

ENGLAND AND WALES / JUDGMENT

Wagner v White

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Case No: CH-2017-000278 CH-2017-000279 Neutral Citation Number: [2018] EWHC 2882 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION CHANCERY APPEALS Order of Deputy Registrar Garwood dated 15 November 2017 Rolls Building, Royal Courts of Justice Fetter Lane, London, EC4A 1NL Date: 31/10/2018 Before : MR JUSTICE NUGEE

- ----- Between : DANIEL MAURICE WAGNER Applicant and Appellant
- and - BENJAMIN VINCENT ST JOHN WHITE Respondent And between : DANIEL MAURICE WAGNER
- and - Applicant and Appellant STUART GRANT RODEN Respondent
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- ----- Richard Millett QC and Stewart Chirnside (instructed by DaySparkes Ltd) for Mr Wagner Joseph Curl and Professor Andrew Keay (instructed by Ashfords LLP) for Mr White John Briggs (instructed by Bryan Cave Leighton Paisner LLP) for Mr Roden
Hearing dates: 10 and 11 October 2018
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Judgment

Mr Justice Nugee:

Introduction

1. 2. 3. There are two appeals before the Court. In each the Appellant is Mr Daniel Wagner. In each case the appeal is against an Order dated 15 November 2017 of the late Deputy Registrar Garwood by which he dismissed applications by Mr Wagner to set aside statutory demands made on him, one by Mr Benjamin White and one by Mr Stuart Roden. In each case the statutory demand was based on a personal guarantee given by Mr Wagner, to Mr White and Mr Roden respectively. Deputy Registrar Garwood heard argument, and gave a judgment, on Mr Wagner's application to set aside the White statutory demand. He did not consider the Roden statutory demand separately as all parties were agreed (and indeed Deputy Registrar Kyriakides had previously directed) that if Mr Wagner's application to set aside the White statutory demand was dismissed then his application to set aside the Roden statutory demand should also be dismissed. In those circumstances it is agreed by all parties

that if Mr Wagner's appeal in the White case fails, then the appeal in the Roden case should be dismissed without further argument, and I have only heard argument in the White appeal. I will say straightaway that I propose to dismiss the appeal in the White case and hence I will also dismiss the appeal in the Roden case. It is not therefore necessary to give any further consideration to the Roden appeal. Basic facts 4. The basic facts can be shortly stated. Mr Wagner was the founder and chairman and, through a company of his, the majority shareholder in a company called Powa Technologies plc ("Powa"). In the autumn of 2015 Powa was short of cash. Mr White was persuaded to invest in Powa and lent the sum of US\$2m (all references to \$ are to US\$) to Powa on the terms of a Convertible Loan Facility Agreement dated 11 December 2015 ("the Facility Agreement"). The loan was not repayable until 30 November 2016 but in the usual way could be called in in the case of specified Events of Default, one of which was Powa going into administration. The loan was interest-free (Mr White's only prospect of profit being from his right to convert the loan into equity) and unsecured, but Mr Wagner agreed to guarantee it. That was done by a Guarantee also dated 11 December 2015 ("the Guarantee") and made between Mr Wagner as Guarantor and Mr White as Lender under which Mr Wagner gave a guarantee in the following terms: "In consideration of the Lender entering into the Facility Agreement, the Guarantor guarantees to the Lender, whenever the Borrower does not pay any of the Guaranteed Obligations when due, to pay on demand the Guaranteed Obligations" (the Borrower being Powa and the Guaranteed Obligations its obligations under the Facility Agreement). 5. On 17 December 2015 Mr Roden, who had been introduced to the opportunity to 6. 7. 8. invest in Powa by Mr White, also lent \$2m to Powa, again on the terms of a similar Facility Agreement, and again against a guarantee given to him by Mr Wagner in similar terms. Powa was the holding company of a group of companies engaged in businesses developing and providing mobile and e-commerce services. One of the group's main businesses was called PowaTag which was focused on developing an app enabling consumers to buy goods by scanning advertisements with their mobile phones. There is little doubt on the evidence that PowaTag was regarded by many people as an exciting and potentially very profitable innovation, but it had not by the end of 2015 earned any revenue. The PowaTag business was held by a subsidiary of Powa called Powa Technologies Ltd. Powa's main source of funding was a US-based institutional fund manager called Wellington Management Company LLP ("Wellington"). Wellington appears to have invested on behalf of a number of limited partnerships, but it is not necessary to distinguish between Wellington and those for whom it made and managed the investment, and I will use "Wellington" to refer to them together. In 2013-14 Wellington had invested a total of \$96m in equity; in June 2014 it had advanced a further \$60m by way of senior secured convertible loan notes; and over the course of 2015 it advanced a further \$41m in a number of tranches the last of which was in November 2015. By then Wellington's total investment in Powa by way of equity and loans was therefore \$197m. The \$60m senior notes were repayable on 31 December 2015. Powa could not, and did not, repay them. On 19 February 2016 Wellington put Powa into administration, two joint administrators from Deloitte being appointed. It is not disputed that Wellington was entitled to do that. That was an Event of Default under the Facility Agreement and on 3 March 2016

