Neutral Citation Number: [2021] EWHC 2443 (Ch)

Case No: **BL-2021-000732**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **27 August 2021**

Before :

His Honour Judge Kramer sitting as a judge of the High Court

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Between :

(1) EMERALD PASTURE DESIGNATED ACTIVITY COMPANY **(2) EMERALD MOOR DESIGNATED ACTIVITY COMPANY** **(3) TRINITY INVESTMENTS DESIGNATED ACTIVITY COMPANY**	**Claimants**
- and -	
(1) CASSINI SAS **(2) GLAS SAS**	**Defendants**

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Daniel Bayfield QC and Matthew Abraham (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
David Allison QC and Ryan Perkins (instructed by **Allen & Overy LLP**) for the First **Defendant**

Hearing dates: **17–20th** and **27th August 2021**

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JUDGMENT

(transcript approved 3 September 2021)

His Honour Judge Kramer
Friday, 27 August 2021
(**11:20** am)

Judgment by **HIS HONOUR JUDGE KRAMER**

1. This judgment follows the trial of a Part 8 claim issued on 2 March 2021. By an order, dated 15 June 2021, Sir Anthony Mann, sitting as a judge of the High Court, ordered that both the trial of this action and the trial of a preliminary point as to jurisdiction be expedited.
2. In a judgment given on 16 July 2021, Zacaroli J ruled that the court had jurisdiction to hear the claim.
3. I heard evidence and argument on the substantive claim between 17 and 20 August 2021. The judgment requires expedition as there are proceedings in France, to which the claim is relevant, and which are to be heard in mid-September 2021 as well as an application which is listed on 3 September. Accordingly, I shall attempt to be as brief as possible whilst, nevertheless, seeking to ensure that my factual conclusions, self-directions of law and reasoning are sufficiently stated to enable the parties and anyone else considering the judgment to understand how I have reached my decision. Paradoxically, this can lead to a longer judgment as there has been little time for editing.
4. The claimants in this case are represented by Daniel Bayfield QC and Matthew Abraham and the first defendant by David Allison QC and Ryan Perkins. The second defendant is joined so that it is bound by the decision but has taken no part in the proceedings.
5. The uncontroversial background to the claim was set out by Zacaroli J in his judgment of 16 July 2021. In view of the pressure of time and the fact that I cannot improve upon what he said, I shall quote from his judgment. He said:

> "1. The claimants ('Emerald') are lenders, and the first defendant ('Cassini') is the borrower, under a senior facilities agreement dated 28 March 2019 ('the SFA'). The SFA is governed by English law and has an exclusive jurisdiction clause in favour of English courts.

2. By the claim, Emerald seeks declarations concerning Cassini's obligations under the SFA to provide information to the agent under the SFA ('the agent'). The second defendant was until recently the agent but has now been replaced by GLAS SAS.

3. Cassini is subject to French insolvency proceedings ('the Sauvegarde') opened on 22 September 2020, a form of debtor-in-possession and safeguard proceedings for a company in financial difficulties that wishes to propose a restructuring plan to its creditors. These are main proceedings under the Recast European Insolvency Regulation, (EU) 2015/848 ('the 'Recast Insolvency Regulation'), which continues to apply in the UK in respect of the Sauvegarde, because it was commenced prior to 31 December 2020.

4. On 27 October 2020 the agent (acting on the instruction of the majority lenders, as defined under the SFA) requested from Cassini information and access to books, accounts, records and the management of the group. Cassini refused to comply contending that the effect of the Sauvegarde as a matter of French insolvency law is to render its obligations under the SFA unenforceable.

5. Emerald (which acquired commitments under the SFA after the commencement of the sauvegarde) is concerned that Cassini will propose a restructuring plan that favours the shareholders over the creditors. It wishes to obtain the information requested by the agent because, without it. it will not be able to put up meaningful resistance for the restructuring proposal."

(I omit paragraphs 6 and 7)

<u>The relevant terms of the SFA.</u>

8. Under the SFA the lenders made available to Cassini a term loan facility and revolving facility in an aggregate amount of €573 million together with an (undrawn) incremental facility of €114 million. Only the provisions relating to the provision of information are relevant for present purposes.

9. Clause 26.7 of the SFA provides.

"'The Company shall supply to the Agent ... (d) promptly on request, such further information regarding the financial condition, assets or operations of the Group and/or any member of the Group as any Finance Party through the Agent may reasonably request.'

10. Clause 28.25 provides:

"If an Event of Default is continuing, each Obligor shall, and the Company shall ensure that each member of the group will permit the Agent and/or Security Agent and/or accountants or other professional advisers and contractors of the Agent or Security Agent, free access at all reasonable times and on reasonable notice at the risk and cost of the Obligor or company to (a) the premises, assets, books, accounts and records of each Obligor and (b) meet and discuss matters with management."

11. An 'event of default' includes the commencement of the Sauvegarde."

(Although Mr Allison at one stage questioned whether that was the case, in fact the contract provides for a large number of events to be treated as an event of default, and sauvegarde is one of them. That is specified within the contract, it is part of the definition clause in the contract.)

<u>The claim.</u>

12. By its Part 8 Claim Form dated 2 March 2021, Emerald contends that, although there is under French law a prohibition and automatic stay on claims aimed at payment of a sum of money by Cassini or the termination of a contract for non-payment of a sum of money (the 'French Moratorium') the opening of the Sauvegarde did not alter or affect Cassini's obligations under clauses 26.7 and 28.25 of the SFA.

13. In the prayer for relief in the Claim Form, Emerald seeks the following declarations:

"(1) A declaration that clauses 26.7 and 28.25 are valid and binding obligations of [Cassini] and are capable of enforcement as against [Cassini].

(2) A declaration that the October Request was a valid request pursuant to the terms of the SFA and complies with clauses 26.7 and 28.25 of the SFA.

(3) A declaration that [Cassini] is in breach of clauses 26.7 and 28.25 of the SFA."

14. Although no defence has yet been served, Cassini has not suggested that there is any defence to the declaration sought other than one based on the impact of French insolvency law. This is reinforced by the submission of Mr Handyside QC (who appears for Cassini with Mr Perkins) that but for the question as to the effect of French insolvency law on the obligation to provide information, there would be no basis on which the court could grant declarations, since there would be no issue between the parties: *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, per Aikens LJ at [120].

15. As to that question, it is Cassini's position that, under French law:

(1) Since the characteristic performance of the SFA is the loan of funds, which has already occurred, the SFA is not a "current contract" (within the meaning of Article L.622-13 of the French Commercial Code); and

(2) Since the SFA is not a "current contract" it is no longer enforceable (see paragraph 29 of the first witness statement of Mr Marc Santoni). Only the underlying debt subsists, which must be paid by way of dividends in the French insolvency proceedings (see paragraph 31 of Mr Santoni's first witness statement).

16. Emerald disputes that French law has such effect. If this claim is permitted to proceed, it will fall to be resolved by reference to expert evidence on French law."

6. That is the introduction supplied by Mr Justice Zacaroli.

7. The requirement for the court to identify the French law applicable to safeguarding proceedings, and its impact on the loan contract, arises from the fact that it is common ground, at least for the purpose of these proceedings that, by virtue of the Recast European Insolvency Regulation (EU) 2015/848, the safeguarding proceedings must be recognised by the English courts and, by virtue of Article

7.2(e) of the Regulation, the law of the state of the opening of the insolvency proceedings determines the effect of the insolvency proceedings on current contracts to which the debtor is a party. The Regulation applies because the safeguarding proceedings are main proceedings under the Regulation and were opened prior to 31 December 2020 and are thus caught by the transitional provisions governing the UK's departure from the European Union.

8. Following Zacaroli J's judgment, this court had jurisdiction to adjudicate on the claim. On 23 July 2021, the first defendant, at his direction, set out a pleading in which it set out the principles of French law upon which it relied. More recently it served evidence which goes to an issue as to whether the court should exercise its discretion to grant declaratory relief.

9. There are two questions I have to determine. They are:

   (a) what is the French law as to the enforceability of the information provisions in the loan contract where safeguarding proceedings have been commenced after the creditor has paid over the loan monies? "Issue 1"; and

   (b) if the first issue is decided in the claimants' favour, should I exercise my discretion to grant declaratory relief in the form sought? "Issue 2".

10. I have read the expert reports of Dr Reinhard Dammann for the claimants and Professor Michel Le Corre for the first defendant as to the content of French law and have heard their oral evidence. There was no joint statement as to the matters of agreement and disagreement due to the lack of time.

11. I have also read the witness statements of Richard Charles East dated 18 June 2021 for the claimants, Marc Santoni dated 10 August 2021 for the first defendant, and a witness statement in response thereto from Saam Golshani of 16 August 2021. By agreement of the parties, these witnesses were not subjected to cross-examination, and I was invited to give such weight as I considered appropriate to their evidence when considering the discretion question. In the event,

there was limited reference to the contents of their statements in either party's opening or closing argument.

Issue 1:

12. Before considering the evidence and argument on this issue it is important to set out the context, particularly for those who are not acquainted with English law. English courts treat foreign law as a matter of fact to be proved by the party basing their claim or defence upon it; Dicey, Morris & Collins, 15th edition ("DMC"), chapter 9-02 and 9-025. Save in the case of limited exceptions which do not apply here, English courts do not take judicial notice of foreign law so it must be proved in each case; DMC chapter 9, paragraph 4. Generally foreign law is proved by expert evidence. The text of foreign enactments, decisions and books of authority can only be placed before the court as part of the expert evidence. DMC chapter 9, paragraph 13. Legal practitioners practising in the foreign country and academic lawyers specialising in the law of that country are competent, that is to say able to give admissible evidence in this field; DMC, chapter 9, paragraph 14. Where the evidence of each party's expert witness conflicts as to the effect of the foreign source of law, the court is bound to look at the sources to decide between the conflicting testimony using its own intelligence as on other questions of evidence: DMC, chapter 9, paragraphs 16 to 17.
13. Dr Dammann and Professor Le Corre provided me with an overview of the French legal system which it is necessary for me to record to give context to those unfamiliar with French law. My description of the system can be treated as my findings of fact taken from the evidence I received from these two experts. The law governing business entities is the French Commercial Code. Case law is not binding in the same way as it is in this country. As a matter of practicality, however, where the Court of Cassation, France's highest court, makes a decision on a particular point, the lower court will know that it faces censure if it rules differently.
14. 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.

