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Case No: CR-2019-004175

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 22nd October 2020

IN THE MATTER OF L & N D DEVELOPMENT AND DESIGN LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

INSOLVENCY AND COMPANIES COURT JUDGE MULLEN

- -

Between :

LYNDA LOUISE DIXON	**Applicant**
- and –	
(1) NICHOLAS MYERS **(2) ADAM HENRY STEPHENS** **(as administrators of** **L & N D Development and Design Limited)**	**Respondents**

- -

MR MARK SPACKMAN (instructed directly) for the **Applicant**
MR JAMES BAILEY QC (instructed by **Brecher LLP**) for the **Respondents**

Hearing dates: 15th and 16th July 2020

- -

Approved Judgment

COVID-19 – This judgment was handed down remotely by circulation to the parties' representatives by email. The time and date of the hand-down are deemed to be 10.45am on 22nd October 2020. This version is to be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE MULLEN

ICC Judge Mullen :

Introduction

1. This application was issued on 27th June 2019 by Mrs Lynda Louise Dixon ("Mrs Dixon") pursuant to paragraph 74(1)(a) of Schedule B1 to the Insolvency Act 1986. Mrs Dixon is the sole shareholder and de jure director of L & N D Development and Design Limited ("L&ND"), which was placed into administration on 8th August 2018 by Amicus Finance plc ("Amicus") as qualifying floating charge holder. Mrs Dixon's complaint is that the respondents, who are the joint administrators of L&ND, ("the Administrators") have declined to assign to her the causes of action that she contends that L&ND has against Amicus. Amicus is itself insolvent and went into administration on 20th December 2018.

2. The application, as issued, was supported by the statement of Mrs Dixon, dated 20th June 2019, and was resisted by the Administrators. On 25th July 2019, Chief ICC Judge Briggs directed the filing of statements of case. Following filing of those pleadings, evidence was served pursuant to the order of ICC Judge Prentis dated 1st November 2019. That evidence consisted of a second statement from Mrs Dixon, dated 2nd February 2020. The first respondent, Mr Nicholas Myers, filed a witness statement in answer, dated 12th March 2020, and Mrs Dixon filed a statement in reply dated 29th April 2020.

3. The hearing proceeded as a hybrid hearing, that is to say that Mr Mark Spackman, counsel instructed on a direct access basis for Mrs Dixon, and Mr James Bailey QC, counsel for the Administrators, together with his solicitor, attended court in person. Mrs Dixon and her husband, Mr Richard Dixon ("Mr Dixon"), attended the proceedings via Skype and were able to hear and see the proceedings via the laptops used by counsel and by me.

4. At the outset of the hearing I was required to deal with an application by Mrs Dixon, made on 13th July 2020, to adjourn the hearing to the first open date after 15th October 2020. The reason for the application was that, according to the evidence in support, on 3rd July 2020 Mr Dixon became aware of an advertisement in the Estates Gazette by a group calling themselves the "Amicus Action Group", which advertisement sought information as to dealings with either Amicus or its administrators. It was suggested that this group might be able to provide Mrs Dixon with further information to support L&ND's cause of action, principally, it was suggested, in the form of similar fact evidence. I declined to adjourn the hearing for reasons that I gave at the time.

Background

5. L&ND was a special purpose vehicle incorporated on 28th January 2015 in order to develop two plots of land that it owned ("the Development Land") for residential housing. Those plots were:

    i) "Land at Scotby" in Carlisle, Cumbria, registered at HM Land Registry under title number CU238708; and

ii) "Land at the back of 39, Scotby Road" in Carlisle, registered under title number CU235125.

Although Mrs Dixon was the sole officer of the company, Mr Dixon and their son, Mr Nicholas Dixon, were employed by the company.

6. Planning permission for the construction of 14 houses ("the Development") was granted in March 2015 and, in order to finance the Development, L&ND sought a secured loan from Amicus. On 19th February 2016 it entered into the following agreements with Amicus –

i) a loan facility agreement in the sum of £2,452,080 ("the 2016 Facility Agreement");

ii) a debenture securing all monies loaned by Amicus to L&ND under the 2016 Facility Agreement by way of fixed and floating charges over the assets of the company;

iii) a personal guarantee and indemnity from Mrs Dixon by which she guaranteed the obligations of L&ND and covenanted to pay them without "any set-off, condition or counterclaim whatsoever"; and

iv) a charge by way of legal mortgage ("the Mortgage") over a property at 61 Scotby Road ("No 61"), the freehold of which was owned by Mrs Dixon.

7. The terms of the 2016 Facility Agreement were set out under the headings "Loan Particulars", "Conditions Precedent" and "Grant of the Facility", which included a section headed "Special Conditions". The Loan Particulars provided that the gross amount of the first advance was to be £823,080 and the gross amount of "further advances under the Special Conditions" would be £1,629,000. The term of the loan was 18 months, with interest at the rate of 1.25% per month and a default interest rate of 3% per month. "The Intermediary" was defined in the Loan Particulars as "Platinum Options", which is a reference to Platinum Options Limited, and its commission was stated to be £48,080.

8. The Conditions Precedent provided that the conditions set out in that section were to be satisfied before a drawdown request could be made, including by the provision of "evidence satisfactory to the Lender in every respect", and Amicus was entitled to waive them in whole or in part without prejudicing its subsequent right to require them to be fulfilled. They contained the following relevant requirement for documents at condition 4:

> "4.1 A Development Appraisal comprising a development appraisal and cash-flow forecast in form and content satisfactory to the Lender in respect of the Project that contains:
>
> (a) a costed description and financial analysis of the Project,
>
> (b) Project Milestones;
>
> (c) comprehensive details of the budgeted costs for the Project, and

(d) the works programme.

4.2 All necessary consents to enable the Project to be completed including any planning consent required for the Project and any other consents or authorisation, including under the Town and County Planning Act 1990, the Highways Act 1980, the Water Industry Act 1991, the Building Regulations 2010 (SI 2010/2214) and Regulatory (Fire Safety) Order 2005 (SI 2005/1541), each environmental licence and under any other statute, bye-law or regulation of any competent authority and which is reasonably necessary to enable the works to be lawfully commenced, carried out and completed.

4.3 The Property and the buildings to be constructed on it must comply with the Building Standards Indemnity Scheme requirements from time to time of the CML Lender's Handbook as specified by the Lender.

4.4 A copy of the building contract to be entered into for the Project such contract to be with a building contractor approved by the Lender and otherwise in a form approved by the Lender and with a charge by way of assignment as security for the Lender over the Borrower's rights under the building contract in respect of the Project to be granted in the from required by the Lender with confirmation when the building contract is entered into and completed.

4.5 Copies of the following, all of which (including, where appropriate, the parties and the respective professional indemnity insurance cover levels and assignment provisions) must be fully satisfactory to the Lender and the Project Monitor:-

(i) completed appointment documentation for the Borrower's professional team;

(ii) a contractor's all risks insurance policy and professional indemnity insurance cover for the contractor and each member of the professional team;

(iii) collateral warranties in favour of the Lender issued by the professional team including contractors and/or sub-contractors (domestic and nominated) having significant design contribution to the Project in a form acceptable to the Lender."

9. The making of further advances was governed by condition 4 of the Special Conditions as follows:

"4. The Lender will make further advances to the Borrower under Facility up to the total amount of the Facility, provided that the Further Advance Conditions Precedent are first

> satisfied to the satisfaction of the Lender in every respect. The Lender may in the Lender's discretion waive any one or more Further Advance Conditions Precedent in whole or in part. The Further Advance Conditions Precedent are in addition to any other requirement under this Agreement."

The Special Conditions made further provision as to the granting of further advances as follows at condition 5:

> "5. The Lender may instruct a Project Monitor to (a) monitor and report to the Lender upon the Project and/or (b) report upon the current market value of the Property with vacant possession immediately prior to any such proposed further Advance being made. The Borrower shall pay or reimburse to the Lender on demand the fees and expenses of the Project Monitor."

