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IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES COURT (ChD)

Royal Courts of Justice

The Rolls Building

Fetter Lane

London EC4A 1NL

Date: 17 February 2022

Before :

Sir Alastair Norris

(Sitting as a judge of the High Court)

- -

IN THE MATTER OF CORBIN & KING HOLDINGS LIMITED

AND IN THE MATTER OF CORBIN & KING RESTAURANT GROUP LIMITED

AND IN THE MATTER OF THE WOLSELEY RESTAURANT LIMITED

AND IN THE MATTER OF THE WOLSELEY RESTAURANT PROPERTY LIMITED

AND IN THE MATTER OF THE DELAUNAY RESTAURANT LIMITED

AND IN THE MATTER OF THE DELAUNAY PROPERTY LIMITED

AND IN THE MATTER OF THE COLBERT RESTAURANT LIMITED

AND IN THE MATTER OF BRASSERIE ZEDEL PROPERTY LIMITED

AND IN THE MATTER OF BRASSERIE ZEDEL LIMITED

AND IN THE MATTER OF FISCHER'S RESTAURANT LIMITED

AND IN THE MATTER OF BELLANGER RESTAURANT LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BE T W E E N :

MINOR HOTEL GROUP MEA DMCC

(a company incorporated under the laws of Dubai)

Applicant

- and -

BENJAMIN DYMANT AND ROBERT HARDING (JOINT MONITORS OF THE ABOVE-MENTIONED COMPANIES)

Respondents

- -

- -

Tom Smith QC and Paul Fradley (instructed by **Mishcon de Reya LLP**) for the **Applicant**

Stephen Robins (instructed by **Macfarlanes LLP**) for the **Respondents**

Hearing date: 4 February 2021

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Sir Alastair Norris :

1. The facts out of which the questions for determination arise lie within a small compass. The Corbin & King group ("the Group") operates eight restaurants in London and one in Bicester Village. The ultimate parent company of the Group is Corbin & King Ltd ("Topco"). Beneath TopCo in the group structure are two intermediate holding companies: and beneath them are eight operating or asset owning restaurant businesses. I will refer to the intermediate holding, operating and asset owning companies together as "the OpCos".

2. The majority shareholder in TopCo is MI Squared Ltd, a company incorporated in Thailand ("MI Squared"). The minority shareholders include Christopher Corbin and Jeremy King, from whom the Group itself takes its name.

3. Topco's working capital is provided by Minor Hotel Group MEA DMCC ("MHG") through (i) a £14.25 million facility due for repayment in May 2020 and (ii) a £20 million loan due for repayment in 2024 but with provisions for acceleration (together, "the Loan"). MHG is an associate company of MI Squared. (Both are subsidiaries of Minor International plc ("Minor International")). The Loan is secured by a debenture granted by TopCo over its assets (including its interests in the OpCos). The Loan is also guaranteed by each of the OpCos (those guarantees also being secured by a debenture).

4. TopCo failed to repay the £14.25m facility when due, which itself constituted an event of default under the associated £20m loan. Topco thereby became obliged to pay some £34 million to MHG forthwith. But MHG did not serve a notice of demand on Topco until about 19 months later, on the 19 January 2022.

5. As soon as MHG served its notice of demand on Topco in January 2022, Minor International received an offer from Knighthead Opportunities Capital Management LLC and Certares Opportunities LLC ("Knighthead") to acquire Minor International's direct and indirect interests in TopCo and the OpCos for a sum equal to the total amount of the Loan. (This was not the first such offer: but earlier offers are not relevant). This offer was therefore a proposal to MHG's parent to purchase debt and equity in TopCo for a consideration equal to the Loan (leaving out of account any other indebtedness of Topco). Minor International rejected this approach. On 25 January 2022 MHG appointed Mr Rowley and Mr Corfield of FRP Advisory to be the administrators of TopCo under Schedule B1 of the Insolvency Act 1986 ("the 1986 Act").

