Neutral Citation Number: [2021] EWHC 533 (Ch)

Case No: CR-2020-003678

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

**IN THE MATTER OF PGH INVESTMENTS LIMITED**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

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

Date: 17 March 2021

**Before** :

**DEPUTY ICC JUDGE PASSFIELD**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**PGH INVESTMENTS LIMITED**

**Applicant**

**- and -**

**SEAN EWING**

**Respondent**

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**Phillip Gale** (instructed by LEXLAW Solicitors & Advocates) for the **Applicant**
**Rory Brown** (instructed by Wedlake Bell LLP) for the **Respondent**

**Hearing dates: 1 March 2021**

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE PASSFIELD

**Deputy ICC Judge Passfield :**

1. By an application notice dated 25 September 2020 ("**the Application**"), PGH Investments Limited ("**the Company**") applies for the dismissal of the winding up petition ("**the Petition**") presented against it by Sean Ewing ("**the Petitioner**") on 8 September 2020. In the alternative, the Company seeks an order restraining the Petitioner from advertising the Petition.

2. By the Petition, the Petitioner claims that the Company owes him the sum of £825,000 ("**the Alleged Debt**"), which is said to arise pursuant to the terms of a Share Purchase and Loan Assignment Agreement ("**the Agreement**") entered into between the Petitioner (as seller), Andrew Neate ("**Mr Neate**") (as buyer) and the Company (as guarantor) on 15 May 2020.

3. The Company disputes that it is liable to pay the Alleged Debt. I am required to determine whether it has genuine and substantial grounds for doing so. It is common ground that this will depend on the proper construction of the terms of the Agreement.

4. If I conclude that the Company is liable to pay the Alleged Debt, it is further common ground that I must go on to consider whether it is likely that the court will be able to make a winding up order against the Company under s.122(1)(f) of the Insolvency Act 1986 ("**the 1986 Act**"), having regard to the coronavirus test in para.5(3) of Schedule 10 to the Corporate Insolvency and Governance Act 2020 ("**the 2020 Act**").

5. Finally, if I am satisfied that the court has jurisdiction to make a winding up order against the Company, it is necessary for me to consider the Company's argument that the Petition should nevertheless be dismissed as an abuse of process on the grounds that the Petitioner has presented it for a collateral purpose.

## Background

6. The Company was incorporated on 5 March 2019 and is part of the Photon group of companies ("**the Group**"), which is involved in the production of dedicated purpose designed and manufactured cannabis growing lighting and the provision of facilities and infrastructure for the purpose of growing cannabis. Mr Neate and his wife are the directors of the Company. It is common ground that the Company does not carry out any trading activity. It previously held shares in other companies in the Group, but these were transferred to Mr Neate and his wife on 9 September 2020 (the day after the presentation of the Petition).

7. The Petitioner is an investor in the Group. He has purchased shares in Photon Holdings Limited ("**PHL**") and Photongrow Limited ("**PGL**"). He has also made or procured a loan to PHL in the sum of £500,000 ("**the Loan**"). The Company has raised a dispute as to whether the Loan is repayable to the Petitioner personally or to a company of which he is the sole director and beneficiary (Doyne Investments Limited), although this was not specifically addressed at the hearing.

8. On 15 May 2020, the Petitioner, Mr Neate and the Company entered into the Agreement. In broad terms, it provided for Mr Neate to purchase some of the Petitioners' shares in PHL and PGL ("**the Sale Shares**") and the Loan for £825,000. Mr Neate asserts that this was conditional on him finding an onward buyer for the Sale Share by 15 July 2020; the Petitioner denies this. By clause 6 of the Agreement, the Company provided a guarantee and indemnity to the Petitioner. I will turn to consider the precise terms of the Agreement and, in particular, the guarantee and indemnity, in paragraphs 37 to 63 below.

9. On 7 July 2020, the Petitioner's solicitors (Wedlake Bell) emailed Mr Neate noting that he had yet to make any payments to the Petitioner pursuant to the Agreement and indicating that the "latest date for payment in full" was 15 July 2020.

10. In the event, Mr Neate did not purchase the Sale Shares and the Loan by 15 July 2020.

11. On 22 July 2020, Mr Neate emailed the Petitioner stating: "I'm being told by my source of funds we should complete on Tuesday [28 July 2020]. I will stay in touch before then with news".

12. On 23 July 2020, the Petitioner responded to that email stating that he had spoken with his solicitors but has asked them to "refrain from progressing as advised, pending your update over the next few days, and completion next Tuesday" and asking Mr Neate to "forward a part payment" as a show of goodwill.

13. On 31 July 2020, Wedlake Bell wrote to Mr Neate threatening to issue proceedings against him if he did not pay the sum of £825,000 to the Petitioner by 7 August 2020. On the same day, Wedlake Bell also sent the Company a formal demand for payment in accordance with clause 6 of the Agreement.

14. On 19 August 2020, the Petitioner sent Mr Neate a WhatsApp message indicating that he would commence proceedings against him the following day. Mr Neate replied to that message stating "I cannot pay you with what I currently don't have" and asking the Petitioner to "extend the completion date of our contract" to 30 September 2020.