The "Further Advance Conditions Precedent" are set out in condition 6:

> "6. The Further Advance Conditions Precedent are as follows:
>
> 6.1 the Lender receives from the Borrower a duly signed Drawdown Request for each further Advance;
>
> 6.2 no Event of Default has occurred:
>
> 6.3 the Lender receives the further report from the Project Monitor in a form satisfactory to the Lender
>
> 6.4 satisfaction of the Development related Conditions Precedent referred to at clause 4 of this Agreement or confirmation from the Project Monitor that these Conditions Precedent have been satisfied and remain satisfied.
>
> 6.5 none of the events mentioned in clause 7 below has occurred; and
>
> 6.6 The total amount of all Advances made under the Facility immediately after a further Advance is made will not exceed 70% of the current market value of the Property with vacant possession as revealed by the Project Monitor's valuation made immediately prior to such further Advance."

For the sake of completeness, I set out the additional events of default referred to at condition 6.5:

> "7. Each of the following events shall also constitute an Event of Default under this Agreement
>
> 7.1 the Borrower has failed to achieve any Project Milestone by the due date or in the opinion of the Project Monitor is more

> likely than not to fail to achieve any Project Milestone by the due date;
>
> 7.2 the Borrower has failed to achieve Practical Completion by the due date or in the opinion of the Project Manager is more likely than not to fail to achieve Practical Completion by the due date;
>
> 7.3 the Project Monitor shall report any material cost overrun with regard to the figures shown in the Development Appraisal;
>
> 7.4 the Development Appraisal shall be found to be inaccurate or misleading in any respect; and
>
> 7.5 The Project shall not proceed and be constructed in accordance with the Development Appraisal."

10. Mrs Dixon's case is that the 2016 Facility Agreement contained an express term that Amicus would make further advances if the conditions for doing so were satisfied and that any such further advances were to be paid in such time as it reasonably required following the satisfaction of the conditions. Alternatively, a term that such advances were to be made within a reasonable time was implied as a matter of business efficacy given that Amicus knew that the advances were necessary to enable contractors to be paid.

11. The Development was divided into two phases. Phase 1 was to be the construction of eight houses and the estate road. Work began on this not long after the 2016 Facility Agreement was executed. An agreement for the provision of affordable housing was entered into with the local authority under section 106 of the Town and Country Planning Act 1990 in March 2016 and, on 16th April 2016, the company requested a drawdown of £150,000 pursuant to the agreement. This was provided on 27th April 2016. A further drawdown of £200,000 was requested on 9th August 2016 and the monies were provided on 22nd September 2016. In the meantime, the local authority had, on 24th August 2016, granted planning permission for a further 8 houses. A request for a drawdown of £140,000 was made on 10th December 2016. That was paid on 21st December 2016.

12. Moving into 2017, the next drawdown of £150,000 was requested on 15th March 2017 and was provided on 29th March 2017. The last drawdown request under the 2016 Facility Agreement was made on 4th April 2017 and was for £135,000. This sum was provided on 21st April 2017. During the course of the consideration of this request Mr Dixon asked for sight of a valuation report provided to Amicus, but this was declined.

13. I shall return to the circumstances of these drawdowns in more detail later in this judgment but, for present purposes, I need only say that Mrs Dixon's case is that the intervals between drawdown requests and payment amounted to breaches of the obligation contained in the 2016 Facility Agreement to make payment within a reasonable time, causing delays and consequential losses.

14. L&ND entered into a further facility agreement with Amicus on 17th May 2017 ("the May 2017 Facility Agreement"). This was on similar terms to the 2016 Facility

Agreement, save that it provided for a further loan of £561,000 to L&ND to be repaid on or before 18th August 2017. The first advance was to be £111,000 and the Further Advance Conditions Precedent that I have recited above were deleted. This agreement again made provision for payment to Platinum Options by way of commission.

15. These further monies were not sufficient to complete the Development as then contemplated with the benefit of the further planning permission granted by the local authority. Negotiations for a further loan were entered into in July 2017 and Amicus offered the company a further facility agreement in the sum of £6,329,844.53, having obtained a further valuation of the Development Land shortly beforehand. The idea behind this was that the sums due under the 2016 Facility Agreement and the May 2017 Facility Agreement would be paid off and a further £2,954,000 would be available to the Company to enable it to complete the Development. Mrs Dixon contends that a binding agreement was entered into to that effect and, indeed, a facility agreement was signed on 6th July 2017 providing for the loan of this sum. The agreement was, however, subject to the following qualification at special condition 1:

> "This Facility is subject to final Amicus credit approval".

16. As it turned out, Amicus did not approve the agreement but, on 23rd July 2017, offered a further £175,000 on the basis that the earlier loans were required to be repaid by 18th August 2017. As a result of further negotiations, however, Amicus and L&ND entered into a facility agreement on 29th August 2017 ("the 2017 Facility Agreement") pursuant to which an additional sum of £260,000 was advanced, which was to be repaid on 28th May 2018. Again, commission was payable to Platinum Options as introducer.

17. The Administrators' evidence is that the reason that Amicus declined to proceed with the loan of the larger sum because sums advanced under the earlier agreements had been applied towards the construction of phase 2 of the Development, rather than phase 1, and its revised offer was to allow the completion of that phase in order to protect its security. However that might be, the Administrators' position is that the advance of the further £2.95 million under the 6th July 2017 facility agreement was subject to final approval, which was not given.

18. Negotiations for further monies foundered and L&ND was unable to complete the Development or repay the loan on 28th May 2018. Notice of default was served on the company on 1st August 2018. The Administrators were appointed in that month and in due course were also appointed as receivers of No 61 under the Law of Property Act 1925. They brought possession proceedings in respect of No 61 on 24th October 2018, naming Mr and Mrs Dixon and Mr Nicholas Dixon as defendants ("the Carlisle Proceedings").

19. Those proceedings were defended. At paragraphs 40 to 46 of the Defence, it was alleged that Amicus was in breach of the 2016 Facility Agreement in that the advances of monies pursuant to it were unduly delayed, as a result of which L&ND was unable to pay contractors and therefore suffered delays and consequential losses. At paragraphs 49 to 72 it set out the negotiations for further advances. It went on to

allege that the 2017 Facility Agreement was voidable because it was entered into under economic duress. The Defence dealt with this argument as follows:

> "102. Further or alternatively, the August 2017 Loan was entered into as a result of Amicus' economic duress and accordingly is voidable.
>
> 103. In particular, taking into account the matters raised at paragraphs 49 – 72 above, Amicus's demands and/or threats of withdrawing finance in relation to the August 2017 Loan, having reneged capriciously and/or arbitrarily from the July 2017 Loan and having withheld the August 2017 valuation, thereby depriving L & ND of properly addressing the value of the Development and the funds required, did not constitute reasonable demands and further would not be considered by reasonable and honest people to be a proper means of reinforcing the demand.
>
> 104. Accordingly, as a corollary of the August 2017 Loan being voidable, the security that is sought to be enforced upon the same (the Mortgage) likewise cannot be enforced against Mrs Dixon."

20. On 15th February 2019, Mr Barnaby Hope, counsel who had drafted the Defence, acting on a direct access basis, emailed to the Administrators a letter summarising Mrs Dixon's case as to the claim that L&ND had against Amicus. Mr Hope introduced the claim by reference to the Carlisle Proceedings:

> "5. Referring to §40 – 46 of the Defence to the No.61 Claim, it was contended by L&ND prior to its administration, and is contended by Mrs Dixon now, that Amicus, in breach of the terms of the (**February 2016 Loan**) and (**May 2017 Loan**), failed to release funds properly due to L&ND, with the consequence that it was unable to progress the Development.
>
> 6. As a result of the delays, contractors could not be paid and materials could not be sourced. The success of the Development and Amicus' repayment depended upon houses being completed and sold. It thus became impossible for L&ND to repay Amicus and/or make profit from the enterprise without further funding. L&ND had no option but to seek further finance.
>
> 7. Despite its earlier failings, Amicus had by July 2018 promised to make a £6.3m facility open to L&ND (a further £2.9m of funds), which would have provided sufficient capital (if timeously released) to enable significant advancement of the Development, sale of properties and repayment of Amicus and/or refinancing to complete the Development.

8. However, despite the (**Aborted July 2017 Loan**) having been all but signed, Amicus then reneged on the deal. It was L&ND's position and is Mrs Dixon's now, that this withdrawal was arbitrary and capricious and designed to place L&ND into a position where it had no option but to sign up to later, less favourable terms (**August 2017 Agreement**).