15. There is a disagreement between Dr Dammann and Professor Le Corre concerning the court's ability to create case law. The latter says that this happens infrequently and in such a situation legislation subsequently enshrines or overrides case law introduced by the courts. Dr Dammann accepted that private law principles which are not expressly mentioned in the legal code are exceptionally applied by the courts but these will be derived from a global interpretation of the statutes and case law as well as overall legal principles which are reflected in the legal codes. He gave me an example as to how a general principle, similar to the English law concept that fraud unravels all, was derived by the Cour de Cassation by reference to a maxim from Roman law concerning the impact of fraud and express provisions of the French Code concerning contracts entered into due to violence or fraud.
16. This disagreement, however, is not central to the issue before me and does not require resolution, for the first defendant is not relying upon a piece of court-created law in defence to this claim.

<u>The statute law to which I was referred by the experts.</u>

17. The French insolvency regime is to be found in Articles L 620-1 to L 628-10 of the French Commercial Code. There is a safeguarding proceeding under the Code for companies which are not insolvent but face difficulties in respect of which they need a breathing space to restructure the

business. Article L 620-1 of the Code, which appears under the heading “TITLE II SAFEGUARDING” provides:

"A safeguard procedure is instituted and opened on the application of a debtor mentioned in Article L620-2 who, without being insolvent, shows proof of difficulties that he is not in a position to surmount. This procedure is aimed at facilitating the reorganisation 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 L626-29 and L626-30.”

18. On the opening of the proceedings, the court appoints a supervising judge whose job it is to ensure the rapid conduct of the procedure whilst protecting the interests present. The court also generally appoints a judicial administrator to supervise or assist the directors of the company. These are distinct roles. That is to say, supervision and assistance are separate types of appointment.
19. The company is referred to as a "debtor" in the Code.
20. The management of the company remains in the hands of the directors during the proceedings and the company operates as normal subject to specific restrictions. This is set out in Article L 622-9, which provides:

"The activity of the undertaking is continued during the period of observation, subject to the provisions of Articles L622-10 to L622-16."

21. The judgment opens an observation period of six months which can be renewed once and, exceptionally, twice: Article L 621-3. Thus, the maximum period of observation is one of 18 months. In this period, the debtor drafts a safeguarding plan which it submits to the court and the creditors' committees, if there is one, and creditors who are not represented by a committee are consulted individually. There follows a process by which the court can examine and, if appropriate, approve the plan.

22. In cases where there is an agreement between the debtor and the creditors, the plan could provide for writing off debt, debt for equity swaps and rescheduling of debt. In the absence of a creditors' agreement or in relation to a creditor who refuses the debtor's proposal, the court can approve a plan which binds the creditors, but all that plan can do is impose a uniform rescheduling of the refusing creditors' debts over a maximum period of ten years. That is to be found in Article L 626-12.
23. The observation period can come to an end in a number of ways. It may be that the debtor's difficulties cease and there is no need for a plan. In such a case, Article L622-12 provides that the court will end the proceedings on an application by the debtor. The debtor and creditors may come to an arrangement which does not require a court-approved plan. A plan may not be viable, in which case some other insolvency procedure such as liquidation may follow. Article L 622-11 provides for the period of observation to end where the court orders a winding up.
24. The Code makes provision for the debtor to enjoy certain protections during the safeguarding period. Article L 622-13, which Professor Le Corre regards as the key provision in this case, indeed he regards L 622-13, paragraph 2, as particularly key, states:

    "I. Notwithstanding any statutory provision or contractual clause, no indivisibility termination or rescission of a contract of ongoing performance may result merely from the opening of safeguarding proceedings.

    The contractual counterparty is required to comply with its obligations despite non-compliance on the part of the debtor with obligations pre-dating the opening judgment. Such non-compliance only confers upon creditors a right to declare their claims as liabilities.

    II. The administrator alone is entitled to require the performance of contracts of ongoing performance whilst giving the consideration promised to the contractual counterparty of the debtor. In light of the provisional documentation at their disposal, administrators must ensure whenever they require the performance of a contract that they hold the funds necessary to make any payments required thereunder. In the case of a contract under which performance or payment is staggered over

time administrators may terminate such contract should it become apparent that they will not have funds necessary to perform the obligations associated with the next instalment or performance or payment.

III. A contract of ongoing performance must be terminated automatically:

1. After notice to state a position with regard to the continuation of the relevant contract is served by the contractual counterparty on the administrator to which no response is made within one month. Prior to the expiry of such period, the supervising judge may shorten or extend such period for the administrator to state their position (but no extension may exceed two months).

2. In the event of non-payment in accordance with the provisions of Section II and in the absence of contractual counterparty's consent to continue the contractual relationship. In such a case the public prosecutor, the administrator, the creditors' representative or a controller may apply to the courts for an order terminating the observation period.

IV. At the request of the administrator, termination of the contract will be declared by the supervising judge should it be necessary for the purposes of safeguarding the debtor and should it not excessively prejudice the interests of the contractual counterparty.

V. Should the administrator not exercise their rights to continue any contract or should they put an end thereto in accordance with Section II or should termination be declared in accordance with Section IV, non-performance may result in an award of damages to the contractual counterparty, the amount of which must be declared as a liability. The contractual counterparty may nevertheless require the payment of excess sums paid by the debtor pursuant to the performance of their contract until such time as a ruling on damages is handed down.

VI. The provisions of this Article do not apply to employment contracts. They also do not apply to trust agreements (contrats de fiducie), save for agreements pursuant to the performance of which the debtor retains the use or enjoyment of goods or rights transferred to a trust."

25. This version of Art L 622-13 is taken from the translation set out in Professor Le Corre's first report and equates, though not verbatim, with the translation in the trial bundle. It is common ground that the reference to contracts of ongoing performance, elsewhere translated as continuing or ongoing contracts, means contracts in which the counterparty has yet to give performance. A contract which is not ongoing is one in which the counterparty has given the characteristic performance of the contract. It is also common ground that a contract of loan under which the creditor has advanced all the monies are due, as is the case here, is a non-ongoing contract even if the debtor is yet to make repayment. Article L 622-13 only applies to contracts which are ongoing at the date of the commencement of the sauvegarde proceeding.

26. The effect of this provision is that ongoing contracts cannot be terminated by the operation of a statutory or contractual termination clause which would be otherwise triggered by the safeguarding proceedings. It gives the administrator the discretion to require performance of such contracts although they must take reasonable steps to satisfy themselves that the debtor has sufficient funds to pay under the continued contract. For example, if the co-contractor is a supplier of materials to the debtor which it uses as part of its manufacturing process, it can be compelled to continue the supply notwithstanding that the supply contract contained a termination provision in the event of safeguarding.

27. Although the administrator is under an obligation to see that funds are available to pay for the goods delivered under the continuing contract, it is up to the debtor whether it pays or uses those funds for something else. Dr Dammann described the co-contractor's position in such a case as being unfavourable due to the risk of non-payment. Professor Le Corre says this provision does the contractual counterparties a favour as there will be no interference in the contract because the continuance of the contractual relationship is imposed upon them. It seems to me as a matter of common sense that Dr Dammann's assessment of the impact of the provision is more likely to be correct. The article prevents the co-contractor operating a contractual termination provision

designed to give it some protection from the debtor's economic difficulties and it compels it to continue to perform in circumstances where there is a real doubt as to whether it will be paid. It is notable that the judicial administrator does not take on the obligation to pay continued contracts which would give some comfort, they just have to take reasonable steps to ensure that the money is available. It also compels the co-contractor to perform even if the debtor had not complied with its obligations before the opening of the safeguarding proceedings. In relation to that non-performance, its remedy is limited to declare the claims as liabilities. Thus, as regards past default by the debtor, its remedy is limited to that open to creditors under non-ongoing contracts and yet it can be compelled to continue to perform.

28. The other provisions within the safeguarding regime which have an impact on contractual relations and which were explored in the hearing are at Article L 622-7, which provide in section 1:

"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 judgment opening the procedure that is not mentioned in [section] I of Article L622-17. These prohibitions do not apply to the payment of maintenance debts."

29. And Article L 622-21, which has been described as a moratorium on claims for debt, reads:

" I: The judgment opening the procedure suspends or prohibits any legal proceedings by all the creditors whose claims are not mentioned in section 1 of Article L622-17 and which are aimed at:

1. Sentencing the debtor to pay a sum of money.

2. Rescinding a contract for non-payment of a sum of money.

II. The judgment stops and prohibits as well any execution procedure on the part of these creditors, whether against chattels or real property, as well as any distribution that has not had an allocation effect before the judgment opening the procedure.

III. The time limits that are imposed on payment for forfeit or termination of rights are consequently suspended."

30. Article L 626-18 was also referred to in Cassini's statement of relevant legal provisions and indeed Professor Le Corre's report but it did not feature much in the argument. The article largely deals with repayment under a safeguarding plan.

31. The opening of the proceedings therefore stays or prevents any legal action seeking payment of a sum of money, rescission for non-payment of a sum of money, and enforcements over the assets of the debtor. It also prevents the payment by the debtor of pre-observation period debts. The remedy for creditors entitled to payment at the time the proceedings start is to send a declaration of their claims to the court-appointed administrator, that is Article L 622-24. The claim may be accepted or rejected by the administrator and, where there is a dispute, there is a provision for resolution by the supervising judge. The prohibition on the payment of pre-safeguarding debts is reinforced by Article L 654-8 which imposes a criminal sanction for contravention.

The expert evidence.

32. Dr Dammann was cross-examined in some detail as to his expertise. He has his own law firm in Paris and holds both German and French legal qualifications. He was head of restructuring at the Paris office of Clifford Chance for 12 years and was a partner at White & Case where he was made a partner in 1997. His area of expertise is insolvency law with an emphasis on cross-border insolvency and restructuring. He lectures at the Sorbonne on French domestic insolvency law and writes on that subject for a German audience. He is an affiliate professor at Sciences Po, Paris, having taught there since 2005. He delivers courses of 12 lectures on security laws and international laws.

