG Capital PE Fund ("SSG Fund") promised him that the guarantees were procedural only and would not be called upon; and

ii) the Respondent, controlled by Mr Maheshwari, engineered a default under the Facilities Agreements. Two principal matters underlie the alleged, engineered default:

a) PHUK would have been able to repay the sums due to the Respondent if the Meininger Hotel Group owned by Meininger Hotels Ltd ("Meininger") had been sold, as planned, in the first quarter of 2020. Meininger is a wholly-owned subsidiary of Holiday Break Limited ("HBL"). 51% of HBL is owned by PHUK and the remaining 49% by Borita Global Limited ("Borita"), another company in the Ares SSG Group. The sale did not go ahead. Mr Kerkar believes that Mr Maheshwari, brought about a change of focus so that an IPO was proposed instead of the sale. Mr Kerkar claims that in light of the Covid-19 pandemic, then gathering pace, this was a hopeless strategy and inevitably resulted in PHUK not being able to repay the sums due to the Respondent. He alleges that Mr Maheshwari brought about this change in order that, by triggering defaults under the Facilities Agreement, Ares SSG Group could take control of Meininger and HBL and in the meantime, recover whatever it could under the personal guarantees given by him. This he describes, as the:

> "typical behaviour of a vulture fund. Making me bankrupt in the meantime opens the way to seizing my few remaining assets, removes the possibility of a challenge from me and lessens the scope for scrutiny of things that Mr Maheshwari and others have done in India".

b) C&K has been the victim of a long-running fraud resulting in it being stripped of funds and entering a corporate insolvency resolution process in India with an estimated deficiency of £500 million. Mr Kerkar believes that Mr Maheshwari and others participated in the fraud by diverting funds away from C&K to a company called Redkite Capital Limited ("Redkite") and in doing so, deprived C&K of the ability to repay the sums advanced to PHUK. As the extract from his witness statement above demonstrates, he believes that the Respondent's decision to pursue him under the guarantees is in part designed to hide their role.

6. Mr Kerkar explained in his witness statement the difficulties he experienced during Covid-19 lockdown in Mumbai, where he lives, in gaining access personally or via his solicitors to documents. Mr Johnson submits that it would give rise to serious injustice to allow the statutory demand to stand, with bankruptcy proceedings to follow, without these serious allegations first being pleaded and tried with the benefit of disclosure and cross-examination.

7. The Respondent states that it is not controlled by Mr Maheshwari. Consequently, even if he did make the representations alleged and even if they had the effect of inducing

Mr Kerkar to enter into the guarantees (each of which is denied) he had no authority to bind the Respondent and any such representation would not affect the Respondent's right to recover the Debt.

8. As regards the allegations of fraud, the Respondent states that none have been raised with the particularity required of an allegation of fraud, nor do they have any evidential foundation which could justify them being properly pleaded or alleged. The Respondent submits that the allegations should therefore be withdrawn.

9. The Respondent contends that it would derive no benefit from sabotaging the proposed Meininger sale: the funds from such a sale would have resulted in repayment of sums due under the Facility Agreements. Deliberately obstructing such an outcome would have been commercially irrational.

10. It submits further that even if the allegations were true, there is no basis upon which the alleged fraudulent acts could be attributed to the Respondent. The connection is said to be via Mr Maheshwari whom Mr Kerkar claims controls SSG Capital and SSG Fund. The Respondent states that this is not only false but that there is no basis for asserting it.

11. The Respondent states that insofar as it has been able to understand the allegations of fraud, the relevant claim would, in any event, be vested in companies other than PHUK. Consequently, even taking into account the principle of co-extensiveness, they would have no impact on Mr Kerkar's liability to pay sums due under the personal guarantees.

12. The Respondent highlights that despite Mr Kerkar's alleged difficulties in obtaining documents during lockdown, he has not provided any details of the documents that he believes would be available to support his application or who holds them.

Evidence

13. Mr Kerkar provided two witness statements, the first dated 6 July 2020 and the second 28 October 2020.

14. The Respondent relies on the witness statements of:

    i) Mr Maheshwari dated 11 September 2020 and 25 January 2021; and

    ii) Dinesh Goel, also dated 11 September 2020 and 25 January 2021. Mr Goel is a director of the Respondent and employed by Ares SSG Capital Management (Singapore) Pte. Ltd ("Ares SSG Management") which acts as a sub-investment advisor to the Respondent. Mr Goel states that he was one of the lead members of the deal team in connection with the advice Ares SSG Management gave the Respondent in relation to the decision to extend the facilities to PHUK.

Relevant legal principles

Rule 10.5 and a real prospect of success

15. Rule 10.5 (5) IR2016 provides that the court may grant an application to set aside a statutory demand if:

> "(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt specified in the statutory demand;
>
> (b) the debt is disputed on grounds which appear to the court to be substantial; and …
>
> (d) the court is satisfied, on other grounds, that the demand ought to be set aside".

16. Any dispute (Rule 10.5(5)(b)), counterclaim or cross-demand (Rule 10.5(5)(a)) must have a real prospect of success.

17. For the purposes of rule 10.5(5)(a) the court will assess whether the relevant cross-claim is for an amount that equals or exceeds the sum claimed in the statutory demand (see *Jeffrey Green Russell (a firm) v. Ruddock* [2005] EWHC 3498 (Ch)).

18. The "real prospect of success" test is the same test as applied for summary judgment under CPR Part 24 (see *Ashworth v. Newnote Limited* [2007] EWCA Civ 793). The approach which the court should take when assessing whether there is a real prospect of success was set out by Lewison J in *Easy Air Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch):

> "15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the

> application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

19. It is not for the court, when considering an application to set aside a statutory demand, to make findings of fact. The parties' factual evidence should be accepted unless it is demonstrably untrue or unsupportable, particularly if contradicted by contemporaneous documents (*ED & F Man Liquid Products v. Patel* and *Portsmouth v Alldays Franchising Ltd* [2005] BPIR 1394).

