Neutral Citation Number: [2022] EWCA Civ 102

Case No: CA-2021-000032

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HIS HONOUR JUDGE KRAMER (SITTING AS A JUDGE OF THE HIGH COURT)
[2021] EWHC 2443 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday 4 February 2022

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

CASSINI SAS	**Appellant/ First Defendant**
- and –	
(1) EMERALD PASTURE DESIGNATED ACTIVITY COMPANY **(2) EMERALD MOOR DESIGNATED ACTIVITY COMPANY** **(3) TRINITY INVESTMENTS DESIGNATED ACTIVITY COMPANY** **(4) GLAS SAS**	**Respondents /Claimants and Second Defendant**

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David Allison QC and Ryan Perkins (instructed by **Allen & Overy LLP**) for the **Appellant**
Daniel Bayfield QC and Matthew Abraham (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First to Third Respondents**
Hearing date : 30 November 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10 a.m. on Friday 4 February 2022.

Lord Justice Snowden:

Introduction

1. This is an appeal against a decision of His Honour Judge Kramer (sitting as a Judge of the High Court) (the "Judge") given on 27 August 2021: see [2021] EWHC 2443 (Ch) (the "Judgment").

2. After an expedited four day trial with expert evidence, the Judge declared that two of the covenants (the "Covenants") in a loan agreement dated 28 March 2019 (the "Senior Facilities Agreement" or "SFA") were enforceable against the Appellant ("Cassini").

3. The SFA is governed by English law and the Covenants require Cassini, as borrower, (i) to provide the agent acting for its lenders with information regarding the financial condition, assets or operations of Cassini and its subsidiaries (clause 26.7); and (ii) to permit the agent free access to the premises, assets, books, accounts and records of Cassini and certain of its subsidiaries, and to be able to meet and discuss matters with management (clause 28.25).

4. The issue had arisen because Cassini, which is a French company, had since 22 September 2020, been in a French insolvency procedure known as *sauvegarde*, which can be translated as a "safeguard procedure". This is a form of debtor-in-possession proceeding designed to provide protection for a company in financial difficulties which wishes to propose a restructuring plan to its creditors. The initial period of a safeguard procedure, after the commencement (opening) of the proceedings, but before approval of a restructuring plan by the French court, is what is referred to as the "observation period".

5. It is common ground that the legal effects of Cassini's safeguard procedure, as a matter of French insolvency law, fall to be recognised in England pursuant to the Recast Insolvency Regulation (EU 2015/848), notwithstanding Brexit, because the procedure was commenced before the end of the transitional period: see Article 67(3)(c) of the Withdrawal Agreement.

6. Cassini contended that the operation of French insolvency law during the observation period of its safeguard procedure had the result that the Covenants were unenforceable against it. It therefore refused to comply with a request for information and access from the agent acting on behalf of the lenders under the SFA.

7. After the refusal, in March 2021 the Respondents ("Emerald"), who are funds which acquired a significant proportion of the debt under the SFA after commencement of the safeguard procedure, brought a Part 8 claim in England challenging the position adopted by Cassini and seeking a declaration that the Covenants were enforceable against Cassini.

8. In doing so, Emerald relied upon an exclusive jurisdiction clause in the SFA in favour of the English courts. Zacaroli J rejected a challenge to the jurisdiction of the English court by Cassini: see [2021] EWHC 2010 (Ch).

The issue on appeal

9. The sole issue on appeal to this court is whether the Judge was correct in his determination that under French law, the Covenants remained enforceable against Cassini during the observation period of the safeguard procedure.

10. We were told that after the Judge gave his decision on 27 August 2021, on 7 October 2021 the French court approved the restructuring plans proposed by Cassini and its associated companies. This had the effect, subject to any appeal against the French court's decision, of bringing the observation period to an end. We nevertheless proceeded to hear the appeal, as the parties informed us that it might still be relevant if any appeal in France against the approval of the plans were to be successful and the observation period resumed. Neither party contended that any of the provisions of the approved restructuring plans cast any light on the issue that we have to determine.

French insolvency law

11. The safeguard procedure is contained in Title II of Book VI of the French Commercial Code (Articles L.620-1 to L.628-10). References below to Articles are, unless otherwise stated, to the Commercial Code.

12. Article L.620-1 sets out in general terms the structure and purpose of the safeguard procedure,

> "A safeguard procedure is instituted and opened on the application of a debtor mentioned in Article L.620-2, who, without being insolvent, shows proof of difficulties that he is not in a position to surmount. This procedure is aimed at facilitating the reorganization of the undertaking in order to permit it to continue its economic activity, maintain jobs and discharge its debts. The safeguard procedure gives rise to a plan adopted by a judgment after a period of observation and, where necessary, the formation of two committees of creditors, in conformity with the provisions of Articles L.626-29 and L.626-30."

13. The procedure leaves the executive management of the debtor in place, subject to supervision during the observation period by a court-appointed receiver and a court-appointed administrator (the "administrator"). The observation period initially lasts for a maximum of six months, but can be renewed: see Article L.621-3.

14. During the observation period the debtor is protected (subject to certain exceptions) by a moratorium on legal proceedings seeking to recover a money judgment or seeking to terminate a contract for non-payment of money. Article L.622-21 provides,

> "I. The judgment opening the [safeguard] procedure suspends or prohibits any legal proceedings by all the creditors whose claims are not mentioned in I of Article L.622-17 and which are aimed at:
>
> 1. ordering the debtor to pay a sum of money;
>
> 2. rescinding a contract for non-payment of a sum of money."

The exceptions to this prohibition in Article L.622-17 essentially relate to the costs of the safeguard procedure and liabilities for services supplied (including by employees) during the procedure.

15. Consistent with this moratorium on monetary claims, Article L.622-7 provides a prohibition on payment of pre-insolvency claims (other than by set-off). It provides,

> "The judgment opening the procedure entails, by operation of law, a prohibition on paying any claims arising prior to the judgment, with the exception of the payment by set-off of related claims. It entails also, by operation of law, a prohibition on paying any claim arising after the judgment opening the procedure that is not mentioned in I of Article L.622-17. These prohibitions do not apply to the payment of maintenance debts."

16. The operation of the debtor during the observation period is dealt with by Article L.622-9 which provides,

> "The activity of the undertaking is continued during the period of observation, subject to the provisions of Articles L.622-10 to L.622-16."

17. The provisions of the Commercial Code referred to in Article L.622-9 include Article L.622-10 which provides that the observation period can be terminated by conversion of the safeguard procedure into a court-ordered restructuring, or by a court-ordered winding up.