15. On 20 August 2020, Mr Neate sent to Wedlake Bell a letter signed on behalf of himself and the Company stating as follows:

> *"We acknowledge, confirm and agree to an amendment of the Agreement as follows;*
>
> *1. The Agreement of 15th May 2020 is between Sean Ewing, Andy Neate, and PGH Investments limited and as detailed therein provides for the purchase by Andy Neate of Mr. Ewing's shares in PHL and PGL together with Mr. Ewing's loan to PHL for £825,000; and*
>
> *2. The closing envisaged in the Agreement to be by 15 July, 2020 has not occurred and Mr. Ewing has not been paid;*
>
> *3. In consideration of Mr. Ewing agreeing to amend the closing date / payment date in the Agreement to 30 September, 2020 Andy Neate agrees at closing to pay Mr. Ewing interest at the rate of 5% from 15 July, 2020 on the £825,000 until Mr. Ewing is repaid the £825,000;*
> *and*
>
> *4. Andy Neate / PGH Investments Limited's obligation to pay Mr. Ewing is subject to the terms of the Agreement and (i) Mr Ewing adhering to the Confidentiality Provisions as detailed in the Agreement, (ii) refraining from issuing any of the letters before action referred to in the 20 August Email and (iii) Mr. Ewing not demanding repayment of his loan from PHL until after 30th September 2020, it being envisaged that such demand can only occur after 30 September, 2020 if there is no closing / Andy Neate fails to make payment in full by that date to Mr. Ewing in accordance with the Agreement as amended by the terms of this letter.*
>
> *5. We agree that we shall promptly execute a Deed of Variation with Mr. Ewing that reflects the content of this letter."*

16. On 26 August 2020, Wedlake Bell sent to Mr Neate a draft deed of variation ("**the Draft Variation**") and a conformed copy of the Agreement ("**the Conformed Agreement**") which provided for Mr Neate to purchase the Sale Shares and the Loan by 30 September 2020. It is common ground that this obligation would not have been conditional in the way that Mr Neate alleges that the Agreement was. Mr Neate alleges that he sent emails to Wedlake Bell on 26 and 27 August 2020 expressing surprise at this and providing revised drafts of the Draft Variation and the Conformed Agreement. The Petitioner denies that these emails were ever received. It is nevertheless common ground that the Draft Variation and the Conformed Agreement were never executed.

17. On 3 September 2020, Wedlake Bell sent to Mr Neate two letters. The first, which was addressed to Mr Neate personally, asserted that he was in breach of the Agreement by reason of his failure to purchase the Sale Shares and the Loan by 15 May 2020 and threatened to issue proceedings against him (and to "appraise the various directors and stakeholders of the concerns raised") if he did not execute the Draft Variation and the Conformed Agreement by 6pm the following day. The second, which was addressed to the Company, stated that the Petitioner was at liberty to serve a demand for payment on the Company under clause 6 of the Agreement, and again threatened to issue proceedings if the Draft Variation and the Conformed Agreement were not executed by 6pm the following day.

18. On 8 September 2020, the Petitioner presented the Petition. In accordance with para.4.1 of the Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020 ("**the CIGA PD**"), this was initially listed for a non-attendance pre-trial review on 13 October 2020.

19. On 14 September 2020, Mr Neate sent Wedlake Bell a detailed letter in which he asserted that the Agreement had automatically terminated on 15 May 2020, and that he and the Petitioner had reached a fresh oral agreement on 20 May 2020, but that this was conditional on his finding a buyer for the Sale Shares by 30 September 2020.

20. On 23 September 2020, the Company's solicitors (LEXLAW) wrote to Wedlake Bell inviting the Petitioner to withdraw the Petition and threatening to issue an urgent application for an injunction to restrain the advertisement of the Petition and for the dismissal of the Petition. On 24 September 2020, Wedlake Ball responded confirming that the Petitioner would not advertise the Petition until after the non-attendance pre-

trial review on 13 October 2020 and without giving the Company 10 business days' notice.

21. On 25 September 2020, the Company issued the Application, which was supported by witness statements from Mr Neate and Karim Oualnan of LEXLAW.

22. At the first hearing of the Application, on 8 October 2020, ICC Judge Mullen vacated the non-attendance pre-trial review listed on 13 October 2020 (at which the court would otherwise have given directions for a preliminary hearing in accordance with para.7.1(2) of the CIGA PD), gave directions for the filing and service of evidence in response to the Application and listed the matter for a hearing on 1 March 2021 with a time estimate of half a day, plus reading time of 2 hours.

23. In accordance with ICC Judge Mullen's Order, the Petitioner filed a witness statement dated 19 October 2020 and the Company filed a second witness statement from Mr Neate dated 27 November 2020. On 23 February 2021, the Petitioner filed a second witness statement. Although he did not have permission to do so, Mr Gale, who appeared for the Company, sensibly did not raise any objection to my reading it.

24. At 10.20pm on Friday 26 February 2021 (the working day before the present hearing), LEXLAW sent to the court by email a third witness statement from Mr Neate. In that statement, Mr Neate stated that: the previous day, he had become aware that the Petitioner had published a website online which contains false, defamatory and wholly misleading statements and misrepresentations about the Company; this website has caused the Company to lose an investment of at least £20m; and in consequence, the Company has a significant cross-claim against the Petitioner which "dwarfs" the Alleged Debt.