Mr White's solicitors, Ashfords LLP, sent a formal demand to Powa referring to the terms of the Facility Agreement under which administration was an Event of Default and the fact of Powa entering into administration, and in accordance with those terms declaring the loan to be repayable on demand and the Guarantee to be enforceable. On the same day they sent a similar letter to Mr Wagner again referring to Powa's entry into administration and the terms of the Facility Agreement and demanding payment of \$2m under the Guarantee. Mr Wagner did not pay, and that formed the basis of Mr White's statutory demand dated 5 May 2016 and served on 17 May 2016. Mr Wagner's suggested grounds for setting aside the statutory demand 9. Mr Wagner does not dispute any of the basic facts. He does not dispute the validity of the Facility Agreement, or that of the Guarantee; he does not dispute the fact that Powa was put into administration, or Wellington's entitlement to do that, or the fact that this was an Event of Default enabling the loan to be called in; he does not dispute the validity of the demands on Powa and on himself under the Guarantee; and he does not dispute that neither Powa nor he has paid any part of the \$2m. So what are his suggested grounds for setting aside the statutory demand? 10. There were certain other grounds relied on before Deputy Registrar Garwood which have not been pursued on appeal, but on appeal Mr Wagner has, through his counsel Mr Richard Millett QC, put forward two arguments. The first argument (which I will call "the Patel argument") is based on the principle summarised by Bingham J in *Bank of India v Patel* [1982] 1 Ll Rep 507 at 515 (which I will call "the Patel principle") as follows: "Leaving aside what may be the special case of fidelity guarantees, I consider the true principle to be that while a surety is discharged if the creditor acts in bad faith towards him or is guilty of concealment amounting to misrepresentation or causes or connives at the default by the principal debtor in a way which could prejudice the interests of the surety, other conduct on the part of the creditor, not having these features, even if irregular, and even if prejudicial to the interests of the surety in a general sense, does not discharge the surety." That was approved by Robert Goff LJ in the Court of Appeal: see [1983] 2 Ll Rep 298 at 302.

11. Mr Millett elaborated the Patel argument by reference to a number of different grounds of appeal but the thrust of the argument was that Mr White had caused Powa's default by persuading Wellington to appoint administrators instead of pursuing what was said to have been Wellington's preferred route of a restructuring of Powa, thereby acting in bad faith and to the prejudice of Mr Wagner. The way Mr Millett put it in oral submissions before me was that it was not fanciful to suggest that Mr White had played a major role in persuading Wellington not to go ahead with a restructuring but to put Powa into administration; that it was not fanciful to say that if there had been a reconstruction Powa could have paid its unsecured creditors; that it was arguable that there was a fairly available alternative to administration, namely restructuring; and that Wellington chose administration over restructuring not because restructuring was hopeless but because Mr White and others persuaded them (in fact he said "forced" them) to go down the administration route, thereby bringing about the very event of default now relied on. 12. The second argument (which I will call "the co-extensiveness argument") put forward by Mr Millett was that Mr White was

arguably liable to Powa for damages for participating in an unlawful means conspiracy, the unlawful means relied on being Mr White's breach of fiduciary duty towards Powa, he being a de jure director of Powa from 13 January 2016 until after Powa went into administration on 19 February

2016. The factual allegations that lie behind this argument are the same as those which underlie the Patel argument, namely that Mr White lobbied Wellington to put Powa into administration, and that if he had not done so there was at least a realistic chance of Powa being restructured. Mr Millett relies on the so-called "co- extensiveness principle" in the law of sureties which he said meant that if Powa could have resisted a claim by Mr White under the Facility Agreement on the grounds of having a cross-claim against him for damages for conspiracy, then Mr Wagner could equally rely on the same matters against Mr White as an answer to the claim on the Guarantee. 13. That argument raises a number of points of law, both as to the true ambit of the co- extensiveness principle and as to the precise requirements for establishing an unlawful means conspiracy, but the necessity to resolve the latter points fell away when Mr Millett accepted my suggestion that he did not need to establish a conspiracy at all for the purposes of this argument: if Mr White had acted in breach of fiduciary duty to Powa and thereby caused it loss, he would be personally liable to compensate Powa for the loss caused by the breach regardless of whether he had conspired with anyone else or not. Since this alternative way of putting it was in fact included in the grounds of appeal, it seems much simpler to address the co-extensiveness argument by reference to it without having to consider any questions of conspiracy as such.
14. What is apparent however from the way in which Mr Millett put his argument is that both arguments depend on the proposition that there was a viable alternative to administration, namely the restructuring, or at least a real chance of it. The way in which it was put by Mr Millett in the hearing below was: "The triable question reduced to a sentence is: Was the event of default, namely the administration, inevitable even without Mr White's involvement, or was there a fairly available alternative?" He put it in a similar way before me in reply as follows: "is it fanciful to say that Wellington would have pursued restructuring if left to their own devices?" The relevant test – genuine triable issue 15. The repeated references in Mr Millett's formulation of the argument to whether things are fanciful is because this is an application to set aside a statutory demand. There was no significant dispute between the parties as to the principles applicable to such an application, which are well established. By rule 6.5(4) of the Insolvency Rules 1986 (which were the relevant rules in the present case), the Court might grant an application to set aside a statutory demand if: "(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or
- (b) the debt is disputed on grounds which appear to the court to be substantial; or (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