6. Meanwhile the directors of the OpCos were exploring whether it was appropriate to seek a moratorium under Part A1 of the 1986 Act in view of the exposure of the OpCos under their guarantees of the Loan to TopCo. Part A1 of the 1986 Act was introduced by section 1 of the Corporate Insolvency and Governance Act 2020 with effect from June 2020. According to the Explanatory Note to the legislation its enactment was intended to introduce greater flexibility into the insolvency regime by allowing the company in financial distress a breathing space in which to explore its rescue and restructuring options free from creditor action. The institution of such a moratorium requires a statement from the directors that in their view the company is, or is likely to become, unable to pay debts; and a statement from the proposed monitor that, in the proposed monitor's view, it is likely that a

moratorium for the company would result in the rescue of the company as a going concern.

7. The directors of the OpCos discussed the position with Mr Dymant and Mr Harding of Teneo Financial Advisory Ltd (as proposed monitors) and provided them with details of the Knighthead offer and with cash flow forecasts which showed that the Opcos were able to pay their ordinary trading debts when due. Mr Dymant and Mr Harding formed the view that the Opcos could be rescued as going concerns. On 20 January 2022 the directors appointed them as joint monitors of the Opcos under Part A1 of the 1986 Act. The following day MHG made demand of each of the OpCos under their guarantees, thereby making each of them immediately liable to pay £34 million to MHG (subject to the moratorium).

8. To pick up the narrative again from the appointment of the joint administrators of TopCo on the 25 January 2022, the next step was that on 26 January 2022 solicitors for Knighthead made a further offer. This time the offer was to the joint administrators of TopCo and was to purchase TopCo's direct and indirect interests in the OpCos from the joint administrators for

> "[a] consideration at least equal to the outstanding group debt (which we understand to be £33.3m due to [MHG], plus accrued and unpaid interest, £3.7m due to HSBC, £0.6m Value Retail debt facility and £0.3m Grosvenor debt facility. "

The terms of the offer made clear that Knighthead was prepared to work very quickly in order to produce a binding and unconditional offer capable of immediate acceptance by the joint administrators. The willingness of

Knighthead to proceed rapidly could not, of course, relieve the joint administrators of TopCo of their obligation to achieve the best price reasonably obtainable in the circumstances for TopCo's direct and indirect interest in the OpCos, possibly by conducting a full marketing process open to other parties known to be interested. The joint administrators have said in evidence that an orderly sale process would take "[a] few weeks" and in another place "weeks if not months". The solicitors for the Opcos also sent a letter to MHG pointing out that the same commercial result could be achieved through a restructuring plan under Part 26A of the Companies Act 2006. When Minor International, MI Squared and the directors of MHG learned of this offer they put the joint administrators of Topco on notice that if the joint administrators implemented this second Knighthead proposal, then they would face personal claims from those parties.

9. On 28 January 2022 MHG applied to the Court pursuant to sections A38 and A42 of the 1986 Act for orders terminating the moratoria on the ground that the failure of the joint monitors to terminate the moratoria had unfairly harmed MHG's interests.

10. Upon appointment and for the duration of the appointment a monitor must (under section A35 of the 1986 Act)

> "monitor the company's affairs for the purpose of forming a view as to whether it remains likely that a moratorium will result in the rescue of the company as a going concern. "

11. Under section A38 the 1986 Act

> "(1) The monitor must bring a moratorium to an end by filing a notice with the court if …(d) the monitor thinks that the company is unable to pay any of the following that have fallen due … (ii) pre-moratorium debts for which the company does not have a payment holiday during the moratorium…"

12. A "pre-moratorium debt" is defined in section A53 of the 1986 Act to include any debt to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium came into force. The debt created by MHG's demand on 21 January 2022 under the OpCo guarantees following the moratoria which commenced on 20 January 2022 is (it is agreed) therefore a "pre-moratorium debt".

13. The question then arises whether the MHG debt is one in respect of which the OpCos have a "payment holiday" under the moratoria. In general, a company which has invoked a moratorium is entitled to a "payment holiday" in respect of its pre-moratorium debts. But section A18(3) of the 1986 Act excludes from the category of debts in respect of which there is a "payment holiday"

> "(f) debts or other liabilities arising under a contract or other instrument involving financial services ".

Such contracts "involving financial services" are defined in paragraph 2 of Schedule ZA2 to the 1986 Act as including a contract for the provision of financial services consisting of lending. It is common ground before me that the contracts of guarantee between the OpCos and MHG are contracts involving financial services.