33. My impression as to his expertise was that he was well qualified to provide an expert opinion as to French domestic insolvency law, both from a practical point of view, having been a practitioner in the subject at a high level for many years, and from an academic point of view. Mr Allison

suggested that I should doubt his expertise as, under cross-examination, he asked to see the legal texts about which he was being questioned. Far from indicating that he was lacking in knowledge, this seemed to me to indicate the care and precision he wished to bring to his evidence. Indeed, he demonstrated his practical and broad knowledge of the law when he was questioned about the information available to creditors who apply to be "controllers" under the safeguarding regime and thus party to all the information possessed by the judicial administrator. His immediate response, clearly born from practice, was that he advises his clients against such a course as under the Commercial Code controllers are prohibited from acquiring the assets of the debtor. It is not a criticism of his evidence that he did not cite the number of the relevant article at the time. The fact is that he was aware of its content and proved correct when Article L 642-3 of the Commercial Code was produced. His insight into the impact of Article L 622-13 on co-contractors obliged to continue contracts was a further indication of his practical experience in dealing with safeguarding proceedings.

34. Mr Allison criticised the evidence of Dr Dammann on the issue of controllers, suggesting that it was vague as to their rights. Having re-read the cross-examination of this point as a whole, it does not seem to me to be a fair criticism. He accepted that in certain circumstances, which were not explored with him, a creditor who becomes a controller may get more financial information about the debtor. The point he was making was that the function of the controller is not to obtain financial information for themselves but to assist the judicial administrator and the creditors' representative, called the "mandataire judiciaire," in procedural matters. That is entirely plausible given that they are sworn to secrecy, cannot exploit the information they gain to acquire the debtor's asset, and it would be contrary to the principle of equality amongst creditors to allow one of them to use their role as controller to obtain financial information for their own benefit, which is the very criticism that Mr Allison makes of the enforcement of the information provision of the loan agreement (albeit

there is a clear distinction there as to the information which would be provided pursuant to an agreement as opposed to a court process designed to treat creditors equally).

35. Dr Dammann also struck me as a most even-handed witness when answering questions, for example comparing his status and that of Professor Le Corre in the eyes of the Cour de Cassation. In contrast, when Professor Le Corre referred to the ability of a creditor to obtain information by becoming a controller, in a context in his first report in which he was setting out the creditor's options in this regard and the availability of information to them, he left out the consequences to the creditor of taking such course, thus giving the impression that it is a more valuable right than is the case. It was in cross-examination that he acknowledged the disability flowing from becoming a controller, commenting that the creditor has to take a strategic decision whether to pursue information as a controller or preserve its options to acquire assets of the debtor.

36. Both of these observations may stem from Professor Le Corre's experience as an academic lawyer as opposed to Dr Dammann's hands-on experience, but Professor Le Corre does say that he produces 50 to 80 opinions a year for lawyers dealing with undertakings in difficulty and like matters so he has considerable exposure to the legal practice. I see this as a small but certainly not conclusive indication that he was not as even-handed as Dr Dammann in his evidence.

37. Professor Le Corre is highly regarded in the field of French domestic insolvency law. He has written 11 editions of a very important, if not the standard, text on the subject. Dr Dammann accepted that he was someone from whom he had sought opinions in the past and was one of a small number of experts to whom people would go for an opinion on French law on insolvency, the others being Madam Perochon and Madam Saint-Alary-Houin. I have no doubt as to his expertise. His reputation, however, is only one factor to take into account. Mr Allison accepted that greater renown as an expert is not determinative as to who is correct. I have to analyse the argument and evidence presented to reach a conclusion on that issue.

38. I should say something about the manner of giving evidence. The experts gave evidence under very different conditions. Dr Dammann was in court and tended to give focused answers more directed at the question. This aided me not only in following his evidence but in asking for clarifications where I felt necessary. He was in a position to take visual cues as to whether I was taking in what he was saying and offer to give explanations.
39. Professor Le Corre gave evidence through an interpreter via a video-link which itself tends to discourage clarificatory questions from the judge. Several of his answers were quite long, as were some of the questions he was asked. His desire to explain his stance at length is understandable as, upon enquiry of the clerk, I discovered that his view of the court was only of the questioner, so he could not see the audience, i.e. the judge, he was seeking to inform. It seems that the conditions under which Professor Le Corre gave evidence were challenging and I make due allowance for that. Where he did not always answer the question he was asked or took a few questions to get to the answer, that was to a large degree a consequence of the practical arrangements for taking his evidence.
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 which provides:
"Contracts legally entered into have the force of legislation for those who have made them."
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.

43. I shall start with the evidence of Professor Le Corre as the burden of proving French law is on the first defendant as it relies upon it for its defence. In his first report, Professor Le Corre expresses the opinion that Article L 622-13 infringes the fundamental contractual right of the counterparty to put an end to the contract as they see fit. On any view, therefore, it is a derogation to the general rule, a matter he confirmed in cross-examination. He goes on to say, however, at paragraph 7(13), that in the case of a loan agreement which is a non-ongoing agreement, the exception comprised in the continuation of the contract ceases to apply and one reverts to the principle of Article L 622-13 which permits the exclusion of contract law to save the undertaking. This passage seems to treat Article L 622-13 as both the derogation and the general rule, which cannot be a basis for treating the information obligations in this case at an end.

44. This approach re-emerges at paragraph 52 of the report where Professor Le Corre says, when referring to Article L 622-13, and I quote:

"If the administrator must, in the context of continued contracts, give the promised performance, this amounts to admission a contrario that the promised performance need not be given in the case of a contract which is not continued."

45. As he accepted that *a contrario* reasoning can only apply to the exception, i.e. derogations, the fact that non-ongoing contracts are not referred to within the exception which enables the administrator to terminate or compel performance of ongoing contracts cannot lead to the conclusion that the absence of a reference to non-ongoing contracts means that all obligations thereunder cease on the start of safeguarding.

46. Professor Le Corre himself said in evidence that in applying an *a contrario* interpretation, it is necessary to identify what is the general rule and what is the exception. As he accepted in his evidence and much of his first report and paragraph 40 of his second report, Article L 622-13 is the exception. For example, at paragraph 14.6, he described it as a "double derogation" as the administrator can impose the continuation of, or terminate, the contract. The search for the general rule must lie elsewhere.

47. I would add that in paragraph 17 of his second report, Professor Le Corre describes Article L 622-13, section II, under which the administrator has the power to continue contracts, as reasserting the principle of the binding force of contracts where they are continued. Thus he seems to suggest that this is an expression of the '*pacta sunt servanda*' principle which would not be consistent with his double derogation point and, indeed, his acceptance in cross-examination that giving the administrator, a third party, the right to require performance of, or terminate, an ongoing contract derogates from the '*pacta sunt servanda*' principle. I should add that he supplemented that evidence by saying that the debtor has no say in the matter, it is up to the administrator. The law does not give the administrator the authority to represent the debtor in theory as part of the safeguard proceedings.

As part of the continuance of the contract the debtor is represented by the administrator. But he went on to say that it was as if when it came to continuing the contract the debtor had no authority.

48. Professor Le Corre said that there is erasure of the loan by the opening of the safeguarding proceedings. That is what he said in his first report. The lender will be paid in accordance with the terms of the plan, not as a matter of paying the loan but only the repayment of the debt resulting from such a loan. From this he concludes that, as the legislature had provided rules regulating how the lender's claim is to be repaid, there can be no question as to the continuation of the loan agreement. He relied upon an extract from the work of Professor Lionel Andreu, another legal scholar, at page 555 of the publication, '*Effets de Commerce et Enterprises en Difficulté'*.

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 performed 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 item 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.

51. Professor Le Corre relied upon the general proposition, from which Dr Dammann did not dissent, that there is a principle in French law that creditors will be treated equally. The grant of a right to the counterparty to continue to apply the terms of the contract he says is favourable treatment to that party which is authorised by the legislature, as is in the case of ongoing contracts. It is to be observed that this argument presupposes that parties to non-ongoing contracts have lost their rights to enforce the terms of the contract altogether. At all events, from this proposition he argues that it would be anomalous if a party to a non-ongoing contract had a contractual right to performance preserved following safeguarding, but a party to a continuing contract, which is terminated by the administrator, will lose their rights to performance. They will be restricted to damages for termination which they can declare in insolvency proceedings.
52. Apart from the work of Professor Lionel Andreu, Professor Le Corre was unable to point to any other scholarly text, including his own, in which it is said that safeguarding terminates non-ongoing contracts. His explanation for this, at paragraphs 63 and 64 of his second report, is that as his analysis demonstrates that upholding the continuing force of contracts during observation does not constitute the rule but the exception, it is not surprising that legal scholars do not refer to any rule holding that the '*pacta sunt servanda'* principle is not applicable to contracts which are not ongoing. He adds that no legal scholar has said that the maxim is applicable and he again relies on the extract from Professor Andreu's text.
53. Professor Le Corre's enthusiasm for relying on Professor Andreu seemed to wane after he was taken to a footnote in the text which Dr Dammann had explained supported the contention that contractual obligations in non-ongoing contracts survive safeguarding. Professor Le Corre did not dissent from

that explanation but he said that Professor Andreu was speculating and that he was a specialist in contract law and not a specialist in the law that applies to companies in difficulties. He said that Professor Andreu's book, the one that he had placed reliance upon in both his reports, was not necessarily the most relevant.

54. A number of authorities were referred to in the evidence of Professor Le Corre but I shall deal with those when discussing the parties' respective cases.

55. Dr Dammann in a sense had an easier task because his evidence was more based on the existing text. He said that the overarching principle is '*pacta sunt servanda*'. There is no statutory provision in the Commercial Code which provides that contracts which are not ongoing at the time of safeguarding are terminated or unenforceable. He gave examples of non-ongoing contracts which continue. He referred to contracts for the sale of goods with a retention of title clause. Where goods are delivered prior to safeguarding but not paid for they can be recovered post safeguarding, and this is recognised by Article L 624-16. Under that article the recovery is subject to the goods being in their original state at the commencement of safeguarding.