- (d) the court is satisfied, on other grounds, that the demand ought to be set aside.” The Patel argument is said by Mr Millett to give Mr Wagner a defence to the claim on the Guarantee and hence to fall within r 6.5(4)(b); the co-extensiveness argument was I think said by Mr Millett to fall within r 6.5(4)(a). I think the latter probably falls rather within r 6.5(4)(d) (or possibly r 6.5(4)(b)), but it is not necessary to go into the precise analysis at this stage. What is common ground is that the Court will not exercise its powers under r 6.5(4) unless satisfied that there is a genuine triable issue. There has been some debate in the authorities whether that test is precisely on all fours with the test of whether there is a real prospect of success for the purposes of resisting summary judgment under CPR Pt 24, but in *Ashurst v Newnote Ltd* [2007] EWCA Civ 793 at [33] Lawrence Collins LJ said that it seemed to him that that was a sterile and largely verbal question and that there was no practical difference between the two, and certainly not in that case. It has not been suggested that there is any practical difference in the present case either. That enables Mr Millett to rely on the jurisprudence under CPR Pt 24, among which is the well-known statement by Lord Woolf MR in *Swain v Hillman* [2001] 1 AER 91 to the effect that a real or realistic prospect of success is to be contrasted with a fanciful one. 16. For his part, Mr Curl, who appeared for Mr White, did not take issue with any of that, although he referred me to the statement by Arden LJ in *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329 at [21] where she too concluded that there was no material difference on disputed factual issues between the tests of “real prospect of success” and “genuine triable issue”, but made the point that it is not enough to succeed in an application to set aside a statutory demand to point to an arguable dispute. There has to be something to suggest that the assertion is sustainable, and it is open to the Court to reject the applicant’s version of events if it is inherently implausible or if it is contradicted, or not supported, by contemporaneous documentation.
17. Mr Curl submitted that if one kept a close eye on the contemporaneous documents and the inherent probabilities, it is quite apparent that Powa could not afford to trade without the support of its secured creditor (Wellington) or a new funder, and that there is nothing to suggest that Wellington had any enthusiasm to keep Powa going. Far from Mr White causing Powa’s default, therefore, it was in fact Wellington who decided to put Powa into administration. 18. In those circumstances it is necessary to look with some care at the contemporaneous documents, almost all e-mails or text messages. It goes without saying that the purpose of doing so is not to conduct an impermissible mini-trial on the documents, but to see if there is indeed any genuine triable issue. Facts in more detail 19. 20. I can start with the position in November 2015. By then, as referred to above, Wellington had already advanced (i) \$60m in June 2014, repayable at the end of December 2015 and (ii) a further three tranches of \$10m each in April, June and July
2015. On 16 November 2015 it agreed to advance a fourth and final tranche of \$11m, taking its total loans to Powa to \$101m. As Mr Wagner himself says, however, Powa had developed a liquidity problem. The group’s “burn rate”, that is the amount needed to fund normal ongoing operations, was \$3-4m per month. Wellington, although persuaded to invest the final \$11m was, in Mr Wagner’s words, initially reluctant to invest further funds, and it is

now known, although Mr Wagner did not know this at the time, that it had started taking formal UK insolvency advice. The joint administrators reported in their Statement of Proposals (under para 49 of sch B1 to the Insolvency Act 1986) that: “In November 2015, whilst the Companies struggled to secure further investment and with mounting creditor pressure, Deloitte were engaged by [Wellington] on behalf of the Secured Creditors, to produce a high level review of the UK insolvency regime and its applicability to the 21. 22. 23. 24. 25. 26. 27. Group and provide advice on the financial position of the Group.” The statement that “the Companies struggled to secure further investment” and were subject to “mounting creditor pressure” must have come from Wellington and reflected their understanding of the position at the time. In addition to money to cover the burn rate, Powa needed a further \$8m as an initial investment in a joint venture that had been agreed between one of its subsidiaries and a Chinese company. This (“the Chinese JV”) had been entered into as a 10-year joint venture in August 2015, but was subject to approval from the Chinese Ministry of Commerce. The approval had not yet been received, but once it was would trigger an obligation on the Powa group to contribute \$8m to the Chinese JV within a short time of the approval. In these circumstances Mr Wagner’s estimate was that \$30m was needed in the short- term, namely \$10m to the end of January 2016, and a further \$20m to the end of April