18. Importantly, Article L.622-12 further provides that the safeguard procedure will come to an end if the difficulties which justified the opening of the procedure have disappeared and the court ends the procedure.

19. The next Article L.622-13 is central to the arguments in this case. That Article provides,

> "I. Notwithstanding any legal provision or contractual clause, no indivisibility, termination or rescission of an ongoing contract may result from the sole fact of the opening of a safeguard proceeding.
>
> The other contracting party must fulfil his obligations despite the failure of the debtor to perform commitments given prior to the judgment opening the procedure. Failure to perform these commitments only entitles creditors to a declaration of liabilities.
>
> II. The administrator alone has the right to demand the performance of ongoing contracts by supplying the promised performance to the contracting party of the debtor.
>
> In view of the provisional documents at his disposition, the administrator makes sure when he demands the performance of the contract that he will have the funds necessary to ensure the payment resulting from it. In the case of an ongoing contract or a payment by instalments over time, the administrator terminates

> it if it appears to him that he will not have the funds necessary for fulfilling the obligations the next time round.
>
> III. The ongoing contract is rescinded by operation of law:
>
> 1. After a demand for performance of the contract sent to the administrator by the other contracting party has remained without a response for more than a month. Before the expiry of this period, the supervising judge may impose a shorter time limit on the administrator or accord him an extension, which may not exceed two months, to decide what to do;
>
> 2. In the absence of payment under the conditions set out in II and the agreement of the other contracting party to continue contractual relations. In this case, the Public Prosecutor's Office, the administrator, the court-appointed receiver or a supervisor may refer the matter to the court in order to terminate the period of observation.
>
> IV. At the request of the administrator, the termination is ordered by the supervising judge if this is necessary to safeguard the debtor and does not excessively affect the interests of the other contracting party.
>
> V. If the administrator does not make use of the right to continue a contract or terminates it under the conditions of II or if the termination is ordered pursuant to IV, the failure to perform may give rise to damages for the other contracting party, the amount of which must be declared as a liability. The other contracting party may, however, delay the restitution of the sums paid in excess by the debtor in the performance of the contract until there has been a ruling on the damages.
>
> VI. The provisions of this Article do not concern labour contracts. Nor do they apply to a trust deed, with the exception of an agreement during the course of the performance of which the debtor keeps the use and enjoyment of property and rights transferred into a trust fund."

20. An "ongoing contract" as referred to in Article L.622-13 (in the French original, "*un contrat en cours*") is not defined in the Commercial Code. However, the parties were agreed that it has been established by decisions of the French courts that an ongoing contract is a contract whose principal (characteristic) performance has not been completed.

21. The parties also agreed that a loan agreement where the lender has delivered the characteristic performance of the contract by making the agreed loan to the borrower before the commencement of the safeguard procedure is not an ongoing contract for the purposes of Article L.622-13. Accordingly, they were agreed that the SFA, under

which the loan had been fully drawn down by Cassini prior to the commencement of the safeguard procedure, was not an ongoing contract falling within Article L.622-13.

Cassini's contentions and the central issue before the Judge

22. Cassini's contentions as regards the effect of the commencement (opening) of the safeguard procedure on a non-ongoing contract were set out in a number of propositions in a document served on 23 July 2021 pursuant to an order of Zacaroli J. These were supported by its expert on French law, Professor Michel Le Corre, who is a leading academic and author of one of the main textbooks on French insolvency law.

23. After setting out the agreed propositions as to the meaning of an ongoing contract and the fact that the SFA was a non-ongoing contract, Cassini's third and fourth propositions were as follows,

> "3. Professor Le Corre considers that, if a contract is no longer "ongoing" at the date of commencement of the safeguard proceeding, then it is not enforceable for the duration of the safeguard proceeding (the "Enforceability Principle"). Sums owed to the lenders will be paid in accordance with the terms of any safeguard plan approved by the Court, but the underlying contract itself is not enforceable.
>
> 4. The Enforceability Principle is not codified by any single provision of the French Commercial Code. However, the Enforceability Principle is supported by French case law and is to be regarded as a general principle of French insolvency law which underpins the French statutory scheme. The Enforceability Principle is also implicit in certain provisions of the French Commercial Code."

24. Cassini's fifth principle gave further detail of the assertion that the "Enforceability Principle" was implicit in certain provisions of the Commercial Code. It drew attention to the provisions of Article L.622-13 II (above) to the effect that only the administrator has the right to demand the performance of ongoing contracts by supplying the promised performance to the counterparty of the debtor. Cassini contended that it was implicit from this that a contract which is not ongoing is unenforceable,

> "Otherwise, there would be no restriction on the enforcement of a contract which is not ongoing, even though ongoing contracts can only be enforced with the consent of the judicial administrator. Such an outcome would be absurd and could not represent the intention of the legislature, since it could not have been intended that ongoing contracts would be more difficult to enforce than contracts which are not ongoing."

25. Those propositions were disputed by the expert instructed on behalf of Emerald, Dr. Reinhard Dammann. Dr. Dammann is an experienced commercial practitioner in France specialising in insolvency law. Dr. Dammann denied that there was any such "Enforceability Principle" in French law and pointed out that it was not mentioned in any case law or textbook, including Professor Le Corre's own work on insolvency.

26. Dr. Dammann was of the opinion that in accordance with the overarching *pacta sunt servanda* principle of French contract law embodied in Article 1103 of the French Civil Code, any contract that does not qualify as an ongoing contract is not affected by Article L.622-13. He contended that such contracts continue to be binding on the parties during the observation period, subject to the restriction in Article L.622-21 that a payment obligation cannot be enforced against the debtor during the observation period.

27. Dr. Dammann further opined that the counterparty to a non-ongoing contract is able to apply to the French court pursuant to Article 1221 of the French Civil Code (as amended by an ordinance of 10 February 2016) for an order for specific performance by the debtor of any obligation not caught by Article L.622-21. On such application, according to Article 1221 of the French Civil Code, the court can refuse to grant specific performance if performance is impossible, or (importantly) if there is a manifest disproportion between the cost to the debtor and the interests of the creditor.