56. He also gave an example of the survival of contractual terms in a partnership agreement, which are treated as non-ongoing contracts, and shareholder agreements in private companies and trust agreements. He was cross-examined on the basis that the return of goods and property under trust agreements differed from the current case to the extent that there were proprietary rights present, but there was no challenge to the assertion that the entitlement to exercise those rights stemmed from a contract, the terms of which survived the safeguarding.

57. Dr Dammann described a regime in which the overarching principle applies but to which there are derogations. He pointed to the moratorium in claims for debt or rescission of the contract for non-payment, Article L 622-21, and pointed out that the moratorium does not encompass actions based on the violation of non-financial obligations; that is common ground between the parties.

58. He 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 obligation. 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.
59. Dr Dammann refers to Article L 622-7 which prohibits the payment of any claims arising prior to the commencement of the safeguarding but has been held not to prevent a creditor involving an early payment clause to pursue a guarantor. The decision of 12 June 2001 was relied upon by Dr Dammann -- and he relied upon a Versailles Court of Appeal decision of 28 February 2013 to support the contention that contractual terms triggering early payment were suspended during the execution of the safeguarding plan but no other terms.
60. He also gave, as examples of derogation, Article L 622-29, which deprives of effect a clause increasing a debtor's obligation due to the opening of insolvency proceedings, and Article 622-28, which renders ineffective interest clauses in contracts for a period of less than one year, but for a contract with longer term, interest continues to accrue although the article stops the capitalisation of interest. Professor Le Corre accepted that case law has accepted that lenders must benefit from the continued accrual of interest. Dr Damman referred to a number of cases in the Cour de Cassation which support his position.
61. Dr Dammann does not invest Article L 622-13 with the significance placed upon it by Professor Le Corre. He says that the French legislators provided for rules of derogation in respect of ongoing contracts and these are found in Article L 622-13. There was no need to state the obvious, which is that the general rules of French contract law otherwise apply. Thus, an *a contrario* interpretation of the article leads one back to the overarching rule that those contracts not provided for within the article remain strictly enforceable. He said that as the debtor has received the main contractual performance prior to the opening of the safeguarding proceedings and does not have to repay the loan during the safeguarding proceedings, there is no need for the article to apply.

62. Mr Allison relies upon certain things said by Dr Dammann in cross-examination which he says should lead me to doubt his evidence. Dr Dammann accepted that if there had been further instalments of the loan due to the debtor the contract would be an ongoing one. In such circumstances, if the administrator decided to terminate the loan agreement, the obligation to provide information would also terminate. Mr Allison says that this concession was forced from him because he did not accept the contention immediately. In fact, the point at which he disagreed with the proposition being put to him was when he was asked that if it was discovered that part of the loan was yet to be paid, his whole report would have to be rewritten to reach the opposite conclusion. Given that his report sets out the impact of the French law of safeguarding on this contract, it is difficult to see why that should change, causing him to rewrite his whole report if the loan is an ongoing one. I did not detect any prevarication in his response to questioning on this subject.
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.
64. In Mr Allison's closing skeleton argument he recites a short exchange with Dr Dammann in which he said, and I quote:

"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."

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.

68. Mr Allison also told me that this passage from Dr Dammann's evidence was an example of his implausibility, and he sought to build on that in his skeleton by suggesting that Dr Dammann had suggested that the Versailles Court of Appeal decision was wrong, although he had left it unclear on what basis that was the case. In fact, both in his report and in evidence he made it clear that he regarded it as wrong on one point, namely, that the court had refused to allow default interest, and he cited another Cour de Cassation decision which he said supported the making of such an award. He also explained in evidence why the error was not the subject of an appeal, it making no difference to the parties due to the difference between the amount of security that was still available and the level of the debt. The allegation of implausibility on these grounds is unfounded.

Discussion and conclusion.

69. I shall not set out the parties' contentions separately but will include them in my discussion as to the merits of the case.

70. I start with a number of uncontroversial propositions taken from the evidence.

    a. The general rule governing French contracts is that they are to be strictly performed; agreements are to be kept.

    b. In order to depart from the general rule, the law must provide for derogation.

    c. Where a fundamental principle like '*pacta sunt servanda*' is to be derogated from, the derogation and the extent of that derogation should be made clear. I take that from the evidence of Professor Le Corre on Day 2, page 81, lines 3 to 7.

    d. The purpose of having a Code is that one finds the rules set out clearly. Again, this is from Professor Le Corre's evidence on Day 2, page 81, 8 to 10 of the transcript.

e. The purpose of the provisions in the Commercial Code for companies in financial difficulty is to give them a breathing space and to reorganise so as to preserve jobs, the business and protect the interests of the creditor in that order.

f. The Code provides that the activity and the undertaking is to continue during the period of observation subject to the provisions of Article L 622-10 to 622-16.

g. Under the Code, the estate of the debtor is protected by the moratorium on proceedings with claims for payment or terminating the contract for breach; thus it is a derogation from the '*pacta sunt servanda*' rule and does not apply to obligations to provide information.

h. The estate of the debtor is further protected and it is not permitted to pay pre-safeguarding debts. This restriction also does not relate to non-monetary performance.

i. The loan agreement in this case is a non-ongoing agreement.

j. Article L 622-13 refers to ongoing but not non-ongoing agreements.

k. There is no textbook of French law which says that non-ongoing contracts terminate upon the commencement of safeguarding proceedings or, indeed, that non-monetary obligations cease to be enforceable.

l. *A contrario* interpretation can be applied to exceptions to the rule but not the rule itself. The effect of applying such reasoning is that a state of affairs not referred to in the exception is governed by the general rule.

71. I now turn to the more contentious evidence. The text of Professor Andreu does postulate that contract terms in a non-ongoing loan contract survive the commencement of safeguarding. Whilst Professor Le Corre passed this off as speculation from someone who is not an expert in domestic insolvency, the fact is that he thought Professor Andreu was of sufficient stature to place reliance upon his work in his report. As this appears to be the only scholarly work on the subject, that is some evidence supporting the claimants' case, albeit not of great weight given that it is contained in

a footnote and not fully argued; it is some, but only slight, support. What is clear, however, is that Professor Andreu's work does not support the first defendant's case.

72. There is a dispute as to whether any of the authorities support the contention that safeguarding terminates a non-ongoing contract. I have been shown none which says so in terms.

73. There were three cases relied upon by the first defendant in their pleading in which they set out the principles of French law upon which they relied and the Professor Andreu text to which I have already referred. It is clear from the text of the pleading, that is to say the first defendant's pleading concerning the law, that it was prepared in consultation with Professor Le Corre.

74. The first case was a decision of the Cour de Cassation dated 10 May 2000 where the issue was whether the appellants could rely upon arbitration clauses in particular contracts. The courts found that they could not because, as part of the safeguarding plan, the contracts had been terminated. Professor Le Corre was asked whether, in light of that, the case was not authority for the proposition that non-ongoing contracts were *caduc* on the opening of safeguarding proceedings and he agreed. He said the case was irrelevant. Notwithstanding the lack of relevance, the case is also dealt with in some detail and relied upon in Professor Le Corre's report.

75. The second case was a decision of the Cour de Cassation dated 9 December 1997 where a bank was held to be entitled to rely on a contractual right of set off in the context of a non-ongoing loan contract. The fact that the term of the set off survived the safeguarding proceedings is some evidence that French law does not regard such contracts at *caduc*. Professor Le Corre accepted that the court allowed the bank to rely on the set off but added that the liquidator, who was opposing the claim to set off, had not argued that the contract was *caduc* and courts in France only deal with the arguments placed before them.

76. The professor has not always been consistent in his commentary on this case. In his first report, he claimed that this case was one in which the Cour de Cassation unambiguously refused to apply a clause in a loan agreement which was not an ongoing contract. This mirrors the summary of the

case in the pleading as to French law and is clearly wrong. His first response to questioning about this case was that the court had rejected the liquidator's case that this was not an ongoing contract to which Article L 622-13 applied, so the contract could not be terminated for failure to execute (perform). For that reason, there was no need to find a remedy for non-ongoing contracts. I observe that there was a remedy, however, namely the ability to rely on the contractual set-off.

77. Mr Bayfield says that this case supports the claimants' case, not just because the court permitted a reliance on set-off, but also because if Professor Le Corre was correct and the court produced this decision as a result of no one taking the *caducité* point, it would be a remarkable oversight on the part of the lawyers in this commercial litigation that the argument had been overlooked. He makes the further point that this is a published decision, the significance of which is that the court directs the publishing of decisions it sees as important guides to the law.

78. The third case is a decision of the Court of Appeal of Versailles dated 28 February 2013. The case concerned two companies called HOLD and DAME LUXEMBOURG in the judgment. They entered into safeguarding in November 2008. Safeguarding plans were approved on 9 September 2009. This was appealed on 21 October 2009 which had the effect of suspending the plans. The appeal was later to be found irrelevant because, on 25 February 2010, the Court of Appeal set aside the opening of the safeguarding proceedings, but that order was quashed by the Cour de Cassation on 8 March 2012, leaving the safeguarding proceedings and plans in place subject to the earlier appeal.

79. In the course of the appeal, it was argued that the court could not approve a plan postponing the due date for payment of a loan from 20 July 2012 to 10 July 2014 because that could only be done by the debtor under conditions set out in the contract which had not been met. These were translated from the French as "formal and substantive conditions". The argument failed.

80. At this point it is necessary for me to refer to the judgment. Much was said as to how the interpretation of the judgment should be viewed. The argument which the court was meeting is to

be found on internal page 8 of the judgment where it was said that the court could not, in 2009, postpone the due date of the loan from 10 July 2012 to 10 July 2014 whilst this extension was only possible contractually under formal and substantive conditions that were not met.

81. Later on, at internal page no.19, the court refers to the provisions of Article L 626-18:

"It follows from the provisions of Article L626-18 that with regard to creditors who will not accept the proposal for the settlement of liabilities, the court can only impose uniform payment deadlines. These provisions limit the power of the court called upon to adopt the safeguard plan. Anything beyond these limits constitutes an excess of power."

Reading on at page no. 20, it is said:

"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 contractual parties must respect the contractual obligations as they have been agreed.

It is not the case with a loan agreement.

A loan contract is executed by 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 safeguarding and 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 they determine within the ten-year limit provided for by Article L626-12.

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 for the plan's instalments."

82. Great weight was put on this passage. " It also results in the terms of the loan being suspended during the execution of the plan."

