



Neutral Citation Number [2023] EWHC 173 (Ch)

BR 2021 000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
IN THE MATTER OF MOSE KRAUS (IN BANKRUPTCY)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 01/02/2023

Before :

ICC JUDGE BARBER

Between :

MR ROBERT WILLIAM LESLIE HORTON
(AS TRUSTEE IN BANKRUPTCY OF MOSES KRAUS)

Applicant

- and -

(1) EUROBEAM SERVICES LTD
(2) BUDE NATHAN IWANIER LLP (A FIRM)
(3) MR BORUCH ROTH

Respondents

Dawn McCambley (instructed by **Ince Gordon Dadds LLP**) for the Applicant
Stephen Innes for the First and Third Respondents

Hearing date: 21 November 2022

Approved Judgment

This judgment was handed down remotely by email. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30a.m. on 1 February 2023.

ICC Judge Barber

1. This judgment concerns the costs of an application brought by Mr Horton as Trustee in Bankruptcy of Moses Kraus ('the Debtor') pursuant to s.366 of the Insolvency Act 1986.

Evidence

2. For the purposes of this judgment, I have read and considered the following witness statements and their respective exhibits:
 - (1) Witness statement of Mr Horton dated 16 December 2016;
 - (2) Witness statement of Mr Kandler dated 18 January 2017;
 - (3) Witness statement of Mr Roth dated 19 January 2017;
 - (4) Second Witness Statement of Mr Horton dated 5 June 2017;
 - (5) Witness Statement of Mr Goldstone dated 2 August 2018;
 - (6) Second Witness Statement of Mr Roth dated 6 December 2018;
 - (7) Third Witness Statement of Mr Horton dated 15 February 2019;
 - (8) Third Witness Statement of Mr Roth dated 12 December 2019;
 - (9) Witness Statement of Mr Cassidy dated 4 May 2022;
 - (10) Fourth Witness Statement of Mr Roth dated 20 May 2022;
 - (11) Second Witness Statement of Mr Goldstone dated 26 August 2022.
3. I have also read and considered the other documents contained in a 654-page bundle agreed for the purpose of the hearing before me, to which reference will be made where appropriate.

Background

4. The Debtor was adjudicated bankrupt on 12 January 2016 on the petition of Swiss Life AG presented on 14 September 2015 in connection with outstanding costs orders made in proceedings between the parties ('the Swiss Life Proceedings'). The Swiss Life Proceedings sought the enforcement of various substantive judgments obtained against the Debtor in the US.
5. The Trustee was appointed on 23 March 2016. As a result of investigations into the Debtor's affairs, the Official Receiver and the Trustee became aware of an alleged loan of £300,000 to the Debtor from the First Respondent, Eurobeam Services Limited ('Eurobeam') ('the Eurobeam Loan'). This was purportedly secured upon the Debtor's matrimonial home ('the Property') by way of a second charge ('the Charge').

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6. The 'Facility Agreement' said to relate to the Eurobeam Loan was made between (1) Eurobeam and (2) the Debtor and his wife. Whilst undated, it appeared to have been executed on 30 April 2015, less than five months before the Petition was presented and nine months before the Debtor was adjudicated bankrupt. The Charge was granted in favour of Eurobeam on 21 July 2015, less than two months prior to presentation of the Petition. The bank statements relating to the Debtor's bank accounts did not evidence receipt of the Eurobeam Loan.
7. At the material time, a very old friend of the Debtor, Mr Roth, was the sole director of Eurobeam (albeit it appears that he is no longer a director) and was an equal shareholder in Eurobeam, together with his wife. The Second Respondent, Bude Nathan Iwanier ('BNI') was a firm of solicitors who initially acted for Eurobeam in connection with the Eurobeam Loan.
8. Enquiries were made of the Debtor concerning the Eurobeam Loan and the Charge, but the results of such enquiries were unsatisfactory.
9. On 10 February 2016, the Debtor provided replies to questions put to him by the Official Receiver ('OR replies'). In relation to the loan, he stated as follows (with emphasis added):

'Originally I approached *the company* around 2011 or a little earlier to borrow money and help me finance the building of an extension to my wife's property in order for my parents to live with us. The £80,000 was originally provided on an unsecured basis, interest was rolled up so that the loan debt increased to £122,000 by April 2015. At that time, I wanted to raise £250,000 to fund my Defence from Swiss Life AG Unjust Claim and so to cover my solicitors and barristers' fees. However, Eurobeam Services Limited would only lend a total of £300,000 including the outstanding £122,000 and requested that this be secured by a second Charge over the property.'
10. Later, at page 5 of the OR replies, the Debtor altered what he had stated earlier, claiming that the additional £170,000 /180,000 was used to repay 'my other creditors proportionately' instead of funding his defence. He also stated that although he had wanted to pay his legal expenses, after his children had obtained professional advice, he was told that he could not prefer some of his creditors over others.
11. In April 2016, the Debtor filed an objection to registration of the bankruptcy restriction against the Property. In his statement in support, the Debtor stated that in the spring of 2015, Eurobeam had agreed to lend him £350,000 as funding to defend himself in litigation and that the maximum funding was subsequently reduced to £300,000 following a valuation of the Property.
12. On 5 May 2016, the Trustee met with the Debtor to discuss various matters, including the Eurobeam Loan and the Charge. Following the meeting, on 18 May 2016 the Trustee wrote to the Debtor asking for the following information in relation to the Eurobeam Loan:
 - (1) the dates that monies were transferred to the Debtor by Eurobeam;

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- (2) details of the bank account to which the monies were paid to the Debtor by Eurobeam;
 - (3) how the payment was made (i.e. by cheque, direct transfer, etc); and
 - (4) how the monies advanced by Eurobeam had been utilised by the Debtor.
13. The Debtor replied by email on 8 June 2016 in which (in summary) he responded as follows:
 - (1) his children had managed the transaction and had instructed Eurobeam's solicitors about payment of the funds advanced;
 - (2) none of the money was paid into any account of his;
 - (3) the solicitor for Eurobeam who paid the £300,000 was a Mr Kandler of Bude Nathan Iwanier ('BNI'). Mr Kandler would know how he paid the money, the Debtor did not know himself;
 - (4) all the money was used to pay his (unparticularised) debts. A 'proportional ratio' was applied.
14. On 16 June 2016, the Trustee wrote again to the Debtor asking that he provide (i) contact details for those of his children who had handled the transaction and (ii) a detailed schedule of the creditors said to have been paid with the loan funds, including name, address, amount and date paid. The Debtor replied by email on 3 July 2016, confirming the names and partial addresses of his children who handled the transaction. He failed to provide the requested schedule of creditors said to have been paid from the loan funds.
15. Subsequent attempts by the Trustee to obtain from the Debtor and various of his children full details of (and documentation relating to) receipt of the Eurobeam Loan monies and their later distribution proved unsuccessful, notwithstanding the confirmation given in the Debtor's statement to the Official Receiver dated 2 March 2016 that he would ask his children 'to provide a schedule of the payments made to various creditors out of the loan finance received from Eurobeam Services Ltd around May 2015'.
16. It was against that backdrop that the Trustee came to make enquiries of Eurobeam (acting by Mr Roth) and Eurobeam's solicitors at the time, BNI.

Enquiries of BNI

17. By letter dated 16 June 2016, the Trustee wrote to Mr Kandler of BNI, stating:

'I have been seeking information from both the bankrupt and Eurobeam Services Ltd in relation to this transaction and in particular the payment of the £300,000 to the bankrupt. The bankrupt has informed me that these monies were not actually paid into any account in his name and that you, using the bankrupt's terminology "knows how he paid it". The bankrupt also states that he does not know who received the funds

notwithstanding that the bankrupt and his wife were the borrowers and they entered into the loan agreement with Eurobeam Services Ltd. I should therefore be grateful if you would clarify the position and provide full details of the recipient(s) of the monies paid out under the loan agreement’.

18. By letter dated 6 July 2016, BNI responded:

‘We have taken instructions from our client.

The writer’s recollection is that this was a case where there was a grant of time and credit facilities in relation to monies loaned by Eurobeam Services Limited to Mr Krausz. The source of monies was from a Director of Eurobeam Services Limited and so the whole thing was tied up in one. The monies were assigned to Eurobeam for the purpose of the loan.

If you have specific questions we will be happy to deal with them.’

19. By letter dated 20 July 2016, the Trustee reiterated his request for details of the recipients of the funds. The letter continued:

‘The bankrupt has indicated that you dealt with this matter on behalf of your client Eurobeam Services Limited. Please therefore let me know the following and provide supporting documentation:

1. Date of the advance by your client
2. The amount advanced by your client
3. The recipient (s) of the funds’.

20. The letter of 20 July 2016 sought the requested information within seven days and concluded with a reference to s.366 of the Insolvency Act 1986.

21. A chaser was sent on 11 August 2016. By email dated 17 August 2016, BNI responded to state that Mr Kandler was away on holiday until 1 September and indicated that he would deal with the Trustee’s enquiry on his return.

22. By letter dated 12 September 2016, Mr Kandler of BNI wrote stating:

‘We refer to your letter dated 20 July 2016 and respond as follows:

1. The date of advance by our client was 18 May 2015
2. The amount advanced by our client is £300,000
3. The recipient of the funds was Moses Krausz’.