25. At the outset of the hearing (which commenced at 12.30pm on Monday 1 March 2021), I made it clear that I was not prepared to consider these new allegations without the Petitioner being given an opportunity to file evidence in response and it was agreed that I would simply proceed to deal with the issues outlined in paragraphs 3 to 5 above.

**Legislative Framework**

26. By s.122(1)(f) of the 1986 Act, a company may be wound up by the court if the company is unable to pay its debts. By s.123(1)(e) of the 1986 Act, a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. A failure by a company to pay a debt which is due and not disputed is of itself evidence that the company is unable to pay its debts as they fall due (*Cornhill Insurance Plc v Improvement Services Ltd* [1986] 1 WLR 114).

27. A petition founded on a debt that is disputed on genuine and substantial grounds would be an abuse of process and/or is bound to fail (*Mann v Goldstein* [1968] 1 WLR 1091). A dispute about a petition debt may nevertheless be determined on the hearing of the petition if it is sufficiently simple and straightforward and all the evidence necessary to resolve it is before the court, particularly if there is a short point of law or construction (see *French: Applications to Wind Up Companies (3rd ed)* at 7.526).

28. By para.5(1) and (3) of Schedule 10 to the 2020 Act, where (a) a creditor presents a petition for the winding up of a registered company under s.124 of the 1986 Act during the "relevant period", (b) the company is deemed unable to pay its debts on the ground specified in s.123(1)(e) of the 1986 Act (i.e. the company is unable to pay its

debts as they fall due) and (c) it appears to the court that coronavirus has had a financial effect on the company before the presentation of the petition, the court may only make a winding up order against the company if it is satisfied that the ground in s.123(1)(e) of the 1986 Act would apply (i.e. the company would be unable to pay its debts as they fall due) even if coronavirus had not had a financial effect on the company. By para.21(1) of Schedule 10 to the 2020 Act (as modified by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2020/1483), the "relevant period" means the period which begins with 17 April 2020 and ends with 31 March 2021. By para.21(3) of Schedule 10 to the 2020 Act, coronavirus has a "financial effect" on a company if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus.

29. The evidential burden of showing that coronavirus had a "financial effect" on the company before the presentation of the petition is on the company. In this regard, the company need only establish a *prima facie* case. If that is established, the evidential burden shifts to the petitioner to show that even if the financial effect of coronavirus is ignored, the company would still be unable to pay its debts as they fall due (*Re A Company (Application to Restrain Advertisement of a Winding Up Petition)* [2020] EWHC 1551 (Ch); [2020] BCC 773 at [40] and [44]-[45]).

**Nature of the Application**

30. As noted in paragraph 1 above, the Application seeks either the dismissal of the Petition or an order restraining the Petitioner from advertising it.

31. Mr Brown, who appeared for the Petitioner, argued that this is "premature and pointless" because the Petitioner has already undertaken not to advertise the Petition

without giving ten business days' notice (see para 20 above). In fact, in light of para.19(2) of Schedule 10 to the 2020 Act, the Petitioner is not presently entitled to advertise the Petition in any event.

32. By para.19(2) of Schedule 10 to the 2020 Act, where a winding up petition has been presented between 26 June 2020 and the end of the relevant period (currently 31 March 2021), any provision of the Insolvency (England and Wales) Rules which requires or permits (or authorises the court to require or permit) notice, publication or advertisement of the petition does not apply until such time as the court has made a determination in relation to the question of whether it is likely that the court will be able to make an order under s.122(1)(f) of the 1986 Act (i.e. a winding up order on the ground that the company is unable to pay its debts).

33. Prior to the enactment of this provision, it was necessary for a company served with a winding up petition which disputed the petition debt to apply for an injunction restraining advertisement of the petition in order to avoid the well-known adverse consequences that would flow from advertisement, including the freezing of the company's bank accounts and potentially significant reputational damage. However, where the court was satisfied that the company had genuine and substantial grounds for disputing the petition debt, its order would not ordinarily be limited to simply restraining advertisement of the petition; the court would also restrain any further proceedings on the petition and/or strike it out.

34. It is true that para.19(2) of Schedule 10 to the 2020 Act has removed the immediate need for a company served with a winding up petition to seek an injunction to restrain the advertisement of the petition. Moreover, as the court will necessarily have to consider any alleged dispute of the petition debt at the preliminary hearing listed in

accordance with the CIGA PD in order to determine whether it is likely that it will be able to make an order under s.122(1)(f) of the 1986 Act, a company may simply wait until that hearing to determine the issue.

35. But I see no reason why this should prevent a company from applying at an early stage for the strike out and/or summary dismissal of a petition if it wishes to do so. Indeed, there are likely to be good grounds for doing so in a case of real urgency, such as where the presentation of the petition constitutes an event of default for the purposes of a funding agreement.

36. In the circumstances, whilst I accept that it was unnecessary for the Company to apply for an order restraining the Petitioner from advertising the Petition in addition to seeking its dismissal, I do not consider that the Application is "premature" or "pointless". In any event, I note that ICC Judge Mullen listed the present hearing specifically for the purposes of considering the Company's claim that the Alleged Debt is genuinely disputed on substantial grounds and, as that issue has been fully argued before me, I will now turn to consider and determine it.