20. The court should not conduct a long and elaborate hearing, examining each side's case in minute detail. In the context of corporate insolvency, the Court of Appeal held in *Tallington Lakes Limited v Ancasta International Boat Sales Limited* [2012] EWCA Civ 1712 that a petitioner should avoid a lengthy hearing which is likely to result in a wasteful duplication of court time and take a realistic view of whether the debtor is likely to establish a genuine and substantial dispute.

21. The Court must also be alive to the possibility that a debtor is seeking to raise a smokescreen. As Megarry V-C observed in *Lady Anne Tennant v. Associated Newspapers Group Ltd* [1979] FSR 298

> "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism."

Other grounds on which the statutory demand should be set aside

22. The purpose and effect of rule 10.5(5)(d) (that the court is satisfied, on other grounds, that the demand ought to be set aside) were considered by the Court of Appeal in *Octagon Assets Ltd. v. Remblance & Anor* [2009] EWCA Civ 581. At paragraph 32 of his judgment, Dyson LJ stated (by reference to the predecessor rule, 6.5(4)(d) of the Insolvency Rules 1986):

> "The discretion to set aside a statutory demand under rule 6.5(4)(d) is a residual discretion which will normally be exercised in "circumstances which would make it unjust for the statutory demand to give rise to [bankruptcy] consequences in the particular case. The court's intervention is called for to prevent that injustice": see per Nicholls LJ in *In re A Debtor (No 1 of 1987)* [1989] 1 WLR 271, 276D. Nicholls LJ went on to say that this approach to sub-paragraph (d) is in line with the particular grounds specified in sub-paragraphs (a) to (c) of rule 6.5(4). As he said (with reference to sub-paragraph (a)), it would normally be unjust that a person should be regarded as unable to pay a debt if he has a counterclaim, set off or cross-demand which equals or exceeds the amount of the debt."

Fraud, allegations of bad faith and engineering of default

23. For Mr Kerkar, Mr Johnson relies upon two authorities which establish that prejudicial conduct and bad faith, each of which fall short of fraud in the conventional sense, may justify setting aside a guarantee.

24. In *Baker v. LSREF III Wight Limited* [2016] BPIR 509, Chief Registrar Baister (as he was) held that non-disclosure of facts surrounding a key valuation report gave rise to a potential action in deceit.

25. In *Dubai Islamic Bank PJSC v. PSI Energy Holding Company BSC* [2011] EWHC 2718 (Comm) the bank sought summary judgment in respect of claims under guarantees against the second to fifth defendants. To succeed in its application for summary judgment, the bank needed to show that none of the various defences raised by the defendants had a real prospect of success. The court held that two such defences did have a real prospect of success and required factual investigation at trial. The first concerned an allegation that the default that triggered the guarantee liability, was engineered by the bank. The court referred to paragraph 10-08 of *O'Donovan & Philips: The Modern Contract of Guarantee*:

> "Not every default justifies the creditor enforcing the guarantee. Where the default is caused by the creditor's own conduct or by the creditor's failure to accept the debtor's proper performance of the principal obligation, the guarantee cannot be enforced. Nor is the surety liable for a default which occurs with the connivance of the creditor."

26. Hamblen J noted, at paragraph 39 of his judgment, that:

> "Fraud, in this context, has been said to encompass conduct which is unfair to a surety".

He clarified this further, at paragraph 43, saying:

> "The case law accordingly provides some support for the Defendants' argument that a surety may be discharged where a creditor causes a default or acts in bad faith towards the surety, or positively acts so as to prejudice the surety in an unfair way."

Setting out particulars of fraud or dishonesty

27. Mr Deacok referred to *Three Rivers District Council v Governor and Company of the Bank of England* [2001] UKHL 16 in which, following an investigation into the collapse of BCCI in 1991, BCCI's liquidators claimed that the Bank of England was liable in the tort of misfeasance in public office, contending that named senior officials had acted in a knowingly unlawful and dishonest manner. The House of Lords considered whether the grounds for the claim lying in misfeasance in public office had been sufficiently particularised. Lord Hope noted at paragraph 51 of his judgment:

> "… it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.
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> 52. *In Wallingford v Mutual Society (1880)* 5 App Cas 685, 697 Lord Selborne LC said*:*
>
> > 'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice.'
>
> In the same case, at p 709, Lord Watson said:
>
> > 'My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to

> infer liability on the part of those who are said to have committed it. And even if that were not the rule of the common law, I think the terms of Order XIV would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.'"

28. Mr Deacock also referred to the Chancery Guide which provides:

> "**10.1 :** In addition to the matters which PD 16 requires to be set out specifically in the particulars of claim, a party must set out in any statement of case:
>
> - full particulars of any allegation of fraud, dishonesty, malice or illegality; and
>
> - where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.
>
> **10.2 :** A party should not set out allegations of fraud or dishonesty unless there is credible material to support the contentions made. Setting out such matters without such material being available may result in the particular allegations being struck out and may result in wasted costs orders being made against the legal advisers responsible."

Is the debt disputed on substantial grounds?

(a) Alleged representations of Mr Maheshwari

29. In his first witness statement, Mr Kerkar states that during a meeting in Hong Kong prior to signing the US$ Facility Agreement (and therefore, it seems, after the original Euro facility agreement had been entered into), Mr Maheshwari told him:

> "not to worry, because the guarantee was just procedural. I therefore understood that the guarantee would not be called upon. Mr Maheshwari knew that I did not have sufficient assets to pay up to US$30 million in any case. He reiterated the procedural nature of the guarantee to me in a telephone conversation after SSG Capital Partners II LP (a Cayman Island corporation) had issued a winding up petition in the Supreme Court of Mauritius against a company controlled by me."

30. In his first witness statement, Mr Maheshwari denied attending a meeting with Mr Kerkar in Hong Kong prior to or around the time when the US$ Facility Agreement was executed (April 2019). He denies making any statements to Mr Kerkar in relation to the personal guarantee, whether before or after the personal guarantee was given in the US$ Facility Agreement or the Euro Facilities Agreement, including before the Mauritius court proceedings. He claims to have no knowledge of Mr Kerkar's net worth and, as set out above, that the decision to require him to provide a personal guarantee "was taken at the direction of the Respondent's Board of Directors".