23. By letter dated 14 September 2016, the Trustee wrote again to BNI, noting the disparity between the Debtor's account of events and that of BNI. The letter stated:
- ‘In my letter of the 16 June, I indicated to you that the bankrupt had informed me in writing that the monies received from Eurobeam Services Ltd were not paid into an account in his name. The bankrupt also states that he does not know who received the funds and that you can provide full details of where the funds were paid to. However, your letter of the 12 September now states that the recipient of the funds was the bankrupt but you have not provided any evidence to show that he received the monies.’
24. The letter of 14 September 2016 enclosed written authority from the Debtor and went on to request within 7 days:
1. A copy of the completion statement relating to the transaction;
 2. If the funds were remitted electronically, details of the bank, account number, sort code number and the name of the account holder, together with supporting bank paperwork;
 3. If the funds were remitted by cheque, then details of the payee on the cheque, the date, the amount of the cheque and cheque number, together with a copy of the relevant bank statement showing the cheque clearing BNI's client account and a copy of the paid cheque.
25. BNI replied by letter dated 15 September 2016, stating:
- ‘The sums were paid to Caruso and S Krausz.
- In relation to your numbered paragraphs:
1. There was no Completion Statement
 2. I attach a copy of the transaction
 3. This is not relevant.’
26. Enclosed with the letter of 15 September 2016 were two Barclays Bank transfer advices, confirming same day payments on 18 May 2015 from BNI General Client Account to (1) Caruso AG in the sum of £122,320.72 and (2) Salomon Krausz in the sum of £47,994.28.
27. On 18 October 2016, the Trustee wrote again to BNI, noting the disparities in the information given in BNI's letters of 12 September and 15 September regarding the recipients of the funds and noting also that the payments evidenced totalled only £170,315 and not £300,000. The letter sought, inter alia, confirmation of who had given instructions in relation to the payments totalling £170,315 to Caruso and S Krausz, who the recipients were and the basis upon which such funds were paid to them.

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28. BNI responded substantively by letter dated 31 October 2016, stating:

‘The sum of circa £170,000 lent brought the full indebtedness up to £300,000.

The initial sum related to an old debt that our client had called in but which Mr Krausz had failed to pay. Accordingly, our client gave time and credit facilities on the basis that Mr Krausz would enter into the charge over the property which he did. Further, our client was asked to lend a further sum to compromise liability that he had with others.’

29. The letter dated 31 October 2016 went on to confirm that they had received instructions as to payment from Mr Roth of Eurobeam ‘as directed by Mr Krausz to whom the money was being lent’. The letter also stated that BNI did not know who Caruso and Krausz were, they were told that ‘they were persons who were going to disperse monies to the creditors of Mr Krausz’.
30. Caruso AG was a Liechtenstein company controlled by the Debtor and his family, in which the Debtor was the principal actor. Salomon Krausz, the other payee, was the Debtor’s son.

Enquiries of Eurobeam

31. In the meantime, parallel enquiries were underway with Eurobeam itself. By letter dated 5 April 2016, the Trustee wrote to Eurobeam asking for a copy of the Charge and confirmation of the current amount outstanding in relation to the Charge including any interest. No response was received. A further copy of the letter of 5 April 2016 was sent under cover of a letter dated 3 May 2016 to an alternative address for Eurobeam, requesting a response within 14 days.
32. Mr Roth responded on behalf of Eurobeam by email dated 17 May 2016, enclosing office copy entries in relation to the Property and a one-page document setting out monthly interest calculations on a loan of £300,000 stated in the document to date from 30th April 2015.
33. This did not tally with Eurobeam’s filed accounts for the year ended 30 April 2015 (signed by Mr Roth as sole director), however. According to the abbreviated balance sheet for Eurobeam, as at 30 April 2015, Eurobeam’s ‘debtors’ totalled only £20,000.
34. The Trustee wrote again to Mr Roth of Eurobeam on 18 May 2016, seeking confirmation of how the funds were advanced and supporting documentation. A chaser was sent on 1 June 2016. A further chaser was sent on 14 June 2016, making express reference to s.366 of the Insolvency Act 1986. Another chaser was sent on 12 July 2016, warning that in the absence of a response in seven days, an application to court under s.366 would be made.
35. Having received no response to these chasers, the Trustee again wrote to Mr Roth of Eurobeam on 14 September 2016, noting that BNI had not provided him with details of the transaction and supporting documentation requested either. The letter enclosed

written authority from the Debtor and demanded a response within seven days, warning that court proceedings would ensue in the absence of any response.

36. Eurobeam (acting by Mr Roth) did not respond to any of the letters of 3 May, 18 May, 1 June, 14 June, 12 July and 14 September 2016. Its only communication with the Trustee over this period was a proof of debt which it lodged with the Trustee's offices on 22nd September without any covering letter. The proof of debt was signed by Mr Roth as director of Eurobeam and claimed (variously) sums of £346,238.49 and £388,263.85 said to be due under a 'facility agreement'. The 'particulars' of the debt given in the proof were as follows:
- 'Loan agreed and executed 30 April 15.
- Loan paid out 17 May 2015
- Interest accumulating'.
37. The particulars of 'security held' given in the proof were as follows:
- 'Value=£350,000 second charge on
- (up to 700000) 34 Fontayne Road N16
- Date given 30 Apr 2015'.
38. Accompanying the proof were simply office copy entries confirming registration of the Charge at HM Land Registry and a single page document setting out interest calculations on a loan of £300,000 said to date from 30 April 2015.
39. By letter dated 27 September 2016, the Trustee wrote again to Mr Roth of Eurobeam, noting that he had still failed to deal with the queries which he had raised in the letter of 3 May and had not provided the supporting documentation showing the advance of funds to the Debtor. The letter went on to request:
1. A copy of Eurobeam's bank statement showing the sum of £300,000 being paid by Eurobeam to the Debtor or BNI in May 2015;
 2. If the payment was electronic, a copy of the bank's funds transfer advice note showing the payment of £300,000 and to whom it was paid;
 3. If the payment was by cheque, a copy of the cheque together with the supporting bank statement referred to in 1 above.
40. The letter warned that in the absence of a written response within seven days, an application would be made under s.366 of the Act.
41. No response was received. A further copy of the letter of 27 September 2016 was sent undercover of a letter dated 18 October 2016, again warning that in the absence of a substantive response the Trustee would make an application under s.366.

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42. No substantive response having been received, by application notice dated 16 December 2016, the Trustee applied to the County Court at Central London ('CLCC') for s.366 relief against both Eurobeam and BNI.

The s.366 Application

43. In summary the application sought orders:
1. that an authorised partner or director of each of Eurobeam and BNI attend the court to be examined in relation to all sums loaned by Eurobeam to the debtor, the relationship between Eurobeam and the Debtor, their dealings and all circumstances relating to the loan;
 2. that Eurobeam and BNI be ordered to produce all supporting documentation relating to the loan agreement between Eurobeam and the Debtor, the sum loaned and the payments made, along with any notes of meetings with the Debtor or his representatives, file notes and relevant email or other correspondence; and
 3. costs.
44. The s.366 application was supported by a witness statement of Mr Horton dated 16 December 2016, which set out the circumstances giving rise to the application, making reference to the various explanations given by the Debtor and much of the correspondence summarised above. By his witness statement, Mr Horton confirmed that at the time of making his statement, he still had not received any satisfactory response to his enquiries. He further confirmed his belief that he would not obtain the information and documentation which he had requested of the respondents without the assistance of the court.
45. The application was served on Eurobeam and BNI on 23 December 2016.

Events post-issue

46. In early 2017, the Trustee successfully applied to CLCC for an order suspending the discharge of the Debtor's bankruptcy due to various failures of the Debtor to comply with his obligations to give the Trustee information regarding his affairs, including information in connection with the proceeds of the Eurobeam Loan.
47. In the meantime, the issue and service of the s.366 application upon Eurobeam and BNI prompted a response. On 19/20 January 2017, in the run-up to the first hearing of the s.366 application, which was listed for Monday 23 January 2017, BNI (at that stage acting on its own behalf and as solicitors for Eurobeam) filed and served on the Trustee's solicitors (1) the first statement of Mr Kandler statement dated 18 January 2017 and (2) the first statement of Mr Roth dated 19 January 2017.
48. It was only after issue of the s.366 application that the following information was provided, in the witness statements of Mr Kandler and Mr Roth:
- (1) of the sum of £300,000 originally said to have been advanced by Eurobeam in April/May 2015, £122,000 (£80,000 plus interest) represented loan monies now said to have been advanced informally *by Mr Roth personally* to the Debtor (or to third parties at the Debtor's request) over a period of time leading up to (and including)

May 2012 and then reflected in a loan agreement dated 31 May 2012 and Heter Iska (redefining the relationship as a joint business venture to allow for the charging of interest) which provided for a repayment date of 4 September 2013, drawn up with the assistance of a rabbi ('the Roth Loan'): paragraphs 3-5 of Mr Roth's first witness statement;

(2) Mr Kandler confirmed that BNI had 'nothing to do' with the Roth Loan: paragraph 5 of Mr Kandler's witness statement;