83. Later on, the court said in relation to interest at page no. 21:

"By application of the provisions of article L622-28, the plan must also provide for the payment of interest resulting from the loan contracts concluded for a period equal to or greater than one year once this interest has been declared...

The methods of calculating interest cannot be changed. In this particular case, the variability of the rate must be applied in accordance with the contractual stipulations. On the other hand, late payment interest is not due because the additional payment period results from the plan."

That is the part of the decision which Dr Dammann disagreed with.

Going on:

"…The opening of the safeguard proceedings does not make the loan payable and does not have any consequences on the fact that the loan is re- payable *in fine* on the dates indicated above. The plan must respect the due dates agreed between the parties in the sense that it cannot impose 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 substantive conditions under which HOLD can postpone this date of 10 July 2013, and then 10 July 2014, have not been met. 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 safeguarding proceedings, nor against the court having to adopt the safeguarding plan."

84. Mr Allison says that this is the only case looked at containing any relevant reasoning and support for Professor Le Corre's position. In his first report, the professor had said that the court clearly ruled that the adoption of the plan has the effect of suspending the performance of the contractual provisions relating to the maturity of the debt and that, by implication, it was also stating that the opening of the safeguarding proceedings has the effect of suspending such provision; page 18 of the report. On page 19 he says that the reference to formal and substantive terms of the loan agreement includes the information provisions, but he does not explain the link.

85. Dr Dammann, who represented certain creditors in that case, said that the decision was that the court found that certain contractual obligations of a loan agreement which are totally incompatible with the court-imposed plan are suspended for the duration of the plan but not all clauses, including those relating to the provision of information. Dr Dammann also did not agree with Professor Le Corre's view that it was implicit in the ruling that what was said about suspension of contractual terms during the operation of the plan applied during the observation period. Dr Dammann said that to reach that conclusion he must be arguing by analogy but the observation period is different to the period of the plan, so an *a contrario* approach is correct or should be applied.

86. In relation to Professor Le Corre's point that the reference to the suspension of terms may be a reference to all terms, not just those about which the argument was made, I asked him why this was in the light of his previous evidence that the court will not decide a point that was not argued. He accepted that the argument had been limited to the formal and substantive terms as to the maturity of the debt, but the response of the Court of Appeal he said could be interpreted in a wider way. He asked rhetorically: why would the court distinguish between the regime applicable to formal and substantive terms relating to a maturity date or other formal and substantive terms? That was not, however, an answer to my question, and it seemed to me designed to overcome the inconsistency in this part of his evidence on the subject.

87. Indeed if one looks at pages 18 and 19 of his first report, it can be seen that on the former he stated the court was ruling on terms relating to suspending the terms as to maturity and it was these terms which were also suspended during the observation period, but over the page he extends that to the information terms saying, *"this renders it beyond doubt that information provisions were not enforceable,"* albeit that he seems to base his conclusion on a highly debatable interpretation he placed on the words of the court and would involve a departure from the practice, which he himself says the court follows, of only dealing with the arguments placed before it.

88. I prefer Dr Dammann's explanation as to the effect of the Versailles case, not just because he represented some of the parties and thus has inside knowledge, particularly as to default interest, but largely because what he says follows from the wording of the judgment. The court would not need to identify the types of terms covered by the suspension if it had meant all terms. And I refer to the words of the court when talking of suspension where they say:

> "It also results in the terms of the loan being suspended during the execution of the plan. This is the case for sureties and early repayment clauses, clauses providing for cases of default and LTV and ROIC ratios should be respected."

There would be no need to spell that out if they were simply saying every term was suspended.

89. I also accept what he says of the observation period and the period of the plan not being analogous. During the former there is a unique set of rules to be followed to be found in Article L 622, and by virtue of Article L 622-9, the undertaking continues subject to provisions of Articles L 622-10 to L 622-16. Amongst the strictures is the prohibition on the payment of pre-safeguarding debts, pursuing claims for such debts against the debtor, and the option for the administrator to continue or terminate ongoing contracts. Once the plan is in place the undertaking continues subject to the arrangements set out in the agreed or approved plan.

90. There was also a supportive case produced by Dr Dammann, that being the decision of the Cour de Cassation dated June 2001. Before looking at that, I also note that in relation to the period of the

plan the court did not say that the loan contract was terminated, erased or *caduc*, the expression it used as regards the formal and substantive conditions was that they were suspended. The argument that a non-ongoing contract becomes *caduc* upon the commencement of safeguarding is not consistent with the terms being suspended at the plan stage, which presupposes that the contract remains in existence.

91. The Cour de Cassation decision of 12 June 2001 concerned a claim against the joint guarantors of a five-year loan which had been paid to a company which entered into insolvency proceedings. The loan contract provided that the lender could forfeit the term, thereby accelerating payment of the balance due, that is the balance due and unpaid, where there was a default of payment. The court upheld the decision of the Court of Appeal, ruling in favour of the lender on the basis that the forfeiture of the term had occurred not because of the opening of the insolvency proceedings but by the application of stipulations in the contract after the opening of the insolvency proceedings.
92. Dr Dammann relied on this case as demonstrating that non-ongoing contracts, even terms relating to acceleration of payments, survive the opening of insolvency proceedings because that is what happened in that case, notwithstanding that the debtor had protection from enforcement. Professor Le Corre said, in his second report, that the decision was not relevant as it related to a relationship between a creditor and guarantor and that it did not reflect the current law as set out in a decision of the Cour de Cassation of 8 June 1993 and a decision dated 16 June 2016. In evidence he supplemented his reasoning, adding that the decision was not published, thus, cannot have been thought by the court to be a decision of significance.
93. I elicited from him that if the Cour de Cassation or a court is dealing with a point of law which appears in no textbook and no previous decision of the court, you would expect the court to publish it where it entailed a clear principle. He also relied upon the fact that the *caducité* of the contract had not been argued before the court. Mr Allison relies upon these reasons as undermining the relevance of this case and Dr Dammann's reliance upon it.

94. Dr Dammann was asked about the fact that the case concerned a guarantee and not the debtor. He accepted that a claim against the guarantor does not deplete the assets of the debtor and he did not know if anyone had pleaded that the loan contract could not be enforced due to the insolvency proceedings. The point remains, however, that in order to trigger the guarantor's liability the forfeiture clause had to be invoked, and this was done at a time after the opening of the proceedings. Thus there is support in this decision for Dr Dammann's stance.

95. As to the question of non-publication, it seems that if this case decided some clear point of principle it would have been published. The fact that it was not is an indication the court did not consider the survival of the contract, and thus the forfeiture clause, as remarkable. Whilst it is correct that there is no evidence that the *caducité* argument was raised, I accept Mr Bayfield's point that if what Cassini calls its “enforceability principle”, namely, that non-ongoing contracts terminate on safeguarding, was a well-known part of French insolvency law and so obvious that it is not even referred to in textbooks, one would expect it to be raised in a case such as this, as would have been the case in relation to the decision relating to the set-off looked at earlier. Is it credible that there is such a blind spot concerning this in French legal circles? This too points to supporting Dr Dammann's analysis of the case. What of the cases relied on by Professor Le Corre as contradicting this decision?

96. The first case is dated 8 June 1993. Dr Dammann said in cross-examination that the case was not relevant for present purposes. He recited the facts of this case which concerned an insurer, SFAC, which had guaranteed the debts of Courta, the debtor. The insurance contract provided for the insurer to serve a notice of non-payment of premiums which would bring the obligation to indemnify to an end. Insolvency proceedings were opened against the debtor after which SFAC sent a letter for the payment of premiums as a precursor to forfeiting their liability. In an action by the liquidator of the debtor for payments under the policy relating to pre-commencement debts, SFAC

argued it was not liable due to the forfeiture of the guarantee due to non-payment of the premiums demanded in their pre-commencement letter.

97. The court held that SFAC could not rely on the letter to avoid its obligations as, on the opening of the insolvency proceedings, the moratorium prevented payment of pre-proceedings debts, thus the insurer could not rely upon such non-payment to forfeit and it was for that reason that the notice did not have its contractual effect. The insurer had to pay. Dr Damman explained that this was an example of the co-contractor trying to get out of its obligations as a result of the opening of proceedings; it did not look at the secondary obligations of the debtor. He said the other case relied upon by Professor Le Corre contained a similar distinction.

98. The second case was an attempt by URSAFF, which provides insurance for social security claims, to refuse to provide to the debtor a document certifying the payment of insurance contributions in the observation period on the basis that it had not paid contributions prior to the start of the safeguarding proceedings. It seems the certificate was needed in connection with the renewal of a public works contract. The Cour de Cassation held that the certificate had to be delivered as Article L 622-7 prohibited the payment of pre-observation period debts so that the contributions payable before that time were no longer payable.

99. Professor Le Corre did not dissent from Dr Dammann's description of these cases. It is clear from what Dr Dammann said that not only do they not show that the decision of 8 June 1993 was wrongly decided, but they explain why. There is nothing in the four points relied upon by Professor Le Corre for challenging the relevance of that decision to the issues in this case and I prefer Dr Dammann's evidence on this point.

100. Mr Bayfield relied upon two further cases of the Cour de Cassation dated 5 May 2021 and 7 October 2020. Both involved claims by borrowers who had entered into loan agreements with a bank to finance the purchase of solar panels. In order to escape the loan agreement, they needed to have the sales contracts annulled. The basis upon which they claimed to be entitled to annul is not

apparent from the judgments. The sellers went into receivership. Professor Le Corre accepted that Article L 622-13 applies in such a case. Nevertheless, the purchasers were held able to have the contracts annulled post the commencement of the insolvency procedure (as its opening only prohibits legal actions for the payment of money) or termination of the contract for non-performance. These cases indicate that the contracts continued beyond the start of insolvency for otherwise they could not subsist so as to be annulled or terminated. When asked to consider these points in relation to the May 2021 case, which he accepted was similar to the October 2020 decision, Professor Le Corre said that if the contract had been performed by the purchasers, i.e. they had paid, this would be a non-current contract, but he questioned whether they had performed as this was not stated in the decision.