31. In his second witness statement, Mr Kerkar said that having reviewed his records, the meeting at which Mr Maheshwari's comments were made, was in Hong Kong but on the earlier date of 11 December 2018, which pre-dated the Euro Facilities Agreement. He provides copy airline tickets to show that both he and Mr Maheshwari took the same flight and returned the next day. He states:

> "This meeting was prior to the entering into force of the PEL facility, which was replaced by the Euro facility. I understood the assurance given by Mr Maheshwari to apply to it and the Euro facility and thereafter the US$ facility."

32. At first blush this appears to reveal a direct conflict of evidence. Mr Johnson submits that it is a paradigm case for cross-examination. He submits that the reason for the delay between default under the Facilities Agreements in July 2019 and the Respondent's service of a statutory demand nine months later is because Mr Kerkar had been told that the "procedural guarantees" would not be relied upon and that that is a question which must await trial.

33. In my judgment this conflict in evidence does not need to be tested by cross examination in Part 7 proceedings. Putting to one side the question of whether Mr Maheshwari was in a position to make representations on behalf of the Respondent (to which I shall return later in the judgment), Mr Kerkar does not allege a causal connection between Mr Maheshwari's alleged representation on behalf of the Respondent and his decision personally to guarantee PHUK's obligations under the Facilities Agreements. He claims that Mr Maheshwari informed him that the guarantees were "purely procedural". He does not allege that Mr Maheshwari told him that they would not be relied upon. It was Mr Kerkar who chose:

    i) to understand that "purely procedural" meant that the Respondent would not seek to rely upon them; and

    ii) to rely upon his understanding of that statement, without further clarification, some four months later when he elected to sign documents in which he gave representations and warranties which entirely conflicted with such an understanding.

34. The court is not required to take at face value and without analysis everything that a claimant says in his statements. It can reject evidence because it finds it to be inherently implausible. I find it inherently implausible that a man of Mr Kerkar's extensive business interests would have been prepared to rely on a statement, the meaning of which was not clearly articulated, made four months earlier, in relation to

a different lending arrangement, that contrary to the clear and express wording of the agreement he was about to sign, it would not seek to rely upon his personal guarantee. There is nothing to negate the express agreement contained in the guarantee.

35. In my judgment, this ground of dispute does not have a real prospect of success.

(b) Engineering a default by sabotaging the Meininger sale

36. Mr Kerkar explains in his first witness statement that the reason PHUK entered into the Facilities Agreements was to pass all sums drawn down to C&K "whose own resources and borrowing capacity had been exhausted". He said that PHUK would only be able to repay the monies from its own assets or reimbursement from C&K. One such asset was its shareholding, via HBL in Meininger.

37. In relation to the proposed Meininger sale, Mr Kerkar alleges that:

> "various SSG entities had loaned substantial amounts to HBL. This enabled Mr Maheshwari to take control of HBL's board and use his influence eventually to stop the sale and pursue an IPO which he must have realised would fail".

38. He explains that Lazard were retained to run the sale process and received indicative offers from seven parties. He was aware that two additional parties had expressed serious interest. However, by engineering the rejection of a request for exclusivity by one of them, and delaying the other's due diligence process, "SSG Fund" procured that neither of the parties concluded a binding offer.

39. Mr Kerkar's reference to SSG Fund appears to be to HBL's 49% owner, Borita, another company in the SSG Group. He refers to the role of Mr Menon, "at first deputy CEO at HBL and then CEO" and alleges that:

> "The disposal process was compromised by conflict of interest. SSG Fund had a conflict of interest, being both a shareholder and part of the same corporate group as the creditor, both controlled by Mr Maheshwari. Mr Menon had a conflict of interest in his handling of the proposed sale. He was entitled to a bonus to encourage him to obtain the best price reasonably obtainable. HBL's management accounts provided for this bonus."

40. Mr Kerkar refers to an email from the chairman of Meininger complaining that between September 2019 and February 2020, no update had been provided on the Lazard-led sales process and that before considering Plan B (which I understand to be a reference to the proposed IPO), he would like to understand why that process failed to produce acceptable offers. Mr Kerkar states:

> "It is inconceivable that there would be no formal update to the board in relation to the process of selling the company's core asset over such a long period, or that the CEO would pursue a different strategy with no prior discussion of the relative merits at board level. Mr Menon favoured the IPO because it was the

> best route to the bonus. Mr Maheshwari allowed the focus to change, thus reducing the prospects of a disposal to zero, to further his own agenda."

41. Mr Johnson submits that it is self-evident that an IPO of a hotel group, at a time when the World was being progressively overtaken by a global pandemic was a wholly unrealistic commercial strategy. As there is no evidence before the court which properly contradicts Mr Kerkar's assertions that Mr Menon pursued the IPO at SSG's behest, delaying a sale in order to maximise SSG's return under its loans and investments, the court cannot make any conclusions on the allegations. No evidence is before the court from the other directors of Meininger at the relevant time. Thus, Mr Johnson says, Mr Kerkar's allegations must be tested at trial, where the trial judge will have the benefit of all relevant documents and cross-examination of witnesses.

42. I do not agree. As Lewison J noted in *Easy Air Limited v Opal Telecom Limited*, the approach the court must take when considering whether there is a real prospect of success involves considering whether the claimant has a "realistic" prospect of success. A realistic claim is one that carries some degree of conviction and is more than merely arguable.

43. Mr Kerkar's evidence includes a schedule titled "Distribution as per waterfall" setting out how the Meininger sale proceeds would or could be distributed. It was prepared on the basis that Meininger had an enterprise value of €450 million. The schedule sets out that a sale at this price would have enabled a dividend to be paid to PHUK and, after applying most of it to items described as "PHUK Debt and "other PHUK Liability" there would be a balance of €6.61 million to pay "upstream to PEL". He recognises that the figures would need to be adjusted depending on whether Meininger was sold for a lower or higher price.