14. The exclusion of finance debts from the "payment holiday" effects of a moratorium is somewhat surprising: but is the clear meaning of the amended Act.

15. A noted commentator in this field, Professor Jennifer Payne, summarised the position thus in her article *'An Assessment of the UK Restructuring Moratorium'* (2021) Lloyds Maritime and Commercial Law Quarterly 454 at 464-465:

> "However, there are a number of pre-moratorium debts that are still required to be paid, including the monitor's remuneration and expenses … and amounts payable in respect of debts or liabilities arising under a contract or other instrument involving financial services. These carved-out debts will reduce the benefit of the restructuring moratorium in practice…
>
> There was discussion following the publication of the Corporate Insolvency and Governance Bill whether lenders would be able to use contractual rights to accelerate a loan during a moratorium. Acceleration of a bank loan would be likely to lead to the termination of the moratorium by the monitor given that the company would in almost all cases be unable to pay the accelerated liability. The accelerated debt would then acquire super priority status in a subsequent insolvency or restructuring procedure. The relevant provisions were debated at length in the House of Lords and amendments were introduced to the Bill. **As a result, it is clear under the Act that lenders can accelerate loans in the moratorium if they have the contractual right to do so, but that 'relevant accelerated debt' will not be a 'priority pre-moratorium debt' for the purposes of super priority in a subsequent insolvency or restructuring procedure. This means that for the moratorium to be fully effective the company will need to have the support of its lenders, and possibly enter into some form of waiver or standstill agreement with them. This potentially limits the benefits and widespread use of the restructuring moratorium.**" (emphasis added)

16. Mr Smith QC referred me to the debates and amendments mentioned by Professor Payne. The matter under review was a modification to the extent to which restructuring finance should be afforded super-priority in a subsequent insolvency. The amendments were spoken to by Lord Callanan in these terms:-

> "The amendments in my name do not prevent a financial services creditor exercising a termination or acceleration clause; nor do they remove the requirement that if the accelerated debt is not paid then the monitor must bring the moratorium to an end. **These are important provisions that will encourage lending to companies in difficulty and support the operation and stability of financial markets. The Government want to encourage financial services firms to keep lending to companies in distress. Including**

> **debts to these firms in the payment holiday concept could disincentivise them from doing so. That could leave some companies in a moratorium without the finance that they need to recover. In other words, it could jeopardise the very purpose of the moratorium in the first place**…" (Emphasis added)"

17. I do not need to refer to the debate in order to illuminate some ambiguity in the statutory language, which is clear. But it is useful to understand why sums due under finance contracts were excluded from the "payment holiday" provisions. The result is that the OpCos remained bound to pay the sums due under the guarantees as and when due for payment notwithstanding the moratoria. Although the OpCos were trading successfully, they did not and could not meet the demand for payment under the guarantees of the Loan they had given to MHG.

18. In that situation a monitor must bring the moratorium to an end if the monitor "thinks that the company is unable to pay" such a debt. This is a different question from the one that a monitor must answer when the moratorium is proposed and the one that the monitor must keep under review during the moratorium viz. "Is it likely that a moratorium will result in the rescue of the company as a going concern?". In the instant case the joint monitors did not bring the moratoria to an end, and they resist the application of MHG that the Court should order the termination of the moratoria under section A42(5) of the 1986 Act.

19. What the joint monitors "think" is set out in paragraph 83 of the witness statement of Mr Harding of 1 February 2022 (which adopts some internal definitions that are readily understandable from the foregoing account):-

> "83.2 The Monitors consider that it is likely that the [Opcos] will be rescued as a going concern and that it is likely that the [Loan] will be repaid in full in the reasonably near future as
>
> 83.2.1 the Proposed Transaction would result in the repayment in full of [the Loan] in the reasonably near future;…
>
> 83.2.3 the Bidding Parties are ….. very credible counterparties which will be able to complete the Proposed Transaction in a matter of days if the Bidding Parties' offer is accepted by the TopCo Administrators…
>
> 83.2.4 the offer of the Proposed Transaction sets an effective "floor" on any other offer which the Topco Administrators are able to accept .. As a result, any other offer accepted by the Topco administrators must also result in full repayment of the [Loan]…
>
> 83.2.6 the Topco Administrators will be required to complete any marketing process for the shares in the [Opcos] as quickly and efficiently as possible…
>
> 83.2.7 once that marketing process has completed, the negotiation, agreement and execution of agreements for the sale will occur very quickly;
>
> 83.2.8 …. the implementation of the Proposed Transaction is not reliant on the consent of the shareholders of Topco or any consent from [MHG]
>
> 83.2.9 based on our experience of the restaurant market and the potentially damaging effects of an administration… any sale process will be assisted by the [OpCos] remaining as going concerns which we expect will be a positive factor for bidders".