101. Mr Bayfield argues on that factual point that the overwhelming likelihood is that the payment had taken place due to the timings of the contract and the hearing -- there was a substantial time lag between the two -- the fact that the payment under the contract was made by the bank, whose contract of loan the purchasers were trying to escape, and they were seeking a restitution of sums paid to the bank. Having regard to these matters, Mr Bayfield is probably correct and these were non-ongoing contracts which were capable of being annulled as they continued to exist beyond the start of the insolvency proceedings.

102. It follows from my review of the authorities relied upon by the first defendant and claimants that they do not support the “enforceability principle” propounded by Cassini, and several of them support its absence. Against that background, I look at whether, as the first defendant claims, it can be shown to exist by the application of general principles of French law. It is important to record that it is not my task to act as a French judge, analysing and interpreting the French law and how it ought to be developed for myself. My role is limited to finding as a fact what is the French law on the enforceability of the information provision in this contract based on the expert evidence that has

been placed before me, which, for practical purposes, is a question of deciding between the two of them who is likely to be correct.

103. Mr Allison says that I should prefer the evidence of Professor Le Corre, as Dr Dammann's analysis would lead to implausible consequences, his oral evidence and an analysis of the authorities and academic writings. I have dealt with the latter, that is to say the authorities and academic writings, and these clearly favour the claimants' contention and thus support Dr Dammann's opinion.

104. The implausible, probably more correctly termed incongruous, consequence of Dr Dammann's analysis is that, in the case of a non-ongoing loan contract, the counterparty can enforce secondary terms, or terms with no bearing on the payment and payment dates, whereas in the case of a continuing contract which cannot be terminated in consequence of the start of insolvency proceedings but which is terminated by the judicial administrator, they cannot. Of course, if the contract is continued, so will its terms. Professor Le Corre argued that this consequence would be contrary to the purpose of safeguarding, that being to save jobs and the business, and protecting creditors. He also argued that it would be absurd if there was a different regime for the suspension of contracts in the observation period and the operation of the plan.

105. As regards this last point, absurd or not, there clearly are different regimes of protection in force in the observation period and during the running of the plan. The latter would not work at all if the debtor was subject to the protections afforded it during the observation period. Indeed, I cannot see where the absurdity is said to lie. The undertaking is to continue operating but subject to the restrictions relating to the observation period which, in a broad sense, are directed at ensuring it keeps its cash and assets and retains the benefit of third-party contractual obligations which it needs to continue trading and jettisoning those which it does not. The protections under the plan relate to provisions which conflict with its implementation, as was seen in the Versailles case.

106. Mr Bayfield also points out what would be an incongruous result if all non-ongoing contracts are *caduc* at the start of safeguarding. He says that if they are null and void from that moment, which is

Professor Le Corre's evidence, any loss suffered by the counterparty due to the debtor failing to perform a non-monetary obligation which became due in the observation period would not be recoverable because the obligation would have disappeared when the contract became *caduc*. Professor Le Corre accepted that, in such a case, this would be the outcome. In contrast, however, if the contract was ongoing but terminated by the administrator, the counterparty could include a claim for early termination of the contract in a declaration to be dealt with in the safeguarding plan.

107. Dr Dammann's response to Mr Allison's incongruity point is that he could not answer why it exists, but you just have to apply the law. I observe the law may indeed be imperfect; the question is: should the imperfect outcomes identified by Mr Allison or Mr Bayfield lead me to conclude that the "enforceability principle" is or is not a feature of French law?

108. For the following reasons, I am not persuaded that it is, and 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. I have already set out a number of criticisms of Dr

Dammann's evidence which I consider unfounded. His 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. I was also struck by the circularity of the *caduc* argument. For a contract to be *caduc*, there has to be some element of the contract which has disappeared. Professor Le Corre did not identify the absent element; he relied upon the opening of the proceedings making it unenforceable. As Mr Bayfield correctly observed, that is equivalent to saying it is *caduc* because it has become *caduc*. To put it another way, there is no distinction between cause and outcome. 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 is 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, and his writing-off Professor Andreu as not an expert in insolvency when it was pointed out to him that part of his text supported the claimants, in circumstances where he had introduced Professor Andreu's work to support his 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. Since he acknowledged that he had not looked at the point before, despite having written 11 editions of a leading textbook on insolvency and 50 to 80 legal opinions a year, as well as having a distinguished career in academia, I infer that he came to look at this issue for the purposes of these proceedings, and with that is the danger that his views could be unconsciously skewed by his instructions which have produced an interesting academic argument as opposed to an accurate exposition of the French law on this subject.

(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. There are derogations to be found in paragraphs III and IV, again accepted by Professor Le Corre, but I do not need to look at how they derogate as the argument has focused on the impact of Article L 622-13 II. 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 declaration issue.

109. In order to look at this issue, some additional background information is necessary, which I have taken from the witness statements to which I have been referred.

110. Firstly, the statement of Richard East, which tells me that, on 22 September 2020, the first defendant and the group of companies, Comète Holdings SAS, Comexposium Holding SAS and Comexposium SAS, by judgment of the French Tribunal de Commerce de Nanterre, entered into French insolvency proceedings known as sauvegarde proceedings. The judicial administrators are Maitre Helène Charpentier and Maitre Frédéric Abitbol

111. There had been appointed individuals on behalf of the interest of the creditors. These are the ‘mandataires judiciaires’. They are Marc Sénéchal and Christophe Bass.

112. The claimants are, together with other lenders, Kohlberg Kravis Roberts & Co and Hayfin Capital Management, the majority lenders, having more than $66^{2}/_{3}$% of what are called the Commitments, or the rights under the SFA, and "majority lenders" is a term of art in the SFA. The majority lenders put forward a proposal to get the first defendants out of financial difficulty on 24 October 2020, and that was made on the basis that those making the offer did not have information available to them due to, they say, a systematic refusal to provide information. The offer was made on the basis that it was conditional on obtaining information.

113. On 27 October 2020, an information and meeting request was sent by the agent under the contract on the request of the majority lenders requesting information. The request sought certain specific information, such as the history of the group's accounting data, financial projections, documents relating to past mergers, acquisitions, transactions, access by the agent, or its accountants or financial advisers, to the books, accounts and records of each member of the group through an electronic data room so that the request for information could be satisfied in a meeting of directors to discuss the affairs of the company. This request was sent under the contract pursuant to clauses 26.7(b) and (d) and 28.25 of the SFA.

114. On 2 November 2020, the first defendant responded to the agent denying the information and meeting request, claiming that the SFA was no longer enforceable because of the safeguarding proceedings.

115. The claimants are part of the coordination committee of creditors, who have made a further offer on 27 November 2020 to solve the first defendant's financial difficulties and those of the Comexposium group of which, through various companies, the first defendant is the holding company, and since then have been pursuing the obtaining of information.

116. On 11 February 2021, the claimants, through their solicitors, wrote to the first defendant asking it to comply with the information and meeting request, saying that if they did not meet that request an application would be made to the court for a declaration, which is what has happened. The information has not been forthcoming.

117. On 29 March 2021, the majority lenders learnt that Cassini and certain other group companies had been granted a six-month extension to the safeguarding proceedings, but they only became aware of that through the press, and they say that that is despite the fact that the offer made by the coordination committee would have permitted the safeguarding proceedings to come to an end.

118. At the date of the making of Mr East's statement, 18 June 2021. a request to see the judicial administrator's report, made on 30 April 2021, had not been complied with.

119. Mr East identifies a number of possibilities as to what may happen when the safeguarding proceedings are reviewed on or before 22 September 2021. The first possibility is the public prosecutor, on behalf of the first defendant and group of companies, will seek a final six-month extension to the safeguarding proceedings. The second possibility is that the first defendant group of companies and the judicial administrator will present a restructuring plan to the French court seeking, amongst other things, the extension of the terms of the claimants' debt for a period of ten years. He says that if that was to happen, it would be driven by the directors under close supervision of the shareholders of the company not the creditors. It is in the shareholders' interest for the claimants' debt to be extended for as long as a period as possible.

120. It is due to the possible extension of repayment under a plan which, they say, would favour shareholders over creditors that they wrote to the first defendant on 19 May 2021 to request confirmation of its position and confirm whether or not it was its intention to present a restructuring plan to the court in September 2021. In response, they were told that French lawyers would write to them shortly. Things have moved on since then, but, says Mr East, the claimants have not received the information which was requested.

121. There is the evidence of Mr Santoni, for the first defendant, who says that some information has been forthcoming. There is now a safeguarding plan, information was sent with the safeguarding plan, and he says that in the light of the French government's COVID-19 announcement in May 2021, it made it possible to envisage an initial resumption of activities starting in 2021. On that basis the Comexposium Group was able to draw up a consolidated ten-year business plan of forecast cashflows prior to debt repayments for all of the four Comexposium entities which had entered the safeguarding process. He says that each plan explains the origins of the difficulties of the company, provides an overview of the measures implemented during the observation period, sets out the prospects of the recovery, the manner in which the company, under the safeguard, will settle its liabilities, and there are schedules to each safeguarding plan with operating forecasts of the Comexposium Group, operating forecasts for the relevant company, a consolidated repayment scenario, a repayment scenario at the level of the relevant company and business information based on standards of lenders' reports. These have been sent to the claimants, and the plan is to be reviewed by the court on 14 September 2021.

122. There is currently an application outstanding, made by the claimants, Hayfin and KKR against the judicial administrator, complaining that creditors' committees have not been established. They allege that one of the companies within the Comexposium group qualifies for the creation of such committees. Mr Santoni states that the matter came before the supervising judge who noted that the application would be withdrawn provided that a discussion forum was instituted. He says that discussions took place between the coordinating committee and the judicial administrators and a hearing was scheduled for 3 September 2021 before the supervisory judge.

123. Mr Santoni's statement was served very late in the day and Mr Justice Zacaroli gave permission for it to be produced provided that the claimants could respond by the day of the hearing, which they have done with the statement of Mr Golshani, a French lawyer. He puts a different complexion on things. He says that on 26 July 2021 his firm received on behalf of the majority lenders four

separate draft safeguard plans which were submitted by each of the four companies within the Comexposium Group following those companies' entry into French insolvency. He says that whilst limited information has now been provided to the majority lenders, it accounts for a small proportion of the information which has been requested pursuant to the terms of the SFA and which the claimants and the majority lenders are entitled to receive. He exhibited an annotated version of a lengthy schedule setting out the information which has been requested, and he has marked on it the information which has been provided.