**The Agreement**

37. In order to determine whether or not the Company has genuine and substantial grounds for disputing the Alleged Debt, I am required to determine the proper interpretation of the Agreement. In doing so, my task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the principles of contractual interpretation considered by Lord Hodge in *Wood v Capita Insurance Services Limited* [2017] UKSC 24; [2017] AC 1173 at [8] to [15].

38. The Agreement is dated 15 May 2020 and was prepared by Wedlake Bell (who, as indicated above, are the Petitioner's solicitors). It contains six recitals which record as follows:

i) Recital A records that PHL has an issued share capital of £300,000 divided into 6,000,000 ordinary shares of £0.05 each (defined as the "PHL Ordinary Shares").

ii) Recital B records that PGL has an issued share capital of £200,000 divided into 4,000,000 ordinary shares of £0.05 each (defined as the "PGL Ordinary Shares").

iii) Recital C records that the Petitioner is the owner, or is otherwise able to procure the transfer, of the legal and beneficial title to (i) the "Sale Shares"; and (ii) the "Loan". In clause 1.1, "Sale Shares" is defined as the "PHL Sale Shares" and the "PGL Sale Shares". In turn, the "PHL Sale Shares" is defined as 100,000 PHL Ordinary Shares and the "PGL Sale Shares" is defined as 50,000 PGL Ordinary Shares. The "Loan" is defined as the sum of £500,000 advanced by the Petitioner to PHL in accordance with the terms of a loan agreement between the Petitioner and PHL dated 5 June 2019.

iv) Recital D records that the Petitioner has agreed to sell and Mr Neate has agreed to buy the "Sale Shares" and the "Loan" subject to the terms and conditions of the Agreement.

v) Recital E records that Mr Neate owns the entire issued share capital of the Company.

vi) Recital F records that the Company has become a party to the Agreement for the purpose of entering into the guarantee and indemnity set out in clause 6 and the undertakings set out in clause 7.

39. Clause 2 of the Agreement is titled "conditions". Clause 2.1 provides that "Completion" (defined in clause 1.1 as "completion of the sale and purchase of the Sale Shares and the Loan in accordance with this agreement") is "subject to and conditional upon" two conditions. The first condition, in sub-clause 2.1.1, is "[the Petitioner] not exercising his right to demand repayment of the Loan from PHL prior to the Completion Date" ("**the Repayment Condition**"). The second condition, in sub-clause 2.1.2, is "[Mr Neate] having the ability to pay the Purchase Price to the Petitioner on or before the Completion Date" ("**the Solvency Condition**").

40. By clause 1.1 of the Agreement, "Purchase Price" is stated to have "the meaning given in clause 4.1" (to which, see paragraph 43 below) and "Completion Date" is stated to have "the meaning given in clause 5.2" (to which, see paragraph 45 below).

41. Clauses 2.2 and 2.3 of the Agreement provide as follows:

> 2.2If the Conditions are not fully satisfied then except as provided in clause 2.3, this agreement shall automatically terminate with immediate effect at 4.01pm on 15 July 2020.
>
> 2.3If this agreement terminates in accordance with clause 2.2 it will immediately cease to have any further force and effect except for:
>
> > 2.3.1 any provision of this agreement that expressly or by implication is intended to come into or continue in force on or after termination (including clause 1 (Interpretation), clause 2.2 and this clause 2.3 (Conditions), clause 6 (Guarantee and indemnity) and clause 10 (Entire agreement) to clause 19 (Governing law and jurisdiction) (inclusive)), each of which shall remain in full force and effect; and
> >
> > 2.3.2 any rights, remedies, obligations or liabilities of the parties that have accrued before termination.

42. Clause 3 of the Agreement is titled "Sale and Purchase". It provides that on the terms of the Agreement, and subject to the "Conditions", Mr Neate shall buy and the Petitioner shall sell the "Sale Shares" and the "Loan" at "Completion". "Conditions" is defined in clause 1.1 as "the conditions to Completion, being the matters set out in clause 2.1".

43. Clause 4 of the Agreement is titled "Purchase Price". Clause 4.1 provides:

> The total consideration for the sale of the Sale Shares and the Loan is the sum of £825,000 (the **"Purchase Price"),** which shall be paid by the Buyer to the Seller in cash on Completion in accordance with clause 4.2.

44. Clause 4.2 provides for payments to be made in sterling by electronic transfer of immediately available funds to Wedlake Bell.

45. Clause 5 of the Agreement (which is titled "Completion") provides as follows:

> 5.1 Completion shall take place on the Completion Date as is agreed by the parties in writing.
>
> 5.2 The Completion Date shall be the date on which the Conditions are satisfied and the Buyer is in a position to pay the Purchase Price to the Seller in full, which date shall be no later than 4.00pm on 15 July 2020.
>
> 5.3 At Completion the Seller shall deliver or cause to be delivered to the Buyer two share transfer forms in respect of the transfer of the Sale Shares, duly signed by the Seller in favour of the Buyer (or its nominee).

46. Both parties appear to be in agreement that clause 5.2 is intended to create a longstop by which the Solvency Condition must be satisfied. However, they are in disagreement as to the effect of that longstop on Mr Neate.