9. The August 2017 agreement, whilst giving L&ND an extra 9 months to repay the total amount, resulted in only £260,000 being actually released to L&ND (the rest being used to repay outstanding loans and on interest/fees). It was a deal that Amicus well knew would lead to nothing except for the downfall of L&ND, yet further profits for itself at L&ND's expense.

10. L&ND sought further advances from Amicus to enable it to progress the Development, no progress having been made from August 2017 – July 2018. Amicus resolved in principle to grant a further loan (**Aborted July 2018 Loan**) to L&ND. This loan would not have resulted in L&ND receiving any further funds, but would have simply extended the date for repayment by 12 months.

11. However, it was part of the Aborted July 2018 Loan that Amicus would 'behind the scenes' charge monthly interest to L&ND at 0.5%, but the contractual documentation would state that monthly interest was 1.15%. This is confirmed in emails by Amicus employees. It is Mrs Dixon's view that this was proposed in order to present a rosier picture to Amicus' financial backers than was in fact the case. Mrs Dixon refused to be party to this, considering it to be a fraud, and as such Amicus refused to grant any further advances and on 31/7/18 called in the August 2017 Loan.

…

15. It is Mrs Dixon's position that Amicus has:

a) Acted in breach of contract on numerous occasions by releasing funds late.

b) Committed economic duress and/or the tort of intimidation by unlawfully and/or illegitimately reneging on promises to loan monies and/or resolving only to do so on terms that were improper. Such action was taken with the purpose of coercing L&ND to enter into unfavourable agreements with Amicus, which it then did.

…

> 17. This is not a vexatious and/or frivolous claim and accordingly pursuant to *Hockin v Marsden* [2014] EWHC 763 (Ch) administrators are obliged to assign such claims on terms that would benefit the company, if they do not wish to pursue the claim themselves.
>
> 18. Please provide a substantive response to this letter within 14 days, indicating whether:
>
> a) You wish to pursue the claim for the benefit of L&ND; and, if not
>
> b) What terms you would require from Mrs Dixon to secure an assignment of the above claim, and any other claims against Amicus arising out of the parties' relationship (wording to be negotiated)."

An application under paragraph 74 of Schedule B1 was threatened.

21. Brecher LLP replied to Mr Hope on behalf of the administrators on 22nd February 2019. They stated:

> "As you will be aware the administrators of L&ND have only been appointed for a comparatively limited time and their investigations into the company's activities and the circumstances surrounding the development in Carlisle are ongoing. At this stage the administrators have not yet considered the merits of pursuing a claim against Amicus Finance PLC and clearly a relevant factor in that decision will be the fact that Amicus Finance PLC is now in administration itself. Until a full and comprehensive review of the position is carried out it would be premature to assign a claim which could, if viable, potentially benefit the company and its creditors.
>
> For the above reasons an application to the Court to compel the administrators to assign any claims to Mrs Dixon at this stage is wholly inappropriate. We do not believe that such an application would have any prospect of success whatsoever."

22. It seems that this reply, which should have been sent to Mrs Dixon directly, was misplaced by counsel and Mr Richard Dixon asked for a copy of it by an email dated 17th May 2019. This was provided by Mr Wright of Brecher by an email dated 21st May 2019. Mr Dixon replied on the same day to acknowledge receipt and asked, given that three months had passed since the reply, whether the Administrators were ready to assign the claims if they were not proposing to pursue them themselves. He also asked what the position was in relation to offers made for the assets of the company and the Development Land itself.

23. Mr Wright replied by email of 22nd May 2019. He said:

> 'Mr Dixon,
>
> In relation to your queries, I can confirm that the position as far as I am aware is unchanged in respect of the requested assignment and offers previously submitted. However, should you and/or Mrs Dixon wish to submit a further offer in line with the Administrators' expectations I am sure this will be considered at the appropriate time."

24. Mr Dixon then wrote to Mr Myers on 23rd May 2019 and raised various questions about the administration. He concluded:

> "I am as you are aware from the below emails, also waiting on Chris Wright of Brecher coming back to me on the assignment position."

The email was copied to Mr Myers, who replied on the same day:

> "Mr Dixon,
>
> I did not realise you were awaiting a response from me on the assignment point. I had thought my email of 22 May made the assignment position clear. There is no prospect of any potential claim, even if there is one, which is not accepted, being assigned by the Administrators. With Amicus Finance PLC itself in administration the Administrators of L&ND Development and Design Limited will not incur costs investigating an alleged potential claim which would have no financial benefit to creditors. Even if successful the claim would be an unsecured claim in the Administration and would rank alongside other unsecured creditors. Such action would merely incur additional costs and prejudice the position of creditors.
>
> I trust the position is now clear."

25. Mr Dixon's response on the same day was to say that, in the light of the Administrators' position, which he understood to be that they had not investigated the claims and did not propose to do so, he would formulate an offer for the assignment of the cause of action for a nominal sum. This prompted a reply within the hour from Mr Wright. He said:

> "It appears you have mistaken the content of my email and come to an unsupported and incorrect conclusions.
>
> I did not say that no investigations had been carried out previously simply that the Administrators would not incur further costs investigating this possibility.

> There is no obligation on the Administrators to assign any potential claim to you or anyone else and my instructions are that they will not do so."

26. Mrs Dixon nonetheless made an offer to pay £2,000, together with 5% of the proceeds of the litigation, in return for the assignment of the cause of action. That offer has been rejected by the Administrators.

27. On 21st November 2019, after the application to this court has been made, His Honour Judge Dodd gave judgment on a number of applications in the Carlisle Proceedings. One such application was the Administrators' application, in their capacity as LPA receivers, to strike out the defence, or for summary judgment upon the possession claim. The learned judge granted summary judgment for the Administrators. In rejecting the arguments of economic duress and intimidation he said:

> "33. This consists of three allegations, which are in summary:
>
> a. The fact that Amicus did not complete the July 2017 Draft Loan
>
> b. The way that Amicus behaved in the run up to the August 2017 Loan
>
> c. Amicus's refusal to disclose a valuation it had independently obtained of the Development.
>
> 34. To operate as a defence, economic duress must comprise illegitimate or wrongful pressure (my emphasis).
>
> 35. The allegations made by the Defendants here amount to no more than tough negotiation between commercial entities/business people, and/or a refusal by Amicus to contract on terms agreeable to the Defendants. There is no threat by the Claimants to act in breach of contract. In the circumstances described by the Defendant there was no obligation on Amicus to contract with them at all or to disclose the valuation it obtained. The July 2017 draft loan document makes it clear that completion was subject to credit approval – which was not forthcoming"

I should say that the emphasis in paragraph 34 is the judge's own. He referred in a footnote to Chitty, 33rd edition, paragraph 8-008. He further held that the existence of a counterclaim was irrelevant to the claim as the only remedy sought was possession.

28. An application for permission to appeal has been made but, as at the date of the hearing that application had not been considered. Following circulation of this judgment in draft, I was informed that the application for permission, with appeal to follow if granted, has been listed for 30th November 2020.

The positions of the parties

29. Mrs Dixon's position, as set out by Mr Spackman, was straightforward. There is a claim with a real prospect of success. It consists of a claim for damages for delays in advancing tranches of money on at least five occasions, leading to inevitable loss and damage as a result of delays in paying contractors, and a claim for intimidation and economic duress by which L&ND were pressured into entering into the 2017 Facility Agreement, which entitles L&ND to have that agreement set aside. It is not, to use the language of the cases, "frivolous or vexatious" and an offer has been made to assign it for a lump sum and a share of the proceeds of sale. The Administrators have simply turned their faces against assignment. Mr Spackman submitted that the existence of a meritorious claim was recognised in the concluding paragraph of Mr Myers's statement, in which after setting out the Administrators' case that the alleged claim was hopeless, he said:

> "That being said, were the Claimant to offer a reasonable sum of the purchase and assignment of this claim, then we would have taken this considerably more seriously, and would likely have conceded to it."

30. Mr Spackman's submission was that this court ought not to conduct a detailed enquiry into the merits of the claim. The Administrators could not show that the claim was plainly hopeless and the guidance provided by the court in previous cases was that, in such cases, it should be assigned. The substantive merits can be debated, if necessary, between Mrs Dixon as assignee of the claim and Amicus in due course. At this stage the court should do no more than consider the reasons, or lack of reasons, given by the Administrators when they declined to assign the causes of action, rather than those now advanced. Even if that is not right, he argued that the burden lies upon the Administrators to show that the claim is hopeless, frivolous or vexatious and that they cannot discharge that burden. Finally, he contends that, if there is any doubt as to whether the consideration offered for the assignment of the claim is sufficient, the court can give directions for fixing the purchase price.

