Neutral Citation Number: **[2022] EWHC 2914 (Ch)**

Case Nos: CR-2022-003123,BR-2022-000355, BR-2022-000356

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

Rolls Building
London
EC4A 1NL

Date: 17 November 2022

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL AGNELLO KC

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Between :

(1) TOWN & COUNTRY PROPERTIES (GB) LTD
(2) LACUNA VENTURES LTD
(3) THE BEAUTY CREATIVE LIMITED
(4) VARDO VENTURES LTD
(5) HOME TO HOME EXCHANGE LIMITED
(6) SANDRA MITCHELL
(7) LORNA MITCHELL
(8) JANE MITCHELL
(9) ROBERT MITCHELL

Petitioners

— and —

(1) BLACK CAPITAL (AN UNREGISTERED COMPANY)
(2) SARJU PATEL
(3) RAVNEET UBHI

Respondents

Mr Daniel Lewis (instructed by **FWJ Legal Limited**) for the **Applicant/Petitioners**
Mr James Kinman (instructed by **Grovesnor Law**) for the **Second Respondent**
Mr Dan McCourt Fritz and **Mr Tim Benham-Mirando** (instructed by **Thursfield Solicitors**) for the **Third Respondent**

Hearing dates: 26 October and 4 November 2022

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JUDGMENT

Introduction

1. On 14 September 2022, a petition was presented to this Court by Town and Country Properties (GB)Ltd, Lacuna Ventures Ltd, The Beauty Creative Limited, Vardo Ventures Ltd, Home to Home Exchange Limited , Sandra Mitchell, Lorna Mitchel, Jane Mitchel and Robert Mitchell ('the Petitioners') seeking to wind up a partnership known as Black Capital. That petition was presented pursuant to article 7 of the Insolvent Partnerships Order 1994 ('the IPO'). No concurrent bankruptcy petitions were presented on the same day as against two of the partners of the partnership, being Mr Sarju Patel, the Second Respondent ('Mr Patel') and Mr Ravneet Ubhi, the Third Respondent ('Mr Ubhi'). Thereafter, on 28 September 2022, the Petitioners issued bankruptcy petitions against Mr Patel and Mr Uhbi. Statutory demands had not been served in accordance with the Insolvency Rules prior to the issue of these bankruptcy petitions. On 10 October 2022, the Petitioners sought and were granted permission to amend the partnership petition so to refer to the bankruptcy petitions. The amended statement in the partnership petition is as follows:-'*The Court is referred to bankruptcy petitions issued against the Partners Mr Sarju Patel and Mr Ravneet Ubhi on 28 September 2022 which have been issued by virtue of article 8 Insolvent Partnerships Order 1994.'* The order of 10 October 2022 also gave directions for the purposes of the hearing before me.

2. Before me, I have the partnership petition, the two bankruptcy petitions against Mr Patel and Mr Ubhi respectively, as well as an application by the Petitioners seeking permission pursuant to section 124(3)(a) of the Insolvency Act 1986 (as amended by paragraph 8 of Schedule 4 of the IPO) to present the Bankruptcy petitions on a date different from the winding up petition. There are also issues relating to the fact that the winding up petition, being now, it appears, a petition pursuant to article 8 of the IPO, was not preceded by a statutory demand in accordance with the IPO and the relevant amended legislation. Additionally, the bankruptcy petitions were not preceded by statutory demands served in accordance with the Insolvency Rules. The statutory demands are both dated 26 September 2022 with the petitions being issued on 28 September 2022 in both cases. The Petitioners seek a winding up order in respect of the petition and bankruptcy orders in relation to the two petitions. They seek various directions/orders to deal with the defects. These orders are opposed by the Respondents on various grounds as set out below.

3. The issues before me are as follows:-

(1) Is there a dispute on substantial grounds as to whether Mr Ubhi was a partner in the partnership, Black Capital

(2) Is the partnership petition for a liquidated sum, and

(3) Whether I should grant to the Petitioners the following orders-

(i) Dispense with the service of a statutory demand prior to the issue of the partnership petition or in some way waive the defect in the partnership petition as amended;

(ii) Waive the defect in that the bankruptcy petitions were issued prior to the expiry of the period of time for a debtor to apply to set aside the statutory demands;

(iii) Grant permission retrospectively to have presented the bankruptcy petitions after the presentation of the partnership petition

I will deal in this judgment with the issues in the order set out above after setting out a brief background including a summary of the history of the court proceedings.

The background facts and court proceedings

4. I take some of this background from the helpful skeleton of Mr Daniel Lewis acting on behalf of the Petitioners. The Petitioners are members of the same family and their companies. Over the period from September 2018 until about July 2021, they invested personally, or through a company in which one or more of them had a substantial interest. The total sum invested, according to Mr John Mitchell, one of the investors, is £13,702,750. Mr Mitchell asserts, on behalf of all Petitioners, that the total sum due is £18,362,520. This sum gives credit for post 1 December 2021 credits. As alternatives, Mr Daniel Lewis, acting on behalf of the Petitioners, identified lower sums which he submitted were liquidated sums due and owing. I deal with this below.

5. On 15 September 2022, the Petitioners sought and obtained, at a without notice hearing, an order appointing a provisional liquidator of Black Capital as an unregistered company (an article 7 petition) and a freezing injunctionsagainst Mr Patel and Mr Ubhi. The grounds for making the application are set out in the affidavits filed in support and set out concerns relating to the safety of their

investments and the failure to repay them when promised. These interlocutory proceedings have now been adjourned to come on before a High Court Judge in the week commencing 21 November 2022. As far as I am aware, there will be an application seeking to discharge the freezing orders. It is of course important for the Judge hearing the interlocutory proceedings to know the outcome of the hearing before me and therefore I have ensured that this judgment is handed down prior to the 21 November 2022.