(3) Mr Roth confirmed that he had drafted the Facility Agreement and the mortgage deed, adapting other precedents used by Eurobeam: paragraph 9 of Mr Roth's witness statement. Mr Kandler gave corroborative evidence on this aspect, stating that BNI's involvement was 'limited' and confirming that his firm did not draft the Facility Agreement or the mortgage deed. As put at paragraph 10 of his witness statement, 'All we did was to transfer the £170,315 as per Mr Roth's instructions and have the charge registered'. He further confirmed that he had exhibited all of the documents which it had which were not protected by privilege or otherwise available to the Trustee (paragraph 10);

(4) The Roth Loan was said to have been 'rolled up' somehow into the Eurobeam Loan and this was the reason why only £170,315 was advanced by Eurobeam in May 2015 (and not £300,000 as originally stated by BNI on Eurobeam's behalf): paragraph 7 of the witness statement of Mr Roth;

(5) Mr Roth asserted that, ahead of the Eurobeam Loan, BNI already held the sum of £154,000 on his (rather than Eurobeam's) account and that Eurobeam advanced a further £16,315 to BNI on 18 May 2015 (paragraph 11 of Mr Roth's statement). This would explain why Eurobeam had been unable to provide any documentary evidence of its advance of the sum of £300,000 or £170,315 and was said to explain how BNI came to be holding a total sum of £170,315 in the first place. No detail or evidence was provided as to the source of the funds held by BNI allegedly on Mr Roth's behalf.

49. Exhibited to Mr Roth's witness statement was a loan agreement dated 31 May 2012 and a Heter Iska in Hebrew, without a translation. Also exhibited was an email dated 14 May 2015 from Mr Simon Stern (stated to be Mr Roth's assistant) to Mr Kandler of BNI, confirming that £16,315 was to be transferred to BNI's account and instructing BNI (1) to transfer £122,320.72 to Caruso AG (2) to transfer £47,994.28 to Salomon Krausz and (3) to 'secure the charge asap'.
50. In advance of the hearing on 23 January 2017, BNI (acting on their own behalf and as solicitors for Eurobeam) wrote to the Trustee's solicitors by email on 20 January 2017 stating that:

'Our clients' intention is to voluntarily provide the information and documentation that your client is entitled to such that it is not necessary for the Court to make an Order on the Application. We appreciate that your client will not want the Application dismissed unless and until he has the information and documentation'.

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51. BNI's email of 20 January 2017 proposed draft directions for the ongoing conduct of the application. A slightly revised version of the draft directions was subsequently agreed between the parties, subject to the court's approval, in advance of the first hearing on 23 January 2017. The order agreed by the parties provided for the Trustee to write to each of the respondents requesting any further information or documentation required and for the respondents to provide the further information or documentation requested (if so advised) by given dates. The agreed order also laid down a timetable of directions thereafter through to final hearing.

The hearing of 23 January 2017

52. At the hearing on 23 January 2017, District Judge Alan Johns QC made an order directing the Trustee to write to each of the respondents by a given date requesting any further information or documentation required, directing the respondents (on an 'if so advised' basis) to provide the information and documentation requested by a given date, and directing the Trustee to file and serve his evidence in reply thereafter. The order also made provision for a non-attendance pre-trial review on 13 March 2017. The timetabling was set in order to allow the parties time to engage in the further exchange of correspondence, in the hope that the information and documentation required would be provided voluntarily by the Respondents, obviating the need for a formal s.366 order to be made. Costs were reserved.
53. By letter dated 6 February 2017, the Trustee's solicitors wrote to both Eurobeam and BNI setting out a list of further questions and requests for documentation.
54. In relation to Eurobeam (acting by its sole director Mr Roth), the list requested (among other things)
- (1) a breakdown of the sum of £68,000 said to be owed by May 2012 and the further £12,000 advanced in that month, with supporting documentation;
 - (2) a calculation of the sum of £122,000 said to be due and payable in October 2014, with supporting documentation;
 - (3) an explanation of how a personal loan from Mr Roth to the Debtor of £80,000 (plus interest) came to be a debt due from the Debtor to Eurobeam; and
 - (4) confirmation of whether the money utilised to effect the transfer of £122,320.72 to Caruso AG and £49,994.28 to Solomon Kraus belonged to Eurobeam or Mr Roth and, if Mr Roth, the basis upon which such money could be deployed on behalf of Eurobeam, with supporting documentation.
55. In relation to BNI, the list requested (among other things):
- (1) confirmation of the source of the opening balance on BNI's account ledger as at 18 May 2015;
 - (2) confirmation of whether the matter code 'ROT02146' related to Eurobeam or Mr Roth;
 - (3) a copy of the bank statement for BNI evidencing the transfer of £16,315 on or around 14 May 2015 from Eurobeam to BNI.

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56. By email dated 27 February 2017, Mr Kandler of BNI answered certain of the questions listed in the letter of 6 February 2017. Attached to the email (among other documents) were:
- (1) a translation of the 2012 loan document and ‘transaction permit’ (Heter Iska) referred to in Mr Roth’s statement (which inter alia provided that the Debtor had received from Mr Roth the sum of £80,000 *on 31 May 2012*, set out a rate of interest and a repayment date);
 - (2) a handwritten note in Hebrew (which BNI confirmed they were having translated), which was said to have been located by Mr Roth since preparing his first witness statement and to relate to the £80,000 loan (‘the Roth Note’). The Roth Note listed, by month, year and amount, certain individual payments said to have been made by Mr Roth over the period September 2011 to May 2012 and contained some handwritten text in Hebrew, which was said to include acknowledgements by the Debtor of given sums making up the Roth Loan. The payments listed in hand in the Roth Note were reproduced in typed form in the body of BNI’s email dated 27 February 2017 and were said to total £80,000. In fact, they totalled only £44,000;
 - (3) a two-page document setting out interest calculations on the Roth Loan, showing a gross sum due as at 31 March 2015 of £122,045;
 - (4) transaction details of £16,315 transferred from Eurobeam’s Natwest account to BNI’s general client account.
57. BNI’s email of 27 February 2017 also stated (in summary) that
- (1) The Roth Loan had been ‘novated’ to Eurobeam;
 - (2) The £154,000 already standing in BNI’s general client account in the run up to the Eurobeam Loan had been paid to BNI by Milton Properties Limited in tranches of £79,000 and £75,000 paid on 7 and 8 May 2015 respectively. The £154,000 represented monies hitherto held by Milton Properties Limited on behalf of Mr Roth;
 - (3) Mr Roth had directed that £154,000 of his money be transferred by Milton Properties to BNI’s general client account;
 - (4) Mr Roth had loaned the sum of £154,000 to Eurobeam for the purpose of facilitating the Eurobeam Loan;
 - (5) The money transferred to Caruso AG and Solomon Kraus ‘belonged to and was lent by Eurobeam’;
 - (6) ROT02146 was the code ‘for the specific 2015 transaction of [Eurobeam] making a secured loan to [the Debtor];
 - (7) Both Eurobeam and Mr Roth were clients of BNI.
58. Milton Properties Limited, which was said in BNI’s email of 27 February 2017 to have been involved in providing £154,000 of the sums making up the Eurobeam Loan, was a company nominally owned by another of the Debtor’s sons, Abraham Krausz.

59. By letter dated 3 March 2017, the Trustee's solicitor raised further questions of Eurobeam and BNI. Among other things, the letter (i) pressed for the promised translation of the Roth Note and sought copies of any further documentation relating to the Roth Loan, (ii) queried the absence of a reference to a director's loan in Eurobeam's accounts for the year ending 2016, (iii) sought copies of any documents relating to the novation, and (iv) queried the manner in which the sums received by BNI from Milton Properties Limited were recorded in BNI's accounting ledger only 10/11 days after receipt of the funds. The letter suggested that, in light of outstanding queries, an extension be agreed for the Trustee's evidence in reply.

The Non Attendance Pre-Trial Review ('NAPTR'): 14 March 2017

60. At the NAPTR, the matter was listed for a short, attended 15 minute directions hearing on 24 April 2017. Costs were reserved.

Correspondence following the NAPTR of 14 March 2017

61. By letter dated 15 March 2017, BNI replied to the Trustee's solicitors' letter of 3 March 2017, stating (with emphasis added) that the Roth Note was the only supporting documentation in respect of 'the loan of £80,000 over a 10 month period' and observing that the lack of documentation was 'not unusual in transactions between close-knit Orthodox Jewish community to which Mr Roth and [the Debtor] belong'. The letter of 15 March 2017 further confirmed (among other things) that (1) that there was no written evidence of the novation from Mr Roth to Eurobeam and (2) that there were no documents to evidence the transfer of £154,000 from Mr Roth to Eurobeam, although it was observed that Eurobeam's financial statements for the year ending 30 April 2016 did have £793,514 'in the "directors current accounts row"'. The £154,000 was said to have been held on a suspense ledger 'until the funds were identified on 14 May 2015'.
62. The Trustee's solicitors responded on 20 March 2017, inter alia pressing for the promised translation of the Roth Note and copies of the entries from the suspense ledger in which the sum of £154,000 was said to have been held initially on receipt by BNI. This was again chased by letter of 24 March 2017.
63. BNI responded by email dated 27 March 2017, enclosing further copies of the translated loan agreement dated 31 May 2012 and transaction permit (Heter Iska). This was not what had been requested; the Trustee wanted a translation of the Roth Note. The Trustee's solicitors chased again by letter of 30 March 2017, asking for a more legible copy of the Roth Note or sight of the original.
64. By letter of 30 March 2017, BNI wrote again enclosing copies of the translated loan agreement dated 31 May 2012 and transaction permit rather than a translation of the Roth Note. Also enclosed were partially redacted details of the suspense account.
65. By letter of 6 April 2017, the Trustee's solicitors pressed again for a clear and legible copy of the Roth Note. By further letter of 19 April 2017, the Trustee's solicitors asked to inspect the original Roth Note.