2016. Mr Wagner described this as bridging finance while longer-term funding (of \$150-200m) was obtained. Powa was talking to a number of possible investors for this longer-term funding. Mr Wagner was at that stage hoping and expecting that the approval of the Chinese JV (which by 25 November 2015 he was confident would happen “imminently”) would unlock this longer-term funding: what he says is that he was confident that the approval “would mean we could convince investors...to invest.” Those were the circumstances when Mr Wagner met Mr White on 25 November
2015. Mr White was excited by the PowaTag technology, saying in a text message afterwards that he thought that what Mr Wagner had done was “amazing” and “very special”. He asked Mr Wagner if \$10m would buy him enough time, to which Mr Wagner replied that he thought \$10m was all that was needed as a bridge “because I am sure that the Union Pay announcement next week [a reference to the Chinese JV] will spark closure on the many interested parties of size.” On 11 December 2015 Mr White advanced the \$2m under the Facility Agreement against Mr Wagner’s guarantee. That was too late to meet Powa’s US and Asia payroll which was missed on 10 December 2015. On 15 December 2015 the Chinese Ministry of Commerce duly approved the Chinese JV. On 17 December 2015 Mr Roden advanced his \$2m loan to Powa against Mr Wagner’s guarantee. On 19 December 2015 Mr Wagner had a meeting with representatives of an entity called Double Eagle which had \$500m of cash and which it was suggested might acquire Powa through a reverse merger. Mr Wagner circulated a report of the proposal to a number of representatives of Wellington in which he said that Powa would not have access to the capital for 4-8 weeks after mid-January, but that once they went ahead and announced, they were of the view that interim funding was assured. In fact the potential Double Eagle acquisition proved to require a

significantly longer timescale than that: on 24 January 2016 Double Eagle told Mr Wagner that although “tremendously impressed” and “excited”, their interest was conditional on a successful commercial launch in China; they would then want to see performance over February and March before providing a view on valuation and meeting shareholders in early April, and would not look to close until early to mid- summer. 28. The Chinese JV in the event went live in February 2016, and Mr Millett said it was not fanciful to suggest that Double Eagle would have invested. That may or may not be so, but that would only arise if Powa had a viable means of surviving until the Double Eagle acquisition, that is until early summer at the earliest.

29. Meanwhile the \$60m Wellington senior notes were due for repayment on 31 December 2015. On 21 December 2015 Ms Emily Babalas, one of the Wellington team, initiated e-mail discussions with Mr Wagner on terms for extending the maturity of the notes by 6 months in return for a \$10m fee. That proposal was rejected by Mr Wagner. Discussions continued until 6 January 2016 when Mr Wagner rejected the then terms on offer. That led on 7 January 2016 to a formal Reservation of Rights Letter from Wellington, something of which Deputy Registrar Garwood (who I was told was very experienced and himself a licensed insolvency practitioner) said in the course of the hearing below that he would not interpret it as meaning that Wellington were “massively enthusiastic to stick in there”, and that Powa were “on the edge of a precipice”.
30. Mr White procured a loan from a Mr Fulbrook to Powa on 30 December 2015, and himself lent a further \$1m on 31 December 2015. That was however too late to prevent Powa missing another US payroll on 30 December 2015. 31. 32. On 13 January 2016 Mr White became a director of Powa. Despite Mr Wagner’s confidence that approval of the Chinese JV would convince investors to invest, there is no evidence in the material I was shown that it did in fact do so. Powa remained critically short of cash. On 27 January 2016 Mr Wagner referred in an e-mail to “the many creditors banging on the door to be paid.” On 29 January, Mr Alessandro Gadotti, the CEO of the Asian side of the business, reported to the board and to Wellington the disturbing news that as a result of Powa’s failure to pay the \$8m investment required into the Chinese JV, work had stopped on deploying PowaTag; Mr Wagner forwarded it to Mr White. 33. On 1 February 2016 Mr Wagner texted Mr White asking if he could count on funds being received that morning and received the reply: “No the money will come from Wellington or it won’t come, I will not bridge to nowhere.” The result of that was that Powa missed another payroll. Mr Millett identified this as the point at which Mr White turned hostile, although he did not suggest that Mr White, who had by now put in \$3m of his own money and procured a further \$3m to be lent by Mr Roden and Mr Fulbrook, was in breach of any contractual obligation to advance, or procure the advance of, any further funds. Mr Curl suggested that it was to be inferred that the reason he was unwilling to fund Powa any more was that the approval of the Chinese JV had not had the effect that everyone thought it would. That does seem a reasonable likelihood: it was one thing for Mr White to tide the company over if there was a clear commitment for longer-term funding and a total of \$10m would do the trick, as Mr Wagner had suggested, but without that (and there is

nothing to suggest that any such commitment had either been forthcoming or was likely to be imminent) Mr White would indeed in his own striking phrase be bridging to nowhere. But I do not need to reach any conclusion on this: the fact is that Mr White was not under any obligation to carry on funding Powa and it does not ultimately matter why he declined to do so.