The Judgment

28. At paragraph 14 of his Judgment, the Judge recorded some common ground between the parties as to the approach of a French court to the interpretation of a statutory provision, and, in particular, to the application of the "*a contrario*" method of statutory interpretation,

> "The judge's role when interpreting a statutory provision, such as the Code, is to establish the intention of the legislature. The court will take into account the purpose of the legislation in order to ascertain the legislative intent. Two of the interpretative tools used by the court in this regard are *a fortiori* and *a contrario* reasoning.
>
> The former arises where the situation being considered by the court is not expressly covered by a written code. It is open to the court to look at a like situation which is referred to by law and applied by analogy. The latter interpretation operates on the basis that where the law refers to certain situations, called hypotheses in academic texts, it must be inferred that it intended to exclude the hypotheses not referred to.
>
> The experts agreed that the *a contrario* argument should be applied to rules which set out exceptions and not to general rules and that, when applied to a rule that sets out an exception, the effect is to revert to the general rule. In this, they were supported by an extract from *P. Malinvaudand N. Balat, "Introduction à l'Étude du Droit"*, 21st edition, at para 143."

29. After setting out the relevant statutory provisions, at paragraphs 40-42 of his Judgment, the Judge then summarised the key difference between the experts,

> "40. The key difference between Dr. Dammann and Professor Le Corre can be summed up in this way. The latter is of the view that any contract which is not ongoing at the commencement of safeguarding proceedings is no longer

> enforceable. Dr. Dammann's opinion is that the contract continues in force but subject to the specific restrictions set out in the safeguarding regime, such as the inability to sue for payment. They reached these opposing views by applying the *a contrario* principle but from a different starting point.
>
> 41. Professor Le Corre's argument, which has an element of circularity, is that the general rule is that all non-ongoing contracts become unenforceable in their entirety on the opening of the safeguarding proceedings. Article L.622-13 provides for the continuation of ongoing contracts alone as it makes no reference to non-ongoing contracts and, applying *a contrario* reasoning, one is thrown back on to the general rule that all other contracts are unenforceable. I stress this is a simplification and not the whole of his argument.
>
> 42. Dr. Dammann takes as his starting point the general principle of French law encompassed in the maxim *"pacta sunt servanda"*, which he translates as "agreements must be kept". The maxim is given legislative expression in Article 1103 of the French Civil Code … Up to this point, Dr. Dammann and Professor Le Corre are agreed. Where they differ is that Dr. Dammann says that the maxim continues to apply to all contracts after the opening of safeguarding proceedings, save to the extent that it is derogated from by the articles of the regime. Article L.622-7 is a derogation as it prevents paying claims arising prior to the safeguarding. He says that Article L.622-21 prevents a creditor enforcing his debt by action or execution. Article L.622-13 is a derogation specific to ongoing contracts. Thus, applying *a contrario* reasoning to Article L.622-13, which has no application to non-ongoing contracts, Dr. Dammann concludes that it makes no sense to suggest that they are terminated on the commencement of safeguarding."

30. In his Judgment, the Judge then summarised the evidence of the experts in support of their rival theses. Professor Le Corre suggested that the power of an administrator to compel continued performance of an ongoing contract under Article L.622.13 II is designed to allow the administrator to claim the benefits of the contract to enhance the wealth of the debtor, but subject to protection for the counterparty by requiring the administrator to ensure that the debtor can pay for such performance. Professor Le Corre reasoned that a counterparty who had already performed his obligations prior to the opening of the safeguard procedure would be unable to provide any further wealth to the debtor, and so there would no longer be any justification from the perspective of fulfilment of the purposes of the safeguard procedure for the clauses of the contract to continue in force during the observation period.

31. This reasoning also led Professor Le Corre to give the opinion which was reflected in Cassini's fifth principle,

> "(5) Therefore it would be illogical for the contractual counterparty of the debtor under a contract which is not a

> contract of ongoing performance to be able to demand the performance thereof. This would result in a perverse situation in which contracts which are no longer contracts of ongoing performance would be easier to apply than those which are contracts of ongoing performance, which could be contrary to the intentions of the legislature."

32. In his report, Professor Le Corre also sought to explain how the commencement (opening) of the safeguard procedure affected a non-ongoing contract,

> "One should now consider what happens to a loan agreement which is not ongoing: the general principle is that after the opening of the proceedings, there is an "erasure" of the loan in favour of the subsistence of the repayment debt only. It is no longer a matter of performing the loan agreement by making payments in accordance with the contractual repayment timetable, subject to the acceleration of the term. It is now only a question of settling a claim which arose before the opening judgment in the context of a safeguarding plan. This is why the legislature took care to regulate how such debt will be repaid, which will often be far removed from the contractual stipulations…"

33. Professor Le Corre was cross-examined on this evidence. The Judge summarised his explanation as follows,

> "49. In evidence, Professor Le Corre applied other terms or concepts to describe what happens to the contract that is not ongoing at the opening of the safeguarding proceedings. He said that "execution", by which he meant the requirement to perform, is "terminated". At one stage he was asked whether the contract was terminated or suspended. His first response was to say "terminated" but he changed that to "suspended". On the second day of his cross-examination he said that on the opening of the proceedings the contract was subject to "*caducité*". This had not been stated in his two reports or during his first day of giving evidence and this was not put to Dr. Dammann. As a consequence of this new evidence, Article 1186 of the French Civil Code was produced. This states that:
>
> > "A contract validly formed becomes null and void ("*caduc*") if one of its essential elements disappears."
>
> Article 1187 provides that,
>
> > "*Caducité* puts an end to the contract. It may give rise to restitution under conditions laid down in Articles 1352 to 1352-9."
>
> 50. Professor Le Corre told me that the contract only became void from the time at which it was terminated. It was not

> like a void contract under English law which treats such a contract as of no effect throughout. He said that the doctrine of "*caducité*" applies to contracts correctly formed but which cannot be executed for a reason external to the parties. Where insolvency proceedings are opened, continuing execution is not possible as the contract is not ongoing any more. The nullity would last for the duration of the safeguarding proceedings but would disappear if the company came out of safeguarding."

34. The Judge then summarised aspects of Dr. Dammann's evidence, noting in particular at paragraph 58 of his Judgment that,

> "58. [Dr. Dammann] points to the fact that Professor Le Corre says in his book "*Droit et Pratique des Procédures Collectives*" that specific performance is available in the case of violation of non-monetary contractual obligations. In cross-examination, Professor Le Corre said that he was there referring to ongoing contracts only although he accepted that he had not made this distinction in the text."

35. The Judge also summarised Dr. Dammann's answer to the contention that it would be illogical for it to be easier for a counterparty to be able to enforce a non-monetary obligation in a non-ongoing contract than in an ongoing contract,

> "63. Mr. Allison suggested to Dr. Dammann that it would be most surprising if non-monetary obligations in non-ongoing contracts were easier to enforce against the debtor in safeguarding proceedings than non-monetary obligations in terminated ongoing contracts. He was asked whether he had an answer for that anomaly. He said he did not, for the reason that one just has to apply the law. There is no special treatment for non-ongoing contracts as they do not fall within Article L.622-13. It is argued by Mr. Allison that in giving this answer, Dr. Dammann wrongly disregarded the purpose of the safeguarding regime which he had rightly said was to save jobs and the debtor's business, and to protect creditors. I found Dr. Dammann's answer refreshingly candid. He did not seek to dissemble in order to somehow explain how the identified anomaly was not an anomaly or was justified. He just said it exists but you have to apply the law."