44. His evidence proceeds to explain that the best indicative, non-binding offer remaining on the table was for €375 million. If a sale had proceeded for that figure, taking into account Mr Kerkar's own documented waterfall of payments to be made from the sale proceeds, the amount to be paid to PHUK would have been insufficient to discharge the full amount due to the Respondent under the Facilities Agreements, which he guaranteed. This alone undermines the substance of Mr Kerkar's argument.

45. Even if that were not the case, I find that this part of his claim has no real prospect of success for the following reasons:

    i) by the time the Meininger sales process was being run (September 2019 to February 2020), PHUK had already defaulted under the Facility Agreements;

    ii) if, as alleged, Mr Menon breached his duties to HBL, a claim would lie against him by that company and not by PHUK. It could not therefore give rise to either PHUK or Mr Kerkar having a cross claim against the Respondent;

    iii) Mr Kerkar does not claim that the Respondent was directly involved in the alleged frustrated sale. Reference is made to "SSG Fund" engineering the withdrawal of other potential, more lucractive offers and the connection otherwise appears to be via Mr Maheshwari who, he says, was able to take control of HBL's board. Mr Goel addresses SSG's relationship with HBL and

the composition of its board. As a preference shareholder of HBL, Borita was entitled to nominate directors to sit on its board. Mr Maheshwari and Mr Goel were appointed to HBL's board in this way, with a Mr Vourloumis as an alternate. Notice of Mr Vourloumis and Mr Goel's resignation was filed at Companies House on 25 November 2019. The Respondent was also entitled to appoint one director, which it did on 31 October 2019. However, HBL's board also comprised, at all material times, three parties nominated by C&K, Mr Kerkar (who was CEO of HBL), Mr Menon, deputy CEO of HBL and Mr Bali, Group CFO of HBL. No explanation is given to explain how Mr Maheshwari or any entity within the Ares SSG Group was able to control HBL's board against this balance of directorships.

iv) It is clear from the company filings and a letter of resignation that Mr Maheshwari was a director of HBL from 29 January 2019 until 27 August 2019. He had therefore resigned from the board before the discussions regarding the Meininger sales process took place. Despite Mr Kerkar himself being on the board of HBL at the relevant time, he tenders no evidence regarding the manner or basis upon which Mr Maheshwari exercised his alleged control over the board: no minutes or correspondence, nor any evidence of steps taken by Mr Kerkar as HBL's CEO to show that he objected to the decisions being taken by the rest of its board. Even the letter dated 4 July 2019 setting out the terms for Mr Menon to earn the bonus which Mr Kerkar claims incited his conflict of interest, was signed not by Mr Maheshwari or any of Borita/Ares SSG Group's appointed directors, but by Mr Kerkar.

46. The court must take into account not only the evidence actually placed before it, but also the evidence that can reasonably be expected to be available at trial. Mr Johnson relies on the absence of evidence to contradict Mr Kerkar's assertions. Mr Kerkar's allegations are of bad faith, misconduct or fraud. Contrary to the requirements set out in *Three Rivers,* he has entirely failed to provide any particulars of such serious allegations. Even if it can be said that these requirements do not apply to an application under Rule 10.5, where there are no pleadings, Mr Kerkar has failed to provide any evidence to support his allegations and factual assertions regarding the Meininger sale. Such evidence as there is, in particular, regarding the composition of HBL's board, contradicts those assertions. Taking into account the matters set out in paragraphs 42 – 45 above, and the approach set out in paragraph 15(vi) of Lewison J's judgment in *Easy Air Limited v Opal Telecom Limited*, I see no reasonable grounds for believing that a fuller investigation into the facts surrounding the Meininger sale would affect the outcome of the case.

47. In my judgment, this part of Mr Kerkar's claim has no real prospect of success.

(c) The Respondent's role in the alleged fraud against C&K

48. The majority of the hearing was spent examining evidence surrounding the fraud perpetrated against C&K, the alleged involvement of the Ares SSG Group and Mr Maheshwari in that fraud and Mr Maheshwari's alleged role as the controlling mind of the entities within the Ares SSG Group to demonstrate the Respondent's alleged role in that fraud.

49. I was taken to a draft interim report prepared by PWC in relation to various fraudulent transactions which had the effect of stripping C&K of hundreds of millions of pounds (set out in the report as INR crores). One recipient of C&K's funds, according to the report, was a company called Ezeego One Travel & Tours Limited ("Ezeego"). It is said to have received sums which convert to approximately £686 million of which £37.1 million relates to fictitious sales.

50. Mr Kerkar and his sister are directors and shareholders of Ezeego. They commissioned their own report into its affairs by Desai Saksena & Associates. Their report also revealed millions of pounds' worth of fictitious transactions.

51. Mr Kerkar focusses on loans in excess of £31 million made by Ezeego to a company called Redkite Capital Limited between 27 February 2015 and 9 May 2019. He states:

> "There are no board resolutions sanctioning such a vast lending programme. Plainly if Ezeego had not received such large sums from C&K, it would not have been able to provide funds to Redkite. The money can only have come from C&K."

52. This, Mr Kerkar says, is relevant because:

> "Redkite is a company controlled by Mr Maheshwari. I believe that he directed it to use the money provided by Ezeego to buy shares in TFCI. There is no conceivable benefit in such an arrangement for Ezeego."

53. TFCI is an abbreviation for the Tourism Finance Corporation of India Limited, formerly a government-backed tourism finance company which is now listed on the Indian stock exchange. Mr Kerkar states that:

> "Redkite wished to increase its stake in TFCI and had to comply with the provisions of the Indian Takeover Regulation. I have obtained what appears to be a draft press release produced in this connection by Mr Khandelwal and Mrs Jain describing Redkite, the key personalities and the proposed transaction. This describes Redkite as working together with '*Asia's leading Credit Fund, SSG Capital …*', both in relation to the original acquisition of shares and the further acquisition.
>
> Had Mr Maheshwari not caused Mr Khandelwal, Mr Jain and Rashmi Jain and others within C&K to divert C&K's money to Ezeego, and then to Redkite for the purchase of shares in TFCL, C&K would have had sufficient resources to avoid a default on its payment obligations. There would have been no default under the Euro facility and no cross-default under the US$ facility. My guarantees would not have been triggered. C&K's resources have been so depleted that it cannot repay the money that it obtained from PHUK pursuant to the facilities. It would be grossly unjust for the court to permit the statutory

> demand to stand, in the light of these complex dealings, which on their face evidence a substantial fraud."