34. Mr Wagner had no obvious alternative funders lined up. That meant that in practical terms unless he could find some short-term funding he was dependent on Wellington. On 29 January 2016 Wellington had suggested extending the maturity of the \$60m senior notes to the end of April for a lesser fee, a proposal that Mr Wagner says was agreed in principle, although it was evidently never contractually agreed. But extending the notes by itself would do nothing to cure the liquidity problem. It is not surprising that on 1 February after Mr White had declined to bridge to nowhere Mr Wagner told the other directors in an e-mail that: "...as directors we need to debate that as we now have no alternative or further funding options for the business are we still a "going concern"?"
35. Mr Wagner continued to try to raise funds. One person he contacted was a Mr Niklas Zennström of an entity called Atomico (UK) Partners LLP. But on 1 February Mr Zennström told Mr Wagner that he was not interested, mentioning that Mr White had recommended they look at Powa. Mr Wagner appears to have thought that Mr White had put Mr Zennström off, but e-mails which Mr White had not seen at the time show that Mr White had contacted Mr Zennström on 14 January recommending Powa to him in entirely supportive terms, and that Mr Zennström had rejected the proposal on 18 January. There is nothing to suggest that Mr White had been seeking to discourage Mr Zennström or "poisoning the well", or that he had been instrumental in Mr Zennström's decision to decline the proposal. 36. 37. Another potential investor was an entity called Ivanhoe Mines Ltd ("Ivanhoe"). On 6 February Mr Wagner had met Mr Robert Friedland, the founder and chairman of Ivanhoe, who was at that stage positive about investing \$10m. But on 11 February Mr Wagner had a meeting with another representative of Ivanhoe, Mr Michael Lechtzier, and was told that Ivanhoe would not be investing after all. Mr Wagner again suspected Mr White of having sought to dissuade Ivanhoe from investing. Again that is not supported by the contemporaneous material in evidence. From that it appears that Mr Lechtzier met Mr Wagner on 10 February and later that day spoke to Mr Nick Adams of Wellington. Mr Adams was described by Mr Lechtzier as "the principal fund manager responsible for the Powa investment". Mr Lechtzier reported on this telephone call to Mr Friedland in an e-mail that evening. This is a significant e-mail and I should refer to several parts of it, as follows: "In summary, Adams said that barring a "significant" equity investment by other parties in the immediate future, Wellington would take Powa into administration and remove the IP which they have a lien on and find a home for it elsewhere or in a reorganised company. He defined significant in this regard as plus \$100 million. While they noted their obvious self interest they also advised not putting any new equity into the Company on the terms we had been contemplating as it will do nothing to improve the fortunes of the Company in the short term which needs considerable streamlining and re-organ[i]sation particularly in senior management and at the Board

level... Adams continued that should these major items be addressed, they would consider converting their (straight) debt to equity and if Ivanhoe could orchestrate such material changes even with lower levels of investment, Wellington would support those efforts in any way they could. ... In Wellington's mind, Dan [a reference to Mr Wagner] had needed to address the medium and long term plans and to implement structural changes immediately to attract new equity. He must also address the current cash management, budget and illustrate how the debt will be Adams also extinguished and the preference shares converted. suggested that from what he understands, Dan was not being entirely genuine with us in explaining the full circumstances of the Company in his initial meeting with you. In short, Adams advised we do nothing unless all the conditions were agreed in advance and that a small equity placement now would do nothing to cure the Company's greater, and more long term ills. However, should an agreement be reached, Wellington would consider being diluted to make facilitate these changes. While they didn't say it specifically, it sounded very much like they wanted us to do all the dirty work and critical surgery. The most attractive position may be to let the Company go into administration and then see if there is any arrangement that can be made with Wellington to preserve the technology." That e-mail demonstrates a number of things. First, Wellington were already considering administration. That is scarcely surprising in circumstances where they had had UK insolvency advice since some time in November 2015, their senior notes had gone past maturity with no contractually agreed rescheduling, and they had over a month before sent a formal Reservation of Rights letter. Second, Mr Adams' stated position was that significant equity, \$100m plus, would be required to avoid this. Third, Mr Adams advised against a small equity placement. Fourth, Mr Lechtzier recommended to Mr Friedland that the most attractive course might be to let Powa go into administration. There is nothing here which lends any support to the idea that Wellington were keen on a restructuring instead of administration, at any rate without a large amount of new equity investment. 38. Nor is there anything here which supports the idea that it was Mr White who was instrumental in dissuading Ivanhoe from investing its \$10m; this was coming from Mr Adams of Wellington. A follow-up e-mail from Mr Lechtzier to Mr Friedland the next day (11 February) indicates that Mr White contacted him on the morning of 11 February – that is after Mr Lechtzier had already recommended to Mr Friedland letting Powa go into administration. 39. Those were the circumstances in which Mr Wagner met Mr Lechtzier on 11 February 40. 41. 42. 43. and was told by him that Ivanhoe had decided to withdraw. Mr Wagner's own account, in an e-mail that evening, was that Ivanhoe and Mr Friedland had decided to do so "as a result of the clear lack of support from Wellington." That same evening (11 February) Wellington told Powa that they intended to have representatives of Deloitte arrive at Powa to investigate an Event of Default. On the evening of the next day (Friday 12 February) Ms Babalas of Wellington sent an e-mail to Mr Friedland of Ivanhoe. Again this is a significant e-mail. Mr Millett relied on it as evidence that as late as one week before the administration (which took place the next Friday, 19 February) Wellington was still willing, if not keen, to restructure Powa rather than put it into administration. He relied on the opening words: "We have made some significant progress with Powa over the past couple days. in fact all of