6. Mr Stephen Hunt, the Provisional Liquidator, has filed various witness statements and affidavits. He states that Mr Patel and Mr Ubhi have not cooperated with him as Provisional Liquidator and that he has not been provided with access to Black Capital's trader accounts, its email account and the Hello Sign platform (an electronic platform to enable, amongst other matters, the electronic signing of documents). Additionally, Mr Hunt states that ledgers and accounting records have also not been provided. Mr Hunt estimates that by the end of 2021, there were more than 300 investors with managed fund agreements between themselves as investors and the partnership. Mr Hunt has carried out an analysis of the bank statements which have been disclosed by Mr Ubhi and he states that this analysis demonstrates that the partnership has been operating as a Ponzi scheme. Effectively the high returns being made to the existing investors were being paid from sums received from new investors. He states that less than one fifth of the incoming money were used to make actual investments. Mr Hunt's evidence in this regard makes for some disturbing reading. He states that he has been unable to locate any assets or funds held by the partnership. It appears from at least what Mr Hunt sets out that Black Capital was operating an unauthorised collective investment scheme.

7. Mr Patel accepts that the business of Black Capital operated as a partnership between himself and Mr Ubhi. He made an application seeking to set aside the statutory demand which had been presented against him. He asserted that from November 2019, the clients, assets and debts and liabilities of the partnership were taken over by Black Capital Partners Limited. This application was summarily dismissed by ICC Judge Jones on 7 October 2022 who stated, 'this does not release the partners from their existing liabilities to the creditors unless the creditor consented to the assignment. This is not suggested in the evidence.' Mr James Kinman, who appears on behalf of Mr Patel, made submissions in relation to the defects in the petitions as well as submitting that the petition could not succeed because it was not for a liquidated sum. His submissions on these points were adopted by Mr Dan McCourt Fritz and Mr Tim Beham-Mirando, acting on behalf of Mr Ubhi. As I have indicted above, I will deal with these issues after determination of first issue. For this reason, I will not set out at this stage any further procedural background.

The issue of whether there is a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital – summary judgment test

8. The majority of the time before me was spent on the issue as to whether there was a dispute on substantial grounds relating to Mr Ubhi being a partner of the Black Capital Partnership. Although the matter arises by way of an application to set aside the statutory demand which has been served on Mr Ubhi, the bankruptcy petition is also before me. The fact that I have both the application to set aside the statutory demand as well as the bankruptcy petitions before me does not, in my judgment, alter the test. I have used the words above, namely, whether there is a dispute on

substantial grounds as to whether Mr Ubhi was a partner of Black Capital, which is one of the ways the test has been formulated in the relevant case law. It is well established that what I have before me is a summary judgment test.

9. There are many cases which set out this test, sometimes using different wording or expressions. However I will set out certain passages from the decision of Lady Justice Arden in *Collier v P & MJ Wright (Holdings) Ltd [2007] EWCA Civ 1329*. That case involved an application to set aside a statutory demand and therefore it demonstrates clearly the applicable principles and test. It also confirms that despite the different formulations used, the test is the summary judgement test.

> *21.Mr Roger Kaye QC does not explain in what way the test of real prospect of success would here differ from that of genuine triable issue. I note that in the recent case of* Ashworth v Newnote Ltd *[2007] BPIR 1012, para 33 Lawrence Collins LJ, with whom Buxton LJ agreed, regarded the debate as to a difference between ""genuine triable issue"" and ""real prospect of success"" as involving ""a sterile and largely verbal question"", and that there is no practical difference between the two. I do not consider that the passage that I have cited above from the judgment of Mr Roger Kaye QC should be followed. I accept that the refusal to set aside a statutory demand is a serious step, but so is the grant of summary judgment. The court cannot grant summary judgment under CPR r 24(2) unless it is satisfied that the party against whom the order is to be made has no real prospect of success. To have a real prospect of success a party must have a case which is more than merely arguable: see* Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc *[1986] 2 Lloyd's Rep 221. If the test in the* Kellar *case [2002] BPIR 544 were applicable, the court would have to apply a lower threshold than real prospect of success, and that would mean that it would be enough on an application to set aside a statutory demand if the dispute were merely arguable. However, that approach would give no real weight to the word ""substantial" in the rule 6.5(4); nor would it give any meaning to the word ""genuine" in para 12.4 of the practice direction. In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation: see also per Lawrence Collins LJ in the* Ashworth *case, para 34. But a mere assertion by the applicant that something had been said or happened would not generally be*

enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material difference on disputed factual issues between real prospect of success and genuine triable issue.'

10. It is important to expand further in relation to what the court's role is and is not in these types of cases. Obviously, as set out by Lady Justice Arden, in cases where there is in a witness statement, bare assertions or assertions which are contradicted by contemporaneous documents, it is then open to the court to determine, if appropriate on the facts of the particular case, that the statements set out in the witness statements are inherently implausible. That type of determination is, in my judgment reserved for clear cases. The Court must not embark upon a mini trial. Mr McCourt Fritz took me to the Supreme Court decision of *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc [2021] 1 WLR 1294* and in particular the passage from the judgment of Lord Justice Carnwath from *Mentmore International ltd v Abbey Healthcare (Festival) Ltd [2010] EWCA Civ 761* which was quoted with approval by Lord Hamblen at paragraph 110,

> *110 In his judgment at para* 190 *the Chancellor rejected the complaint that Fraser J had conducted a mini-trial and considered that he was doing no more than subjecting the evidence to critical analysis. He cited para* 10 *of Potter LJ's judgment in* ED & F Man Liquid Products Ltd v Patel *[*2003*] CP Rep* 51 *in which it was observed that factual assertions do not have to be accepted by the court if it is "clear" that there is "no real substance" in them, "particularly if contradicted by contemporary documents"-i e if they are demonstrably unsupportable. That is only going to be so in clear cases. As Carnwath LJ observed in Mentmore International Ltd v Abbey Healthcare (Festival) Ltd [2010] EWCA Civ 761 at [*23*], referring to both Potter LJ's judgment in the ED & F Man case and Lord Hope's judgment in the Three Rivers case [*2003*]* 2 *AC* 1*:*
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> *"If Mr Reza was hoping to find in those words some qualification of Lord Hope's approach, he will be disappointed. The Three Rivers case was specifically cited by Potter LJ. He was in my view intending no more than a summary of the same principles. Lord Hope had spoken of a statement contradicted by "*all *the documents or other material on which it is based" (emphasis added). It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in*

my view important not to equate what may be very powerful cross-examination ammunition, with the kind of "knock-out blow" which Lord Hope seems to have had in mind.""