54. Anil Khandelwal was the chief financial officer of C&K, Naresh Jain was the company's internal auditor and Rashmi Jain its company secretary and compliance officer. Mr Kerkar considers them all to be responsible for the staggering frauds exposed and described in PWC's draft interim report.

55. As further evidence of the Respondent's alleged involvement in the wrongful diversion of C&K's money to Redkite, Mr Johnson took me to evidence of

    i) allegations made by Mr Kerkar to the Indian Enforcement Directorate. He told the Directorate that he was not informed of the method by which SSG acquired nonconvertible debentures in Redkite, apparently from his own company Ezeego at the hand of Mr Khandelwal;

    ii) emails dated April 2016 from Ms Ankita Rane of SSG Advisors (India) Private Limited (whose email address refers to SSG Asia) addressed to Govind Dhavan at Ezeego and Sagar Deshpande at C&K asking Mr Dhavan to credit significant funds of 1 Crore each (which I believe is approximately £98,000) "to our axis bank account" followed by details of an account at Axis Bank named "Redkite Capital Private Limited";

    iii) a summary of evidence given by Ms Rane in Indian criminal proceedings according to which she is reported to have said that she was a signatory on the accounts which Redkite maintained at Kotak Mahindra Bank.

56. Mr Kerkar relies on Ms Rane's emails to show that he knew nothing about the Redkite arrangements and to establish links between SSG and Redkite. He states that there can be no reason for Ms Rane to be a signatory on Redkite's account unless there was a close relationship between SSG and Redkite which the Respondent is concealing from the court. He claims that the Ares SSG Group, acting through a number of entities, were both lenders and subscribers for shares in Redkite, and that SSG and Redkite worked in concert to acquire TFCI.

57. Mr Kerkar's witness statement sets out the results of his team's investigations into the injection of capital into Redkite: 38% came from Ezeego, 26% from India Special Situations Scheme 1 ("ISS") managed by Griffin Partners which, he says, is an entity owned by SSG Capital and 21% was secured against shares of TCFI, the remainder coming from loans against property, or from the company's directors or promoters. He appears to call into question why, when Ezeego's loans are unsecured, SSG Capital's holding, via ISS is secured and yet attracts more favourable rates of interest than Ezeego's loans.

Mr Maheshwari's alleged role in Redkite

58. When Mr Kerkar's advisers investigated Mr Maheshwari's involvement in Redkite they discovered that in a filing made, it is believed, in May 2020 in respect of shareholding for the financial year to 31 March 2019, Mr Maheshwari's wife was shown as the registered owner of preference shares in companies which were corporate shareholders in Redkite. A subsequent filing appears to have been made in

November 2020, purporting to be a correction and showing that the preference shares were passed to the wives of Mr Jain and Mr Khandelwal. The relevance, it is said, is that given his connections to Redkite, and given his connection to Mr Khandelwal and Mr Jain, to whose wives his own wife transferred her shares, Mr Maheshwari must have known the source of Redkite's money. However, he did not provide any documentary evidence regarding the transfers and the Respondent tendered no evidence about it from Mrs Maheshwari.

59. Mr Johnson also focusses on Mr Maheshwari's decision to omit from the list in his witness statements of his directorships, that he is a director of TFCI, appointed to the board alongside Mr Jain. The omission, he says, is material, in a case where the court is asked to conclude that Mr Kerkar's allegations are demonstrably untrue. He submits that the omissions from the evidence of Mr Maheshwari undermines his credibility. Disclosure within the context of Part 7 proceedings would provide the court with the full picture and an opportunity for witnesses to be cross-examined.

60. Mr Kerkar claims that Mr Maheshwari procured that the Respondent served acceleration notices on 22 July 2019 because:

> "he realized that I was close to uncovering the use of C&K's funds to buy shares in TFCI and his part in that scandal. He wanted to protect himself and SSG by destroying me."

61. In support of this statement, he has exhibited WhatsApp exchanges between them in which, at 7.09am he asked Mr Maheshwari:

> "just for clarity Redkite which controls TFCI is your company right. If so can it lend us in India"

62. Mr Maheshwari replied:

> "Just need one last clarity on Redkite".

63. Mr Kerkar then wrote that he and Anil (which I understand to be a reference to Mr Khandelwal) needed to speak to Mr Maheshwari and suggested speaking a little later. Mr Maheshwari replied that he had already spoken to Mr Khandelwal and had agreed to speak to him again later that evening. Mr Kerkar asked: "With me?" and Mr Maheshwari replied "I believe so". That evening, Mr Kerkar wrote saying:

> "I am very concerned on all transactions with SSG when are you back in India for a meeting. We need to look at history from 2008".

Looking beyond the distinct corporate entities

64. Mr Johnson's skeleton argument states that the Respondent's case depends in large part on the "narrow identification" of Mr Maheshwari's role on the date when the Facility Agreements were entered into. He submits that Mr Maheshwari's evidence on these matters is incomplete and open to question: other than providing publicly available information, he exhibits no documents to show the precise ambit of his role or the role of SSG Capital in the Respondent's decision making.

65. Whilst there was little time to examine them during the one-day hearing of Mr Kerkar's application, Mr Johnson urged me to consider several pages of the WhatsApp chat messages between Mr Maheshwari and Mr Kerkar. He submitted that they demonstrated that Mr Kerkar dealt with Mr Maheshwari "on a principal-to-principal basis with a strong personal bond".