36. The Judge then turned to consider a number of cases decided by French courts that were said by each side to support their respective positions. The Judge had earlier noted that French law does not include a doctrine of precedent in relation to the decisions of courts in the same way as English law, albeit that a lower court might "face censure" if it failed to follow a decision of the *Cour de Cassation*.

37. The main authority to which reference was made was a decision of the Court of Appeal of Versailles, 13th Chamber, of 28 February 2013 in the cases of Heart of La Defense SAS ("HOLD") and Dame Luxembourg SARL ("DAME") (the "HOLD" case). In the HOLD case, the Versailles Court of Appeal considered a challenge to the approval by

the Paris Commercial Court of a safeguard plan which involved the rescheduling of two loans totalling €1.6 billion owed by HOLD to a securitisation fund ("FCT") and which were guaranteed by DAME. The loans had a variable interest rate and were repayable according to their terms on 10 July 2012, or on 10 July 2013 or 2014 at the election of the debtor if certain formal and substantive conditions were met.

38. HOLD and DAME had gone into a safeguard procedure in November 2008, and the Paris Commercial Court approved safeguard plans in September 2009 which extended the maturities of the loans to 10 July 2014. The argument on appeal by the Public Prosecutor, supported by FCT, was that the Paris Commercial Court could not approve a plan providing for the extension to the maturities of the loan other than in accordance with the relevant contractual conditions for extension in the loan agreements, and these had not been met.

39. The Court of Appeal rejected these arguments. It first held that because the loan agreements were not ongoing contracts, they could be modified by the plan to impose longer repayment periods than specified in the loan agreement, provided that the plan did not exceed the statutory maximum of ten years provided by Article L.626-12. The judgment stated,

> "On the consequences arising from the fact that the loan contract is not a current contract.
>
> Current contracts within the meaning of article L.622-13 continue without modification. The contracting parties must respect the contractual obligations, as they have been agreed.
>
> This is not the case with the loan agreement.
>
> The loan contract is executed by the delivery of funds and does not constitute a current contract. The lender has a receivable which is subject to insolvency proceedings and which is reimbursed to it according to the terms of settlement of liabilities provided for in the safeguard or continuation plan.
>
> As a result, in determining the duration of the plan, the duration of the loan is not binding on the court and the lender may be imposed on repayment terms that are longer than the contractual terms.
>
> Consequently, the duration of the plan can be fixed within the limit of ten years, without taking into account the duration of the loan or its term. It is therefore within the limits of their powers that the first judges set the end of the plan at a date that they determined within the 10-year limit provided for by article L.626-12.
>
> It also results in the terms of the loan being suspended during the execution of the plan. This is the case for sureties, early repayment clauses, clauses providing for cases of default, and LTV and ROIC ratios to be respected.

> Ultimately, as long as the plan is executed, the lender can only claim payment of the plan's instalments."

40. The Court of Appeal then also rejected an argument by FCT that the plan could not extend the duration of the loans other than in accordance with the conditions for extension in the loan agreements,

> "On compliance with the due date of the capital agreed between the parties.
>
> Article L.626-18 lays down the rule according to which the court, for creditors who have not accepted the debt settlement proposals, 'imposes uniform payment deadlines'.
>
> However, it formulates an exception in the following terms: 'subject, with regard to term debts, to longer periods stipulated by the parties before the opening of the procedure which may exceed the duration of the plan.'
>
> In this case, the loan capital is repayable *in fine*, on 10 July 2012, or 2013 or 2014.
>
> The opening of the safeguard procedure does not make the loan payable and does not have any consequence on the fact that the loan is repayable *in fine*, on the dates indicated above.
>
> The plan must respect the due date agreed between the parties, in the sense that it cannot impose a repayment of capital, even partial, before this date.
>
> The FCT maintains that the due date of the loan must be set at 10 July 2012, because the formal and substantive conditions under which HOLD can postpone this date to 10 July 2013 and then to 10 July 2014, have not been met.
>
> It recalls that if it did not make any difficulty for a postponement to 10 July 2014 within the framework of a consensual plan, this concession is not opposable within the framework of a plan imposed.
>
> But, as has been said, the loan contract is not an ongoing contract. The formal and substantive conditions are no longer enforceable against the debtor in the safeguard proceedings, nor against the court having to adopt the safeguard plan.
>
> It is therefore within the limits of its powers that the Paris Commercial Court considered that the due date of the loan capital could be set at the earliest contractual date, i.e. 12 July 2014."

41. In cross-examination, Professor Le Corre accepted that the decision of the Versailles Court of Appeal dealt with the effect of the approval of the plan on the loan agreements

and that it did not deal expressly with the effect of the opening of proceedings on the loan agreements. He also accepted that the Court of Appeal had not said that the loan agreements in the case had become *caduc* on the opening of the safeguard procedure.

The Judge's conclusion

42. The Judge explained the conclusion that he had reached in paragraph 108 of his Judgment as follows,

> "For the following reasons … I find that the information provisions in the SFA continued after the opening the safeguarding proceedings:
>
> (a) The '*pacta sunt servanda*' principle is a key provision in French contract law and it is to be expected that any derogation from the principle in the safeguarding regime would be explicit.
>
> (b) The Code is intended to be a clear statement of the rules governing safeguarding.
>
> (c) There is nothing in the Commercial Code which states that the '*pacta sunt servanda*' principle does not apply in the case of non-ongoing contracts.
>
> (d) There is no statement that the principle is displaced in the case of non-ongoing contracts in French case law or in the academic texts, including that of Professor Le Corre. On the contrary, those cases relied upon by the first defendant do not demonstrate the existence of the "enforceability principle", and several of the cases to which I have been referred by the parties would have been decided differently if it did exist. The fact that the point never seems to have been taken in such cases is yet a further indication that it is not part of French insolvency law.
>
> (e) There are a number of respects in which I found the evidence of Professor Le Corre unsatisfactory and I prefer that of Dr. Dammann. … [Dr. Dammann's] evidence follows the written law and cases which I have been shown and his explanation of the application of law and cases was coherent and logical. His explanation of the working of the Code is in keeping with its stated purpose and the manner in which the purpose is to be achieved, which in the latter regard is set out in Article L.622-9, which provides for the undertaking to continue subject to the rules set out in Article L.622-10 to Article L.622-16. These are safeguards which enable the debtor to continue in business whilst protecting it from monetary liabilities.
>
> My view as to Professor Le Corre's evidence was shaped by:

(i) the different theories he postulated as to what became of non-ongoing contracts at the start of safeguarding, speaking of erased obligations, the suspension of the contract, contracts being terminated, and only after two reports and a day of cross-examination the explanation that it became *caduc*. This came so late in the day that not even Mr Allison seemed to have been aware of it as he did not cross-examine Dr Dammann about *caduc* contracts;

(ii) the *caduc* theory does not fit the Code. If non-ongoing contracts were *caduc* at the start of safeguarding, there would be no need to include the moratorium as according to Professor Le Corre at that point the right to payment under the contract ceases and converts into a right to payment under the plan, if there is one. … The question would also arise as to where the difference was between ongoing and non-ongoing contracts. Unless they had some separate quality, why are they not too *caduc* subject to the Article L.622-13, which itself does not state in terms that such contracts are not *caduc*?

(iii) the periphrastic approach to applying the *a contrario* principle to Article L.622-13 also gave me cause to doubt the accuracy of his evidence. Mr Bayfield took the professor through each paragraph of the article and he identified each as derogating from the '*pacta sunt servanda*' principle. In his report he had referred to the Article as a double derogation as the administrator had both the right to terminate and continue the contract. At one stage, in answer to my question he said that Article L.622-13 II derogated from the rest of the article. If that is right, according to his evidence it would be a derogation from a derogation. In the written evidence he suggested that section II upholds the '*pacta sunt servanda*' principle as it enables the administrator to enforce the contract, whereas in oral evidence he said it was a derogation. It seemed to me that all this circumlocution became necessary as he recognised that if Articles L 622-13 I and II were derogations from the general rule, one has to revert to the rule, the consequence of which would be that an *a contrario* interpretation of the article would lead to the conclusion that non-ongoing contracts are unaffected by what is said as regards ongoing contracts in Article L 622-13 and continue in force; and

(iv) the misplaced reliance on cases which did not support his analysis, coupled with his attempts to

> neutralise their support for the claimants' case … This suggested to me that Professor Le Corre had taken a narrow approach to this case, starting with the proposition that non-ongoing contracts do not survive safeguarding and then looking for evidence to back it up…
>
> (f) The view I have reached is that the Code is refreshingly straightforward. The statutory purpose is served by rules to enable the company to continue in business under the control of its directors. To do this it has to be protected from creditors and the termination of contracts on which it relies. These protections are necessary derogations from the '*pacta sunt servanda*' principle. As regards Article L.622-13, paragraph I, it is a clear derogation as it prevents the operation of a termination clause and requires the counterparty to perform even where there have been pre-safeguarding breaches by the debtor, the latter being a derogation from Articles 1219 and 1220 of the Civil Code as Professor Le Corre accepted; these articles entitle a party to refuse or suspend performance in the face of non-performance by the counterparty. Section II is a derogation as it puts the right to demand performance in the hands of a third party and gives them the power to require continuation or terminate the contract. … As it is accepted that Article L.622-13 only relates to ongoing contracts, Dr. Dammann must be correct in his assertion that an *a contrario* interpretation leads to the conclusion that its impact on non-ongoing contracts is to render them, or acknowledge that they are, unenforceable against the debtor during the observation period, save in the respects expressly set out in the Code are concerned, is illogical. They continue to be governed by the '*pacta sunt servanda*' rule subject to the express derogations found elsewhere in the Code.
>
> Accordingly, the information requirements in the SFA continue."

The arguments

43. On appeal, Cassini's main contention was that the conclusion reached by the Judge on the basis of Dr. Dammann's evidence produces an illogical result which is contrary to the purpose of the safeguard regime. Cassini also contended that the Judge placed too much reliance on the French cases that he had considered; that he misconstrued Dr. Dammann's evidence on one aspect of the decision of the Versailles Court of Appeal in the HOLD case; and that he was unduly influenced to reject Professor Le Corre's analysis by a number of unjustified criticisms of his evidence.

The alleged illogicality of the Judge's conclusion

44. Of these grounds, by far the most significant is the first contention. Reflecting Professor Le Corre's evidence, Mr. Allison contended that if regard were to be had to the purposes of the safeguard procedure set out in Article L.620-1, it was illogical and

perverse that non-monetary obligations in non-ongoing contracts (the performance of which could not produce any benefits for the debtor in the safeguard procedure) should be easier to enforce against a debtor than non-monetary obligations in ongoing contracts (the performance of which could be capable of producing benefits for the debtor).

45. Mr. Allison contended that it had been incumbent upon Dr. Dammann to explain why, on his thesis, such anomalies existed and how they could be reconciled with the statutory purposes of the safeguard regime. He submitted that in light of the fact that Dr. Dammann could not account for such anomalies, the Judge was wrong to accept his evidence.

Analysis

46. In assessing these criticisms of the Judgment, it is important to appreciate that the Judge was faced with two experts espousing very different theories to predict how a French court would decide what we were told was a novel point of French law. Ultimately the question is whether the Judge was wrong to prefer the analysis advanced by Dr. Dammann over that advanced by Professor Le Corre.

47. In that regard, although findings as to foreign law are treated as findings of fact by the English courts, it was common ground between the parties that they are different from other findings of fact and are not subject to the same restrictions on scrutiny by an appellate court. Although an appellate court will bear in mind that the trial judge had the advantage of seeing and hearing the expert witnesses, and of clarifying their evidence directly with them, the appellate court is entitled to consider the expert evidence afresh and form its own view of the cogency of the rival contentions in determining whether the trial judge came to the correct conclusion: see Dalmia Dairy Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223 at 286 per Megaw LJ. That is certainly so where, as here, the appellate court has been provided with the reports and a full transcript of the evidence and cross-examination of the experts.

48. I also agree with the Judge that the reputation of the experts is a factor to take into account in the assessment of expert evidence, but it is by no means determinative. It is the substance of the evidence and the cogency of the opinions and analyses offered by the experts, both in their reports and when they are tested under cross-examination, that is of primary importance.