111 In my view, it is clear that Fraser J did conduct a mini-trial and did far more than subject the evidence to critical analysis, as reflected in the ""findings"" he made on the evidence. This is further borne out by the nature of the appeal from his decision, which was essentially based on his erroneous approach in evaluating the evidence. As the Court of Appeal held, he wrongly excluded all evidence relating to the period prior to the corporate restructuring of the Shell group in 2005*, and he wrongly placed no reliance on publicly available Shell corporate documentation which had been produced in the context of fulfilment of listing obligations'*

11. In the Supreme Court case of *Okpabi*, the Court had before it a jurisdiction challenge and was concerned with whether it was appropriate to grant permission to serve proceedings out of the jurisdiction on a foreign defendant. The challenge was, in summary, on the basis that the claimants had no arguable case against the anchor defendant. The difficulty in that case seems to have arisen because the parties relied on more than the pleaded case set out in the particulars of claim. Additionally, the claimants had not updated the particulars of claim to reflect the evidence. This drew the first instance court, as well as the Court of Appeal, into an evaluation of the evidence beyond a critical analysis. As noted at paragraph 109, Lord Hamblen stated that the Court did not have before it the trial of a preliminary issue. Lord Hamblen stated, '*it was not for the judge to make "findings'*. At paragraph 127, Lord Hamblen stated as follows, after considering the 'critical anaylsis' which the Court of Appeal had undertaken on the evidence and the findings which the Court had made ;*'This is an erroneous approach. The resolution of the jurisdictional challenge depended upon whether the appellants' claim satisfied the summary judgment test of real prospect of success.'* In my judgment, it is clear that the summary judgement test referred to therein is the same test as applicable before me.

12. Mr Lewis submitted that the principles set out in *Okpabi* were somewhat different and referred me to the passages commencing at paragraph 20 relating to the need to observe proportionality in relation to the litigation of jurisdiction issues. However, that paragraph does not alter the summary judgment test which is applied. In fact, specific reference is made in paragraph 201 to the test being whether there is a triable issue with reference to the relevant passage in *Three Rivers (no 3) [2003] 2 AC 1*. In my judgment, whilst care must always be taken when referring and relying upon cases which relate to different areas of the law, it is clear here that the Supreme Court was considering the same summary judgment test as I need to apply in this case. Of course, in the case before me, there are no pleadings. This doesn't alter the test and this can be seen clearly in the passage which I have referred to above from *Collier.*

13. Mr McCourt Fritz relied heavily on the above passages from *Okpabi* and emphasised the reference in that passage to 'all documents'. In my judgment, the key to that passage lies in what is said above and just after that sentence. It is only in clear cases that a court may determine that a particular defence etc is inherently implausible. Contemporaneous documentation which supports a particular defence in a case where there are contemporaneous documents which contradict that defence is an example of a case where a Judge would not necessarily be facing one of those clear cases. There may well be cases where the contemporaneous documentation relied on which contradict other documentation are clearly capable of being rejected, but this is not the time to speculate on those types of cases. In my judgment, the test to be applied remains as set out by Lady Justice Arden and is one which is well understood. The Supreme Court cases provides a useful reminder of these well known principles and also that courts must not fall into the mini trial trap

and must ensure that an evaluation, or critical analysis by the court of the evidence before it does not lead to findings as occurred in *Okpabi* at first instance and also in the Court of Appeal.

Mr Ubhi's grounds

14. Mr Ubhi denies, as set out in his affidavit dated 6 October 2022, that Black Capital was a partnership in which he was a partner. He claims that he was an agent acting for Mr Patel who was a sole trader using the name Black Capital for his investment business. From about 2017, Mr Ubhi assumed what he called a sales role where he would introduce clients to Mr Patel with a view to them investing funds for which he would be paid a commission of 10% on any returns earned by the client. In June 2018 his role was formalised in an independent contractor agreement which was signed by him and by Mr Patel. In April 2019, Mr Ubhi states that he ceased being an independent contractor and instead he became an employee of Black Capital. He states that he was thereafter paid a wage. He produces a copy of the independent contractor agreement, the employment agreement and two payslips which show taxes being deducted on a PAYE basis. Mr Ubhi also relies upon a letter dated 13 June 2019 signed by Mr Patel which states on a 'to whom it may concern' basis that Mr Ubhi worked for 'us' regularly as a contractor at Black Capital on an ad hoc basis from 4 June 2018 until the role because a full time and permanent position on 5 April 2019.

15. Mr McCourt Fritz relies on what Mr Ubhi sets out in his affidavits alongside the documentation I have referred to above. Both the independent contractor agreement dated June 2018 and the employment contract dated 28 March 2019 are signed by both Mr Ubhi and Mr Patel. Mr Lewis made no specific reference to their respective

terms, but as I set out below, his submission in relation to these documents is to invite me to consider them alongside all the evidence and in doing so, reach the conclusion that Mr Ubhi's case is inherently implausible and can be rejected. In particular, as I set out below, Mr Lewis invites me to consider carefully what he submits is clear evidence of the existence of the partnership as between Mr Ubhi and Mr Patel of the investment business, Black Capital. I turn to the evidence relied upon the Petitioners in order to assess this evidence alongside Mr Ubhi's position.

The Managed Fund Agreements

16. The Petitioners rely upon a series of Managed Fund Agreements (MFAs) which were entered into by them and the Partnership each time the Petitioners made an investment. Some of these agreements were physically signed by both the relevant investor, and Mr Patel and Mr Ubhi as partners of Black Capital. Some of the agreements were electronically signed using the platform, Hello Sign. Mr Ubhi denies that he gave authority or was aware of the MFAs signed electronically with his name. He does not deny he signed the MFAs physically which have been exhibited and relied upon by the Petitioners. The evidence also demonstrates that the same type of agreements were entered into by other investors.

17. Save with the exception of some of the earlier MFAs, the common features of the MFAs in the evidence before me, are the following.