31. Mr Bailey, however, argued that the burden is on Mrs Dixon to show that the claim is not frivolous or vexatious and that she has failed to do so. It is in fact hopeless and the prime mover behind the application, Mr Dixon, will use it to pursue a vendetta against Amicus. It would be a breach of the Administrators' professional obligations to assign it and no unfair harm can be said to have been caused in declining to assign a hopeless and vexatious claim.

32. He submitted moreover that, even if the claim had sufficient merit, it is of no utility to Mrs Dixon, or the creditors of the company more generally. To the extent that there is a claim for damages against Amicus it is worthless because Amicus is itself in administration. Mrs Dixon cannot set it up as a set off in possession proceedings brought against her and an assignment to her would similarly prevent it from operating as a set off in the administration of L&ND. The intimidation and economic duress arguments have already been dismissed in the Carlisle Proceedings on the basis that they had no real prospect of success and it is an abuse of process for Mrs Dixon to seek to argue the contrary in this application. Finally, it is said that the purchase price offered is inadequate and no satisfactory indemnities against adverse costs have

or could be offered so that, even if the claim could properly be assigned by the Administrators, they were justified in refusing to do so.

Legal principles applicable to paragraph 74 and assignment of causes of action

33. Paragraph 74 of Schedule B1 to the Insolvency Act provides as follows, insofar as it is material:

> "(1) A creditor or member of a company in administration may apply to the court claiming that—
>
> (a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
>
> (b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).
>
> …
>
> (3) The court may—
>
> (a) grant relief;
>
> (b) dismiss the application;
>
> (c) adjourn the hearing conditionally or unconditionally;
>
> (d) make an interim order;
>
> (e) make any other order it thinks appropriate.
>
> (4) In particular, an order under this paragraph may—
>
> (a) regulate the administrator's exercise of his functions;
>
> (b) require the administrator to do or not do a specified thing"

34. Both Mr Spackman and Mr Bailey relied upon *Hockin v Marsden* [2014] EWHC 763 (Ch). In that case, Mr Nicholas Le Poidevin QC, sitting as a deputy High Court Judge, considered a company in administration that had two potential claims against a bank, which the administrators declined to assign. As the deputy judge noted, an applicant under paragraph 74 does not have to show, as in other contexts, that the decision of the administrator is perverse but that it causes "unfair harm". This will, as Norris J said in *In re Coniston Hotel (Kent) LLP* [2013] 2 BCLC 405, at paragraph 36, usually take the form of:

> "unequal or differential treatment to the disadvantage of the applicant (or applicant class)."

As the deputy judge explained at paragraph 19, the paragraph is not limited to such cases and:

> "a lack of commercial justification for a decision causing harm to the creditors as a whole may be unfair in the sense that the harm is not one which they should be expected to suffer".

The harm must however be "unfair", and a creditor cannot complain of harm to his interests that are justifiable with reference to the interests of the creditors as a whole.

35. It was accepted by the parties in *Hockin* that the court should not direct the assignment of a claim which is "frivolous or vexatious." The deputy judge stated that the applicant had the burden of proving that it was not. The report does not indicate whether the parties were also in agreement as to where the burden lay.

36. Mr Spackman and Mr Bailey also both referred to me to the recent consideration of paragraph 74 in *LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch), in which Morgan J provided, *obiter,* the following account of the principles and gave guidance as to the approach that an administrator should take as to the assignment of a cause of action:

> "54. The origin of the suggestion that an administrator is under a positive duty not to assign a cause of action that is without merit was said to be the following passage in the judgment of Browne-Wilkinson J in *In re Papaloizou* [1999] BPIR 106, 112:
>
> 'Although it is not necessary for me to decide the point, I should sound a note of warning to trustees. At best the transaction here was very close to the line of what is permissible. Although I loyally accept the decision of the Court of Appeal in *Ramsay v Hartley* that the sale of a bare cause of action by the trustee in bankruptcy back to the bankrupt is not *per se* contrary to public policy, I think trustees should exercise their power to take such a step with great circumspection. It must not be forgotten that by so doing they are enabling the bankrupt to conduct possibly vexatious litigation against third parties who will have no effective remedy in costs against him, since all his assets have been vested in the trustee. There may be cases in which this is an appropriate course to adopt, for example if immediate substantial assets are made available for the creditors. But in general the policy of the bankruptcy legislation is for the trustee – and not any one else – to get in the assets of the bankrupt and for that purpose to decide whether causes of action should be pursued, if necessary with funds provided for that purpose by the creditors in the bankruptcy. Before abdicating this responsibility by putting the bankrupt back in the saddle, the trustee should bear in mind the consequences to the other parties in litigation of so

> doing. My present view is that it should not be done unless clear and certain benefits are obtained for the creditors.'

55. This passage does not identify the legal principle which produces the result that the office-holder should be circumspect before assigning a cause of action. As the office-holder has a statutory power to assign the cause of action and has a duty to act in the interests of the creditors, it might be thought that if the assignment produced a benefit for the creditors then the office-holder should be prepared to receive that benefit, unless the case came within the principle in *Ex p James, In re Condon* (1874) LR 9 Ch App 609. That principle might mean that it would not be honest and fair for the office-holder to assign an alleged cause of action where a claim by the assignee would be frivolous or vexatious.

…

57. The approach of an office holder asked to assign an alleged cause of action was considered in detail by the Federal Court of Australia in *Citicorp Australia v Official Trustee in Bankruptcy* [1996] FCA 1115. This case was referred to in the English case of *Cummings v The Official Receiver* [2002] EWHC 2894 (Ch) to which I was referred, although it was referred to by a different name, namely, Re: the Bankrupt Estate of Serillo with no citation given. In fact, 'Serillo' was a misspelling of the name 'Cirillo'. The *Citicorp* case contains a valuable discussion of the approach to be adopted by the office holder and by the court. Having considered a number of authorities, including *Stein v Blake*, the court held:

> 'The foregoing authorities do not deny that in a case where it is clear that the claim sought to be pursued by the bankrupt or other proposed assignee is frivolous or vexatious, the trustee or the court should not allow the assignment to occur. A claim with no reasonable prospect of success would be a frivolous one, and the prosecution of such a claim would be vexatious. As earlier noted, in most cases it will not be clear that an alleged claim has no reasonable prospect of success. However when a clear case arises, the trustee as an officer of the Court, and the Court itself, in the public interest, should not allow the assignment to occur, even where an immediate sum of money is offered as consideration that would benefit the estate of the bankrupt.'

58. It was argued in the *Citicorp* case that if there were an issue as to whether a claim was frivolous or vexatious, the burden was on the person seeking to take an assignment of the claim to satisfy the court that the claim was not frivolous or vexatious. This submission was rejected. The court put the matter the other way around and said:

> 'Where a creditor or intervening party contends that an assignment should not be authorised because the proposed claim has no prospect of success it is for that party to demonstrate the absence of any prospect of success. This follows from the general principle that a party who asserts a proposition carries the evidentiary onus of establishing the necessary facts to support it.'

…

63. Apart from the *Citicorp* case which was not cited to me, these are the cases which are said to support the principles relied upon by the Deputy Judge and the further proposition put to me that when it is not clear whether the cause of action has merit, the administrator ought not to assign it and should instead place a burden on the party seeking the assignment to demonstrate that the claim is not frivolous or vexatious. I consider that this approach reads far too much into the remarks in *Papaloizou* and *Cummings v Official Receiver* and is wrong in principle. I also consider that the most helpful authority is the decision in *Citicorp* which contains an accurate statement of the principles to be applied.

64. The administrator's power to assign a cause of action is conferred by paragraph 2 of schedule 1 to the 1986 Act, as a cause of action is 'property' within that paragraph. That paragraph is not limited by any words which require the administrator to satisfy himself as to the arguability of an alleged cause of action.

65. A viable claim by the company against a third party is an asset of the company. A claim which is arguably viable, is a potential asset of the company. In principle, an administrator ought to be ready to investigate whether such an asset should be preserved and pursued. Of course, there may be obstacles in the way of doing so. The administrator may have no funds with which to take legal advice. In such a case, it may be open to the body of creditors to provide the necessary funds.