66. Mr Kerkar states:

> "I never presented to an investment committee or board of directors. I had no dealings with analysts or other representatives. I did not have significant personal dealings with Mr Goel, still less Ranjan Lath. They dealt directly with Mr Khandelwal, Mr Jain and Rashmi Jain. My main contact was Mr Maheshwari. If the layers of bureaucracy and carefully delineated responsibility among multiple corporate entities within the SSG group existed as the creditor claims, they were hidden from me.
>
> The closeness of my former relationship with Mr Maheshwari and SSG is clear from the fact that he asked me to buy SSG's shares in C&K for US$15 million giving a 5% return at a meeting in Mumbai on 8 August 2018. The messages refer to the meeting at PK2 page 695. Mr Maheshwari asked me to help him out because of our long-standing relationship. The fund through which he bought the shares was shortly to close and he did not want to book a loss against this investment. I agreed to buy the shares.
>
> Mr Maheshwari often invited me to speak to potential investors in the various funds operated by SSG as, ironically, a "contented borrower". I refer at PK2 page 698 to a message on 10 January 2019 when I said to Mr Maheshwari "Had a great call with Cambridge Associates for you". I did 20 or so of these calls, often for more than 2 hours at a time."

67. Mr Johnson also highlights that whilst a key part of the Respondent's case is that each company in the Ares SSG Group is a separate legal entity, when describing SSG's involvement in Redkite, even Mr Goel merely refers generally to "various other entities in the Ares SSG Group" lending money to Redkite "and one particular entity subscribed for shares in TFCI".

68. This, Mr Johnson submits, demonstrates the difficulty the court is likely to experience in trying to understand who has been doing what and who the real participants were. It goes to show that Mr Kerkar has a real prospect of establishing that:

    i) Mr Maheshwari's acts and omissions are to be imputed to the Respondent; or alternatively

    ii) Mr Maheshwari acted as the Respondent's agent, with its express or apparent authority, as demonstrated by the WhatsApp messages, such that the

> Respondent is responsible in law for what Mr Maheshwari did or failed to do; and

justifies why a fuller investigation into the issues is required.

Other allegations of wrongdoing on the part of SSG Group and Mr Maheshwari

69. Mr Kerkar's second witness statement refers to litigation in the USA in which claims have been made against Mr Maheshwari, Mr Goel and SSG Capital Partners I LP. Mr Kerkar states that his lawyers have informed him that an earlier attempt to strike out the claims failed and the judge concluded that they should advance to trial. He says that the allegations bear similarities to his allegations of wrongdoing on the part of Mr Maheshwari and SSG in that it is alleged that SSG manufactured loan agreements which were "used as a cloak for the sums received by the SSG entities" and that they participated in a fraud which deprived a Hyderabadi corporation, Prithvi Information Systems Limited ("PISL") of its assets and its ability to repay a judgment debt obtained by one of its significant creditors, Kyko, to which it had factored fictitious debts.

70. Mr Kerkar states:

> "The existence of serious allegations of fraud made by a third party against Mr Maheshwari, Mr Goel and SSG entities, indicates a propensity to dishonesty on their part. There are basic factual similarities with my case: the extraction of funds through bogus loan arrangements; the central role of Mr Maheshwari and Mr Goel and their use of SSG entities as vehicles for their activities.
>
> It is significant that the US court requires Kyko's allegations to be determined at trial and has rejected the SSG defendants' attempt to throw them out. Mr Maheshwari's and Mr Goel's and the respondent's intemperate denials of wrongdoing in this application must not be taken at face value, but will need to be determined by pleadings, disclosure and a trial in due course."

71. He also refers to transactions taking place between SSG Capital and two BVI companies in 2014 which he alleges involved shares being sold at an undervalue to Mr and Mrs Maheshwari in satisfaction of a loan pursuant to a contract on which his signature was forged and another allegedly forged document which formed the basis of winding-up proceedings commenced by SSG against one of Mr Kerkar's companies in Mauritius.

The Respondent's evidence regarding the alleged fraud

72. Mr Goel explains in both his first and second witness statements why he considers Mr Kerkar's allegations regarding C&K being deprived of its assets are irrelevant to the Respondent's claim for repayment under the personal guarantee. Those reasons include:

i) C&K was a corporate guarantor of the sums due under the Facilities Agreements. It would never have been in the Respondent's interests to deprive C&K of its ability to repay the significant sums advanced by the Respondent to PHUK;

ii) C&K's ability to repay, as an additional guarantor, does not affect Mr Kerkar's own obligation, given by way of his own personal guarantee, to repay the sums due to the Respondent under the Facilities Agreements;

iii) the alleged fraud at C&K occurred during the period between 1 April 2014 and 30 June 2019. The Facilities Agreements were not entered into until April 2019:

> "It is inconceivable that individuals would pre-emptively seek to divert money from C&K in order to ensure a guarantee which had not yet been entered into was called in respect of a loan which had also not been entered into at the time of the alleged fraud."

iv) The PWC report makes no reference to the Respondent, Ares SSG Group or Mr Maheshwari. All of the allegations relate to internal accounting matters allegedly committed by individuals employed by C&K of which Mr Kerkar was the CEO.

73. Having explained why he considers the allegations not to be relevant, Mr Goel then addresses Ares SSG Group's alleged role in the allegations:

> "I can confirm that the Respondent itself had no dealings with Redkite whatsoever. However, various other entities in the Ares SSG Group did lend money to Redkite and one particular entity subscribed for shares in TFCI. That is the extent of Ares SSG Group involvement in Redkite and I can confirm that no entity within the Ares SSG Group controlled or owned Redkite or had any involvement in its management, let alone any responsibility for or involvement in any fraud carried out by or on it."

74. He expands on this in his second witness statement, setting out details of Ares SSG Group's purchase in January 2018 of non-convertible debentures issued by Redkite and the subscription in February and July 2019 by India Special Solutions Scheme, an alternative investment fund in which he says "the Ares SSG Group has only an economic interest by virtue of being an AIF unit holder" to secured non-convertible debentures issued by Redkite. In relation to Ms Rane he states that:

> "For the sake of completeness, in February 2012 Ares SSG Group invested in INR 500m of NCDs issued by Redkite. Redkite repaid these NCDs in full by February 2017. Whilst this had nothing at all to do with TFCI, this was the investment which Ankita Rane was monitoring.