(1) At the start of the document, the following statement appears ,

> *"Black Capital is a partnership between Mr Sarju Patel and Mr Ravneet Ubhi; a Private Investment Fund and as such clients acknowledge that it is not subject to the regulations of the Financial Authority (FCA)* [sic] *and have sound knowledge of the financial markets before deciding to invest."*
> Black Capital is said to be a 'Trading Agent/Advisor'

(2) The MFAs have been initialled on each page by both Mr Ubhi and Mr Patel as well as the investor. On some of the documents, part of the initials of one of the parties has been cut off (probably on the copying) but no point arises from this. In my judgment, it is clear that on each of the MFAs that appear in the evidence, the parties, which included Mr Ubhi , signed at the end of the agreement as well as initialling each page. Mr Ubhi does not dispute this to be the case.

(3) On the last page of the MFAs, they have been signed by both the investor as well as Mr Ubhi and Mr Patel as 'Partner'. That word is expressly set out under their respective signatures.

I will return to the specific terms of the MFAs as relevant on the issue of liquidated debt.

18. Mr Lewis asserts that these documents clearly demonstrate the position of Mr Ubhi as a partner in Black Capital. He relied on the signature page, the description and the conscious decisions of Mr Ubhi to sign and initial these documents. Mr Lewis also relied upon the evidence of Mr Mitchell and Ms Lorna Mitchell in relation to the discussion and meetings with Mr Ubhi. There is no denial by Mr Ubhi that he physically signed the MFAs which are exhibited, but he states the following in his affidavit dated 6 October 2022 at paragraph 33:-

'*When Sarj started trading as Black Capital some of the contracts that I issued had my name on them. I did not understand the potential legal implications of this and when I asked Sarj he just said that was how it was done. From around mid 2018 onwards I did not deal with the contracts at all and Sarj would deal with all the contracts and paperwork there was also a PA hired called Amber'*

19. The evidence before me contains MFAs signed by Mr Ubhi and with the wording relating to him being a partner as well as his signature and the description as signing as a partner for the following dates: 27 September 2018, 28 February 2019, 1 November 2019, 1 December 2019, 1 March 2020, 6 July 2020, 1 July 2021, 1 November 2021 and 11 November 2021. As Mr Lewis explains, these are simply the documents which have been located to date. However, in my judgment, the statements set out in Mr Ubhi's affidavit at paragraph 33, lack real credibility. It is clear that Mr Ubhi signed not just in some early period, but his signature appears on these physically signed documents for the period September 2018 until as late as November 2021. This is clearly, in my judgment, not just at the start as set out in the paragraph for Mr Ubhi's affidavit. I shall return to this point after considering further documents relied upon by Mr Lewis.

20. Mr Lewis also relies upon the following documentation as further evidence of the position of Mr Ubhi as a partner. In his skeleton, Mr Lewis sought to argue (1) that the evidence demonstrated that Mr Ubhi was a partner of Black Capital, or more correctly, that the evidence before me did not satisfy the test that there was a dispute on substantial grounds as to whether he was a partner; and alternatively (2) that he was he holding himself out as a partner, again more accurately that the evidence before me did not satisfy the test that there was a dispute on substantial grounds as to whether he held himself out as a partner. Before me, on instructions, Mr Lewis argued only the first ground. Mr McCourt Fritz submitted that some of the evidence relied upon by Mr Lewis really related to the now abandoned ground. In my

judgment, the evidence presented forms part of all the evidence before me and needs to be evaluated alongside the other evidence presented and relied upon by Mr Ubhi.

The business card

21. Mr Lewis relied on a business card which was handed to one of the Petitioners, Ms Sandra Mitchell, which states that Mr Ubhi was a partner of Black Capital. That card has his name, 'Rav Ubhi' with the word Partner written below and the telephone number and email address at Black Capital. The reverse side of the card has the word 'Black capital' on it.

Emails

22. Mr Lewis relies upon emails sent to potential investors, with references to contact details for both Mr Patel and Mr Ubhi and using language such as, 'Sarj and Rav really enjoyed meeting you and would be happy for you to invest with them' References in relation to various investment options presented to Mr Mitchell to accounts, 'we would set up' and stating in relation to returns, 'we would pay'. Mr Lewis submitted that the emails demonstrate how the business operated, with a degree of informality and with investors invited to contact either of them.

Management of the investments – involvement of Mr Ubhi

23. Mr Lewis relied upon Mr Ubhi being a member of the WhatsApp group with Mr Mitchell and Mr Patel. Mr Ubhi would provide directions to Mr Mitchell as to the payment of his investment and thereafter regarding repayment to the Petitioners. Mr Lewis referred to Mr Ubhi being copied to the majority of emails as between the Petitioners and Black Capital, being, submitted Mr Lewis, some 218 in total. Mr Lewis also relied upon the fact that the WhatsApp messages show both Mr Patel as

well as Mr Ubhi replying in August 2021 in relation to where to pay certain sums. Additionally, when in December 2021, Mr Mitchel was seeking repayment of the investments due to concerns he had, it was Mr Ubhi as well as Mr Patel who replied to the messages.

24. Mr Lewis also relied upon what Mr Ubhi said at a Christmas party in 2018. This was provided to the court by way of a video as well as notes of what was said. Having watched the video, it is clear that Mr Ubhi stated that he and Mr Patel were partners. He stated in his speech .'when Sarj and I first set up the business..', '..we are just two friends trading..', 'we are not your typical fund managers…', '..I am very happy to have a business partner like you…'. In so far as relevant, the video also raises a real lack of credibility in relation to the statements set out in paragraph 33 of Mr Ubhi's affidavit which I have set out above.

25. Mr Lewis also drew my attention to an email sent by solicitors acting on behalf of Mr Ubhi where he was referred to as a partner. I do not consider what is set out in that email really assists Mr Lewis. It relates to other issues and is not, in my judgment, really evidence which can be properly relied upon on this aspect.

Partnership Agreement

26. Mr Lewis also relied upon the Partnership agreement signed and executed between Mr Patel and Mr Ubhi. This document is dated 1 July 2016. Its terms state that the parties are entering into a general partnership in accordance with the laws of England and that the rights and obligations of the Partners will be as provided under the common law and as stated in the Partnership Act 1890 and any other applicable legislation. The firm name is stated to be Black Capital. Clause 3 states, '*The purpose of the Partnership will be: Property Investments'*. Clause 4 states that the

partnership will begin on 1 July 2016 and continue until terminated as provided in the agreement. The principal office of the business of the partnership will be located at 17 Diamond Court, Opal Drive, Milton Keynes, MK15 0DU or such other place as the partners may designate. The agreement sets out details of capital contributions and other terms of a rather standard partnership. Clause 15 states that no partner will be remunerated for services rendered to the Partnership, except reimbursement for expenses directly related to the operation of the Partnership. Clause 48 states that title to partnership property will remain in the name of the Partnership.