47. Mr Gale argued that, on a proper interpretation of clauses 2 to 5 of the Agreement, if the Solvency Condition is not met by the longstop, Mr Neate loses the opportunity to complete the purchase of the Sale Shares and the Loan for the agreed purchase price. In this regard, he relies on the ordinary and natural meaning of clause 2.1 (which provides that completion is subject to and conditional on the Repayment Condition and the Solvency Condition) and clause 2.2 (which provides for the agreement to automatically terminate 1 minute after the expiry of the longstop if those conditions are not "fully satisfied)".

48. Conversely, Mr Brown argued that, on a proper interpretation of clauses 2 to 5 of the Agreement, Mr Neate must complete the purchase of the Sale Shares and the Loan by the expiry of the longstop whether or not the Solvency Condition has been achieved. In this regard, he relies on the fact that the Agreement is stated to be a "share purchase and loan assignment agreement" (rather than an "option agreement"), the description of the Petitioner and Mr Neate respectively as "seller" and "buyer", and the fact that clauses 3 to 5 are expressed in mandatory terms.

49. In my judgment, it is clear that Mr Gale's interpretation is the correct one, for the following reasons:

    i) on their face, clauses 2.1 and 5.2 of the Agreement make it abundantly clear that completion does not take place unless and until the Solvency Condition is met;

    ii) if, as Mr Brown contends, Mr Neate was obliged to complete the purchase of the Sale Shares and the Loan by 4pm on 15 July 2020 even if the Solvency Condition was not satisfied by that time, clause 2.2 of the Agreement (which

provides for the Agreement to automatically terminate at 4.01pm on 15 July 2020 if the Solvency Condition was not met) would be entirely otiose;

iii) clause 2.3 of the Agreement (which provides for certain provisions of the Agreement to remain in force notwithstanding its automatic termination) does not expressly reserve clauses 3 and 4 of the Agreement (which impose the obligations on Mr Neate and the Petitioner to buy and sell the Sale Shares and the Loan for the agreed purchase price);

iv) the label which the parties have placed on the Agreement, and the abbreviations which they have adopted therein, cannot be determinative of its proper interpretation (see *Lewison: The Interpretation of Contracts* (7th ed) at 9.56-9.72) but, in any event, I do not consider that the description of the Agreement as a "share purchase and loan assignment agreement" and of the parties as "buyer" and "seller" is in any way inconsistent with that agreement being conditional;

v) the Draft Variation prepared by Wedlake Bell following the automatic termination of the Agreement provided for it to be substantially amended to: (i) remove the Solvency Condition; and (ii) amend the definition of the "Completion Date" to "4pm on 30 September 2020 (or such earlier date and time when the Buyer pays the Purchase Price and Interest in full in cash to the Seller)". If Mr Brown's interpretation of the Agreement were correct, and Mr Neate's obligation to purchase the Sale Shares and the Loan was already a certain one, this would have been unnecessary;

vi) on 5 October 2020, Wedlake Bell wrote to Mr Neate inviting him to agree to the rectification of the Agreement to remove the Solvency Condition and, in

his first witness statement, the Petitioner states that "the Court should note that I will be applying for rectification of the Agreement". This necessarily presupposes that Mr Gale's interpretation of the Agreement is the correct one.

50. It is also worth noting that under the Agreement, Mr Neate's obligation to pay the sum of £825,000 and the Petitioner's obligation to transfer the Sale Shares and the Loan to him are dependent obligations. Accordingly, even if Mr Neate's obligation to pay the purchase price had crystallised before the automatic termination of the Agreement, he would not owe any debt to the Petitioner, and could not therefore be the subject of insolvency proceedings in respect thereof, although the Petitioner could sue him for specific performance or damages (see *Doherty v Fannigan Holdings Ltd* [2018] EWCA Civ 1615; [2018] 2 BCLC 623).

51. In fact, the parties were in agreement that if (as I have found) the Agreement automatically terminated at 4.01pm on 15 July 2020 in accordance with clause 2.2 of the Agreement, clauses 3 and 4 would not survive and, accordingly, Mr Neate's obligation to purchase the Sale Shares and the Loan would cease to have effect.

52. However, clause 2.3 of the Agreement expressly provides that if the Agreement automatically terminates in accordance with clause 2.2, clause 6 (which is titled "Guarantee and Indemnity") shall remain in full force or effect. The principal issue which I have to determine is whether (as Mr Brown contends) clause 6 creates a freestanding liability on the part of the Company to pay the agreed purchase price to the Petitioner notwithstanding that Mr Neate is no longer liable to purchase the Sale Shares and the Loan or (as Mr Gale contends) the automatic termination of the Agreement also operates to extinguish any liability which the Company would otherwise have under clause 6.