66. If the administrator has no funds to investigate a possible claim against a third party and he receives an offer from a potential assignee of the claim to pay for an assignment, that offer will potentially constitute an asset of the company. The administrator should normally wish to preserve and pursue that asset. If it is clear to the administrator that the claim would be hopeless and that the potential assignee is bent on pursuing a hopeless claim in order to harass the third party, then the administrator should normally decline to assign the hopeless claim. The administrator is an officer of the court and the court expects him to behave honestly and fairly. In the same way as the court would not direct an assignment of a hopeless claim

> where the court was of the view that the assignee's intention was to use the hopeless claim to harass a third party, then the administrator might well take the same view as to his own participation without finding it necessary to seek a direction from the court.
>
> 67. But there will be other cases. One such case is where the administrator does not have a clear view that the proposed claim would be vexatious and he is offered a sum of money for the assignment of the claim. In such a case, the administrator should be prepared to obtain a proper payment for the assignment. If it is not clear that the offer reflects the true value of the cause of action, then the administrator may well be advised to conduct some process of inviting rival bids or to hold an auction of the cause of action. The receipt of a sum of money for the claim would be likely to benefit someone, whether it is the administrator (as a contribution to his expenses) or the creditors.
>
> 68. There may also be practical considerations and time pressures which the administrator has to take into account. If the administrator is considering whether the company has a potential claim and there is a high risk that the limitation period for the claim may be about to expire, the administrator may have to take immediate action to protect a potential asset of the company. The administrator may have to cause the company to issue a protective claim form or even to conduct some rapid negotiations to obtain the best available offer for an assignment of the cause of action.
>
> 69. The focus of the submissions on behalf of the administrators in this case was on protecting a third party from the possibility of being harassed by litigation rather than (as it should be) on the administrators realising the assets or potential assets of the company for the benefit of the creditors. It must be remembered that if the alleged claim is assigned and the assignee then issues a claim form, the defendant will be able to apply to strike out the claim form or to seek a reverse summary judgment if the defendant wishes to contend that the claim is frivolous or vexatious."

37. As to the application of the principle in *Ex parte James* Mr Bailey drew my attention to recent consideration of its application in *Lehman Brothers v MacNamara* [2020] EWCA Civ 321. The following passages from the judgment of David Richards LJ (with whom Newey and Patten LJJ agreed) described the principle as follows:

> "35. The principle established by the decision of the Court of Appeal in *Ex parte James* is that the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the

> standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers. The principle applies to a failure to act, as much as to positive acts: see *Re Hall* [1907] 1 KB 875, a decision of this court. As a public authority and given its role in society, the court is expected to apply standards to its own conduct which may go beyond bare legal rights and duties. A specific example is a sale of property made by the court in accordance with its powers: *Else v Else* (1872) LR 13 Eq 196. Trustees in bankruptcy, liquidators in compulsory liquidations and administrators are all officers of the court. In the case of administrators, this is expressly provided by paragraph 5 of schedule B1. As such, they are acting on behalf of the court and they will accordingly be held to these standards by the court.
>
> 36. That the governing principle is that the court should apply to its officers those standards of conduct that society expects of the court itself is made clear in the authorities: see *Ex parte James* at 614; *Ex parte Simmonds* (1885) QBD 308 at 312 per Lord Esher MR; *Re Tyler* [1907] 1 KB 865 per Vaughan Williams LJ at 869, Farwell LJ at 871 and Buckley LJ at 873.
>
> …
>
> 38. Before looking at the terms used by courts over the past 165 years, a general point should first be made. The court applies the standard on an objective basis. It is not concerned to ask whether the officeholder is consciously proposing to take a course which falls below the standard set by the court. It asks only whether the course proposed would or would not, on an objective basis, meet that standard. As a regulated profession, insolvency practitioners may feel aggrieved at a challenge to their conduct or proposed conduct on this basis and may be tempted to argue that the challenge is an attack on their personal integrity. This would be a misapprehension on their part."

38. Mr Spackman and Mr Bailey parted company as to where the burden of proof of showing that a claim is not "frivolous" or "vexatious" lay. Mr Bailey relies upon the statement in *Hockin* that the burden lies on the applicant to show that the claim is not vexatious or frivolous. Mr Spackman relies on the observations of Morgan J in *LF2*, which I have set out at length above, to contend that the burden lies upon the Administrators to show that it is.

39. Mr Bailey's submission on this was that I am bound by the decision of Mr Le Poidevin QC in *Hockin*, the remarks of Morgan J being *obiter*. He referred me to the observations, again *obiter*, of Mr David Foxton QC, sitting as a deputy High Court Judge, in *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 3844 (Ch). That decision was an appeal from Master Matthews, as he then was, reported at [2016]

EWHC 874 (Ch), in which he expressed the view that a Master (and, it would follow, an ICC Judge), exercising the first instance jurisdiction of the High Court, was not bound by a decision of a High Court judge exercising that same jurisdiction but would usually follow such a decision out of comity, unless convinced that it was wrong.

40. Neither of those decisions is strictly binding on me but I do not think that I have to grapple with them because it does not seem to me that the decisions in *Hockin* and *LF2* are at odds. *Citicorp*, approved by Morgan J, was not a case concerning the "unfair harm" test. It was an application by a trustee for leave to assign a cause of action under relevant legislation in that jurisdiction. In that case, the Full Court of the Federal Court of Australia held that neither the trustee nor the court in such an application had to be positively satisfied that the cause of action had a reasonable prospect of success. As is apparent from the extracts quoted by Morgan J, it would follow that a person objecting to the assignment would have to prove its case for doing so.

41. Morgan J's guidance explains how administrators' duties to creditors and their professional obligations interact and the approach they should take to an offer to purchase a cause of action. His lordship was not addressing the approach that a court will take if an application under paragraph 74 is in fact brought. He does not suggest that the approach in *Hockin* as to where the burden of proof lies on such an application is wrong. Indeed, experienced insolvency counsel in *LF2* agreed that the burden lay on the applicant (see paragraph 52). Morgan J recognised that this was so in observing, at paragraph 71, in the context of the ability of an assignee to meet an adverse costs order, that it was:

> "better for the administrator to leave the third party to seek security from the assignee of the claim for the costs of the claim against the third party rather than for the administrator to take on the task of arguing, on an application under paragraph 74 of schedule B1, that the applicant has not discharged the burden of showing that the claim is not frivolous and vexatious"

42. In my judgment *LF2* is not authority for the proposition that the burden lies upon the administrators in an application under paragraph 74 to show that the claim is frivolous or vexatious. While an administrator faced with a request to assign should be prepared to assign it unless it would not be proper for him or her, as an officer of the court, to do so, an applicant under paragraph 74 must demonstrate unfair harm. That requires the applicant to show that the cause of action is one that can properly be pursued. That must mean, in the usual run of cases, that it must have a real prospect of success. The expressions "frivolous or vexatious" or "no reasonable prospect of success" are in my judgment synonymous with the familiar test for summary judgment under Part 24 of the Civil Procedure Rules.

43. I reject the submission that some lesser test is appropriate. It seems clear from the passage from *Citicorp* cited with approval by Morgan J that a claim without a reasonable, or real, prospect of success is frivolous and such a claim is, for that reason, vexatious. By the same token, I do not see that whether a claim is "vexatious"

requires separate consideration in a case such as this. A claim without a real prospect of success is vexatious for the purposes of an application under paragraph 74. It is difficult to see how a claim with a real prospect of success could nonetheless be considered vexatious.

44. If the applicant cannot show that the claim has a real prospect of success it does not appear to me that he or she can say that unfair harm has been suffered as a result of the administrator not allowing it to proceed. It would not be proper for the administrator to assign it. That approach seems to me to be consistent with standards of conduct expected of administrators, to which I have been referred, and similarly consistent with the degree of discretion that is afforded to office-holders in the administration of the affairs of an insolvent company.

45. I think that also explains the concluding paragraph of Mr Myers's witness statement. It reflects the fact that, had the Administrators been offered a sum of money that they considered to be adequate to justify conducting the exercise contemplated by Morgan J it is likely that they would have done so. As it is, they have, in this unusual case, not only found themselves answering a paragraph 74 application, but doing so having had to engage with the identical arguments raised in the Carlisle Proceedings, which has inevitably led to a more detailed examination of the merits than might otherwise have been undertaken.