Directions Hearing of 24 April 2017

66. At the hearing of 24 April 2017, directions were given for (among other things) the Trustee to file and serve any evidence in reply by 5 June 2017. Again, the rationale behind that was to allow further time for an exchange of correspondence between the parties in the hope that the matter could be dealt with voluntarily.

Events following the Directions Hearing of 24 April 2017

67. By letter of 16 May 2017, the Trustee's solicitors asked:
- (i) for details of how each payment listed in the Roth Note was made; whether by cheque, bank transfer or cash;
 - (ii) for copies of relevant bank statements relating to any payments made by transfer or cheque and for any receipts given by any third party recipients to whom payments were made;
 - (iii) why Milton Properties Limited (a company run by the Debtor's son) was holding £154,000 for Mr Roth;
 - (iv) for copies of any documents showing the deposit by Mr Roth of these sums with Milton Properties Limited; and
 - (v) for an update on the translation of the Roth Note.
68. BNI replied by letter dated 17 May 2017, stating that they hoped to provide a substantive response by 24 May 2017. They did not.
69. No substantive response having been received, the Trustee's solicitors chased by letter of 1 June 2017, indicating that if the matter proceeded to an examination, they would wish to examine Mr Kandler and Mr Roth. The letter requested confirmation of consent to their joinder to the proceedings.
70. By witness statement dated 5 June 2017, the Trustee updated the court on progress in his enquiries. His statement confirmed that he was awaiting (among other things):
- (1) further detail and supporting documentation relating to the Roth Loan;
 - (2) an explanation of why Milton Properties Ltd was holding the sum of at least £154,000 for Mr Roth and documentation to evidence Mr Roth's deposit of such sums with the company; and
 - (3) a translation of the Roth Note.
71. On 12 June 2017, BNI responded to the Trustee's letter of 16 May 2017, stating:
- '1. We are instructed by Mr Roth that the money paid to [the Debtor] or his creditors would either have been in cash or by cheque, but due to the passage of time Mr Roth cannot remember which specific payments were in cash and which were by cheque. Mr Roth has many rental properties and it is

common for his tenants to pay him in cash or by cheque with the “payee” blank. Mr Roth could therefore give Mr Kraus [the Debtor] cash or write Mr Kraus’ name or Mr Kraus’ Creditor’s name in the “payee” section of his tenants cheques. Mr Roth’s recollection is that Mr Kraus sometimes needed the money to pay his bank, so if your client has Mr Kraus’ bank statements for the relevant period, at least some of the payments should be visible there. Mr Kraus did acknowledge receipt of the payments on the handwritten Hebrew note [ie the Roth Note].

2. We are instructed by Mr Roth that towards the end of 2014 he transferred £171,000 to Milton Properties Limited to invest as he held monies abroad. He gave instructions for £170,000 to be sent to Milton Properties Limited for a potential real estate proposal that Milton Properties Limited were putting together. The monies were sent via a money change and transfer company, namely Transway Limited. Two weeks prior thereto in order to give a show of intent to participate Mr Roth sent £1000 to Milton Properties Limited. The further £170,000 was Mr Roth’s potential share of the deposit in the event that the deal materialised, which it did not. Hence, Milton Properties Limited was holding money of Mr Roth’s in 2015. We are instructed that the money was sent to Milton Properties Limited via a money-changer, Transway Limited.

3. Mr Marmorstein of 29 Heathland Road, London N16 was asked to translate the handwritten Hebrew note (attached)....’

I pause here to note that the documents attached were in fact further copies of the 2012 loan agreement and transaction permit, not the Roth Note. The letter of 12 June 2017 continued:

‘The translation has not yet been provided, but you are welcome to chase Mr Marmorstein for it. Alternatively, your client could pay for his own translation of the note (a course which has been open to him since February)....’

I pause here to note that the copy of the Roth Note provided to the Trustee was too faint to have enabled the Trustee to obtain his own translation, which was why he had been asking for a clearer copy or sight of the original. The letter of 12 June 2017 continued:

‘4. We are instructed by Mr Roth that he does not have the original Heter Iska (the typed Hebrew loan document). Under Jewish law, once a loan is repaid [sic] the original loan document is handed back to the borrower or torn up. Mr Roth handed back the original Heter Iska to Mr Kraus. Your client will therefore need to ask Mr Kraus if he has retained the original.

Going back over the correspondence, the only information your client is still seeking from this firm is about the difference in the letter code between “CR1” and “TT60”. The answer is that both are codes for telegraphic transfers; “CR1” is code for payment received overnight so only seen on the statement and “TT60” means the payment was received during office hours.

If your client will be seeking an order for private examination or production of documents against Mr Kandler and Mr Roth, these individuals will need to be joined as Respondents to your client’s Application so that they can be heard. If you provide us with a draft of your Application to join Mr Kandler and Mr Roth as Respondents, we will consider it and then let you have our position on it ...

As you are aware from information previously provided, this firm had no involvement with Mr Roth’s loans to Mr Kraus in 2011/2012. This firm’s first involvement with Mr Kraus was the loan from Eurobeam Services Limited in 2015. Mr Kandler has no professional or personal involvement in or knowledge of Mr Kraus’ affairs prior to 2015. As for your client’s questions about the ultimate derivation of the funds paid into this firm’s bank account in 2015, Mr Kandler has no professional or personal knowledge of that either. In the circumstances, please confirm what information or documents about Mr Kraus, his dealings or affairs or property you will be seeking from Mr Kandler.

Please also confirm whether you will be seeking any orders against Eurobeam Services Limited or [BNI] at the final hearing. If so, what orders will you be seeking?’

72. By letter dated 4 July 2017, the Trustee’s solicitors responded. In summary, the letter of 4 July 2017:

(1) noted that the Trustee had for many months been seeking documentary evidence of the payments allegedly made by Mr Roth to the Debtor or on his behalf which was said to make up the loan sum of £80,000 which Mr Roth claimed was due to him by May 2012;

(2) stated that the Trustee had reviewed the Debtor’s bank statements for the relevant period and had been unable to reconcile monies coming in with the list of payments said to make up the £80,000 loan;

(3) expressed surprise that Mr Roth had been unable to provide any documentary evidence showing the funds being transferred;

(4) by paragraph 2 of the letter, noted the explanation given for the sum of £171,000 being held by Milton Properties Ltd and requested:

‘... documentary supporting evidence of these transfers including (without limitation) the following:

- a. The potential real estate proposal that Milton were putting together;
- b. Correspondence with Milton in this regard;
- c. The source of funds of the £171,000 transferred by Transway Ltd to Milton towards the end of 2014’.

(5) pressed for a copy of the translation of the Roth Note;

(6) noted the explanation regarding the absence of the original Hebrew 2012 loan agreement;

(7) enclosed a draft application to join Mr Roth as a respondent to the s366 application together with supporting statement;

(8) confirmed that in the light of the further information provided in BNI’s letter of 12 June 2017, it was not the Trustee’s intention to seek the joinder of Mr Kandler as an additional respondent or to seek orders against BNI or Eurobeam at the final hearing, save for preserving the Trustee’s position on costs.

73. BNI wrote by email on 21 July 2017 to confirm that Mr Roth and Mr Kandler were seeking independent legal advice.
74. On 1 August 2017 the Trustee’s solicitors received two letters from Waller Pollins Goldstein (‘WPG’) confirming that they were instructed by Eurobeam and stating that they anticipated in able to have reviewed all the paperwork by the end of the week.
75. By letter dated 2 August 2017, the Trustee’s solicitors wrote to WPG asking them to confirm whether they were also instructed on behalf of Mr Roth and whether Mr Roth consented to the joinder application. The letter also requested a substantive response to the letter of 4 July 2017.
76. The Trustee’s solicitors sent a chaser by letter dated 17 October 2017. A further chaser was sent by letter dated 7 March 2018.
77. By letter dated 15 March 2018, the Trustee’s solicitors wrote directly to Mr Roth, enclosing copies of their earlier letters to WPG and asking him to confirm by 23 March 2018 whether he consented to being joined as a respondent to the s.366 Application.
78. Nothing was heard from WPG, Eurobeam or Mr Roth prior to the issue of the Joinder Application in August 2018.

The Joinder Application: 2 August 2018

79. By Application Notice dated 2 August 2018, the Trustee applied to CLCC for an order that Mr Roth be joined as a respondent to the s.366 application. The joinder

application was supported by a witness statement of Mr Nicholas Goldstone, solicitor for the Trustee, dated 2 August 2018.