our shared concerns are being, or are in a position to be, addressed.” But that has to be read with the rest of the e-mail, which makes it clear that Wellington’s willingness to participate in this proposal was dependent on Powa being recapitalised with new money being invested by way of equity. That is apparent from a number of points, namely (i) a reference under “Cap structure” to Wellington being willing to convert their notes to equity “dollar-for-dollar with new equity”; (ii) a reference under “Board” to “the debt restructuring and equity infusion” being contingent on Dan’s (that is Mr Wagner’s) resignation; (iii) a reference under “Focus” to the company having a significantly lower cash burn “that will allow for the plan period to be funded by this recap”; (iv) a reference to the plan being needed to be funded by Monday; and (v) a reference to Wellington thinking that Ivanhoe might be well suited to partner and asking Mr Friedland to let them know “your interest level”. All of that seems to me to indicate clearly enough that what Wellington were proposing was a restructuring of their debt if and only if there was a recapitalisation by the infusion of new equity (and asking Ivanhoe how much they would be interested in contributing). But it is put beyond any reasonable doubt by a further e-mail in the same chain, this time from Mr Adams on the evening of Saturday 13 February to Mr Lechtzier as follows: “Have you spoken with Josh and Matt? They have the numbers and proposals whichever way we decide. We cannot, however, avoid administration without a large equity infusion of \$40-50M of which we could be only a very small part. On the other hand, we could convert a portion of our debt to equity.” I have referred at some length to this e-mail chain as to my mind it does show that it is indeed fanciful to suggest that Wellington were ever contemplating restructuring Powa without a significant infusion of new equity. That was what Mr Lechtzier reported Mr Adams to have said on 10 February (where he referred to \$100m plus). That was also what Mr Adams repeated in his e-mail of 13 February to Mr Lechtzier (where he referred to \$40-50m). It seems entirely clear that Wellington were not willing to fund that themselves – at any rate there is nothing to contradict Mr Adams’ statement that they could be only a very small part of it.

44. Meanwhile Mr White had evidently come to the conclusion that Powa could not be saved in its current form, and that his interests would best be served by it being put into administration and the assets sold to a new entity in which he could participate. On 11 February he had told Mr Lechtzier that the company was going nowhere with Mr Wagner in charge, that he was “extremely excited” about the technology and that he thought someone was going to make millions from it. On 11 or 12 February he texted Mr Friedland saying he was frustrated by Mr Wagner but: “The flip side to this is we now have the chance to own a material piece of a much slimmed down business at a knocked down price. At the heart of this is a very exciting business in a really hot space. All the potential that you got excited about when you met Dan is real it just won’t happen with him running it.” On 12 February he e-mailed Mr Lechtzier: “why don’t you guys Patrick and myself get on the phone and hatch some sort of plan this is a prize I think worth fighting for” (Patrick was a reference to a Mr Patrick O’Brien of Blizzard Partners who had originally been engaged by Powa in late 2015 to help raise funds but who were by this stage working closely with Mr White. It is not

necessary to consider if there was anything wrong with them doing so). 45. Late on the evening of 12 February, Mr Josh Goldman of Wellington e-mailed Mr White saying: “We talked to Ivanhoe. We prefer to preserve value by avoiding administration, to the extent it’s possible at this late date.” He also referred to Wellington wanting to have Mr White on board as, inter alia, an investor in this scenario, and to it being prudent to plan for “both contingencies” at this point. Mr Millett suggested that the different personnel at Wellington were taking different lines, but I see no reason to think this was so. There is nothing to suggest that Mr Goldman, who was part of Mr Adams’ team and who copied both him and Ms Babalas into the e-mail, was taking any different line from that taken by Ms Babalas earlier the same evening to Mr Friedland, or that taken by Mr Adams in his e-mail of the next day to Mr Lechtzier. Wellington may well have preferred to avoid administration, but there is nothing in Mr Goldman’s e-mail to suggest it was willing to go down that route without substantial new equity investment. 46. On 13 February Mr O’Brien of Blizzard Partners sent Mr Adams and his team a document headed “Project Act II”. This referred to there being two options (compare Mr Goldman’s reference the night before to both contingencies). These were (i) a restructuring which they did not believe would be viable, and (ii) an administration with a pre-pack sale of the Asian business. Mr O’Brien said they thought recapitalisation would require \$75-100m. He described the document in an e-mail to Mr Lechtzier that morning as: “really to deal with Nick’s predisposition to restructure the burning house rather than removing the furniture.” Mr White followed up Mr O’Brien’s sending of the Project Act II document with an e-mail to Wellington also on 13 February saying he had been speaking to a number of investors, none of whom had any interest in being a part of a recap of the existing business. He also copied in Mr Lechtzier saying that he “strongly shares our view”. That evidently came as something of a surprise to Mr Goldman who asked Mr Lechtzier if it were true and if he had changed his position from the day before; Mr Lechtzier replied that his view (having spoken to Mr Friedland who was however in the DRC and not in a position to weigh up everything) was that a consensual process was not possible and that he therefore did indeed support Mr White’s position and believed that view was backed by most of the potential investors he had spoken to. Negotiations continued over the next week between Mr White, Ivanhoe and Wellington on terms for putting together a new company to buy assets out of an administration. I was referred to no material that suggests that Wellington ever had any appetite for restructuring the existing company without significant new equity investment, and no material that suggests that Wellington had any appetite to make that investment itself. Nor was I shown any material suggesting that Ivanhoe ever changed its mind from Mr Lechtzier’s stated position on 13 February that restructuring was not viable, or that it ever agreed to make a significant investment in Powa. Indeed by (Thursday) 18 February, Mr Lechtzier was e-mailing Mr Adams in these terms: “While we are obviously not going to be an immediate partner in this venture...” That was I think probably a reference to participating in a new company to bid for assets, not the existing Powa, but it matters not. It shows that by 18 February Ivanhoe were not expecting to participate, and thought that was obvious to Wellington. Indeed on 17 February Mr Lechtzier had got the idea that Wellington were