46. In my judgment, Mr Bailey is also correct to say that, on an application under paragraph 74, the question of whether a claim is frivolous or vexatious must be determined on the basis of the evidence available at the hearing and the arguments to be derived from that evidence. The administrator is not confined to the reasons that he or she advanced when refusing the assignment. An application under paragraph 74 is not a review of an administrator's decision and it would be wrong to require an office holder to assign a cause of action that was ill-founded because the office holder had not identified that as a reason for not assigning prior to an application under paragraph.

Is the cause of action frivolous or vexatious?

47. As I have said, this is an unusual case and the extent to which the Administrators have, in this application, raised detailed arguments that might otherwise have been raised by Amicus if faced with the claim is no doubt as a result of them having been required to engage with the same or very similar arguments in the Carlisle Proceedings. I accept that I have sufficient material before me to determine whether the alleged claim has a real prospect of success and, that being so, I should do so. Mrs Dixon, as the director of the company, is well able to provide to her counsel all the necessary information related to the cause of action and has put in three witness statements in support of her application as well as points of claim. Given that the case was argued before me over the course of two days it would be a waste of costs to disregard that and simply leave those matters to be argued over again were the claim to be assigned.

48. There are two elements to L&ND's alleged claim. The first is damages for breach of an obligation to make advances within a reasonable time pursuant to the 2016 Facility Agreement and the second is a right to rescind the 2017 Facility Agreement on the basis that it was procured by intimidation or economic duress.

49. The value of the claim has not been set out in any detail in the statements of case or the evidence. Mrs Dixon's first statement suggests that the value of the land has diminished as a result of the Administrators allowing planning permissions to lapse. That is not of course a claim against Amicus. There is exhibited to Mrs Dixon's third statement an email from Mr Dixon to Mr Ben Jackson of Amicus dated 8th December 2017 in which he contends that the delays in making advances extended the project by three months leading to a claim of at least £236,500. This is broken down as:

    i) £7,500 'for Hundred plus hours sorting';

    ii) £125,000 in additional interest costs; and

    iii) £104,000 in office management and site operation costs in the region of £8,000 per week.

    He further suggests a loss of £69,500 for "not being able to have retentions included". Finally, he says there is a loss of £738,333 relating to the failure to honour the 6.3 million facility." This is broken down as:

    i) £40,000 "for several Hundred hours in time, travelling, hotel, solicitors etc";

    ii) £85,000 in additional fees;

    iii) £336,000 in additional interest costs; and

    iv) £277,333 in office management and site expenses.

    Some of those elements are projected losses. The alleged losses are set out in only the broadest terms and no detail is given as to what loss is claimed to have been caused by what period of delay.

50. As to the alleged failure to make advances timeously, Mrs Dixon relies principally on five periods of delay between an initial request and payment. I consider these in the context of the onerous requirements of the 2016 Facility Agreement, which I have set out in detail above. I make the general observation that it is clear from those requirements that Amicus was entitled to consider progress of the Development, compliance with planning obligations and performance targets and the loan to value ratio in detail before making further advances. While Mr Spackman noted that there had been instances where monies had been advanced within two days, it seems to me that such a time was plainly inadequate to complete the enquiries that Amicus were entitled to make, if they saw fit, under the 2016 Facility Agreement. No realistic alternative time frame was offered in respect of any of the alleged periods of delay. The complaint in respect of each was that Amicus took too long, but no realistic reasonable period is suggested.

51. The first is a period of 11 days or, arguably, 13 calendar days (10 working days) from 16th April 2016. On that date, £150,000 was requested. A breakdown of costs was required by Amicus on 19th April 2016 and, later on the same day, an update on discharge of planning conditions was sought. A response was provided by Mr Dixon on 21st April 2016 which was forwarded to Amicus on 22nd April 2016. Amicus stated that the information was not sufficient but would transfer funds to allow the

development to progress. It stated that further drawdowns would require up to date cash flow forecasts, the last having been provided in January. Funds were released on 27th April 2016 and received by L&ND on 29th April 2016.

52. It is notable that Mr Dixon's email of 8th September 2017 does not refer to this drawdown request and payment as a ground for complaint at all. Instead he states that the first period of delay related to a drawdown request occurred in August 2016 and, indeed, I cannot see what is unreasonable in the interval between the April request and payment. Amicus initially stated that a revaluation would be required, as permitted by the facility agreement. It then decided that it would waive that requirement if a costs breakdown was provided. It was not satisfied with the information provided, and could have required a valuation in accordance with the conditions, but nonetheless released the funds.

53. The second and most substantial interval relied upon in the points of claim is a period of 44 days from 9th August 2016 when Mr Dixon wrote to Mr Andrew Jones of Alexander Mann Ltd setting out the progress of the Development and the imminent entry into the section 106 agreement with the local authority. He said that further drawdowns would be required imminently. He said:

> "Please can you speak to Amicus and see what their position is because we do not wish to see any delays in being able to drawn down further funding in advance of it being required.
>
> I fully expect we would like to draw down another 200k within the next ten days and thereafter 200k monthly of the next five / six months."

That was a request that was neither made to Amicus nor to Platinum Options, the introducer. The request for such a drawdown triggered the Further Advance Conditions Precedent set out in the special conditions. A revaluation was thus required. Mrs Dixon's third witness statement contends that no valuation pursuant to those conditions was necessary as the project remained within 70% of loan to value, though she herself accepts that the further advance took the amount drawn down to approximately 69% of the value of the Development Land, according to the valuation obtained in January 2016. She contends that, in seeking a valuation, Amicus was simply seeking to delay making the advance. There is no basis for that allegation at all. On her own case the advance took the borrowing to the cusp of the maximum permitted loan to value ratio. Following the valuation, Amicus was content to make the loan.

54. The valuer emailed Mr Dixon on 16th August 2016 to arrange to carry out the valuation, which was set for 30th August 2016. The reason for that was simply that he was going on holiday. Mr Dixon did not raise any objection to that time frame. On 24th August 2016, Mr Jones wrote to Mr Dixon to state that Amicus had requested a schedule of works, up-to-date costings and confirmation that the Development was on schedule and on budget. Certain information was provided on 1st September 2016 in an email from Mr Dixon, although he said that he would provide the schedule of works on the following day or the day after that.

55. The valuation was provided to Amicus on 2nd September 2016. On 5th September 2016 Mr Jones chased Mr Stuart Boag of Amicus for a reply, stating that this was his third email. Mr Boag replied to say that he had to deal directly with the introducer and that the introducer was aware of the outstanding information required. Schedules of Works and up-to-date costings were provided to Amicus by Platinum Options on 9th September 2016, although Mrs Dixon's evidence is that these had also been provided by Alexander Mann Ltd on 31st August 2016, although it is by no means clear in the evidence that I have that these were the same documents.

56. A further email from Mr Jones of 14th September 2016 again referred to delays and again requested that Amicus dealt directly with Alexander Mann Ltd rather having to use Platinum Options. A similar email was sent by Mrs Dixon on the same day. It is evident that dealing with Platinum Options was regarded as a complicating factor in processing drawdown requests. Mr Boag reiterated in reply that day that Amicus had to deal with Platinum Options as introducer but that to speed up the process he would deal with Mrs Dixon directly. The formal drawdown request was sent by Mr Boag to Platinum Options on the same day.

57. It is impossible to detect in the correspondence any deliberate desire to delay making a further advance. On the contrary, Mr Boag was attempting to expedite the process. The drawdown request was sent by Mr Boag and returned by Mr Dixon to Amicus later that evening. A further drawdown request for £80,000 was made on the following day. £120,000 was apparently released on 16th September 2016 and £80,000 was released on 19th September 2016. For present purposes it is accepted that it did not reach L&ND until 22nd September 2016.

58. The difficulty with this alleged period of delay is that it is overstated. A substantial period of the delay was caused by debate as to with whom Amicus was prepared to deal as agent for L&ND and by the fact that the valuer was to go on holiday, as might be expected given the time of year. There is nothing to which I was referred to show that L&ND had objected to the delay caused by the valuer's holiday. In my view, time began to run, if I can put it like that, from when Amicus received the valuation on 2nd September 2016, a Friday, at the earliest and thus 14 business days elapsed between receipt of that valuation and the receipt of funds. That interval does not appear to me to have a real prospect of being shown to be in breach of the facility agreement on the evidence that I have, particularly in the context of the request for copies of schedules of works and up-to-date costings from the relevant introducer thereafter.