80. The reason for seeking Mr Roth's joinder was set out at paragraph 17 of Mr Goldstone's statement, where he stated:

'It now appears from the witness statement filed by Mr Roth dated 19 January 2017 and from the information provided in correspondence with BNI that he is the appropriate individual at Eurobeam who has personal knowledge of these matters and of the background to the subject transactions. In circumstances where it now appears that this matter will need to proceed to a private examination of Mr Roth, it is necessary that he is now joined as a party to the Application to be made personally subject to the Order made at the final hearing of the Application'.

81. Mr Goldstone went on to confirm at paragraph 20 of his statement that in light of the information provided in BNI's letter dated 12 June 2017, it was not now anticipated that Mr Horton would seek an order for examination against BNI, Eurobeam or Mr Kandler. Mr Goldstone further confirmed that Mr Horton would be seeking an order for examination against Mr Roth, *unless* the outstanding information that had been sought from Mr Roth was provided to the satisfaction of Mr Horton prior to the hearing of the Application. Mr Goldstone reserved the Trustee's position against BNI and Eurobeam on the issue of costs.

Hearing of the Joinder Application: 9 October 2018

82. The s366 Application and the Joinder Application were listed for hearing before District Judge Alan Johns QC on 9 October 2018. Ms Staynings of Counsel appeared for the Trustee and Mr James Davies of Counsel appeared for Eurobeam and Mr Roth. BNI did not attend and was not represented, having consented to the Joinder Application (and a minor amendment of the Application Notice to reflect its new status as an LLP).
83. The Joinder Application was hotly contested by Mr Davies and it was this application that then took up most of the time allocated for the hearing.

Order of 9 October 2018

84. In the event, joinder of Mr Roth as third respondent to the 366 Application was ordered on 9 October 2018. In addition, it was (inter alia) ordered:
- (1) that the s366 Application be stayed as against BNI with liberty to restore;
 - (2) that the Trustee should set out clearly in writing for Mr Roth (and serve on him) a list of the information still sought from him by 4pm on 30 October 2018;
 - (3) that Mr Roth should file and serve any written evidence in response to the application by 4 December 2018;

- (4) that the Trustee should file and serve any written evidence in reply by 8 January 2019;
- (5) that there should be a non-attendance pre-trial review on the first available date after 22 January 2019;
- (6) as to the costs of the Joinder Application, (a) that there be no order as between the Trustee and BNI; and (b) that costs as between the Trustee and Eurobeam/Mr Roth be reserved.

Events following the hearing of 9 October 2018

85. Following the hearing of 9 October 2018, the Trustee prepared a schedule of information still sought from Mr Roth. The schedule was dated 30 October 2018 and provided (inter alia) as follows:

‘(1) Please confirm (supported by a statement of truth) the date and amount of the payments said to comprise the alleged initial £80,000 loan from the Third Respondent to the Bankrupt and provide supporting contemporaneous documents in respect of each transfer of funds.

(2) Please disclose a copy of the English translation of the “handwritten Hebrew note” that [BNI] stated was in the process of being prepared in their email dated 27 February 2017 [ie the Roth Note]

(3) Please confirm that the original “handwritten Hebrew note” [ie the Roth Note] is available for inspection. If not, please confirm (supported by a statement of truth) why not.

(4) In respect of any other substantiating documentation, please provide copies of the same.

(5) Please confirm (supported by a statement of truth) the Third Respondent’s understanding ... of the purpose of the alleged additional loan of a further circa £178,000 referred to at paragraphs 5 and 6 of the Third Respondent’s witness statement dated 19 January 2017 ...

...

(9) Please provide the explanations and documentation sought (supported by a statement of truth) to the questions raised at paragraphs 2(a) to (c) of Gordon Dadd LLP’s letter dated 4 July 2017 concerning the funds allegedly held on the Third Respondent’s behalf by Milton Properties Ltd (a company in which the Applicant understands the Bankrupt is involved and of which the Bankrupt’s sons are directors) from which the Applicant understands it is asserted that £154,000 of the funds

allegedly advanced by the First Respondent to the Bankrupt came.

(10) Please provide all historic documentation relating to all and any transactions entered into between the First and Third Respondents and any of them on the one hand and the Bankrupt on the other.’

86. Mr Roth filed a witness statement dated 6 December 2018 in response to the schedule of outstanding information dated 30 October 2018. His statement provided (inter alia) as follows:

‘1. I confirm the dates and times of the payments made to and on behalf of the bankrupt as per the attached schedule. I am further advised that my former solicitors, [BNI], provided all of this information to the Applicant previously’.

87. The ‘attached schedule’ referred to in Mr Roth’s witness statement dated 6 December 2018 was a typed list of sums said to make up the Roth Loan. Mr Roth was incorrect in stating that BNI had ‘provided all of this information to the Applicant previously’. The schedule attached to his witness statement dated 6 December 2018 contained sums which had *not* been included in the Roth Note attached to BNI’s email dated 27 February 2017. The figures in the Roth Note added up to £44,000, although in summarising the same at paragraph 1b of their email of 27 February 2017, BNI had wrongly totalled them as £80,000. The typed schedule exhibited to Mr Roth’s witness statement dated 6 December 2018 sought to put this right, adding, in addition to the payments listed in the Roth Note, the following single line:

‘* Till the 22 of July 2011, £36,000 was lent’

88. The insertion of this extra figure of £36,000 neatly brought the total up to £80,000. No breakdown of the sum of £36,000 was provided, nor any details of the dates on which the sums making up this sum had been lent to the Debtor.

89. Referring next to the request for a translation of the Roth Note, Mr Roth’s witness statement dated 6 December 2018 continued:

‘2. I am somewhat surprised by this request for a translation to be produced that I have prepared for the purpose of litigation, that I may wish to utilise should I need to bring proceedings against any other parties. The translation was produced simply for my own benefit and I do not consider it to be disclosable as part of this process. I do however attach a copy of a translation, but I make no comment other than it was a translation, as already stated that was produced for me’

90. Pausing there, Mr Roth’s expression of surprise was misplaced. BNI had confirmed that they were in the process of getting the Roth Note translated as long ago as 27 February 2017, yet despite chasers had failed to provide a translation to the Trustee’s solicitors. Moreover, contrary to Mr Roth’s assertion that a translation was attached to his statement, no translation of the Roth Note was exhibited to Mr Roth’s witness

statement. There was simply a typed list of the sums set out in the Roth Note together with an additional sum of £36,000, now said, for the first time, to have been lent in an unspecified period up to 22 July 2011. No translation of the handwritten Hebrew text contained in the Roth Note was (or has ever been) provided.

91. Mr Roth's witness statement continued (inter alia):

'3. The original handwritten Hebrew note, was as is customary in our community, was handed to the bankrupt in exchange for £300,000 loan.

4. I believe all documentation in relation to the loans have already been produced.

5. I provided the bankrupt with £178,000, as the bankrupt was involved in a terrible accident and needed money to defend himself and I understood to live.

...

9. I respond to the questions posed in the letter 4 July and say as follows

a. Milton Properties Ltd – I did not know of any connection between the bankrupt and the company.

b. At no time did I discuss with the bankrupt any issues pertaining to Milton properties Ltd.

c. The children of the bankrupt are directors of the company, my understanding was, and actually still is, that I do not believe that there is any this relationship between the parents and children.

d. Milton Properties Ltd, offered me a property investment, which fell through hence my transaction with them.

10. In spite of the fact that this appears to be a fishing expedition, I am prepared to respond to this and state that Eurobeam Ltd has had no business dealings other than those disclosed with myself.'

92. Pausing there, Mr Roth's purported responses to the questions posed in paragraph 2 a-c of the Trustee's solicitor's letter of 4 July 2017 did not in fact answer the questions raised (see paragraph 72(4) of this judgment).

93. Following receipt of Mr Roth's statement of 6 December 2018, the Trustee's solicitors wrote to WPG by letter dated 11 December 2018 asking that Mr Roth address, by way of *supplemental witness statement*, a number of points which had either not been addressed in his statement of 6 December 2018 or required further clarification. This request was made 'in the spirit of cooperation'.

94. Adopting the same paragraph numbering as that adopted in Mr Roth's witness statement dated 6 December 2018, the matters listed in the letter of 11 December 2018 to be addressed were (inter alia) as follows:

'(1) [BNI] did previously provide a schedule of payments purporting to show the alleged initial loan sum of £80,000 but, as can be seen from Mr Kandler's email of 27 February 2017, the schedule of payments provided did not amount to £80,000. This appears to be the first time that Mr Roth has asserted that the bankrupt was indebted to him in the sum of £36,000 prior to 22nd July 2011. In relation to the schedule and to Mr Ross witness statement ("the Schedule"), please confirm the following:

(a) Please confirm the date and amount of the payments said to comprise to some of £36,000 shown on the Schedule.

(b) Please confirm whether it is the First and Third Respondent's position that they hold no contemporaneous documents whatsoever showing the payment of the initial loan sum of £80,000, or any part thereof, too, or at the direction of, the Bankrupt.