49. In analysing the rival opinions of the experts, in my view the Judge was clearly correct to take as the default position and starting point the *pacta sunt servanda* principle. Both experts accepted that this applied to all contracts entered into by a company and in force immediately prior to the opening of a safeguard procedure. In the case of a loan agreement, this would mean that the creditor is able, prior to the opening of the safeguard procedure, to take various courses of action to vindicate his rights in the event of a default by the debtor. The available options would include bringing proceedings under Article 1221 of the Civil Code for specific performance of non-monetary obligations; bringing proceedings to recover a money judgment for sums due; and ultimately terminating the contract and bringing proceedings for damages for breach.

50. The Judge was also correct then to ask whether the provisions of the Commercial Code derogate, expressly or by implication, from the general *pacta sunt servanda* principle after the opening of a safeguard procedure.

51. In that regard, it is clear that the Commercial Code contains a number of express derogations which apply to all contracts. These include Article L.622-21 imposing a moratorium on proceedings seeking a monetary judgment or the rescission of the contract for non-payment, and Article L.622-7 prohibiting the payment of pre-existing claims.

52. The Judge was also clearly right to accept Dr. Dammann's evidence that the provisions of Article L.622-13 amounted to a derogation from the *pacta sunt servanda* principle in respect of ongoing contracts. Article L.622-13 clearly modifies the pre-safeguard position in respect of enforcement of such contracts in the manner outlined by the Judge in paragraph 108(f) of his Judgment.

53. Accordingly, I consider that the Judge was right to hold in paragraph 108(e)(iii) and at the end of paragraph 108(f) of his Judgment that the application of the *a contrario* method of statutory interpretation would support Dr. Dammann's contention that no equivalent derogation to Article L.622-13 was intended by the legislature in respect of contracts that were not ongoing.

54. Prima facie, this would mean that, subject to the express moratorium and prohibitions in Articles L.622-7 and L.622-21, the pre-safeguard regime for non-ongoing contracts continues after the opening of the safeguard procedure. Non-monetary obligations in such contracts would therefore be potentially enforceable against debtor companies during the observation period on an application by a creditor pursuant to Article 1221 of the Civil Code. I say "potentially enforceable" because Article 1221 of the Civil Code makes it clear that the court could refuse such an order if the cost to the debtor company of complying with the obligation would be manifestly disproportionate to the interests of the creditor.

55. I do not consider this proposition is cast into any doubt by Professor Le Corre's evidence, recorded by the Judge in paragraph 58 of his Judgment (see above) that Article 1221 of the Civil Code might only be applicable to an ongoing contract and would not be applicable to a non-ongoing contract. That distinction between ongoing and non-ongoing contracts does not appear in Article 1221 itself, it is not one that Professor Le Corre had drawn in his own published work on insolvency, and it is not supported by any other material.

56. As Arnold LJ commented during the appeal hearing, assuming that the French legislature did not simply make the mistake of failing even to consider the treatment of non-ongoing contracts, an alternative approach to the *a contrario* method of statutory interpretation would be to ask whether it is so obvious that the pre-safeguard regime for enforcement of non-monetary obligations in non-ongoing contracts could not continue during the observation period that the French legislature thought it unnecessary to make express provision to that effect.

57. In that respect, as I have indicated, Cassini's contention was that the conclusion reached by the Judge is manifestly inconsistent with fulfilment of the purposes of the safeguard procedure, that it would be absurd if it were easier for a creditor to enforce an obligation in a non-ongoing contract than in an ongoing contract, and that the only logical solution consistent with the safeguard procedure is that advanced by Professor Le Corre.

58. Dealing with the first point, I do not accept that the regime which the Judge accepted is inconsistent with the fulfilment of the purposes of the safeguard procedure. On the contrary, Article 1221 of the Civil Code expressly enables the court hearing an application for specific performance to consider whether the cost to the debtor of performing the obligation would be "manifestly disproportionate" to the interest of the creditor. This plainly requires a judgment to be made, balancing the interests of creditor and debtor.

59. In that regard, although Cassini's argument and Professor Le Corre's evidence both focussed on the example of an insolvent debtor seeking to use the safeguard procedure to formulate a restructuring plan to put to creditors to compromise their claims, it should be recalled that Article L.620-1 provides that the availability of the safeguard procedure does not depend upon the debtor being insolvent, and Article L.622-12 provides that the procedure can be ended without a plan if the difficulties which justified the opening of the procedure have disappeared.

60. So, for example, if an insolvent debtor was using its limited resources to formulate a restructuring plan to compromise the claims of creditors, the court hearing an application under Article 1221 of the Civil Code might well conclude that it was manifestly disproportionate to require it to expend significant time and money complying with requests for performance of non-money obligations from an individual creditor who was subject to the moratorium on debt claims in any event.

61. But in contrast, the debtor might have entered the safeguard procedure as a result of cashflow problems to obtain a temporary moratorium from claims, and might be intending to exit the safeguard procedure, resume its normal operations and pay all of its creditors in full once those problems had disappeared. The debtor might also be able to comply with the requests for performance of its non-monetary obligations at minimal cost or expenditure of resources. In such cases, it is difficult to see why ordering specific performance of the non-monetary obligation would be contrary to the purposes of the safeguard regime.

62. I also do not accept Mr. Allison's submission that it is obviously illogical for there to be what he characterised as an "easier" regime for enforcement of a non-ongoing contract than an ongoing contract. That submission needs to be unpacked. The contention is that it would be illogical for a non-ongoing contract to be capable of enforcement by court order under Article 1221 of the Civil Code provided that that the cost of performance was not manifestly disproportionate; but on the other hand for an ongoing contract only to be capable of enforcement if the judicial administrator consented on the basis that the debtor company had the funds to pay for the performance.

63. Professor Le Corre's thesis was that the regime for ongoing contracts enables the administrator of the debtor to choose which contracts he wishes to have performed by the counterparty to enhance the wealth of the debtor, subject to the safeguard for the counterparty that the administrator should ensure that the debtor has the funds to pay for the performance. He was of the opinion that the debtor should not be required to perform its obligations under non-ongoing contracts because the debtor's performance of its remaining obligations could not enhance its wealth, and the amounts owing to the counterparty would be dealt with under a restructuring plan.

64. As I see it, that thesis approaches the safeguard procedure entirely from the perspective of an insolvent debtor and assumes that a restructuring plan will be promulgated to compromise creditor claims. I do not see why the French legislature should be assumed to have taken that restricted view when, as I have indicated, the debtor is able to enter the safeguard procedure whether or not it is insolvent, and the procedure can lead to several outcomes, including the resumption of normal trading. Nor do I think that it is obviously illogical that a counterparty which has fully performed its side of the contractual bargain should at least have the possibility of obtaining a court order for specific performance of non-monetary obligations for which it has paid in full.