He observes that:

> "No historical financials have been provided. These are important to the majority lenders to enable them to fully understand the historic performance of the company within the Comexposium Group. This, in turn, will help them to take a view on the accuracy of the projected performance of the group. Limited projected financial information has been provided. It is therefore very difficult for the majority lenders properly to analyse the proposals made. No documents have been provided in relation to previous M&A processes. This would shed light on the value of the Comexposium Group to any strategic acquisition it has made. Apart from some limited information in relation to strategic planning in relation to the Comexposium Group's competitors, no other information has been provided in relation to the group's corporate governance or operations -- request 3 of the information meeting request. In particular no information has been provided in relation to the events/trade shows that the company organises, and no information with regard to the operating costs of the group, including with regard to its employees, has been provided, and no information has been provided with regards to the clients, suppliers or headcount of the group of companies. Such information is crucial to the majority lenders to understand the operational aspects of the group and in turn its future prospects. Limited information with regard to the constitutional document of the company has been provided. Basic documents such as the request for the opening of the safeguard proceedings has

not been provided. Furthermore. The majority lenders have not been updated on the information as to the financial arrangements, security arrangements and any other related arrangements entered into since the date of the SFA. By way of example, only the majority lenders were told of the implementation of the shareholder financing and the observation period for the advisers' submissions at the hearing of 6 July 2021. No detailed information was provided, nor were the majority lenders told about any other arrangements which may be in place." *(that is a reference to some financing which was said to have been provided by the shareholders.)*

124. Mr Golshani says that the company has not shared an independent business review, which, in 20 years' experience of acting as a lawyer on restructuring in France, is commonly produced in order to look at the market management and financial aspects of the business.

125. As regards these proceedings before the supervisory judge, he said that what has actually happened is that at the hearing the suggestion was made that there would be a discussion forum. The case was adjourned to see if that happened. A meeting was arranged but the directors of the companies did not turn up at the discussion forum, only the judicial administrators, it was wholly unsatisfactory and the case is left in the list for 3 September for the hearing of the claimants' application in light of what has happened concerning the discussion forum.

126. He also refers to terms having been offered by the creditors to enable the first defendant and allied companies to remove themselves from the safeguarding, and he says that the caveat which Mr East referred to in the first offer that was made, namely, that the terms have been developed on the basis of preliminary and incomplete information and that a final proposal is likely once further information has been provided and this has continued to apply to all offers. A final offer is conditional on the obtaining of information.

127. He also says that if a declaration is granted, acting for the majority holders as he does, he expects that the agent will be instructed to take action to enforce this provision as regards the

information, and in his experience this can be dealt with pretty quickly without the French court looking into the merits of the case, save in very limited circumstances.

128. That is the evidence. The important facts that come out of this is that the claimants have made the information and meeting request to the defendants in October 2020 in accordance with the contract, that is not denied, and the first defendant has refused to honour that request. I have seen the schedule marking that which has not been answered, and the first defendant does not say that the un-marked requests have been answered, neither do they say that there are matters in the schedule which are irrelevant and should not be provided on the grounds of relevance. The whole of their opposition to producing the information has been they are not obliged to produce because the contract under which it is available is unenforceable. Apart from that, there is no defence to the claim.

129. As regards the grant of the declaration, they seem to be saying that enough information has been provided, but, again, it has not been explained why this information is enough by reference to the information that has been sought, and it is the position that under the SFA there is no limitation on the obligation to provide information restricted to information necessary to decide whether a safeguarding plan is a good one or not. I find that they have not complied with the obligation to provide information in accordance with the request made in October 2020.

130. It is also clear from the evidence that the refusal to provide information and meet with the creditors and the rejection of earlier offers to refinance the first defendant and its subsidiaries has fuelled the creditors' suspicion that the safeguarding proceedings are being used to advance the interests of the shareholders at the expense of the creditors. Whether that is what is happening or not is not for me to determine, but the suspicion is not an unreasonable one for the creditors to hold in view of what has happened.

131. I now look at whether the discretion to grant declaratory relief should be exercised. The court's jurisdiction to grant declaratory relief comes from section 19 of the Senior Courts Act 1981 and

CPR 14.20. The court may grant declaratory relief whether or not any other remedy is claimed, and there is no dispute that this is a discretionary remedy. I have been referred to a helpful summary as to the factors to be taken into account in deciding whether to exercise the discretion in a judgment given by Mr Justice Marcus Smith in the case of *Bank of New York Mellon London Branch v Essar Steel India Limited* [2018] EWHC 3177. Both sides have referred me to this case, and at paragraph 21 he said this:

"1. There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. A present dispute over a right or obligation that may only arise if a future contingency occurs may well be suitable for declaratory relief and amount to a real and present dispute.

2. Each party must, in general, be affected by the court's determination of the issues concerning the legal rights in question.

3. The fact that the claimant is not a party to the relevant contract in respect of which such a declaration is sought is not fatal to an application for a declaration provided the claimant is directly affected by the issue. In such cases, however, the court ought to proceed very cautiously when considering whether to make the declaration sought."

This is not a case where the claimant is not a party, so we do not need to consider that.

4 "The court will be prepared to give a declaratory relief in respect of a friendly action."

We are not concerned with a friendly action here, on any view, so we do not need to look at that.

"5. The court may be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it, or their arguments put before the court. For this reason, the court ought not to make a decision without a trial.

6. In all cases, assuming that the other tests are satisfied, a court must decide is this the most effective way of resolving the issues raised. In answering that question the court must consider the other options of resolving the issue."

Later on, Mr Justice Marcus Smith makes the point that the court has to take into account the utility of the declaration sought.

132. Just applying the relevant considerations before I look at the first defendant's arguments, what does that show?

133. Is there a real and present dispute? There certainly is. Four days have been spent on evidence and argument. There is a utility in the determination of the dispute as, on my finding, not all the information requested has been provided, and the first defendant has still not complied with the request in breach of its obligation.

134. Is each party affected by the outcome? They clearly are affected. The claimants want the information in order to get a fuller picture of how they should deal with the first defendant's business and their loan, to which they are very much committed with this very large loan of €500 million, and the first defendant, for whatever reason, has decided that it does not want to divulge the information. And there is a point made by Mr Bayfield, which I return to later. He asks, if the first defendant really did not think this declaration had any effect upon it, why is it that a company which is in a financial difficulty is lavishing large sums of money on litigation to avoid a conclusion, and indeed a declaration, that it is obliged to provide the information?

135. Is the court satisfied that all sides of the argument have been heard and fully and properly put? This too is touched upon by Mr Allison. At this stage, if one looks at Mr Allison's arguments, it does seem to me that all the arguments have been put. The parties on both sides of the contract are before the court. It is the first defendant who has the obligation to provide documents, including any documents from a subsidiary which it has to procure from that subsidiary, but they are 100% owners of those subsidiaries and there is no suggestion they cannot lay their hands on the

documents. So, we have here a case where the parties to the contract, who both had leading and junior counsel, and called experts with opposing views to set out the respective arguments, have engaged in an adversarial hearing lasting over four days to deal with the enforceability issue. *Prima facie*, before I look at Mr Allison's arguments, I am satisfied that all the arguments have been heard and all parties necessary to be before the court have been before the court.

136. Is this the most effective way of resolving the issue raised? Where the parties have taken these opposing views and the first defendant says that the reason there is an issue between them is that they believe that, as a matter of law, they are not obliged to hand over the documents, it seems to me this is the only way of resolving the situation. Furthermore, this is a contract governed by English law with an English jurisdiction clause in it, and the way in which such issues are resolved are by resort to the English courts to obtain a ruling. Indeed, any suggestion to the contrary, that this court should not be exercising its jurisdiction and this is something that should be dealt with in France, seems to me to now be unarguable following the decision of Zacaroli J. This is particularly the case as Mr Bayfield reminds me that Cassini abandoned their *forum non conveniens* type argument which had originally formed the basis of the jurisdiction challenge.

137. Against those considerations which, it seems to me, point very heavily in favour of granting the declarations sought, I look at what is said against it.

138. Mr Allison says that there is no justification for the declaration. He supplements this assertion by saying that the claimants have been provided with detailed financial information when the safeguarding plans were proposed, which he said was similar to that provided in connection with the scheme of arrangement under Part 26 of the Companies Act 2006, the creditors' representatives have produced a letter with further financial information in accordance with the French Commercial Code. To the extent that the creditors want further information they can apply to become controllers -- that is what he said in his skeleton -- and if the claimants did not have sufficient information, they

would not have made an unconditional €605 million refinancing proposal and have indicated that they oppose the safeguarding plans.

139. I have already dealt with in this part. I am satisfied that not all the information requested has been provided, and there has been no attempt to take me through the schedule of missing information to indicate whether an item said to be missing has not been provided or is irrelevant for the creditors' purpose, which is, in any event, not confined by the contract terms to assessing the worth of the proposed safeguarding plan.

140. What Mr Allison sought to do was to show me the safeguarding plan, part of which is not translated into English -- some of the schedules are not translated into English, but that is by the by -- from which it would be impossible to determine without a detailed comparison with the schedule of information requested whether what was in the plan is sufficient, so I am not satisfied that sufficient information has been provided in response to the claimants' request.

141. It may be that this inability to identify precisely what it is that should not be provided on the grounds of irrelevance, or that in fact has been provided, arises from the late provision of Mr Golshani's statement, but the first defendant only has itself to blame as it followed the late introduction of the statement of Mr Santoni. The result is that the first defendant cannot make good on the assertion that the claimants have received all the information to which they are entitled, or that which they continue to seek is irrelevant or not sought for proper reasons.

142. The suggestion that they should apply to be controllers does not advance their case. There is no reason why they should be required to obtain information in a manner which disables them from acquiring the assets, which includes the shares of the first defendant. They contracted to receive information free of the need to make what Professor Le Corre described as a "strategic decision". In any event, the fact that they may be able to obtain the information by a different route does not necessarily mean that they should not have the court's support in going via the contractual route, which in any event would be a more direct route than applying to become controllers.