(2) Contrary to what is stated in Mr Roth's Witness Statement, he does not appear to have provided a translation of the Hebrew language note... [ie the Roth Note] but appears to have provided another copy of the translation of the Loan document and Heter Iska... Please confirm whether your client has obtained a translation of the [the Roth Note] and, if so, whether he is willing to disclose it.

(4) We understand from this paragraph that Mr Roth is confirming that documentation relevant to the loans under his and/or the First Respondent's control has now been disclosed. Please confirm.

(5) We note Mr Roth's statement that he provided the Bankrupt with £178,000 as he needed the money "to defend himself " and "to live". In that context, please explain the following :

(a) Whether the First and/or Third Respondent knew of Caruso A.G. ("Caruso") and the Bankrupt's connection with its prior to the loan being advanced.

(b) The First and/or Third Respondent's understanding of why the majority of the £178,000 was being transferred to Caruso, a foreign registered company. What due diligence had been carried out by them (or either of them) on Caruso prior to funds being released?

...

(9) Mr Roth does not appear to have answered the questions posed at paragraphs 2(a)-(c) of our letter dated 4 July 2017 or provided the requested documentation. Can he please do so?

(10) This paragraph is unclear. Can Mr Roth please clarify whether it is intended to confirm that the First and/or Third Respondent (or either of them) has had no other business dealings with the Bankrupt.'

95. On 18 January 2019, WPG responded as follows (adopting the same paragraph numbering as that appearing in the letter of 11 December 2018):

'1. Dates and amounts of payments comprising the original £36,000

we are instructed our client has been unable to locate any further documentation relation to this.

2. [Re: the Roth Note] No translation of this handwritten note was ever produced.

3. Our client confirms that the best of his knowledge and belief he has provided all the documentation that he has in his possession relation to this matter.

5. We note your request for an explanation as to why our client believed he was providing £178,000, it is our client's position that he has responded to this previously. Additionally, we do not consider this to be an appropriate question. In any event our client did not know who Caruso was at the time that he transferred funds there. ...

...

9. In reply to the questions posed in the letter of the 4th July 2017:

a. Potential Real estate transaction, was 28 Upper Clapton.... [details of the potential transaction were then given]...

b. Our client has endeavoured to obtain the correspondence in relation to the aborted transaction, but due to the passage of time does not and has not been able to locate any of these.

10. There is no documentation to disclose in relation to transactions passing between our client, his company and Mr Kraus, since none took place.'

The Trustee's evidence in reply: 15 February 2019

96. Following receipt of WPG's letter of 18 January 2019, the Trustee prepared his witness statement dated 15 February 2019. By that witness statement, the Trustee stated and observed:
- (1) that no documentary evidence of payment of the sums making up the Roth Loan had been provided and that none of the sums said to make up that loan appeared in the Debtor's bank statements;
 - (2) that no particulars at all had been provided of the £36,000 first mentioned in Mr Roth's statement of 6 December 2018;
 - (3) that the only contemporaneous record of the Roth Loan was a photocopy of the Roth Note, the original of which was no longer available for inspection;
 - (4) that the loan document executed on about 31 May 2012 purportedly confirmed 'receipt' of the sum of £80,000 on 31 May 2012, which plainly did not reflect reality;
 - (5) that Milton Properties Limited, which was involved in providing £154,000 of the overall loan of £300,000 said to have been advanced by Eurobeam to the Debtor, was a company nominally owned by the Debtor's son, Abraham Krausz;
 - (6) that no contemporaneous documentation had been adduced to evidence the underlying property deal said to explain why Milton was holding monies on Mr Roth's behalf;
 - (7) that there was a lack of evidence that Eurobeam was ever a beneficial owner of the said sum of £154,000;
 - (8) that payments of £122,320.72 to Caruso AG (a Liechtenstein company controlled by the Debtor and his family, in which the Debtor was the principal actor) and £47,994.28 to Salomon Krausz (the Debtor's son) were made from the Eurobeam Loan and subsequently secured on the Property;
 - (9) that Eurobeam had written to the Debtor on 1 December 2015 stating that a loan of £300,000 had been made on 30 April 2015 when (a) Eurobeam's accounts for the year ended 30 April 2015 (signed off by Mr Roth) made no mention of any such loan and (b) Eurobeam's proof of debt stated that the loan was made on 17 May 2015;
 - (10) that no documentary evidence had been provided to support the purported 'novation' of the Roth Loan to Eurobeam or the purported loan by Mr Roth to Eurobeam of the said sums then paid on by BNI to Caruso and Salomon Krausz.
97. The Trustee concluded in his witness statement that these were matters that needed to be addressed through Mr Roth attending court to answer questions.

Hearing of 29 October 2019

98. The next hearing of the s.366 application took place on 29 October 2019. The Trustee was represented by Ms McCambley and the First and Third Respondents were again represented by Mr Davies. The First and Third Respondents (now represented before

me by Stephen Innes of Counsel) maintain that Deputy District Judge Colquhoun was critical of the Trustee at that hearing. No transcript of the hearing has been provided, however. Moreover, whilst it is clear from paragraphs 5 and 7 of the Order of 29 October 2019 that, by the time of that hearing, the court wished to impose a degree of discipline on the lines of enquiry that the Trustee could continue to pursue within the context of the s.366 application thereafter, it is also clear that, notwithstanding having been represented by Counsel at the hearing, the First and Third Respondents did not persuade the Court to dismiss the application there and then. Instead, the Court ordered Mr Roth, in mandatory terms ('must'), to file a further witness statement, (a) answering a short list of questions regarding when, to whom and in what amounts the loan monies of £36,000 claimed to have been lent by Mr Roth to the Debtor prior to 22 July 2011 had been paid and (b) confirming the accuracy of the answers given by WPG on his instructions in WPG's letter of 18 January 2019; answers which the Trustee's solicitors had asked to be addressed in a supplemental statement (rather than by letter) as long ago as December 2018: see paragraphs 93 and 94 above.

99. The order of 29 October 2019 further provided that, within 21 days of service of the supplemental witness statement, the Trustee was to confirm by letter whether or not he still wished to proceed with the application. Costs were again reserved.

Events following the hearing of 29 October 2019

100. Pursuant to the Order of 29 October 2019, Mr Roth filed a supplemental witness statement dated 12 December 2019. It was filed and served late (April 2020) as a result of administrative error on the part of WPG, but nothing turns on that, save to explain the timing of the Trustee's steps thereafter.
101. By his witness statement dated 12 December 2019, Mr Roth inter alia (a) confirmed that the contents of WPG's letter of 18 January 2019 were true and accurate (b) stated that he had already provided the Trustee with details of the pre July 2011 loans of £36,000 (which on the evidence before me was incorrect); (c) provided some (not altogether consistent or satisfactory) information regarding the payments making up the said pre-July 2011 loans of £36,000.
102. The Trustee was not entirely satisfied with the explanations given regarding the pre-July 2011 loans of £36,000, but at this stage (April 2020) took a commercial view and elected not to proceed with the s366 application any further.
103. Attempts to agree on the issue of costs having proved unsuccessful, by letter of 9 July 2020, the Applicant's solicitors wrote to CLCC seeking the listing of a one hour hearing to determine the issue of costs. No hearing was listed by CLCC.
104. Subsequently, for unrelated reasons, the underlying bankruptcy proceedings were transferred to the High Court by order of DJ Revere dated 2 February 2021. Following the transfer, at the request of the Applicant's solicitors, ICC Judge Mullen by order dated 22 April 2022 listed the present hearing to determine the issue of costs.
105. Against that backdrop, I turn to consider the issue of costs.

Legal Principles

106. Under s.366(1) IA 1986, the court may, at any time after a bankruptcy order has been made, on the application of the trustee in bankruptcy, summon to appear before it any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property. The court may require any such person to submit to the court a witness statement verified by a statement of truth containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property.
107. Rule 12.22(1) of the Insolvency (England and Wales) Rules 2016 ('IR 2016') provides that where the court has ordered an examination of a person under (inter alia) s366 and it appears to it that the examination was made necessary because information had been unjustifiably refused by the respondent, it may order that the respondent pays the costs of the *examination*. It was common ground that this rule does not apply to the present case, as no examination was ordered.
108. Under rule 12.22(2), where the court makes an order against a person under s.367(1) to deliver up property in any person's possession which belongs to the insolvent estate, the costs of the application for an order may be ordered by the court to be paid by the respondent. It was common ground that this rule does not apply to the present case, as no such order was made.
109. Subject to rule 12.22(1) and (2), the Trustee's costs must, unless the court orders otherwise, be paid out of the bankrupt's estate: rule 12.22(3).
110. Rule 12.22(4) provides that a person summoned to attend for examination must be tendered a reasonable sum for travelling expenses incurred in connection with that person's attendance at any other costs falling on that person are at the court's discretion. It was common ground that this rule does not apply to the present case, as no examination was ordered.
111. Rule 12.1 IR 2016 provides that the provisions of the CPR apply for the purposes of proceedings under Parts 1 to 11 of the Insolvency Act 1986 with any necessary modifications, except so far as disapplied by or inconsistent with IR 2016. Section 366 falls within Part 9 of the Act.
112. Under CPR 44.2, the court has a discretion as to whether costs are payable by one party to another. CPR 44.2(2) provides that if the court decides to make an order on costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.
113. In deciding what order to make about costs, the court will have regard to all the circumstances, including the conduct of the parties, whether a party has succeeded on part of its case and any admissible offer to settle made by a party which is drawn to the court's attention (and which is not a Part 36 offer): CPR 44.2(4). The conduct of the parties includes (a) conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued its case: CPR 44.2(5).