20. This reasoning was reinforced by the emergence on 3 February 2022 of a yet further Knighthead offer (attached to Mr Robins' skeleton argument). This advanced a time-limited cash offer of £45m for the Topco interests and (independently) offered an interim funding arrangement under which Knighthead would refinance the existing debt on a short-term basis on similar terms but at a significantly lower interest rate in order to allow sufficient stability for an orderly sale process to be undertaken by the Joint Administrators. This was the first direct offer to repay the Loan due from TopCo (as opposed to an offer to purchase assets the proceeds of sale of which could be used to repay the Loan).

21. In its evidence in response MHG took a number of legal points (to which I will immediately turn) but made clear that it wished to appoint administrators of the OpCos because it had lost confidence in the directors of the Opcos and wished to bring them under the control of professionally appointed and independent administrators, with the potential benefit of having the same administration team in control both of Topco and of the Opcos. MHG did not suggest that the Loan would be repaid earlier if the OpCos entered administration than it would if the Knighthead offer (or any other offer) was implemented: nor did it suggest that the continuation of the moratoria of itself jeopardised the Loan in any respect (the principal and accrued interest being fully secured).

22. In undertaking an analysis of the thinking of the joint administrators it is well to begin with two points of common ground. First, the duty to terminate a moratorium arises once the monitor "thinks" that a particular state of affairs exists. In Davey v Money [2018] Bus LR 1903 at [255] Snowden J considered the use of the word "thinks" in the context of paragraph 3(3) of Schedule B1 to the 1986 Act and said:-

> " [T]he use of the expression that the administrator "thinks" rather than, for example, "reasonably believes", is a clear indication that Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued, and that he is not lightly to be second-guessed by the court with the benefit of hindsight. In *Lightman & Moss on the Law of Administrators and Receivers of Companies* 6th edition (2017) paragraph 12-022 it is suggested… that the appropriate standard of review by the court should be one of good faith and rationality. This would mean for example that an administrator's decision not to pursue the first objective will only be open to challenge if it was made in bad faith or was clearly perverse in the sense that no reasonable administrator could have thought it was not reasonably practicable to rescue the company as a going concern. I agree with that approach…"

There was no suggestion of bad faith in the instant case: the parties agreed that the question was whether the thinking of the joint monitors produced a result that was clearly perverse, in the sense that no reasonable monitor could have reached it, and so was "irrational".

23. Second, the parties were agreed that if the monitor had applied the wrong test to the question for decision that was a strong (though not conclusive) indicator of irrationality.

24. I can now turn to the four points at issue.

25. First, Mr Smith QC argued that the question which the joint administrators had to ask themselves under section A38(d)(i) of the 1986 Act was whether the OpCos were able " to pay" the sums demanded of them under the guarantee: and they were not. That was an end of the matter. The moratoria ought inevitably to be terminated. Mr Robins argued that the statutory test involved a flexible and commercially realistic approach taking into account the circumstances as a whole, so that account must also be taken of the Knighthead offers.

26. I agree with Mr Robins, at least insofar as liability arising under guarantees is concerned. It would in my judgment be wrong to read provisions intended to introduce greater flexibility into the insolvency regime as requiring a focus solely upon the ability of the guarantor to pay the sum demanded under the guarantee and to ignore altogether the prospect that the guarantee liability itself might evaporate upon performance by the primary obligor of its repayment obligations. "To pay" means to meet, to satisfy or to discharge a *subsisting* obligation. I consider that it was in order for the joint monitors take into account

the ability of Topco to discharge the Loan and thereby relieve the OpCos of their liability under the guarantees.