65. Both in cross-examination of Dr. Dammann, and at the hearing of the appeal, Mr. Allison illustrated his arguments by using the example of a €600 million loan facility which was either (a) fully drawn, or (b) had €10 million undrawn at the commencement of the safeguard procedure. Dr. Dammann accepted that the loan agreement in the first scenario would be classified as a non-ongoing contract at the opening of the safeguard procedure and was of the opinion that the information covenants in the loan agreement would remain in force and would be potentially enforceable by the counterparty during the observation period. Dr. Dammann also accepted that in the second scenario, if the administrator considered that the debtor did not have the money, he could decide that the company should not draw down the last €10 million and could terminate the loan agreement under Article L.622-13 II. Dr. Dammann agreed that in such a situation, the information covenants in the loan agreement would no longer be enforceable after the contract had been terminated.

66. The illustration selected by Mr. Allison seems to lead to an incongruous outcome because of the very small difference of €10 million which he postulated had not been drawn down at the opening of the safeguard procedure. The contrast in outcome might, however, not appear so odd if the facts were different. Assume that in the second scenario the amount which had been drawn down at the opening of the safeguard procedure was only €10 million out of the €600 million agreed facility. In that scenario I would not find it surprising that the counterparty that had performed all of its obligations by lending €600 million should at least be able to apply to the court for specific performance of the information covenants; whereas the lender who had advanced only a very small fraction of the facility might be unable to enforce such covenants if the administrator did not think that it was in the interests of the debtor to draw down any further monies during the safeguard procedure.

67. In any event, as the Judge rightly appreciated, the alleged illogicalities which Cassini contended resulted from the regime advocated by Dr. Dammann are only part of the equation. It was equally important for the Judge to consider the cogency of Professor Le Corre's alternative thesis, and in particular his explanation of how non-ongoing contracts become unenforceable on the opening of the safeguard procedure.

68. As the Judge noted in his Judgment, Professor Le Corre's ultimate thesis was that the effect of the opening of the safeguard procedure is to render all non-ongoing contracts null and void ("*caduc*") and at an end within the meaning of Articles 1186 and 1187 of the Civil Code. That suggestion does not, however, appear in any academic or practitioner literature, or in any decided case. It had also not been advanced by Professor Le Corre in his two reports, which had referred instead to an "erasure" of the contractual terms and conditions of the loan. As the Judge noted, the reference to

Articles 1186 and 1187 of the Civil Code and *caducité* only made a belated appearance during Professor Le Corre's cross-examination.

69. In his evidence, Professor Le Corre did not identify which "essential element" of the contract had "disappeared" on the opening of the safeguard procedure within the meaning of Article 1186 of the Civil Code. I agree with the Judge that because the element which Professor Le Corre contended disappeared on the opening of the safeguard procedure was the ability to enforce the contract, his thesis was rather self-supporting and circular. The Judge was also correct to point out that Professor Le Corre provided no explanation of why, if Article 1186 of the Civil Code applied at all, it should not apply to ongoing contracts as much as non-ongoing contracts.

70. Significantly, I also do not think that Professor Le Corre had any coherent explanation of his assertion (recorded at the end of paragraph 50 of the Judgment) that a non-ongoing contract which had become *caduc* on the opening of a safeguard procedure would in some way revive and cease to be *caduc* if the safeguard procedure came to an end without a restructuring plan having been approved. Article 1187 of the Civil Code simply provides that "*caducité* puts an end to the contract" and there is no suggestion that this is reversible or temporary.

71. The point is plainly important, because as I have indicated, Article L.620-1 of the Commercial Code makes it clear that a debtor company need not be insolvent to enter the safeguard procedure. The company might, for example, simply be suffering from temporary cashflow difficulties, but have sufficient assets to be able to pay all of its creditors in full. It would thus be entirely possible for the company to use the safeguard procedure to obtain the benefit of the moratorium on enforcement of money claims for a short period, and then exit the safeguard procedure under Article L.622-12 and resume normal trading once those problems had been resolved. It is wholly unclear how that would occur if the all of the company's non-ongoing contracts had automatically come to an end on the opening of the safeguard proceedings.

72. Nor did Professor Le Corre explain why, if the loan agreements in the HOLD case had been rendered *caduc* on the opening of safeguard proceedings in that case, the Versailles Court of Appeal did not simply make that point in answer to the argument that the court that approved the safeguard plan had been required to abide by the formal conditions of the loan agreements.

73. These are powerful points that in my view entirely justify the Judge's conclusion, in paragraph 108(e) of his Judgment, that Professor Le Corre's *caducité* (or erasure) theory was not consistent with the provisions of the Commercial Code as regards the safeguard procedure.

74. Taking these points together, in my view the Judge was entitled to come to the view that Dr. Dammann had provided the more cogent explanation of the approach that a French court would be likely to take of the enforceability of the Covenants in the SFA during the observation period.

75. I would therefore reject Cassini's main challenge to the Judge's conclusion.

The remaining points on appeal

76. I can deal more quickly with the other points raised on appeal.

77. The second ground of appeal was that the Judge placed too much reliance upon his analysis of French cases, especially given the absence of the doctrine of precedent in French law. I do not consider that there is anything in this point. It is true that the Judge took some time to set out the facts and explain the decisions in the cases, but I do not think that this was unreasonable given that such cases had been referred to by both parties.

78. I also do not consider that the Judge approached the French cases as if they were common law authorities or sought to place too much weight on them. His main point, as expressed in paragraph 108(d) of his Judgment was simply that they did not demonstrate the existence of the "Enforceability Principle" propounded by Professor Le Corre, and that some of them would have been decided differently if it did exist. That was primarily making the point that if Professor Le Corre had been right, one might have expected a number of the cases – including those aspects of the HOLD case to which I have referred - to have been argued or decided in a different way. That is an entirely legitimate observation on the evidence that does not depend upon whether one is a common lawyer or a civil lawyer, or whether there is or is not a doctrine of precedent in French law.

79. The third ground of appeal related to the Judge's treatment of an answer by Dr. Dammann when he was cross-examined about one part of the decision of the Court of Appeal of Versailles in the HOLD case. The relevant part of the decision was the observation by the Court of Appeal that I have set out in paragraph 39 above, in which the court stated,

> "Consequently, the duration of the plan can be fixed within the limit of ten years, without taking into account the duration of the loan or its term. It is therefore within the limits of their powers that the first judges set the end of the plan at a date that they determined within the 10-year limit provided for by article L.626-12.
>
> It also results in the terms of the loan being suspended during the execution of the plan. This is the case for sureties, early repayment clauses, clauses providing for cases of default, and LTV and ROIC ratios to be respected."
>
> (my emphasis)

80. In cross-examination, Dr. Dammann was asked a series of questions about this statement, at the end of which the following exchange took place,

> "JUDGE KRAMER: The question you were asked … was the court of Versailles saying that every term of the loan is suspended no matter what the terms?