> 30. For the record, I confirm that Ares SSG Group: (a) does not and never has had any direct or indirect shareholding in Redkite, or beneficial interest in Redkite; and (b) does not and never has controlled Redkite. Certain funds which were owed to the entities set out above may have been placed in Redkite accounts and earmarked to meet obligations Redkite owed to Ares SSG Group funds. However that does not mean that Ares SSG Group controlled those Redkite accounts and there is nothing improper with Redkite paying Ares SSG Group what it owed."

Mr Maheshwari's alleged involvement with Redkite

75. Mr Maheshwari states that he is not and never has been a director of C&K, Ezeego, or Redkite or occupied any other executive position in those companies.

76. As regards ownership of Redkite he states:

> "My family held an equity interest in Redkite until 2013. In 2013, they sold their interest to Mr Khandelwal and to Mr Jain and have not acquired any interest since;
>
> 22.2 In March 2011, my wife made a small personal investment in preference shares in the two current shareholders of Redkite (the "Preference Shares"). The Preference Shares had a 10 year tenure, no coupon and no voting rights. They were sold at par in April 2018 after which my wife had no further interest in the shareholders of Redkite. For the avoidance of doubt my wife never had any direct interest in Redkite itself.
>
> 22.3 I have never held any personal shareholding in Redkite, or occupied any management or decision making position in Redkite. After my father ceased to be a director in 2013 neither no member of my family had any management or decision making position in Redkite. I have had no connection to Redkite through any kind of shareholding since the sale of the Preference Shares in April 2018, and what financial interest my family had in Redkite came to an end in 2013 with the sale of my family's shareholding."

Mr Maheshwari's role in SSG

77. Mr Maheshwari expressly denies that he controls the Respondent, SSG Fund or Ares SSG Advisory. In his first witness statement he sets out his involvement in the Ares SSG Group. He was one of its founder members, along with six other people but has not at any time held a majority or even the largest number of shares in the group. At all material times he held less than 25% of the shares in the Group's holding company. He was a director of the Respondent from 6 August 2015 to 8 October 2018 but has never personally held shares in the Respondent. He is the CEO of Ares SSG Management (Singapore) Pte Limited ("Ares SSG Management") which acts as

advisor to the Respondent. He states that he is just one of that company's directors and does not control it, nor does he have sole decision-making power.

78. He states that decisions to make investments through any of the Ares SSG Group's various investment entities, including through the Respondent, are (and were at the time of the Facilities Agreements) taken by the directors of the relevant investment entity in consultation with, and on the advice of, Ares SSG Management. He was not able, alone, to provide advice on behalf of Ares SSG Management: it would first need to be signed off by various individuals.

79. He states that he was a director of the Respondent from August 2015 until 8 October 2018 and of PHUK from November 2017 to 29 January 2019. He was not, therefore a director of either company at the time the Facilities Agreements were entered into.

80. In his second witness statement, Mr Maheshwari sets out the various bodies within SSG which must approve a proposed investment. He confirms that he was a member at the relevant time of a "Sub-Advisor Investment Committee" which is one of the steps of approval that the Ares SSG Group has to go through before making an investment but states that the committee:

> "will only recommend an investment to the "Advisor Investment Committee" for onward review and final decision by the General Partner Investment Committee if it receives an affirmative vote of the majority of its members. It was therefore not possible for me alone to make a decision on behalf of the Sub-Advisor Investment Committee."

81. Mr Maheshwari continues:

> "I was the lead contact for C&K within the Ares SSG team so it is not surprising that there were communications between us personally. However none of the [WhatsApp] messages at paragraph 26 of Kerkar-2 go anywhere near to suggesting that I was the controlling mind of the Respondent and nor do they suggest that the procedural checks were not adhered to. Mr Kerkar appears to be belittling the process of "internal controls and risk management" at the Ares SSG Group by using the phrase "layers of bureaucracy". This may have been how he conducted business within C&K (which has led to the fraud charges by the ED and the arrest of Mr Kerkar and various other employees of C&K) but it is not the way that any of the companies in the Ares SSG Group conducts business. This is supported by the exchange referred to at paragraph 26(i) of Kerkar-2. As can be seen from that exchange, I explained that I had to refer any proposed lending to the investment committee, and it can also be seen that Mr Kerkar was fully familiar with this."

Decision regarding the Respondent's alleged role in the C&K fraud

82. It is not alleged that the Respondent had any direct connection with Ezeego, Redkite or TFCI or that the Respondent is directly responsible for the alleged fraud. The connection is said to arise as a result of:

    i) the Respondent being a company within the Ares SSG Group;

    ii) Ares SSG Group's involvement in Redkite;

    iii) Mr Maheshwari allegedly being the controller of Ares SSG Group;

    iv) Mr Maheshwari allegedly controlling Redkite;

    v) Redkite allegedly receiving monies siphoned away from C&K;

    vi) Such monies allegedly being used by Redkite to fund the purchase of shares in TFCI; and

    vii) Mr Maheshwari being a director of TFCI.

83. Despite his far-reaching but vague allegations of fraud, Mr Kerkar has failed to provide any explanation of:

    i) how PHUK or Mr Kerkar would have any claim against any party in respect of the alleged fraud. C&K is the ultimate parent company of PHUK. If monies have been siphoned away from C&K, the right to take action against the wrong-doers lies with C&K and/or the relevant criminal authorities;

    ii) why, other than what follows, it would have been in Ares SSG Group's or the Respondent's interests, to be involved in a fraud, diverting monies away from C&K so that when, in the future, it entered into the Facility Agreements for which C&K would stand as a corporate guarantor, it could engineer a default. In his first witness statement he describes SSG Capital and SSG Fund as:

> "vulture funds, lending money to borrowers in difficult financial positions at expensive rates of interest with the intention of engineering a default and using their rights under the finance documents to take control of the borrowers' underlying assets and business. That is what is happening in this case."