27. Clause 67 states *'This Agreement may not be amended in whole or in part without the unanimous written consent of all Partners'*. Mr Lewis submits that the Partnership Agreement is evidence of the partnership between Mr Patel and Mr Ubhi. He accepts that the terms of the partnership agreement states that it is for 'property investments' but invites me to consider the business which was actually carried out by the partnership called Black Capital. Essentially, he submits for all intents and purposes, this is the partnership which was operated as Black Capital by Mr Patel and Mr Ubhi even if it does not strictly speaking fall under the expression of 'property investments'. He relies heavily on the name of the business being Black Capital and this was the name of the investment business which forms the subject matter of the MFAs and the petition debt. He says the operation of the investment business with the name 'Black Capital' shows that the partnership went on to do other things.

28. Mr Ubhi's evidence in this respect is a denial that he is or has been a partner in Black Capital operating the investment business. He states that Black Capital has

always been the trading name used by Mr Patel for his investment business which he carried out as a sole trader. In relation to the Partnership Agreement dated 1 July 2016, he states as follows:-

'26. Around this time Sarj and I discussed going into business investing in property. With a view to taking this forward, I obtained a template partnership agreement which I then drew up to reflect our initial discussions. This is the partnership agreement date.
27. 1 July 2016 [RU2/15 - 27). It referred to 'Black Capital' (which was the name that we had discussed using for our property partnership) but both the proposed partnership and the underlying property business were entirely separate from the 'Black Capital' business that is the subject of these proceedings (i.e., the trading/investing business that Sarj subsequently began on his own account). The contemplated partnership was solely concerned with property investments as can be seen from the agreement itself (which refers to a "Property Investment Partnership"). Sarj and I never put this partnership agreement into effect.'

29. Mr Lewis makes the valid point that Mr Ubhi was certainly aware of what a partnership agreement looked like and the terms of the same were drawn up by him to reflect the discussions with Mr Patel. This, submits Mr Lewis, makes what he says at paragraph 33 of his affidavit relating to signing documents as a partner because he did not understand the potential legal implications as being inherently implausible as an explanation. Equally the statement in that paragraph that he signed because of what Mr Patel told him also lacks credibility bearing in mind the other paragraphs of the affidavit which demonstrate a level of knowledge relating to setting up a partnership, obligations and liabilities. I agree with Mr Lewis that what is set out at paragraph 33 of the affidavit lacks real credence, but this is not the

entirety of the evidence relied upon by Mr Ubhi. He maintains in his affidavit that he was not a partner and also relies on certain documents in support of his position.

30. As to the existence of the independent contractor agreement dated 4 June 2018, Mr Lewis makes the following submissions. He points to the dates of the investments in Black Capital by Mr Mitchell and others being some time after the date of the independent contractor agreement. Mr Lewis points to there being no evidence of any invoices raised pursuant to this contractor agreement and also that there is no evidence in relation to how HMRC treated these payments. He also submits that Mr Ubhi being an independent contractor is not necessarily inconsistent with Mr Ubhi being a partner in Black Capital (as the investment business). One of the difficulties for Mr Lewis is that the terms of the Partnership Agreement in 2016 does not allow for partners to remunerated for services to the partnership.

31. In relation to the employment contract and the two payslips which are relied upon by Mr Ubhi, Mr Lewis invites me to consider these documents in the light of the partnership agreement and also the MFAs signed by Mr Ubhi. He points out that the MFAs were entered into after the date of the contract of employment. He submits that again being an employee is not necessarily inconsistent with being a partner in itself. Again the same point relating to prohibition on remuneration in the partnership agreement applies here. There is also, in my judgment, a real inconsistency in this case, between being an employee and being a partner where essentially your earnings comes from your partnership drawings and not as an employee. On the Petitioner's case, the partnership is effectively that set out in the partnership agreement which contains the terms in relation to drawings I have set out above.

32. Mr Lewis took me to the analysis of the bank statements which had been obtained by Mr Hunt and which cover the period 21 September 2018 to 15 February 2019. Mr Lewis points to Mr Ubhi being paid a total sum of £255,000 and Mr Patel being paid the sum of £310,000. He points to a pattern of payments with the pattern being of payments being made to both of them which Mr Lewis submits contradicts the assertion that during this period Mr Ubhi was an independent contractor. There is a description in the bank statements of the payments to Mr Ubhi being described as 'comms'. As I observed during the hearing, references set out in bank statements tend not to be helpful to either party because, as here, there is no evidence as to who inputted the reference on whose instructions and whether it has in any event any significance in relation to who directed what it should be referred to. I am not certain that the evidence of payments made really advance Mr Lewis' case. Under the terms of the employment agreement as well as the earlier independent contractor agreement, Mr Ubhi was due to be paid substantial sums for his services.

33. Mr Lewis also relied upon the evidence of Mr Patel which asserted that he and Mr Ubhi were in a partnership with the business name Black Capital. That statement of Mr Patel is, as appears from his evidence, disputed by Mr Ubhi.