> A. My answer is as a matter of principle "every" is not the right interpretation. There must be some clauses which continue to be applicable out of … this loan agreement. The question is what clauses are necessary suspended. There we have an agreement, and the grey area is with respect to clauses that you … might find in a credit agreement that may continue because they are totally compatible with the court imposed restructuring plan.
>
> MR ALLISON: And what would you say about the information covenants in the present case? Would they continue or would they be suspended?
>
> A. During a court imposed plan, I could see there would be no reason why some of these clauses of general information could continue to apply. The clause which is referring to an event of default is necessarily suspended."

81. The Judge dealt with this evidence (and in particular the last answer) in paragraphs 64-67 of his Judgment as follows,

> "64. … Mr. Allison says that this is evidence which I have received from Dr. Dammann, the suggestion being that he was saying that the obligations to provide information are not enforceable during the operation of a safeguarding plan or that he was doubting whether they were enforceable.
>
> 65. I very much doubt this is what Dr. Dammann meant. His consistent evidence has been that the clauses of a non-ongoing contract, other than those which relate to the timing of payments due, remain enforceable following the commencement of the safeguarding plan, and this includes terms relating to the provision of information. The passage relied upon by Mr. Allison follows a line of questioning concerning his interpretation of the decision of the Court of Appeal of Versailles which referred to terms of a loan agreement being suspended during the plan. His evidence was that the suspension would not cover information covenants. He was then asked if they would continue to be enforceable if they represented events of default. He was asked several questions about this, and the burden of his response was that clauses which interfered with the safeguarding plan were suspended, such as a clause which triggered a default provision; he was clearly referring her to the type of clause which triggers early payment.
>
> 66. He gave the answer quoted by Mr. Allison when asked to apply that reasoning to the loan contract in this case. Unless he had changed his mind without any prompting or additional information in the course of one question, it seems to me that what he had intended to say was that he could see no reason why general information clauses would not apply, hence his reference

> to the early payment type of default clauses, of which the information clause in the instant case is not one, and therefore would not necessarily be suspended.
>
> 67. In reaching this conclusion, I think it is fair to also take into account that although Dr. Dammann's English was very good, it is clear that he is not a native English speaker, some of his syntax was perhaps not those of a native speaker, but at all events I am clear that he had not suddenly changed his mind to suggest that information covenants would not be enforceable following safeguarding."

82. Although the Judge seemed to think that Dr. Dammann had misspoken, I believe that his answer was entirely accurate, and the problem perceived by the Judge may have been caused by the form of the question.

83. The simple point is that, as I have indicated above, the Versailles Court of Appeal in the HOLD case was dealing with the arguments whether, in approving a plan to extend the maturity date of the loans to 2014, the Paris Commercial Court had been bound by or obliged to follow the formal and substantive conditions in the loan agreements for such extension. The court was not considering the effect of the opening of the safeguard procedure on the continuation of contractual provisions in the loan agreement during the observation period. Accordingly, the statement of the Versailles Court of Appeal which referred to "the terms of the loan being suspended during the execution of the plan", plainly addressed the status of the contractual terms after approval of the plan.

84. In his cross-examination, Dr. Dammann was also clearly addressing his mind to the period of time after approval of a safeguard plan. That is readily apparent from his answer to the question asked by the Judge in the extract set out above. Dr. Dammann contrasted the type of clauses in a loan agreement that might necessarily be suspended during the operation of the restructuring plan, and those that might continue in force "because they are totally compatible with the court imposed restructuring plan".

85. Accordingly, when Dr. Dammann was then asked by Mr. Allison,

> "And what would you say about the information covenants in the present case? Would they continue or would they be suspended?"

it is clear to me that he thought that he was being asked to express a view as to whether such information covenants would be of a type that could or could not continue in force after the approval by the court of a restructuring plan. That is why he answered the question,

> A. During a court imposed plan, I could see there would be no reason why some of these clauses of general information could continue to apply. The clause which is referring to an event of default is necessarily suspended."

(my emphasis)

86. The point that I think that Dr. Dammann was making was that the pre-existing rights of creditors to seek general information to enable them to protect their contractual rights to repayment under their loan agreements, might well become otiose if and when those rights had been replaced by the rights to repayment in accordance with a court-approved plan. But in any event, Dr. Dammann's answer was manifestly not addressing the status of the Covenants during the observation period. As such, I do not consider that this answer was inconsistent with Dr. Dammann's main contention that the Covenants continued to apply during the observation period in the instant case.

87. Accordingly, although the Judge appeared to think that Dr. Dammann had misspoken, and sought to correct his answer in the Judgment, I think the Judge was wrong. In my view, Dr. Dammann's evidence was consistent and I do not think that the Judge's misunderstanding casts any doubt upon his central thesis which the Judge accepted.

88. The final ground of appeal relates to a number of criticisms made by the Judge of the manner in which Professor Le Corre had approached giving evidence in the case, and the way in which the Judge had intervened in Mr. Allison's cross-examination of Dr. Dammann. It is suggested that the Judge's criticisms of Professor Le Corre were unfair and tainted the Judge's assessment of the evidence, and that the Judge descended into the fray when intervening.

89. It is unnecessary to deal with those points in any detail. Whether or not the Judge's criticisms of Professor Le Corre to which reference is made were or were not well-founded, they were on peripheral matters, and it is clear to me that they did not affect the Judge's analysis of the key aspects of the expert evidence. Specifically, the matters to which objection is taken do not include the far more substantial matters which the Judge identified in paragraph 108 of his Judgment as having shaped his view of Professor Le Corre's evidence.

90. Likewise, having considered the transcript of the hearing, I do not think that there is the slightest merit in the criticisms of the Judge's interventions in cross-examination. It cannot sensibly be suggested that Mr. Allison was prevented from conducting the fullest examination of the issues with Dr. Dammann.

91. It should also be borne in mind that this was a case involving expert foreign lawyers. In such a situation involving legal concepts and the need to come to grips with foreign legal materials, including decisions of foreign courts, a judge might naturally and legitimately engage more actively with the expert legal witnesses and counsel in the course of cross-examination.

92. For these reasons I would dismiss the appeal.

Lord Justice Arnold:

93. I agree.

Lord Justice Underhill:

94. I also agree.