considering putting \$6m into Powa and told Mr Adams that would be an exceedingly bad idea; Mr Goldman's response was that that was emphatically not Wellington's position, and indeed later that evening told Mr Lechtzier that Wellington had decided to participate in the new company. (This had been incorporated as 964 Bidco Ltd ("Bidco") on 16 February with Mr White as sole director, and through a company called 964 Ltd, sole shareholder). On (Friday) 19 February Wellington put Powa into administration. In the event there was no pre-pack sale and the joint administrators traded Powa for a short while (at Wellington's expense) while running a bidding process. This resulted in a sale on 3 March to Bidco, by then owned by Mr White and Wellington. I have not referred to all the material to which counsel took me over the 2-day hearing of the appeal, but I have referred to the most significant parts of it. Having done so, I can now go back to the triable issue identified by Mr Millett, namely whether there was a fairly available alternative to administration, or whether it is fanciful to say that Wellington would have pursued restructuring if left to their own devices. The answer to that which to my mind emerges with great clarity from the contemporaneous material is that there is indeed nothing to suggest that there is a genuinely triable issue as to whether restructuring was ever a reasonably available alternative, save on terms that substantial new equity investment was made, and nothing to suggest that that was 47. 48. 49. 50. ever available. On the material I have seen, it does indeed seem unrealistic and fanciful to suggest that Wellington would have pursued restructuring if left to their own devices – there is no material at all to support a case that Wellington would have continued down that road in the absence of any willingness by Ivanhoe, or anyone else, to invest the necessary funds to permit that to happen. The Patel argument 51. It is now possible to address Mr Millett's arguments in support of the appeal. So far as the Patel argument is concerned, the primary way in which it was put by Mr Millett was that Mr White caused the very default relied on by him in the formal demand letters of 3 March 2016, namely Powa's entry into administration. Mr Curl in fact had an argument that the Facility Agreement did not require a demand to specify the particular Event of Default relied on, and that he could rely on numerous other Events of Default committed by Powa such as being unable to pay its debts as they fell due (cl 13.5), or commencing negotiations with a view to rescheduling any of its indebtedness because of actual or anticipated financial difficulties (cl 13.9), which could not on any view be said to be the responsibility of Mr White. Mr Millett countered that whatever might have been relied on, what was in fact relied on was the entry of Powa into administration. I do not propose to decide this point and will assume that Mr Millett is or may be right about it. Nevertheless it seems to me that for the purposes of the Patel argument it follows from the views I have expressed above that there is no genuine triable issue that Mr White caused Powa to go into administration, and no realistic prospect of Mr Wagner establishing that he did. On the material I was shown, there is no support for the suggestion that Wellington decided to put Powa into administration because it was persuaded by Mr White that it was the better of two options, the other being a restructuring; it can no doubt be said that Wellington would have preferred a restructuring, but only if there were substantial new equity investment. Since that was not forthcoming, Wellington did not need persuading that administration was the only viable option – it had

already reached that conclusion by the time Mr Adams spoke to Mr Lechtzier on 10 February