34. In my judgment there are a lot of matters in relation to Mr Ubhi's evidence which are unsatisfactory or even extremely unsatisfactory. For example, his assertion that he signed the numerous MPA agreements which clearly stated that he was a partner because he did not understand the legal significance as well as because Mr Patel told him this is what needed to be done, is, in my judgment, one of those incredible statements. His evidence relating to obtaining and adapting a template to create the Partnership Agreement demonstrates the level of knowledge of Mr Ubhi. The

contemporaneous evidence of the MPAs clearly signed by him from the period 2018 until late 2021 also contradicts his evidence that he only signed such agreements early on. However, I need to consider the evidence before me in its entirety. I remind myself that only in clear cases would I be able to reject evidence before me as being inherently implausible. Despite the powerful submissions of Mr Lewis, I do not consider that, based on the entirety of the evidence, this is one of those clear cases enabling me to reject effectively both Mr Ubhi's statements set out in his affidavits as well as the documents relied upon by him. Despite Mr Lewis' submission that I am able to evaluate the evidence, and in doing so, reject the existence of both the independent contractor agreement as well as the employment agreement, I do not agree. It is the existence of these documents which, in my judgment, prevents this from being one of the clear cases referred to in the authorities I have referred to above. It is difficult to reconcile the existence of the two agreements with the evidence presented to me of Mr Ubhi being a partner. The terms of the partnership agreement which Mr Lewis relied upon are inconsistent, in my judgment, with Mr Ubhi's status as either an independent contractor or an employee. However unsatisfactory and incredible certain aspects of Mr Ubhi's evidence are, this does not enable me to ignore or reject the documentation which he relied upon.

35. In conclusion, having considered the evidence before me, I am satisfied that it demonstrates a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital.

36. I have not sought to deal in this judgment in any great detail with the submissions made by Mr McCourt Fritz on behalf of Mr Ubhi. Bearing in mind my

determination, there is no need to lengthen this judgment with an analysis of those detailed submissions.

Liquidated Debt

37. My determination above relating my being satisfied that the debt is disputed on substantial grounds means that, strictly speaking, there is no need to deal with the other outstanding issues. I will however deal with them but will do so in more summary form. Mr Lewis puts his case in three ways. Firstly, he submits that on the evidence, there was an acceptance by Mr Patel and Mr Ubhi that the sum outstanding to the Petitioners totalled £18,767,520. By email dated 13 December 2021, Mr Patel amended Mr Mitchell's calculation and provided a valuation of the Petitioners' investments in the sum of £18,604,513. On 22 December 2021, Mr Ubhi confirmed that Black Capital wished to liquidate all of the Petitioner's investments and return the funds. Mr Mitchell then carried out a revised calculation in the total sum of £18,362,520. The calculation was set out by Mr Michell and he says accepted by Black Capital who also agreed to pay it to the Petitioners. I am not necessarily persuaded that the terms of the agreements enable there to be a liquidated sum due to the Petitioners based on the estimated returns. Mr Kinman referred me to the clause (in all the MFAs I was taken to and which are in the evidence before me) with the heading, *'Expected Return*', which states as follows, '*Historically returns for the Client have been between 40% and 72% per annum but past performance is no guarantee of future results nor does past success guarantee future performance'*. In any event both Mr Patel and Mr Ubhi dispute that there was an agreement to pay the particular sum.

38. Alternatively, Mr Lewis submitted that the Petitioners are entitled to the return of their initial investments (without the promised returns) which he submits total the sum of £13,702,750. In my judgment, this also does not assist Mr Lewis because the agreements themselves do not specifically state that there is an entitlement for the return of the sums invested in such terms, save at the end of the fixed investment period.

39. Alternatively Mr Lewis invites me to consider the terms of the MPAs. In particular, to consider those investment agreements where the stipulated period of investment has expired and therefore under the terms of the agreements themselves, payment is to be made to the relevant Petitioner in the sum of at least 90% of the sum invested. The MPAs are all for fixed terms. In the evidence, there is a list of the dates of the agreements which sets out the dates of expiry of the relevant agreements. None of this evidence is disputed by Mr Patel or Mr Ubhi who instead assert that the sums claimed are not liquidated in more general terms. Mr Lewis submits that the Petitioners had a liquidated debt on the basis of those expired agreements in the total sum of £6,965,000.

40. The relevant terms stipulate that the period of investment is 12 months (under the heading 'Investment'). Thereafter the clause with the heading 'Term' sets out the following:-

'Subject to the clause below entitled 'Key Main Event', the client agrees to commit the Investment for 12 Months. Notwithstanding any other term of this agreement, after the 12 months period has ended, the client may in its sole discretion either:

....(ii) Request that some or all of the Investments be returned to the Client.

In the event that the Client requests the return of some or all of the

Investment, the Trading Agent shall return the funds to the bank account nominated by the Client within 10 days…'

The reference to 'Key Man event' relates to the death or permanent disability of Mr Patel and is therefore not relevant. The only issue is whether it is possible under the terms of the MFA to ascertain a sum which is liquidated and which needs to be returned in accordance with the above provision. In my judgment, the reply to this issue is located in the section entitled 'Risk'. That states as follows:-

'The Client understands the risks associated with trading the Commodity Interests and agrees to allow a maximum drawdown of 10% of the value of the Investment at the start of this contact and any future rollover contract. (unless the Client provides its prior written consent to the trading agent that the client agrees to increase the maximum drawdown amount).If the drawdown of the account is greater than the agreed 10% of the Investment (without the Client having first provided its written consent), the Trading Agent will close the account and contact the Client within 24 hours and return the Investment within 10 days, however in fast moving markets there is a possibility that losses may be higher than the original 10% of original capital introduced.'..'

41. In order for there to be a liquidated debt, the relevant sum needs to be identifiable and be due and owing under the terms of the relevant agreement. In my judgment, the obligation on Black Capital to return of the 90% of the Relevant Investment after the expiry of the 12 month term creates a liquidated debt for that sum. The evidence before me does not show that the last sentence in the above clause applies. Neither Mr Patel nor Mr Ubhi have produced any evidence that the Petitioners' Investments fall under this particular part of the Risk provision, being ones where Black Capital is obliged to notify the client and close the account within 24 hours

and thereafter return the Investment within 10 days if it has drawndown more than the agreed 10%. In fact, the evidence points to Black Capital accepting that Investment sums were due. Even if there is a dispute as to the returns which are due in relation to investments profits, this does not defeat in some way, on the evidence before me, of there being a lower liquidated debt due.