## Guarantee

53. Clause 6 of the Agreement (which, it is common ground, survives the automatic termination of the Agreement) provides as follows:

> 6.1 The Guarantor guarantees to the Seller the due and punctual performance, observance and discharge by the Buyer of all of the Guaranteed Obligation by the Completion Date.
>
> 6.2 If the Buyer defaults in the payment of the Purchase Price by the Completion Date the Guarantor shall, insofar as the Buyer has not paid the Seller the full amount of the Guaranteed Obligation immediately on demand by the Seller, pay the Seller any shortfall from the Guaranteed Obligation in the manner prescribed by this agreement as if it were the Buyer.
>
> 6.3 The Guarantor as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under clause 6.1 and clause 6.2, agrees to indemnify and keep indemnified the Seller in full and on demand from and against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by the Seller arising out of, or in connection with, the Guaranteed Obligation not being recoverable for any reason, or the Buyer's failure to perform or discharge any of the Guaranteed Obligation.
>
> 6.4 The guarantee in this clause 6 is and shall at all times be a continuing security until the Seller has received in total monies from either the Buyer or Guarantor equal to the Guaranteed Obligation, irrespective of any intermediate payment or discharge in full or in part of the Guaranteed Obligation.
>
> 6.5 The liability of the Guarantor under the guarantee in this clause 6 shall not be reduced, discharged or otherwise adversely affected by:
>
> > 6.5.1 any act, omission, matter or thing which would have discharged or affected the liability of the Guarantor had it been a principal obligor instead of a guarantor or indemnifier; or
> > 6.5.2 anything done or omitted by any person which, but for this provision, might operate or exonerate or discharge the Guarantor or otherwise reduce or extinguish its liability under the guarantee.
>
> 6.6 The Guarantor waives any right it may have to require the Seller to proceed against or enforce any other right or claim for payment against any person before claiming from the Guarantor under this clause 6.
>
> 6. 7 The Guarantor shall, on a full indemnity basis, pay to the Seller on demand the amount of all costs and expenses (including reasonable legal and out-of-pocket expenses and any value added tax on them) incurred by the Seller in connection with:

> 6.7.1 the preservation, or exercise and enforcement, of any rights under or in connection with the guarantee in this clause 6 or any attempt so to do; and
> 6.7.2 any discharge or release of this guarantee.

54. In clause 1.1, "Guaranteed Obligation" is defined as "the Purchase Price".

55. In *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286; [2012] 2 All ER (Comm) 265 at [7], Patten LJ identified that a guarantee may impose one or more of the following types of liability on a guarantor:

i) a "see to it" obligation: i.e. an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor;

ii) a conditional payment obligation: i.e. a promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments;

iii) an indemnity; and

iv) a concurrent liability with the debtor for what is due under the contract of loan.

56. In my judgment, it is clear that clauses 6.1 to 6.3 of the Agreement impose various of these types of liability on the Company and clauses 6.4 to 6.7 then regulate those liabilities.

57. It is common ground that clause 6.1 of the Agreement is a "see to it" obligation, and Mr Brown accepted that if Mr Neate's obligation to pay the purchase price was conditional and has ceased to have effect, the Company will have no liability under this provision. Nor did Mr Brown seek to persuade me that clause 6.3 of the Agreement, which on its face is an indemnity, created any freestanding liability on the

part of the Company which would survive the automatic termination of the Agreement.

58. Rather, Mr Brown put his case squarely by reference to clause 6.2 of the Agreement. It is common ground that this is a conditional payment obligation. Mr Brown argued that this provision is engaged because the Petitioner has not received payment of the purchase price. I do not accept that argument. On its face, clause 6.2 only applies where Mr Neate "defaults" in the payment of the "Purchase Price" by the "Completion Date". If, as I have found, his obligation to pay the purchase price was subject to the Solvency Condition and has automatically ceased to have effect, it cannot credibly be said that there has been any "default" on his part.

59. In support of his interpretation of clause 6.2 of the Agreement, Mr Brown sought to pray in aid the provisions in clauses 6.4 and 6.5. However, as I have indicated, those provisions merely regulate the various guarantee liabilities created by clauses 6.1 to 6.3 (in particular, to ensure that those liabilities are not affected by the discharge or release of Mr Neate's obligations) and I do not consider that they provide any assistance in determining the extent of the liability created by clause 6.2.

60. In addition, Mr Brown argued that clause 6, read as a whole, would make no commercial sense if it did not create a freestanding liability on the part of the Company to pay the Petitioner if Mr Neate did not, because otherwise it would never be engaged.

61. However, as Mr Gale points out, on his interpretation of the Agreement, the guarantee would be engaged if the Solvency Condition was satisfied prior to 15 July 2020 (meaning that Mr Neate's conditional obligation to purchase the Sale Shares and the Loan crystallised into a certain obligation to do so) but Mr Neate nevertheless failed

to make payment to the Petitioner. In that case, both Mr Neate (as primary obligor) and the Company (as guarantor) would be liable to pay the purchase price to the Petitioner and the Petitioner would remain obliged to transfer the Sale Shares and the Loan to Mr Neate. In the circumstances, I agree that Mr Gale's interpretation of the Agreement does not render clause 6 otiose.

62. Moreover, the logical absurdity of Mr Brown's argument is that, on his interpretation of the Agreement, if Mr Neate did not purchase the Sale Shares and the Loan by 4pm on 15 July 2020, the Company (but not Mr Neate) would become liable to pay the sum of £825,000 to the Petitioner, but the Petitioner would have no corresponding obligation to transfer the Sale Shares and the Loan to Mr Neate, meaning that the Petitioner would receive a substantial windfall. In my judgment, that plainly cannot be correct.