2016. There is evidence of Mr White persuading Wellington into joining Bidco, but that is a different matter. 52. In my judgment therefore Mr Wagner has failed to show that there is a genuine triable issue based on the Patel principle, or that the Deputy Registrar erred in refusing on this ground to set aside the statutory demand. In terms of the specific Grounds of Appeal put forward on Mr Wagner's behalf: (1) Ground 1 is that the Deputy Registrar was wrong to find that there was no genuine triable issue as to whether Mr White persuaded Wellington to appoint administrators over Powa. At [96] of his judgment the Deputy Registrar said: "whilst it [Wellington] caused the administrators to be appointed, that was not a decision to which it had been persuaded by Mr White." For the reasons given above that was a conclusion that the Deputy Registrar was fully justified in coming to. (2) Grounds 2 and 3 refer to the questions respectively whether the existence of other potential Events of Default (other than administration) on which Mr (3) (4) (5) White could have relied but did not was irrelevant; and whether on the true construction of the formal demand, Mr White did rely on any other Events of Default. For the reasons given above it is unnecessary to resolve these questions as they have no affect on the outcome. Ground 4 is concerned with whether Mr White connived at or materially contributed to Powa's default. I will assume that Mr Millett is right that the Patel principle can apply if the creditor materially contributes to the principal debtor's default, but I do not see that it assists him on the facts of this case. For the reasons given above I do not think there is a genuine triable issue as to whether Mr White did materially contribute to the decision by Wellington to put Powa into administration. Nor need I decide what precisely is meant by "connive at"; I do not see that this can serve to exonerate the surety unless the creditor conniving at the default has had some effect on the surety's position. As Mr Millett himself said, the underlying principle is that the creditor must not do anything to expose the surety to a risk that he did not agree to run. The risk that Mr Wagner agreed to run was (among other things) that Powa would go into administration at a time when it could not repay unsecured creditors such as Mr White. That was a risk that Wellington would exercise the powers it had, and for the reasons given above, regardless of how keen Mr White himself was that Powa be put into administration, nothing he did in fact affected that risk. Grounds 5 and 6 concern the question whether in order to involve the Patel principle on the basis that the creditor has acted in bad faith, it is necessary to identify a breach of some duty to the surety. I will assume that Mr Millett is right that no other duty is required other than the duty not to act in bad faith towards the surety. Ground 7 concerns the question whether Mr White acted in bad faith towards Mr Wagner. It is put on the basis that it is at least arguable that it was bad faith for Mr White to seek to bring about Powa's administration for his own personal benefit in the knowledge that it would trigger Mr White's liability under the Guarantee when there was a reasonable alternative to administration that Wellington were considering. Ground 8 concerns the question whether Mr White acted positively to prejudice Mr Wagner in an unfair way. Both grounds rely on there being a reasonably available alternative that was actively being considered by Wellington. But for the reasons

given above, there is in my judgment no genuine triable issue that Wellington were ever considering a restructuring save one dependent on substantial new equity being invested. In those circumstances whatever Mr White's motivations and actions, they were not responsible for Wellington's decision to put Powa into administration, they did not change the risk that Mr Wagner had agreed to run, and they did not prejudice Mr Wagner in an unfair way. The co-extensiveness argument 53. I can deal with the co-extensiveness argument very shortly. As already indicated, Mr Millett's argument was initially based on Mr White having been party to an unlawful means conspiracy, the unlawful means being the breach of his fiduciary duty to Powa; 54. 55. but in the course of the hearing it became apparent that it was quite unnecessary for Mr Millett to rely on a conspiracy as such as if Mr White acted in breach of his fiduciary duty to Powa and caused it loss, that would give Powa a claim to be compensated by him for that loss (that is a claim for equitable compensation for breach of fiduciary duty) regardless of whether he conspired with anyone else or not. The question therefore is whether there is a genuine triable issue that Mr White did cause Powa any loss by acting in breach of fiduciary duty. The short answer to this to my mind is that even if Mr White acted in breach of fiduciary duty in advocating administration with a view to benefiting personally, there is no genuine triable issue that this caused Powa any loss because this did not cause, or materially contribute to, Wellington's decision to put Powa into administration. That means that Powa does not have a cross-claim against Mr White either for equitable compensation for breach of fiduciary duty, or for damages for the tort of unlawful means conspiracy. That makes it unnecessary to consider whether Mr White did act in breach of fiduciary duty. He was a director of Powa from 13 January 2016. Mr Wagner in fact purported to "fire" him from the Board on 7 February 2016, but he was not formally removed, and the Deputy Registrar accepted that he remained a director de jure at the time of the commencement of the administration and indeed at the time of sale to Bidco (judgment at [86]) and that it was more than arguable that he was still subject to the duties to which directors are subject (judgment at [87]). The particular duties relied on were the duty to act in the best interests of Powa, and the duty to avoid conflicts of interest. Mr Curl's argument was that in the circumstances that Powa found itself, the best interests of the company were to be equated with the best interests of its secured creditors, an argument accepted by the Deputy Registrar (judgment at [90]-[91]). Although I heard argument on the point, I do not find it necessary to resolve this and do not propose to do so. 56. Equally I do not propose to resolve the precise ambit and effect of the co-extensiveness principle. Again I heard argument on the point, but it is not necessary to resolve it. 57. In terms of the particular Grounds of Appeal relied on: (1) (2) (3) Grounds 9, 10 and 11 are all concerned with whether there was a triable issue that Mr White conspired with others (Wellington, Bidco and Blizzard Partners). In the light of the way Mr Millett refined his case, those issues have fallen away, and in any event would not assist him. The same is true of Ground 12 which concerns the question whether the suggested conspirators had an intention to injure Powa. Grounds 13 and 14 concern the question whether Mr White acted in breach of his fiduciary duty. I have already said that, even assuming he did, there is no triable issue that that caused Powa loss for which it could recover compensation

or damages. (4) Ground 15 concerns the question whether the conspiracy caused loss to Powa, which I have considered above. (5) Ground 16 is a general assertion that the Deputy Registrar was wrong to hold that there was no reasonable prospect that Powa would be able to pursue claims against Mr White for breach of fiduciary duty or unlawful means conspiracy. For the reasons given above, I consider he was right. 58. In those circumstances I will dismiss Mr Wagner's appeal in relation to the statutory demand served by Mr White. For the reasons given earlier it follows that Mr Wagner's appeal in relation to the statutory demand served by Mr Roden will also be dismissed.

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