59. The third period highlighted is 11 days, or 7 business days, from 10th December 2016. £140,000 was requested. Ms Dixon says that this had originally been requested in November, and indeed the valuer, Mr Naylor, inspected the site on 28th November 2020. An updated valuation was provided on 14th December 2016. Mr Dixon requested a copy of the drawdown form on 15th December 2016. A drawdown form was sent to Mr Dixon on 16th December 2016. That request expressed a wish to obtain the advance before the Christmas break but expressed no expectation that this was required as a matter of contract. Mr Boag's response noted that Amicus awaited photographs of progress on site. Mr Dixon emailed L&ND's solicitors on December 2016 to advise them to look out for the arrival of those funds on the 19th December 2016. Those funds were in fact provided on 20th December 2016. Again, it is not

obvious why it was unreasonable for the funds to have been provided in accordance with the schedule anticipated, apparently without any concern, by Mr Dixon.

60. The fourth period is 14 days (10 business days) from 15th March 2017 following a request by email for £150,000. Amicus instructed a valuer on the same day. Mr Dixon provided information for the assistance of the valuer on 22nd March 2016. Various enquiries were made, including as to a costs overrun of £400,000. Mr Spackman submits that Mr Myers's account of these emails in his witness statement is mistaken and this is an example of Amicus asking for information that it either had already, or was not entitled to require of L&ND, to explain away delays in providing funds. He submits that this is because it was itself experiencing financial problems. Mrs Dixon's evidence in this regard is that the valuation report received on 23rd March 2016 showed that, applying the loan to value rate of 70%, the Company should have been entitled to a further £238,000. Instead of providing this, further queries were raised. The formal drawdown request for £150,000 was made on the 28th March 2016 and funds were forwarded to his solicitors on 29th March 2016. Again, no information is provided as to what a reasonable period might, even in broad terms, be expected to be and I can see no basis on the information provided to suggest that the interval between 23rd March 2016 and 29th March 2016 was unreasonable in the context of the enquiries that Amicus was entitled to undertake and the matters about which it was entitled to be satisfied.

61. The final period of delay expressly relied upon is 17 days (13 business days) from 4th April 2017. The initial response to that was to say that a valuation report was awaited. Mr Boag declined to provide a copy of the report to Mr Dixon on the basis that it was confidential and for Amicus's use only, although he subsequently provided the valuation figures. Mr Dixon chased the monies on 13th April 2017 advising Mr Boag of the urgency of obtaining these monies but a response providing the drawdown slip was not provided until 19th April 2017. Mrs Dixon raises a further issue about a further request for £19,000, and states that there was simply no need for Amicus to await Mr Naylor's valuation report as the Development was still within the required loan to value ratio. Again, in the context of obtaining a valuation, as Amicus was entitled to do, there appears to be no unreasonable delay.

62. Other delays are also prayed in aid, but these were only raised in Mrs Dixon's third witness statement in reply. I do not propose to address these as they were neither pleaded nor raised in such a manner as to allow them to be addressed in evidence by the Administrators.

63. Finally, it is said that Mr Stuart Boag of Amicus expressly accepted and admitted in an e-mail dated 9 May 2017 that there would have been delays caused by the drawdown of funds. I have to say that I do not read that as any admission that the delays were unreasonable or that there was any breach of Amicus's obligations.

64. Mr Spackman states that none of these issues can be determined on a summary basis against Mrs Dixon. The total period of cumulative delay referred to in those paragraphs is 97 days, or a little over three months on a project which had been running for approximately 12 months. It is self-evident that a delay in providing funds would lead to consequential losses. The reasons for the delay need to be put to Amicus's witnesses in cross-examination.

65. That appears to me to be purely speculative and Mrs Dixon has in my view failed to show that the company has a claim in damages that has a real prospect of success. Evidently the company would have liked monies to be paid sooner and were frustrated that Amicus required updated valuations, raised queries or declined to accept instructions from L&ND's choice of intermediary. Neither the points of claim nor the evidence in support demonstrate that these actions can realistically be argued to be in breach of contract, still less motivated by a desire not to make the payment. Considering the extensive requirements of the Further Advance Conditions Precedent, it is hardly surprising that the interval between request and advance should not be instantaneous. Nor is there any proper particularisation of loss caused by any such delay, beyond the general assertion that delay in paying contractors is bound to cause delays in completion and increased expense. Given Mrs Dixon's intimate involvement in the affairs of the company and the Development as the company's sole director and shareholder, the absence of this information, even by the provision of a clear example, is striking.

66. Dealing now with the second element of the claim, it is not open to Mrs Dixon to argue that a claim based on intimidation or economic duress has a real prospect of success. That has already been adjudicated upon by Judge Dodd in the Carlisle Proceedings. He concluded that it could not succeed. While an application for permission to appeal that argument has been made, permission had not been granted at the time of the hearing before me and no application was made to adjourn these proceedings to abide the outcome of that application. In the absence of permission to appeal, there is no extant appeal and Judge Dodd's judgment is final.

67. The principles of issue estoppel are not in dispute. Lord Sumption explained the doctrine in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160. The two key principles underpinning the doctrine are that it is in the public interest for there to be finality of litigation and that parties should not be harassed twice in respect of the same set of circumstances. It makes no difference that the Administrators brought the possession proceedings in their capacity as LPA receivers. In this regard I was referred to *Ward (acting as liquidator of Brady Property Developments Ltd) v Hutt* [2018] EWHC 77 (Ch), which, while concerning CPR 38.7, appears to me to apply by analogy. The Administrators and Mrs Dixon have already argued out the question of whether there is anything in the intimidation or economic duress points. She cannot seek to reargue that question in these proceedings. At the very least that amounts to an impermissible collateral attack on Judge Dodd's decision.

68. If I am wrong about that, it nonetheless appears to me that such a claim cannot succeed on its merits and I respectfully agree with conclusion of Judge Dodd. The ingredients of these torts were considered *Morley v The Royal Bank of Scotland* [2020] EWHC 88 (Ch). Kerr J said as follows:

> "196. I consider these two grounds of claim together because they overlap substantially both in law and in fact. The claimant asserts that the disputed agreements were procured by threats amounting to the tort of intimidation, sounding in damages; or that they were entered into under economic duress and liable to be set aside; and that the court has power to award, and should award, damages in lieu of rescission of those agreements."

69. He considered the elements of the torts as follows:

> "205. Turning to the tort of intimidation, the claimant refers to Longmore LJ's recent statement of the elements of the tort in *Berezovsky v. Abramovich* [2011] 1 WLR 2290, at [5]: there must be a threat to do something unlawful or "illegitimate"; it must be intended to coerce the claimant to take or not take certain action; the threat must in fact coerce the claimant to take (or not take) that action; and damage must be incurred as a result.
>
> 206. Mr Sims also referred to Dyson J's (as he then was) formulation of the elements of economic duress, drawn from earlier authority, in *DSND Subsea Ltd v. Petroleum Geo-Services ASA* [2000] BLR 530, at [131]. There must be pressure to enter into a contract with the practical effect of compulsion or a lack of practical choice, which is "illegitimate" and is a significant cause inducing the victim to enter into the contract.
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> 207. Dyson J referred to a "range of factors" used to determine whether conduct is "illegitimate", including any actual or threatened breach of contract; good or bad faith; whether the victim had any real choice; whether the victim protested at the time and whether he affirmed or sought to rely on the contract. Dyson J noted that conduct which is "illegitimate" must be "distinguished from the rough and tumble of the pressures of normal commercial bargaining".

70. Mr Spackman submitted that "lawful act duress" is a developing area of jurisprudence. He took me to the decision of Leggat LJ (as he then was) in *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [187] and submitted that the test was whether the defendant had complied with "basic minimum standards of acceptable behaviour". Similarly, he suggested that in the developing area of relational contracts the arrangements here might amount to a venture, albeit not a joint venture properly so-called, into which an obligation of good faith might be implied. Mr Spackman here stressed the July 2017 agreement. This having been signed on 7th July 2017, Mr and Mrs Dixon went on holiday, as Amicus was aware. They returned to find that Amicus had "capriciously" declined to honour that agreement. In other words, the rug was pulled out from under their feet and L&ND was forced to accept the lesser terms offered.