    However, he fails to explain how or to provide evidence of how the Respondent or any Ares SSG Group company has or could have profited from the default which it allegedly engineered; and

    iii) how, even if the alleged wrongful diversion of funds had not occurred, C&K, which Mr Goel's uncontradicted evidence states has aggregate liabilities of more than £500 million, would have been in a position to meet PHUK's liabilities to the Respondent. The amounts allegedly siphoned away represent but a small element of its total liabilities. Moreover, even at the time the

Facilities Agreements were entered into, it was recognised that C&K had exhausted its own funds.

84. He has failed to provide any evidence beyond his own complaint to the police to show:

i) how Ares SSG Group was involved in Redkite other than in the capacities set out in Mr Goel's evidence;

ii) how Mr Maheshwari allegedly controlled Redkite;

iii) that monies siphoned away from C&K (of which Mr Kerkar was CEO), to Ezeego (a company controlled and owned by Mr Kerkar and his sister) which were then allegedly transferred to Redkite were ultimately used to fund the acquisition of TFCI.

85. Mr Kerkar said in his second witness statement:

> "the guarantees will be discharged if the creditor has acted in bad faith, in particular where the default is caused by the creditor's own conduct or occurs with the connivance of the creditor, or amounts to fraud on the part of the creditor. Fraud in this context extends to conduct which is unfair to the guarantor. The respondent having acted in bad faith towards me or positively acted so as to prejudice me, I will be discharged from liability."
>
> Thirdly, there is a general policy that 'fraud unravels all'."

86. It is notable that even Mr Kerkar recognises that the party which must be shown to have acted in bad faith, must be the creditor – in this case, the Respondent. Having failed to provide any evidence at all of the Respondent acting in bad faith towards him, he sought to show that Mr Maheshwari did so and that as Mr Maheshwari is the controlling mind of the Ares SSG Group and/or acted as agent for the Respondent, his bad faith is attributable to the Respondent.

87. Mr Maheshwari was not a director of the Respondent at any relevant time and there is no evidence of him directing the Respondent's decisions. Mr Kerkar complains that there is no evidence of the Respondent or entities within the Ares SSG Group not following Mr Maheshwari's instructions. It is not for the Respondent to prove that something is not the case: the burden of proof starts with Mr Kerkar.

88. Beyond Mr Kerkar's own assertions, the only evidence of Mr Maheshwari's role as "mastermind" behind and controller of Ares SSG Group is the WhatsApp messages. The informal nature of such messages arguably justifies the absence of many references to the various investment committees and layers of approval within SSG entities before decisions are made to invest. Even if that were not the case, there is at least one clear reference to an investment committee and Mr Kerkar himself refers to the need to meet Mr Wong of SSG to explain a funding proposition to him. His own evidence demonstrates that he appreciated that not all decisions lay within Mr Maheshwari's control.

89. Mr Johnson emphasised the apparently grave omission on Mr Maheshwari's part to provide documentary evidence regarding the transfer by his wife of her indirect shareholding in Redkite and his failure to mention that he is a director of TFCI. These were matters, he said, which clearly need further investigation.

90. I do not agree. Mr Maheshwari was not a director or shareholder in Redkite. There is simply no evidence before the court, beyond Mr Kerkar's apparent belief, that Mr Maheshwari was able to exercise any control over Redkite.

91. The only evidence which could suggest a possible connection between Mr Maheshwari and Redkite is his wife's indirect shareholding, via two other companies, of a minority shareholding in the company. This he disclosed. Regardless of the identity of the persons to whom that shareholding was transferred, it falls a long way short of demonstrating a real prospect of successfully arguing that Mr Maheshwari controlled Redkite or was in any way aware of the alleged source of Redkite's funds.

92. It is not part of Mr Kerkar's case that TFCI was a party to the alleged fraud. I do not consider that anything can therefore be said to turn on Mr Maheshwari's omission to say that he is a director of that company. He did not mislead the court: he did not say that he was providing details of all of his directorships nor did he say that he was not a director of TFCI. His directorship of TFCI is so far removed from PHUK's and Mr Kerkar's liabilities to the Respondent under the Facility Agreements that I do not consider it to be of any relevance.

93. I similarly do not consider that the criticism of Mr Goel for failing to specify which SSG corporate entities are involved in Redkite and TFCI is well-founded. The key point, is that the Respondent is not among the entities involved.

94. In my judgment, Mr Kerkar's cross claim in relation to the fraud committed against C&K falls squarely within the types of cases contemplated in *Lady Anne Tennant*. It is all surmise, based on his unsubstantiated belief that Mr Maheshwari, as the controller behind all SSG entities, is somehow responsible for PHUK's inability to repay monies it borrowed from the Respondent which he guaranteed. With the optimism of Mr Micawber he appears to have hoped to have persuaded the court that within the tangled web of allegations of fraud that he has raised, the court will find a cross-claim which bears a real prospect of success and justifies setting aside the statutory demand and sending the Respondent back to square one to start Part 7 proceedings.

95. Allegations of fraud do not, of themselves, compel the court to conclude that further investigation is warranted. For the reasons I have given, the evidence which Mr Kerkar has placed before the court, even against the background that he seeks to paint by reference to claims in the USA regarding PISL and his allegations of fraud and forgery concerning transactions SSG Capital and two BVI companies, do not support his allegations of fraud to the extent of meeting the threshold test of persuading the court that any one of them has a real prospect of success.

Conclusion

96. In conclusion, I find that the evidence provided raises no more than a cloud of objections. For the purposes of Rules 10.5(5)(a) and 10.5(5)(b) there is no or

insufficient evidence to support the allegations made to satisfy the court that there is a real prospect of success. For the purposes of Rule 10.5(5)(d) there are no other grounds on which the demand ought to be set aside.

97. When handing down this judgment, I shall dismiss the application and make an order authorising the Respondent to present a bankruptcy petition against Mr Kerkar.