42. Mr Kinman sought to argue that the sum was not ascertained or a specific amount which had been fully and finally ascertained (see *Durouth v Orca Finance UK Limited [2022] EWHC 2346 CH*). I disagree. In my judgment, Mr Lewis can rely upon the liquidated debt created after the expiry of the 12 month period in relation to 90% of the original investment. This is not a restitution case and there is no need for an account in relation to the limited and much reduced sum which can be claimed as a liquidated debt. There is no claim for moneys had and received. The liquidated sum due arises from the terms of the MFAs. The evidence does not demonstrate that any of the relevant agreements fall under the last sentence in the Risk clause. In my judgment, I do not consider that the fact that the liquidated debt is much smaller than what is claimed in the petition makes a difference. No payment has been made in any event. It may well be that the much larger sum claimed is not properly characterised as being a liquidated debt, but this does not in some way prevent Mr Lewis from asserting, as he does that a smaller sum is a liquidated debt and that this forms part of the sum being claimed in the petition.

The failures to comply with the relevant insolvency procedures.

43. The partnership petition was presented in accordance with article 7 of the IPO. That provides for the presentation of a petition seeking to wind up the partnership, as an unregistered company, without presenting at the same time petitions against the individual partners. As I have set out in the introduction to this judgment, the partnership petition in this case was presented as an article 7 petition. It was not preceded by a statutory demand. Mr Lewis submitted that by reason of the without notice applications seeking the appointment of the Provisional Liquidator and thereafter the freezing orders, no statutory demand was served before the petition.

44. At the hearing before ICC Judge Prentis on 10 October 2022, the Petitioners sought and were granted an amendment to the partnership petition to refer to the bankruptcy petitions which had been issued pursuant to article 8 of the IPO. The evidence in support of this amendment sought is a witness statement of Ms Maria Koureas-Jones dated 4 October 2022. That witness statement expressly states that the Petitioners seek to rely on article 8 of the IPO. The witness statement also set out the grounds for seeking an order for that the hearing of the bankruptcy petitions be expedited. This was refused by the Judge on 10 October 2022.

45. Before me, Mr Lewis sought to argue that the sequence of events was important. The Petitioners clearly started with an article 7 petition and then sought to add the individual bankruptcy petitions, but that in some way the article 7 petition remained as an article 7 petition. His difficulty is that the application to amend expressly sought to convert the article 7 petition into an article 8 petition with concurrent bankruptcy petitions. The IPO provides for two different regimes depending on whether article 7 or article 8 is used.

46. Article 7(1) of the IPO applies the provisions in Part V of the Insolvency Act 1986 subject to specific modifications to some of those provisions as set out in Part 1 of Schedule 4 of the IPO. (Article 7(2) of the IPO) Accordingly, the Petitioners could rely on sections 223 and 224 of the Insolvency Act 1986. Section 224 sets out different ways in which a petitioner can satisfy the test of inability to pay debts. In particular, it allows the petitioner to establish, pursuant to section 224(1) (d), that the partnership is unable to pay its debts as they fall due. Section 224(2) also allows a petitioner to rely on the balance sheet insolvency test. The Petitioners were clearly seeking to rely upon section 224 when they presented their partnership petition pursuant to Article 7. There is therefore no requirement to issue a statutory demand in relation to an Article 7 petition.

47. Article 8 expressly excludes both sections 223 and 224 of the Insolvency Act 1986 from applying to its particular regime (Article 8(1)). This means, as clearly set out in Mr Kinman's helpful skeleton and in his submissions, that the only way for the Petitioners in this case to establish the inability to pay debts, was that set out in section 221 as modified by Part 2 of Schedule 4. This sets out the statutory demand regime as being the only way for article 8 petitioners to establish the inability to pay debts. As modified,

Section 221(8) of the IA 86:-

> "*The circumstances in which an insolvent partnership may be wound up as an unregistered company are as follows-*
>
> *(a) the partnership is unable to pay its debts*

Section 222 IA 86 as modified :-

"*(1) An insolvent partnership is deemed (for the purposes of section 221) unable to pay its debts if there is a creditor, by assignment or otherwise, to whom the partnership is indebted in a sum exceeding £750 then due and–*

(a) the creditor has served on the partnership, in the manner specified in subsection (2) below a written demand in Form 4 in Schedule 9 to the Insolvent Partnerships Order 1994 requiring the partnership to pay the sum so due,

(b) the creditor has also served on any one or more members or former members of the partnership liable to pay the sum due (in the case of a corporate member by leaving it at its registered office and in the case of an individual member by serving it in accordance with the rules) a demand in Form 4 in Schedule 9 to that Order, requiring that member or those members to pay the sum so due, and

(c) the partnership and its members have for 3 weeks after the service of the demands, or the service of the last of them if served at different times, neglected to pay the sum or to secure or compound for it to the creditor's satisfaction.

(2) Service of the demand referred to in subsection (1)(a) shall be effected–

(a) by leaving it at a principal place of business of the partnership in England and Wales, or

(b) by leaving it at a place of business of the partnership in England and Wales at which business is carried on in the course of which the debt (or part of the debt) referred to in subsection (1) arose, or

(c) by delivering it to an officer of the partnership, or

(d) by otherwise serving it in such manner as the court may approve or direct.

(3) ..."

48. No such demand was served by the Petitioners upon the partnership. Mr Lewis accepts this but submits that as the petition started life as an article 7 petition, in some way this allows for the current petition, as amended, to continue. The difficulty is that the petition as amended is now an article 8 petition. That requires a statutory demand to have been served. Mr Lewis sought to persuade me that it cannot be right to impose an obligation relating to article 8 on a petition which started life as an article 7 petition. However, the difficulty with that argument, in my judgment, is that it ignores the requirements of the IA 86. A Court has to be

satisfied that a partnership is unable to pay its debts before it can consider whether to make the winding up order. Before me, the article 7 petition is now declared to be an article 8 petition. There is no mechanism in the IPO or indeed in the IA 86 and its Rules which would enable me in some way to ignore the requirements imposed by article 8.

49. Mr Lewis points to the application for the appointment of the Provisional Liquidator and the freezing order and submits that serving the statutory demands would have defeated these applications being made without notice. That does not, in my judgment, provide some basis for me to ignore the provisions of article 8 and what is required on an article 8 petition. There was no difficulty in seeking the without notice orders based on an article 7 petition because the test for inability to pay debts is wider than the one set out in article 8.