143. As to the offers that have been made, there is as dispute as to whether the last offer was an open offer. I was shown a letter containing the offer, and it certainly reads as such, but Mr Golshani says that all offers were qualified. That is an impossible issue to resolve on the papers as I do not know if I have seen all the documents passing between the parties or have details of all other communications. On the limited information before me, I am not satisfied that the final offer was unconditional, in the light of Mr Golshani's statement. Even if it was, however, the right to have information is not limited to that which is necessary to make an offer, and the fact that they are prepared to take a risk, if that is what they have done, by making an offer on the information to date does not mean that they are not entitled to gain a full understanding of the financial affairs of this group of companies by exercising their rights under the contract.

144. The second point made by Mr Allison is that other important parties have not been joined in the Part 8 claim. He suggests that a letter from the judicial administrators claiming that Cassini must not pay the costs ordered by Zacaroli J is an indication that the ability to provide the information is in the hands of these administrators; he claims they ought to be joined. Further, the claimants have not joined the other companies in the group since the information meeting request requires Cassini to provide or procure the other companies to provide information about the other group companies.

145. This last point has resonance with the *Essar Steel* case for in that case the absence of the relevant party persuaded Marcus Smith J not to grant a declaration as both sides in the dispute had not been heard. The first defendant has had an opportunity to adduce expert evidence as to the French law, yet I have not been provided with an opinion which suggests that the judicial administrators can veto the transmission of information. These are debtor in possession proceedings, so it is the directors of the debtor who are running the company and controlling its records and other financial information. Whatever the judicial administrators said about the payment of costs -- and there appears to be a dispute about the terms of their communication -- it is a complete *non sequitur* to suggest that this means that they have a discretion as to what documents are to be provided. Mr Golshani, who is a

French lawyer, has indicated that it is not the role of administrators to prohibit or stop the company performing its obligations as regards information. There is no justification in those circumstances for them to be joined.

146. There is a further point in that under the Commercial Code the judicial administrator needs to be joined in proceedings against the company where there have been appointed to assist the director not simply to supervise them; the latter is the position in this case. So even if the procedural rules of the French Commercial Code applied, which they do not, there would be no need under that Code to join the administrators.

147. As regards whether adequate parties are before the court, it is apparent from *Essar Steel* at paragraph 21(5) that the court was concerned to see that either all the affected parties were before the court or -- and I stress that -- it ensures that it will have all the arguments before it. This is not a case, however, where all the available arguments have not been put. In any event, the obligation to provide or procure the information is on the first defendant as the other contracting party. There is also an air of unreality about the suggestion that the absence of the subsidiaries counts against the grant of a declaration; they are all wholly owned, and thus controlled, by the first defendant, apparently through various companies. The reason for ensuring that all parties are before the court is that it may be that one of them has some special circumstance to take into account or may be affected by a declaration in a way not envisaged by the participating parties. The first defendant will know whether there is any such danger and could have raised it in defence to the declaration, but they have not. Indeed, if the non-participating members of the group were concerned about the subject matter of the claim, they could have asked to be joined. There is nothing in either of the non-joinder points and I give them no weight.

148. The third point for Cassini is that there is a serious doubt whether the granting of a declaration would have a substantial effect. The grounds for this assertion are that the joint administrators and other group companies have not been joined. I have already dealt with that in part. It is not a good

argument, as the obligation to produce and procure the documents is on the first defendant and there is no evidence that they cannot act without the fiat of the judicial administrators or other companies in the group which they own.

149. The second ground is that no evidence has been produced by the claimants to show that the French court will recognise an English declaration. Further, the French court may baulk at an English court determining a point of French law and the claimants should provide evidence that it would be recognised and explain why they do not apply to become controllers. It is said that the safeguard plans will be effective in weeks, so there may be no time to provide the information or to obtain an order of specific performance of that obligation. What seems to underlie that last submission is that the first defendant will not discharge their obligations in accordance with any declaration voluntarily. That is not what Mr Allison told me when I asked him about it. He said that that was not the position.

150. Lastly, reference is made to a comment by the supervisory judge in Nanterre who said that the dispute as to the applicability of the clause would be lengthy and exceed the repayment period if the decision required enforcement in France. There is no explanation why it would be lengthy.

151. Mr Bayfield informs me that at the hearing for expedition leading counsel for the claimants said that the court should proceed on the basis that it can reasonably be expected that the first defendant will perform the obligation of which it is in breach. There is no evidence from the first defendant to say that it will refuse to discharge its rights as declared, and Mr Allison told me that it was not the stance of the first defendant. Mr Bayfield also made an observation which undermines the argument that making a declaration would be pointless, which I referred to earlier. He says why are they opposing it with such vigour if they thought it was of no effect?

152. The observations made by the supervisory judge are merely a comment made at the time, it is impossible to know the context in which this was said and there is no evidence as to why enforcement would be a lengthy process. Mr Golshani says he can get an order of the English court

enforced very quickly without a review of the merits. He is supporting this assertion by Articles 5 and 8 of the Hague Convention on the Choice of Court Agreements 2005, which would lead the French court, or should lead it, to recognise the judgment of an English court where jurisdiction is given to the court under the Convention.

153. I therefore do not accept that the relief would have no substantial effect. It would establish the rights as between the first defendant and the claimants. On what I have been told and read in relation to how the Court proceeded at the expedition hearing, I do not proceed on the basis that a declaration of those rights will be ignored. It seems to me that, up to now, the first defendant has made a determined attempt to thwart the claimants' requests for information, only providing that which is required by the plan and Code. It has done so under the cover that it is under no obligation to comply because of the French Commercial Code. Now the cover has been blown, they do not have a basis for withholding the information.

154. I am also not satisfied that further proceedings to enforce the rights would inevitably be fruitless. As to the timing of the order and the upcoming hearing concerning the sauvegarde plan, there is no evidence to demonstrate this will be approved or whether an exceptional six-month extension may be sought. It may even be that the plan is approved on 14 September, but that may not be the end of the matter as, on the cases that I have seen, there have been appeals against the approval of plans which have taken well over a year to resolve.

155. The fourth point taken is that declaratory relief is not the most effective way to resolve the matter. It is argued that it is unsatisfactory for issues of French law to be determined in an expedited trial in England, yet further it is said that the claimants have submitted to the jurisdiction of the French court by appearing at substantive hearings and putting forward financing proposals. This is a rerun of the expedition and jurisdiction issues, which have been decided against Cassini, and, I regret, is an example of the makeweight character of many of the grounds which I have been asked to consider.

156. It is also argued that there are regular hearings taking place in France and the claimants are participating in such hearings. There is an application for the creditors' committee and the direction for a discussion forum. The evidence from Mr Golshani is that the claimants have not been kept abreast of hearings; they have managed to attend just one hearing. The application for the appointment of a creditors' committee is still pending and due to be heard on 3 September as the first defendant's directors did not attend the hearing arranged for such discussions to take place. I am therefore not persuaded that the claimants have, or should be treated as having, satisfied themselves that they have been given all the information to which they are entitled.

157. The last ground for opposing the injunction is that if the declaratory relief is of substantial effect it would cut across the statutory regime for the provision of information in France and interfere with foreign insolvency proceedings. The first argument in support of the ground is that the claimants should have become controllers. I have already dealt with that. It is of no weight. The second argument is that it cuts across the French statutory regime for the provision of financial information in the insolvency process and is particularly unsatisfactory due to the non-joinder of the judicial administrators. This point was developed in argument. Mr Allison said that all creditors are to be treated equally. It would run counter to that ethos if one set of creditors could obtain more information about the company than others. There has been no evidence from the first defendant that there is a limit on the information which a creditor can receive from the company or that the information provision is not enforceable due to some French law prohibiting the dissemination of information about a company during the insolvency process. The original parties to the loan agreement contracted for the provision of this information in return for a very large loan.

158. In view of my finding on Issue 1, the information clauses are enforceable and can be taken not to conflict with the French regime on insolvency. Mr Golshani's evidence makes it clear that creditors can, and do, receive vastly more information from debtors in the first defendant's position than the information which Cassini has produced to date. There is nothing inherently improper or

incompatible with the existing French proceedings in the claimants receiving the information for which they have contracted.

159. The first defendant places reliance on the decision of the Versailles Court of Appeal arguing that if the court approves the plan, the information provision will be suspended. It relies upon Dr Dammann's evidence that terms which trigger a default will be suspended during the plan. The first defendant has not identified what default would be triggered if the information is not provided. Dr Dammann made it clear that all that is suspended are terms which contradict the extension of the plan. Thus, I do not accept that the decision of the Versailles Court would have the impact claimed, and indeed I have already accepted Dr Dammann's evidence that the clause requiring information survives even the plan.

160. Finally, it is argued that the claimants are trying to steal a march on the French courts by obtaining relief as to the enforceability of covenants which would be rendered unenforceable once the plan is in place. The latter argument is a misunderstanding of what was said in the Versailles decision concerning the suspension of terms. I do not detect that the claimants are seeking to pre-empt or undermine the French process. They are merely seeking to resolve a dispute as to the effect of a contract term which has to be decided in this jurisdiction.

161. They are not in the same position as the claimant in *Essar Steel* who was seeking a declaration as to a payment default to be used in Indian insolvency proceedings, or the respondent creditors in the *Bluecrest Mercantile BV v Vietnam Shipping Industry Group* [2013] EWHC 1146 (Comm) and *Riverside CREM 3 Ltd v Virgin Active Health Club* [2021] EWHC 746 (Ch) cases appearing in the first defendant's skeleton argument to which I was not taken during the course of submissions. In those cases the creditors were seeking to bring claims to enforce debts which had the potential to destabilise the restructuring process. In such a case, the needs of the creditor had to be balanced against the needs of the general body of creditors. In this case, however, all that is sought are declarations concerning the provision of information. There is no basis for concluding that this

would destabilise the restructuring process or undermine the general body of creditors, a very large part of which are the claimants, as the majority lenders, who have a very substantial economic interest in Cassini.

162. These considerations which the court must bear in mind in the exercise of discretion lead me to grant the declarations, as the considerations gleaned from *Essar Steel* far outweigh, by a large margin, those advanced by the first defendant. I will grant the declaratory relief sought, including the declaration as to breach, given that I have found that there has been a breach of the information clause.