The parties' positions on costs: overview

114. The Trustee seeks an order (i) that Eurobeam and Mr Roth (jointly and severally) pay the Trustee's costs of and occasioned by the Joinder application; (ii) that Eurobeam alone pay the Trustee's (other) costs of and occasioned by the s.366 application up to 9 October 2018 and (iii) that Eurobeam and Mr Roth (jointly and severally) pay the Trustee's costs of and occasioned by the s.366 application from 9 October 2018 onwards.
115. Eurobeam and Mr Roth seek an order that the Trustee pays their costs of and occasioned by the s.366 application.

Submissions on approach

116. On behalf of Eurobeam and Mr Roth, Mr Innes submitted that 'costs should follow the event'. In this regard he referred me to an extract from Totty, Moss & Segal on Insolvency Vol 2 Chapter F1:

'F1-10 There are two aspects of costs in relation to ss 236 and 366 of the Insolvency Act 1986 which need to be considered: costs of the application for an order and the cost of the examination itself.

Where the application for an order is unopposed, the applicant will normally be entitled to recover his or her costs of making the application out of the insolvent estate ... However, if the application for an order is opposed by the respondent (or if, the order having been made ex parte, the respondent then applies to set it aside), the costs of that application will be at the discretion of the court : the normal principle that costs follow the event should apply...'

117. On behalf of the Trustee, Ms McCambley referred me to the case of Miller v Bain & Ors [2013] BPIR 959 (a case in which examination was ordered). This was an application under s.236 rather than s.336, but the same principles apply to both. In Miller, it was held that the correct test regarding liability for the officeholder's costs is whether the officeholder was reasonably entitled to conclude that there was a serious risk that the debtor would not cooperate with him and attend for an interview otherwise than under the compulsion of a court order.
118. Ms McCambley also referred me to Hunt v Renzland [2008] BPIR 1380 (another case in which examination was ordered). In Hunt, the court confirmed (at [10]), that the costs of the application are dealt with by rule 9.6(3) IR 1986 (now 12.22(3) IR 2016), which empower the court, in the exercise of its discretion, to make an order that an examinee pay the costs of obtaining an order for his examination. In Hunt, the judge (at [31]) applied the same test as that applied in Miller, namely, whether the officeholder was reasonably entitled to conclude that there was a serious risk that the proposed examinee would not cooperate with him and attend for an interview otherwise than under the compulsion of a court order.

Approved Judgment

119. Ms McCambley further referred me to the case of *Harvest Finance Ltd* [2014] EWHC 4237 (Ch).

Conclusions on approach

120. In my judgment, save to the extent that Rule 12.22 IR 2016 makes specific provision on costs, CPR 44.2 applies: rule 12.1 IR 2016.
121. CPR 44.2(2) provides that if the court does decide to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.
122. In relation to the Trustee's costs of the s.366 application, the general rule laid down by CPR 44.2(2) is tempered to an extent by r12.22(3) IR 2016, which provides that the Trustee's costs must, unless the court orders otherwise, be paid out of the bankrupt's estate. This suggests a different starting point than the 'loser pays the winner' approach proposed by CPR 44.2(2); the starting point prescribed by r12.22(3) is that the Trustee's costs are paid out of the bankrupt's estate *unless* the court orders otherwise. The emphasis is different.
123. Rule 12.22(3) IR 2016 is silent, however, on the issue of the costs of a s.366 application incurred by a respondent. By operation of r12.1 IR 2016, therefore, the 'general rule' laid down by CPR 44.2(2) will apply (as reflected in the passage in *Totty* upon which Mr Innes relied), but must be considered in context. In this regard, when considering the success or otherwise of a s.366 application, the court must take into account that in many cases a s.366 application is an iterative process, in which the respondent will proffer, by way of a series of witness statements purportedly 'in answer' to the application, some or all of the outstanding information and documentation which prompted the s.366 application in the first place, in an effort to avoid 'substantive relief' being granted on the application. Boundaries can become extremely blurred. Viewed in this context, determining 'success' involves far more than considering whether or not an order for private examination was ultimately granted. The court must consider the realities.
124. In addition, when reviewing 'conduct' for the purposes of CPR 44.2(4)(a) and (5), in cases where evidence given 'in answer' to the application ultimately obviates the need for an order for private examination, one of the factors which the court will need to consider, drawing by analogy on the guidance given in *Miller*, is whether the officeholder was reasonably entitled to conclude that there was a serious risk that the proposed examinee would not cooperate with him without the discipline imposed by proceedings brought under s.366.

Submissions on costs

125. Mr Innes first submitted that costs should follow the event; as no order for private examination was made, he argued, the Trustee should be treated as the unsuccessful party.
126. For reasons explored at paragraph 123 of this judgment, however, the position is more nuanced than that. The issue and pursuit of a s.366 application resulted in significant information being disclosed by Eurobeam and Mr Roth. It is in my judgment entirely

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unrealistic to suggest that the Trustee had no success on his application simply because the evidence disclosed ‘in answer’ to the application obviated the need for an order for private examination. Moreover, in relation to Mr Roth, substantive relief *was* granted, by the Order of 29 October 2019: see paragraph 98 above. On any footing, the Trustee cannot, in my judgment, be treated as the unsuccessful party when considering costs.

127. Moreover, even if the Trustee did fall to be treated as the unsuccessful party, CPR 44.2(2) itself makes clear that the court is not bound to apply the ‘general rule’; it may make a different order. Costs are in the discretion of the court. In the current context, when considering the issue of costs, the court will look closely at the conduct of the parties, both prior to the issue of proceedings and thereafter.
128. In the period leading up to issue of the application, Eurobeam (acting by Mr Roth) adopted an offhand, unhelpful approach. Despite numerous letters from the Trustee to Eurobeam, dated 18 May, 1 June, 14 June, 12 July, 14 September, 27 September and 18 October 2016, the Trustee’s requests for information remained largely ignored by the time the Application was issued. Such information as was provided consisted of conflicting and/or partial accounts of the Eurobeam Loan.
129. Mr Innes’ attempts to demonstrate on the correspondence that ‘substantial information’ was provided by BNI on behalf of Eurobeam, prior to the application being made, were entirely unpersuasive. In this regard Mr Innes relied upon BNI’s letter of 12 September 2016 (which was inaccurate and misleading: see paragraph 22 above) and the later letter of 15 September 2016 (which provided only part of the picture: see paragraphs 25-27 above). He also relied upon BNI’s letter of 31 October 2016 (quoted at paragraph 28 above), which again gave only a partial account.
130. In my judgment, on the evidence before me, the Trustee was reasonably entitled to conclude in the period leading up to issue of these proceedings that there was a serious risk that Eurobeam (acting by Mr Roth) would not cooperate with him otherwise than under the compulsion of a court order.
131. The Trustee was plainly justified in issuing the Application. It was not until after the Application had been issued that certain key information regarding the Eurobeam Loan was forthcoming: see for example paragraphs 48 and 49 above. Given the timing of provision of that information, set against the backdrop of the pre-issue correspondence, I consider it legitimate to conclude that the provision of such information was prompted by issue and service of the s.366 Application. None of the information in question, all of which plainly fell within the scope of s.366, had been provided to the Trustee at any stage previously, despite numerous requests.
132. Mr Innes argued that the Trustee should have stopped pursuing his s.366 Application upon receipt of the first witness statements of Mr Roth and Mr Kandler in January 2017, ahead of the first hearing on 23 January 2017. I reject that argument. Indeed, in advance of the hearing on 23 January 2017, BNI (acting on their own behalf and as solicitors for Eurobeam) tacitly acknowledged by their email dated 20 January 2017 (quoted at paragraph 50 above) that information and documentation reasonably required by the Trustee had yet to be provided. The proposed consent order agreed in the run up to the hearing of 23 January 2017 and the order made at the hearing itself also contemplated the provision of further documentation and information on a

consensual basis. None of the parties, at the time of the hearing of 23 January 2017, proceeded on the basis that all information and documentation reasonably required by the Trustee had already been provided. The correspondence exchanged in the period following the hearing of 23 January 2017 to the end of May 2017 (as summarised at paragraphs 53 to 68 above) speaks for itself.