71. It is quite apparent on the face of the July 2017 Agreement that it was subject to final approval. There is nothing misleading or opaque about the statement in the agreement and nothing illegitimate about that requirement. It ought to have been clear to Mr and Mrs Dixon that final approval had to be forthcoming. There is nothing in the evidence that I have seen to suggest that there is a real prospect of showing that there was the essential element of "illegitimate" conduct, or anything improper or sharp in the conduct of Amicus in this regard. This was simply a commercial decision in the context of a commercial relationship between two arm's length parties, both of whom could be expected to be alive to their own interests. Amicus's initial refusal to

disclose a copy of its own valuation goes nowhere near showing that there is a prospect of demonstrating either intimidation or economic duress. It was obviously open to L&ND, had it wished to attempt to line up alternative finance, to obtain its own valuation. Even assuming in Mrs Dixon's favour that the law might develop in the manner that Mr Spackman suggests, there is nothing on the material before me that points to a breach of a requirement of good faith or a failure to adhere to minimum standards of commercial behaviour.

72. My conclusion is that Mrs Dixon has not discharged the burden of showing that there is a real prospect of success on the alleged claims. She has had the opportunity to plead the case in reasonable detail, though I bear in mind that she might not have access to the company's documents, but in my judgment has not disclosed a real prospect of showing that the intervals between requests for advances were in breach of a term of the 2016 Facility Agreement, or proving loss or damage arising from that breach. Nor has she been able to show a real prospect of successfully making out the torts or intimidation of economic duress.

73. As such, in my judgment, the claim does not have a real prospect of success. Neither Mrs Dixon nor the creditors of L&ND have therefore suffered unfair harm by reason of the claim not proceeding. By the same token, it is not a claim that the Administrators, consistently with their obligations as officers of the court, should assign.

74. As explained in *Citycorp*, a claim that has no "reasonable prospect of success" is a "frivolous" claim and, as such, is a "vexatious" claim. That it not to say that a person who brings a claim that is summarily determined against him is a vexatious litigant. The expression merely reflects that a defendant ought not to be harried by a claim that has no real prospect of success. Mr Bailey went further and submitted that the assignment of the claim would on any footing be used to harass the administrators of Amicus. He argued, in my view with justification, that Mr Richard Dixon is the prime mover behind this claim. He went on to describe "the Dixon style of litigation" as "the definition of harassment".

75. In support of this submission, Mr Bailey took me to some of the emails written by Mr Dixon, highlighting their length and style and the fact that, in some cases, one followed hot on the heels of another. Mr Spackman candidly admitted that some of Mr Dixon's emails "were lengthy and impenetrable" and that is an apt characterisation of a large number of them. I think it wrong however to describe them amounting to or suggesting a propensity to harassment. Mr Dixon evidently feels strongly about the circumstances in which his family find themselves and his emails are sometimes unhelpfully prolix, but I was not taken to any instances of communication that strayed into the realms of harassment. Had I concluded that the claims had a real prospect of success I cannot see that I could decline to allow them to be pursued on the basis that they might be pursued in a vexatious or disproportionately tenacious manner. The court seised of the substantive proceedings would be able, as part of its general case management powers, to prevent that from happening. I do not think that this element of the Administrators' case adds any additional basis for refusing the assignment of the claim.

Utility of the claims

76. I can deal with this aspect briefly. Even if I had concluded that the claim had a real prospect of success, I would have to consider whether the refusal of the Administrators to assign it has caused "unfair harm" to the applicant, whether alone or in common with creditors more generally. Here it is accepted that Amicus is insolvent and will be unable to satisfy any judgment against it. Mr Bailey submitted that, even assuming that the claims had a real prospect of success, no "unfair" harm can be shown in the refusal to assign them because:

    i) The offered sum of £2,000 is insufficient to cover the costs of valuing the claims, arranging an auction of them or dealing with the assignment generally. No damages could be recovered from Amicus in context of its insolvency. The creditors lose nothing if the claim is not assigned.

    ii) The damages claim is of no utility to Mrs Dixon or the company as it could not be set off against Amicus's claims either against the company or Mrs Dixon as guarantor by reason of the operation of Insolvency Rule 14.24, in that the post-administration assignment of the claim would destroy the mutuality of the sums due as between Amicus on the one hand and the company on the other.

    iii) The Administrators were justified in refusing to assign on the terms offered as it did not make adequate provision for the possibility of an adverse costs award against them.

77. Mr Spackman conceded the point as to set off. In my view, the remaining arguments advanced by Mr Bailey are correct. I can take judicial notice, as in *Hockin*, of the fact that the costs of assignment are likely to exceed the lump sum offered. This is particularly so, given that, if contrary to the Administrators' assessment of the merits, I had concluded that the claim had a real prospect of success, it would follow that it had some value. The Administrators might well need to test the market for the claim. Even if that were done to a very limited extent, the monies offered by Mrs Dixon would be exhausted by the process. I cannot see how, as argued on Mrs Dixon's behalf, the court could place a value on the claim that it would be reasonable to accept. There is simply no evidence to allow the court to do so.

78. Mr Bailey also submits that the offer fails to provide an adequate indemnity to the administrators in the event that an adverse third party costs order were made against them. In this regard he refers to *Hunt v Aziz* [2011] EWCA Civ 1239. That case concerned the prospective assignment of a claim by a trustee in bankruptcy in return for a share of any sum awarded and recognised, as it had been by Mr Chief Registrar Baister in *Osborn v Cole* [1999] BPIR 251, that a successful defendant to such an assigned claim might be entitled to seek a costs order against the trustee. As recognised in that case, in bankruptcy, causes of action are vested in the trustee personally and, like any other trustee, he or she is personally liable for any costs that may be awarded against them, subject to a right of indemnity against the trust fund. One can see that it would be unfair to a successful defendant to be deprived of his right to seek costs against a trustee by the mere fact that the trustee had assigned a claim but retained a right to a substantial share of any sum recovered. The Court of Appeal noted that the position of office-holders in relation to companies was different. In such cases, the cause of action remains vested in the company on the

appointment of a liquidator or administrator and they will not be personally liable for any adverse costs order save were impropriety is shown. I was not referred to any authority to suggest, and nor did Mr Spackman argue, that the principle applicable to trustees in bankruptcy would not apply to an assignment by an office-holder in respect of a company, or that such order would be limited to the company or its assets, assuming there was not no impropriety in assigning the claim on the part of the office-holder. Without the benefit of argument, I can certainly see the force in such a submission but, on the arguments and material presented to me, there is at least the potential that the office-holders here could face a claim for a third party costs order. Certainly, it was considered necessary that the administrators in *Hockin* should be protected. In any event, there is a risk that the company itself would be exposed to an adverse costs order, to the detriment of its creditors. There is certainly no basis here on which this court could make a pre-emptive costs order protecting the administrators of the sort contemplated in *Hunt v Aziz*, and there is no evidence that any indemnity offered by Mrs Dixon would adequately protect the Administrators, given the other financial demands on Mrs Dixon.

Conclusion

79. The cause of action for damages lacks reality. Assuming the existence of an implied term to make payment in a reasonable time, none of the periods of delay can realistically amount to a breach of that term in the context of the checks that were to be performed under the 2016 Facility Agreement. There is no evidence to support the contention that those requirements are being used as a smokescreen to explain a reluctance on the part of Amicus to lend further monies. It similarly appears to me that the claim that the later agreements were entered into by reasons of intimidation or economic duress is doomed to failure. I agree with Judge Dodd that the evidence shows hard-nosed negotiation between two commercial entities operating for profit and that there is nothing to show any illegitimate pressure being brought to bear on L&ND. The more fundamental point is that Judge Dodd has already adjudicated on the question and has dismissed the argument that the 2017 Agreement was procured by intimidation or economic duress as unsustainable. Ms Dixon cannot go behind that finding in these proceedings. Even if there were a real prospect of those claims succeeding, the assignment on the proposed terms would be of no utility to the company's creditors, the consideration is inadequate and no protections are in place in the event of an adverse costs order being made against the company or the Administrators.

80. The application is dismissed.