27. Second, Mr Smith QC argued that the relevant question for decision by the joint monitors was whether (at the time the decision has to be made) the company "is" able or unable to pay the relevant debt. He accepted that "is" did not mean "is at this instant": so that, for example, some time must be allowed for the mechanics of payment. The tenor of his submission was that "is presently" was the meaning intended. He submitted, correctly, that there is nothing in the legislation about ability to pay in the "reasonably near future". In support of his argument, he relied on the provisions of Insolvency Rule 1A.24. This provides:-

> "For the purposes of deciding whether to bring a moratorium to an end under section A38(1)(d) the monitor must disregard.. (a) debts that the monitor has reasonable grounds for thinking are likely to be (i) paid or (ii) compounded to the satisfaction of the creditor within five business days of the decision …"

Thus, if there were no reasonable grounds for thinking the particular debt would be paid within five business days then a conscious decision had to be made in relation to it, taking into account that presumptively a debt payable in five business days is one that the company "is" able to pay. He pointed out that on the evidence the joint monitors did not in fact regard the OpCos as able to discharge their guarantee liabilities in respect of the Loan within five business days of any decisions taken by them.

28. Mr Robins contended for a wider reading of the word "is". He submitted that the exercise was not a mechanical comparison between liability and available cash at a given date, with an automatic termination of the moratorium upon the

failure to pay that presently due liability. He drew attention to the fact that in Part A1 of the 1986 Act the term "unable to pay its debts" has the same meaning as in section 123 of the 1986 Act: see section A54(1). The settled law on the interpretation of the cash-flow test in section 123(e) introduces an element of futurity summarised by Lewison LJ in Bucci v Carman [2014] BCC 269 at [27] in these terms:-

> "The cash-flow test looks to the future as well as the present… The future in question is the reasonably near future, and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business. The test is flexible and fact sensitive."

29. Mr Robins drew upon a supporting line of Australian authority (particularly Bell Group v Westpac Banking Corporation (No9) (2008) 225 FLR 1 at [1090]) to underscore that insolvency must be judged by reference to commercial reality, and it is not to be found simply from evidence of a temporary lack of liquidity. He also relied upon the observation of Trower J in Re Hat & Mitre plc [2020] EWHC 2649 at [106] that neither an insufficiency of cash to pay immediate liabilities nor the need to borrow to pay short-term liabilities is necessarily an indication of a present inability to pay debts.

30. The question to be addressed by the monitor is whether the company "is unable" to pay a presently due pre-moratorium finance debt in respect of which it does not have a payment holiday. That is not the same question as whether the company "is unable to pay its debts as they fall due" for the purposes of the cash-flow insolvency test in section 123 of the 1986 Act. As Mr Smith QC submitted, it is the requirement to consider debts "as they fall due" which

introduces the element of futurity. In BNY Corporate Trustee Services v Eurosail -UK [2013] 1 WLR 1408 at [25] the Supreme Court observed that the cash flow test opened up a wider range of enquiry than that concerning ability to pay a single debt:-

> "The range is wider because s.123(e) focuses not on a single debt (which under s 123(a) to (d) has necessarily accrued due) but on all the company's debts "as they fall due" (words which look to the future as well as the present)."

31. Further, it not the same question as whether the company is able to pay the debt within the reasonably near future.

32. The question is to be answered in relation to debts other than those reasonably likely to be paid within five business days (for they may be disregarded). But the "disregard" period provides an indicator of the sort of timescale against which the assessment must be made – something over five business days.

33. In my judgment a company "is able" to pay a presently due pre-moratorium finance obligation if (being itself unable to pay out of current cash resources) it has the immediate prospect of receiving third party funds or owns assets capable of immediate realisation. What is an "immediate" receipt or realisation is a matter of commercial judgment for the monitor (as to which the monitor is allowed considerable latitude) bearing in mind that anything over 5 business days requires specific assessment. This is not the test applied by the joint monitors (unsurprisingly, because the moratorium provisions are new and raise questions not previously arising under existing insolvency regimes, and in relation to which there is a strong temptation to transfer existing learning).