63. In the circumstances, I conclude that, on a proper construction of the Agreement, the Company is not liable to pay the Alleged Debt to the Petitioner and, accordingly, the Petition should be dismissed.

**Coronavirus Test**

64. In light of my finding that the Company is not liable to pay the Admitted Debt, it is not strictly necessary for me to go on to consider the coronavirus test in para.5(3) of Schedule 10 to the 2020 Act. I will however do so on the basis that I heard full argument on this issue and in case this matter goes further.

65. As indicated in paragraph 29 above, the evidential burden is on the Company to establish a *prima facie* case that coronavirus had a "financial effect" on the Company before the presentation of the Petition, that is to say the Company's financial position has worsened in consequence of, or for reasons relating to, coronavirus.

66. In *Re A Company (Application to Restrain Advertisement of a Winding Up Petition)* [2020] EWHC 1551, a winding up petition was presented against a company which operated in the field of business and property management services in eastern, western and southern Africa and was a UK holding company for a variety of companies incorporated in the local jurisdictions in which it operated. In a witness statement in opposition to the petition, the director of the company asserted that it was "solvent for its day to day operations, but relies on rolling over corporate debt and fund-raising by the issue of equity for its long-term financing". He stated that "the current Covid-19 situation has prevented both routes to acquiring new financing as international capital markets have frozen" and that "immediately before the present crisis ensued, the Applicant had agreements in principle for significant new capital financing in the region of over US$10m, all of which fell away when the emergency conditions became full-blown worldwide in early March 2020". The sole documentary evidence produced in support of those assertions was two draft loan agreements. ICC Judge Barber expressed some reservations as to the quality of the Company's evidence, but nevertheless concluded that it had met the "low threshold" of establishing that coronavirus had had a "financial effect" on the company as there was adequate evidence before her that a funding drive was underway by late December 2019/early January 2020 which was stopped in its tracks by the onset of the pandemic.

67. In the present case, in his first witness statement, Mr Neate asserts that coronavirus has had a financial effect on the Company for the following reasons:

    i) coronavirus has had a dramatic effect on liquidity investment worldwide and during these uncertain times, it is difficult for the Company to find investors and the Company has lost anticipated investment as a result of coronavirus;

ii) potential purchasers of the Petitioner's shares are based across the world outside the UK and the travel restrictions imposed as a result of coronavirus have stopped flights for business purposes. Furthermore, within the UK, it has been extremely difficult for him to network and set up business meetings;

iii) the day-to-day operations, business development and revenue of the Company have been severely impacted by coronavirus.

68. Mr Neate did not adduce any documentary evidence to support those assertions. In his second witness statement, he made the following further unsupported assertions:

i) the Company had not envisaged the long-lasting coronavirus pandemic nor that the country would be in a second lockdown. This has harmed the Company's financial position significantly because it has been largely unable to trade for the majority of the year;

ii) with the exception of the Petitioner, all investors in PGL and PHL with any monies outstanding to them have agreed to alter previous repayment terms as a consequence of coronavirus;

iii) the Petitioner and the Company discussed whether it would be possible to extend the longstop date for completion in the Agreement to allow further time for him personally to source funds with which to purchase the Petitioner's shares.

69. Mr Brown forcefully argued that these bare assertions do not overcome the admittedly low threshold of establishing that coronavirus had had a "financial effect" on the company. He noted that the Company has adduced no evidence to support the bare assertion that that it has lost anticipated investment as a result of the coronavirus

pandemic. This can be contrasted with the position in *Re A Company*, where there was some documentary evidence that the company had been engaged in a funding drive prior to the pandemic. He further noted that the Company is not a trading company. In the circumstances, Mr Neate's assertion that coronavirus has impacted the Company's day-to-day operations, business development and revenue must plainly be incorrect. Finally, he relied on the fact that the Agreement was executed after the commencement of the coronavirus pandemic, arguing that the Company would not have agreed to guarantee Mr Neate's obligations under the Agreement if it has been adversely impacted by coronavirus.

70. In response, Mr Gale accepted that coronavirus did not have a *direct* financial effect on the Company because it is simply a holding company which was never intended to attract independent investment. Rather, he argued that coronavirus had had an *indirect* financial effect on the Company because it has prevented Mr Neate from finding a buyer for the Petitioner's shares, meaning that he was unable to discharge his primary obligation under the Agreement to pay the purchase price for the Sale Shares and the Loan, leaving the Company liable to pay the Alleged Debt to the Company in his stead. Thus, the Company is in a worse financial position than it would have been in had the coronavirus pandemic not happened.

71. I accept that it would be sufficient for the purposes of para.5(1)(c) of Schedule 10 to the 2020 Act for the Company to demonstrate a *prima facie* case that coronavirus had an *indirect* financial effect of the type identified by Mr Gale (i.e. Mr Neate was unable to pay the purchase price for the Sale Shares and the Loan because of the coronavirus pandemic and this caused the Company to incur a liability which it would not otherwise have had). In this regard, I note that the definition of "financial effect" in para.21(3) of Schedule 10 to the 2020 Act is a wide one and it is sufficient for a

company to demonstrate that its financial position worsened either "in consequence of" or "for reasons relating to" coronavirus (see para 28 above).