50. Mr Lewis sought to rely upon article 14 in Part 6 of the IPO. This adds the following provision to the end of section 168 IA 86:-

At the end of section 168 of the Act there shall be inserted the following subsections:-

"(5A) Where at any time after a winding-up petition has been presented to the court against any person (including an insolvent partnership or other body which may be wound up under Part V of the Act as an unregistered company), whether by virtue of the provisions of the Insolvent Partnerships Order I 994 or not, the attention of the court is drawn to the fact that the person in question is a member of an insolvent partnership, the court may make an order as to the future conduct of the insolvency proceedings and any such order may apply any provisions of that Order with any necessary modifications.

(5B) Any order or directions under subsection (5A) may be made or given on the application of the official receiver, any responsible insolvency practitioner, the trustee of the partnership or any other interested person and may include provisions as to the administration of the joint estate of the partnership, and in particular how it and the separate estate of any member are to be administered.

51. Mr Lewis submitted that (5A) gives the Court power to deal with current position. Effectively Mr Lewis is inviting me to retrospectively dispense with the service of the statutory demand on the partnership. In my judgment these provisions do not provide me with such a power. They relate to a different scenario being one where a winding up petition has been presented against a person and thereafter the court's attention is drawn to the fact that that person is a member of an insolvent partnership. Here the position is that the Petitioner presented an article 7 petition against the partnership and then amended their petition to proceed by way of article 8. This has nothing to do with the future conduct of the insolvency estate which is what (5B) deals with.

52. Mr Lewis submits that the petition was validly presented and therefore it would be odd if subsequent events rendered it invalid. He referred me to article 19(5) which states, *'nothing in this Order is to be taken as preventing any creditor or creditors owed one or more debts by an insolvent partnership from presenting a petition under the Act against one or more members of the partnership liable for that debt or those debts (as the case may be) without including the others and without presenting a petition for the winding up of the partnership as an unregistered company'*. As I mentioned earlier, the Petitioners had a choice to deal with the individual partners under the terms of the IPO or as article 19(5) demonstrates, outside the provisions of the IPO. The difficulty remains that by amending the petition, the Petitioners are bound by the requirements of Article 8.

53. The service of a prescribed written demand, being the statutory demand, means that the Petitioners are unable to establish, in accordance with Article 8 and its modified provisions of the IA 86, that the partnership is unable to pay its debts. Mr Kinman

referred to the analogous position in relation to bankruptcy petitions where a petition which is not preceded by a statutory demand was dismissed (Canning v Irwin Mitchell [2017] EWHC 718 (Ch). I agree.

54. Whilst I have concentrated in analysing the position in relation to the partnership petition, the same reasoning applies equally in relation to the failure to serve the statutory demands as against the individuals in accordance with the IA 86 and the Insolvency Rules as modified by the IPO . Whilst the statutory demands were served upon Mr Patel and Mr Ubhi, they did not provide for the requisite period of three weeks. The relevant provisions in relation to the individual petitions (as modified) are as follows :-

Section 267(2) IA 1986 (as modified):

> "*a creditor's petition may be presented to the court in respect of a joint debt or debts only if, at the time the petition is presented–*
>
> *(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,*
>
> *(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, immediately, and is unsecured,*
>
> *(c) the debt, or each of the debts, is a debt for which the individual member or former member is liable and which he appears to be unable to pay, and*
>
> *(d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.*"

Section 268 IA 1986 (as modified):

> "*(1) For the purposes of section 267(2)(c), an individual member or former individual member appears to be unable to pay a joint debt for which he is liable if the debt is payable immediately and the petitioning creditor to whom the insolvent partnership owes the joint debt has served–*
>
> *(a) on the individual member or former individual member in accordance with the rules a demand (known as "the statutory*

demand"), in Form 4 in Schedule 9 to the Insolvent Partnerships Order 1994, and

(b) on the partnership in the manner specified in subsection (2) below a demand (known as "the written demand") in the same form, requiring the member or former member and the partnership to pay the debt or to secure or compound for it to the creditor's satisfaction, and at least 3 weeks have elapsed since the service of the demands, or the service of the last of them if served at different times, and neither demand has been complied with nor the demand against the member set aside in accordance with the rules.

(2) Service of the demand referred to in subsection (1)(b) shall be effected–

(a) by leaving it at a principal place of business of the partnership in England and Wales, or

(b) by leaving it at a place of business of the partnership in England and Wales at which business is carried on in the course of which the debt (or part of the debt) referred to in subsection (1) arose, or

(c) by delivering it to an officer of the partnership, or

(d) by otherwise serving it in such manner as the court may approve or direct."

55. Accordingly, the partnership petition stands to be dismissed for these reasons as well as by reason of the determination I have made above relating to Mr Ubhi's dispute. In relation to the position of Mr Patel who had his application to set aside the statutory demand summarily dismissed by order of ICC Judge Jones, I shall hear any submissions as to the appropriate order to make at the effective hearing of other consequential matters.

56. There remains the application before me relating to granting retrospective permission to allow the Petitioners to issue the bankruptcy petitions against the individuals on dates different from that of the partnership petition .

Section 124 of the Insolvency Act 1986 as modified states as follows:-

"*(1) An application to the court by virtue of article 8 of the Insolvent Partnerships Order 1994 for the winding up of an insolvent partnership as an unregistered company and the winding up or bankruptcy (as the case may be) of at least one of its members or former members shall–*

(a) in the case of the partnership, be by petition in Form 5 in Schedule 9 to that Order,

(b) in the case of a corporate member or former corporate member, be by petition in Form 6 in that Schedule, and

(c) in the case of an individual member or former individual member, be by petition in Form 7 in that Schedule.

(2) ...

(3) The petitions mentioned in subsection (1)–

(a) shall all be presented to the same court and, except as the court otherwise permits or directs, on the same day, and

(b) except in the case of the petition mentioned in subsection (1)(c), shall be advertised in Form 8 in the said Schedule 9."

57. I accept that I have clearly a power to make the order sought by Mr Lewis. However, by reason of the determinations I have made above, I am unlikely to grant such an order when the petitions fail for other reasons. There is no reason to take this application further in those circumstances.

58. As the handing down of this judgment is urgent for the reasons I have set out above, I have already indicated that if possible, this judgment will be handed down on a non attendance basis with a direction that the hearing of consequential matters to be adjourned to a hearing before me on a date to be fixed.