133. By the beginning of June 2017, the Trustee was still awaiting (1) further detail and supporting documentation relating to the Roth Loan (2) an explanation of why Milton Properties Ltd was holding the sum of at least £154,000 for Mr Roth and documentation to evidence Mr Roth's deposit of such sums with the company and (3) a translation of the Roth Note (which had been promised by BNI back in February 2017): Trustee's witness statement 5 June 2017.
134. Whilst some further information was provided by BNI's letter of 12 June 2017, the Trustee still awaited information and documentation reasonably requested, including documentary evidence of the various sums making up the Roth Loan and documentary evidence of and relating to Mr Roth's transfer to Milton Properties Ltd of the sum of £171,000 (see BNI's letter dated 12 June 2017 and the Trustee's reply dated 4 July 2017, as summarised at paragraphs 71 and 72 above).
135. The letter of 4 July 2017 enclosed a draft Joinder Application relating to Mr Roth and made clear that the Trustee's ongoing enquiries would now be targeted at Mr Roth personally. Eurobeam and Mr Roth responded by instructing new solicitors, WPG. Despite chasing correspondence, however, WPG then failed to engage substantively with the Trustee for over a year: see paragraphs 74 to 78 above.
136. In my judgment, by the date of issue of the Joinder Application on 2 August 2018, the Trustee was reasonably entitled to conclude that there was a serious risk that Mr Roth would not cooperate with him otherwise than under the compulsion of a court order.
137. At this stage (the issue of the Joinder Application) it was open to Mr Roth to engage constructively with the Trustee and to provide (to the best of his ability) the outstanding information and documentation reasonably requested of him by the Trustee's letter of 4 July 2017. Instead of adopting that course, however, Mr Roth instructed (and as its director caused Eurobeam also to instruct) Counsel to oppose the joinder application at a hearing on 9 October 2018. This was plainly an unreasonable stance to adopt in light of CPR 19.2(2) and in the circumstances of this case. Unsurprisingly, Mr Roth and Eurobeam were unsuccessful in their opposition to the Joinder Application (see paragraphs 82 to 84 above). Joinder was ordered, directions were given for the Trustee to serve on Mr Roth a list of outstanding information and Mr Roth was required to file a witness statement in answer to the s.366 application.
138. Mr Roth's witness statement of 6 December 2018 was plainly inadequate and raised more questions than it answered: see generally paragraphs 85 to 92 above. In my judgment it was entirely reasonable and proportionate for the Trustee to have invited Mr Roth to provide answers to the Trustee's follow up questions by way of supplemental statement bearing a statement of truth: see paragraphs 93-94 above. Had Mr Roth provided the supplemental statement answering, to the best of his ability, the Trustee's questions as requested in December 2018, the later hearing of 29 October 2019 could have been avoided and the s.366 process brought to a conclusion. Instead, Mr Roth elected to instruct his solicitors to respond by letter, addressing some matters

but providing only partial information on others. This unhelpful approach prompted the hearing of 29 October 2019.

139. Although no order for private examination was made at the hearing of 29 October 2019, the Trustee was successful in obtaining an order in mandatory terms against Mr Roth. Mr Innes submitted that the focus by this stage was extremely limited, relating only to the unparticularised sums totalling £36,000 lent to the Debtor, of little importance overall. This is not an accurate summary of the relief granted on 29 October 2019, however. In reality the court ordered Mr Roth, in mandatory terms, (i) to file a witness statement confirming the accuracy of previous answers given on his behalf by WPG in their letter of 18 January 2019, on a wide range of matters set out in WPG's letter of 18 January 2019 and, in addition (ii) to answer a short list of questions regarding the said sum of £36,000. In my judgment the order of 29 October 2019 was a clear acknowledgement by the Court that even as at that date, (i) reasonably requested evidence and information remained outstanding and (ii) the Trustee was entitled to an order that Mr Roth provide the same.
140. In the event, Mr Roth's supplemental witness statement dated 12 December 2019, filed and served in April 2020, was not in all respects satisfactory; whilst it confirmed the accuracy of the responses given on Mr Roth's behalf in WPG's letter of 18 January 2019, which was some progress at least, the answers to the questions relating to the sum of £36,000 were offhand and internally inconsistent. Notwithstanding the shortcomings of the witness statement, however, the Trustee elected to adopt a pragmatic and proportionate approach at this stage and informed the Court that he would not be proceeding with the s366 application any further.
141. Mr Innes contended that the s.366 Application served no purpose. I disagree. Both Eurobeam (acting by Mr Roth) and latterly Mr Roth himself were persons 'able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property'. The lines of enquiry regarding the bankrupt's dealings, affairs and property pursued by the Trustee with Eurobeam and Mr Roth were entirely reasonable, legitimate and proportionate. Given the timing of the Eurobeam Loan and Charge, the Trustee was under a duty to investigate the same and also to investigate what had become of the Loan proceeds. Eurobeam and Mr Roth were under a public duty to assist him in that process.
142. On the evidence before me I am satisfied that the Trustee's enquiries would not have been adequately addressed by Eurobeam or Mr Roth without the discipline imposed by court proceedings. In my judgment the Trustee was reasonably entitled to conclude throughout that there was a serious risk that Eurobeam and latterly Mr Roth would not cooperate with him otherwise than under compulsion of a court order. Time after time, requested information and documentation concerning the Debtor's dealings, affairs and property was only provided as a direct result of the continued involvement of the court.
143. Mr Innes went on to argue that the reasoning behind the reservation of costs at several hearings in the s.366 application was 'no doubt' so that when costs were ultimately determined, the court 'would be in a better position to consider what had been achieved by the application'. In my judgment that is pure speculation. Mr Innes was not in attendance at any of the earlier hearings and no transcripts of such hearings have been adduced. Costs may have been reserved as a simple expedient, due to lack

of court time. Moreover, even if the costs of any given hearing were reserved to allow the court to reflect on what had ultimately been achieved by the application, the application has substantially achieved its purpose: see paragraphs 141 and 142 above.

144. Mr Innes also observed that Eurobeam and Mr Roth were ‘not the Debtor’, but simply third parties who lent money to the Debtor. Even as third parties, however, both Eurobeam and Mr Roth were under a public duty to assist the Trustee: *Harvest Finance Ltd* [2014] EWHC 4237 (Ch).

Conclusions

145. The evidence summarised in this judgment clearly demonstrates that the Trustee’s legitimate enquiries regarding the Eurobeam Loan, the Roth Loan and the Charge would not have been adequately addressed without the issue and continued pursuit of s.366 proceedings. The approach adopted by Eurobeam and Mr Roth was obstructive and ambiguous from the outset. Even after issue of these proceedings, there were repeated failures to respond and/or properly to engage with the Trustee. In my judgment the Trustee was reasonably entitled to conclude throughout that there was a serious ongoing risk that Eurobeam and latterly Mr Roth would not cooperate with him otherwise than under compulsion of a court order.
146. Whilst no order for private examination was ultimately made on the s.366 application, I take into account the matters explored in paragraph 123 above. I also note that the s.366 application notice sought not only an order for private examination but also the provision of documentation and information. Standing back, it is clear that the s.366 proceedings largely achieved their purpose: the provision of documentation and information on the Debtor’s dealings, affairs or property.
147. In addition, in relation to the costs of and occasioned by the Joinder Application, the Trustee was clearly the successful party.
148. In my judgment neither Eurobeam or Mr Roth has made out a persuasive case for an order for costs in their favour (whether an order for costs of and occasioned by the s366 Application or an order for costs of compliance). The Trustee cannot on any footing be described as the unsuccessful party. Eurobeam and Mr Roth were under a public duty to assist the Trustee in his legitimate enquiries regarding the Roth Loan, the Eurobeam Loan and the Charge. Their lack of constructive engagement was unreasonable. The correspondence and evidence addressed in this judgment speaks for itself. There were repeated failures to respond and properly to engage with the Trustee. Eurobeam and Mr Roth only have themselves to blame for the length of time and number of hearings it has taken to bring the s.366 proceedings to a close – and the costs involved in that process.
149. For the reasons outlined in this judgment, I conclude that:
- (1) Eurobeam should be ordered to pay the Trustee’s costs of and occasioned by the s.366 application, including the costs of and occasioned by the Joinder Application, up to and including the hearing of 9 October 2018;
 - (2) Mr Roth should be (i) jointly and severally liable with Eurobeam for the Trustee’s costs of and occasioned by the Joinder Application, up to and including the hearing of

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9 October 2018 and (ii) solely liable for the costs of and occasioned by the s366 application from the date of his joinder as a respondent on 9 October 2018 to the date of the Trustee's written election in April 2020 not to proceed further with the s366 application.

150. I further conclude that both Eurobeam and Mr Roth should be ordered to pay the Trustee's costs of and occasioned by the Trustee's subsequent application, made under the liberty to apply provision contained in the order of 29 October 2019, for a further hearing to be listed on the issue of costs. The Trustee very properly sought to agree costs with Eurobeam and Mr Roth in order to avoid this additional expense, but despite sending various chasing letters in this respect, WPG failed to respond. Ultimately, the Trustee had no alternative but to make a request for a further hearing. In the event, the Trustee has been successful in obtaining costs orders against Eurobeam and Mr Roth. In my judgment Eurobeam and Mr Roth should be ordered to pay the Trustee's costs of and occasioned by the costs application.
151. All such costs orders shall provide for costs to be the subject of detailed assessment if not agreed.
152. I shall further order that any of the Trustee's costs of and occasioned by the s.366 Application (including, for the avoidance of doubt, the Joinder Application and the costs application) which are not recovered from Eurobeam and Mr Roth shall be costs in the bankruptcy.
153. I shall hear any applications for an interim award on account of costs on the handing down of this judgment.

ICC Judge Barber