72. However, in my judgment, the Company has not produced adequate evidence to demonstrate that Mr Neate was unable to find a buyer for the Petitioner's shares because of the coronavirus pandemic. In this regard, the sole piece of documentary evidence relied on by Mr Gale was the email from Mr Neate to the Petitioner on 22 July 2020 referred to in paragraph 11 above in which he stated: "I'm being told by my source of funds we should complete on Tuesday. I will stay in touch before then with news". There is nothing in that email which indicates that any difficulties which Mr Neate had in securing funding for the purchase of the Petitioner's shares were caused by coronavirus.

73. In the circumstances, it does not appear to me that coronavirus had a financial effect on the Company before the presentation of the Petition and therefore the restriction on making a winding up order in para.5(3) of Schedule 10 to the 2020 Act does not apply.

74. If I am wrong in that conclusion, the evidential burden will be on the Petitioner to demonstrate that the Company would be unable to pay its debts as they fall due even if coronavirus had not had a financial effect on the company. However, at this stage, I would be concerned with the anterior question of whether it is *likely* that the court will be able to make a winding up order against the Company, which must be determined with regard to the restriction in para.5(3) of Schedule 10 to the 2020 Act.

75. In *Three Rivers DC v Bank of England (No 4)* [2002] EWCA Civ 1182; [2003] 1 WLR 210, Chadwick LJ considered the meaning of "likely" in the context of CPR 31.17(3)(a) and rejected the submission that it means "more probable than not", but

also indicated that it connotes a rather higher threshold of probability than merely "more than fanciful". He held that the word has, in that context, the meaning "may well". In my judgment, Parliament must have intended that the word "likely" would have the same meaning in the context of para.19(2) of Schedule 10 to the 2020 Act. Accordingly, if I had been satisfied that coronavirus had a financial effect on the Company before the presentation of the Petition, the Petitioner would need to satisfy me that if I allow the Petition to proceed to a final hearing, it may well be able to demonstrate that the Company would be unable to pay its debts as they fall due even if coronavirus had not had a financial effect on it.

76. In this regard, Mr Brown relied on the fact that the Company's liability to pay the Alleged Debt arose as a result of an obligation entered into after the commencement of the coronavirus pandemic. He argued that when Parliament enacted the 2020 Act, it cannot have intended that a company adversely affected by coronavirus should be free to incur new debts which it cannot pay without being liable to a winding up order.

77. In response, Mr Gale argued that that is precisely what Parliament must have intended, otherwise a company which has been rendered cashflow insolvent by the coronavirus pandemic would be unable to continue to trade without risk of being wound up.

78. I remind myself that the question which the court must determine under para.5(3) of Schedule 10 to the 2020 Act is: would the Company be unable to pay its debts as they fall due if coronavirus had not had a financial effect on it before the presentation of the Petition? In order for the court to be able to answer that question in the affirmative, the Petitioner would need to demonstrate that if coronavirus had not had a financial effect on the Company before the presentation of the Petition, it would still

have incurred the Alleged Debt and would still have been unable to pay it. In my judgment, the mere fact that the Alleged Debt arose after the commencement of the coronavirus pandemic does not so demonstrate. Accordingly, if I had been persuaded that coronavirus had a financial effect on the Company before the presentation of the Petition (which, for the reasons set out above, I am not), I would not have been satisfied that there was any likelihood of the Petitioner discharging the evidential burden of satisfying the court that the Company would have been unable to pay its debts as they fall due in any event.

**Collateral Purpose**

79. In addition to the grounds already considered above, the Company argues that the Petition should be dismissed as an abuse of process because it has been brought *"for the collateral purpose of furthering [the Petitioner's] dispute with Mr Neate and to discredit him generally"*.

80. As Rose J explained in *Maud v Aabar Block SARL* [2015] EWHC 1626 (Ch); [2015] BPIR 845 at [29], the presentation of a winding up petition in respect of a debt which is otherwise undisputed will only amount to an abuse of process in two situations. The first is where the petitioner does not really want to obtain the liquidation of the company at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors. Rose J cautioned that the jurisdiction of the court to dismiss a petition based on an undisputed debt on the grounds of collateral purpose must be exercised sparingly.

81. Mr Gale asserts that both of the situations identified by Rose J apply in the present case. He invites me to infer from allegations made by Wedlake Bell in correspondence, and by the Petitioner in his witness statements, that the Petitioner either does not want to obtain the liquidation of the Company or is not pursuing his interests as a creditor of the Company but, rather, as a minority shareholder in the Group.

82. In response, Mr Brown emphasised that the Petitioner does genuinely want to obtain a winding up order against the Company, both because it is insolvent and because the transfer away of its only assets immediately after the presentation of the Petition referred to in paragraph 6 above requires investigation by a liquidator. He also pointed out that, on the Company's own case, the Petitioner is the only unsecured creditor of the Company. In the circumstances, it is logically absurd to suggest that the Petitioner is not acting in the interests of his class of creditors or that the success of the Petition will operate to the disadvantage of those creditors.

83. I accept Mr Brown's arguments. In the circumstances, if I had concluded that the Company is liable to pay the Alleged Debt, I would have refused to dismiss the Petition on the grounds of collateral purpose.

**Disposal**

84. For the reasons set out above, I dismiss the Petition.