34. Of course, in the instant case none of the Opcos had the immediate prospect of receiving third party funds or owned assets capable of immediate realisation. The question facing the joint monitors was whether Topco had the immediate prospect of receiving third party funds or was able immediately to realise assets in order to repay the Loan and thereby relieve the OpCos of their liabilities.

35. This leads to the third issue. Mr Smith QC submitted that no monitor correctly addressing that question could have reached the view that, at the time the decision fell to be made, TopCo "was able" to pay the Loan so as to discharge the liability of the Opcos. Mr Robins contended that the assessment of the joint monitors was not "perverse". Events were so fast moving (and continued to move during and after the hearing) that a review of each decision made is of limited value.

36. The key decision was that of the joint monitors to resist the application of MHG for an order terminating the moratoria. As to that, I consider that the decision of the joint monitors fell on the wrong side of the line as being one which no reasonable monitor applying the correct test could have reached. The Knighthead offer was at that stage an offer to the joint administrators to purchase Topco's direct and indirect interests in the Opcos for a sum equal to the total indebtedness of Topco . It was obvious that the administrators could not immediately accept such an offer but would be bound to conduct a marketing exercise and open sale, and that that process made an immediate realisation impossible. This was not a case of a company having assets in its ownership and control of which it was freely able to dispose on whatever terms it chose in order to realise funds to discharge a debt then due.

37. On the other hand, the revised Knighthead offer of immediately available interim funding sufficient to replace the Loan (made on 3 February 2022) did offer the prospect of the immediate receipt by TopCo of funds sufficient to discharge the Loan (and relieve the OpCos of their guarantee liabilities). The joint administrators (rather to my surprise) gave the proposal a cool reception: but I have little doubt that an offer of secure interim funding for the duration of a thorough sales process could properly cause the joint monitors to "think" that the Loan was able to be repaid. Since the conclusion of the hearing I have been told of a yet further development; funds have in fact been tendered to MHG in repayment of the Loan.

38. The fourth issue is whether, if I reached the view that at some stage the joint monitors ought to have terminated the moratorium I ought now to do so by order. Both sides agreed that the court had a discretion under section A42(5) of the 1986 Act: and that the discretion fell to be exercised as at the date of the hearing in the circumstances then obtaining.

39. As at that date the harm relied upon by MHG was that it was prevented from exercising its rights (including its rights to appoint administrators, the consequence of which would be that the OpCos would have an effective "payment holiday", the matter of which MHG complains in these proceedings): but it did not suggest that the Loan was in jeopardy or that any accruing interest was at risk or that repayment within an administration would be speedier. Mr Smith QC submitted that if the court formed the view that at any stage the joint administrators ought to have terminated the moratorium, then the court ought to

do so upon an application, because otherwise the OpCos were obtaining a "payment holiday" which Parliament had decided they should not have.

40. As at that date the joint monitors thought that the Loan would be repaid in the very short term (given the offer of interim funding) and that the maintenance of the moratoria would lead to the saving of the Opco's as going concerns (that being the object of the moratorium). Mr Robins submitted that the focus of the court's attention should be upon MHG's rights as lender and upon its right to be paid, and not upon its commercial interests as an associate company of MI Squared or of Minor International. He also drew attention to the evidence of Mr Harding as to the impact upon value caused by placing restaurant businesses into insolvency.

41. I had decided to dismiss the MHG application, to allow the moratoria to continue until lapse, and to cast the burden upon the joint administrators to justify an extension in the event that repayment had not occurred by the time the moratoria expired. It is common ground that if the moratoria continue the OpCos are likely to be rescued as going concerns: MHG did not contend to the contrary but focussed its attack on the proposition that the joint monitors wee bound to terminate the moratoria. In the light of that I assessed the harm suffered by MHG *as creditor* to be less significant than the harm suffered by the Opcos if MHG was enabled to commence insolvency proceedings against them having regard to the fact (i) that each was trading successfully and (ii) that there was an immediate prospect of the Loan being repaid and their guarantee liabilities evaporating.

42. When completing final preparations for the hand-down of this judgment I was told that the Loan was in the course of being repaid and (from one side) that terms as to costs had been agreed. I invite junior Counsel to submit an order in whatever terms are agreed as appropriate in the light of this judgment and of events occurring during its preparation.