Neutral Citation Number: [2023] EWHC 1168 (Ch)

Case No: CH-2022-000234

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2023

Before :

LADY JUSTICE ASPLIN

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Between :

TOWN AND COUNTRY PROPERTIES (GB) LTD AND OTHERS	**Appellants**
- and -	
PATEL AND OTHERS	**Respondents**

- -
- -

Daniel Lewis and **Jessica Brooke** (instructed by **Francis, Wilks & Jones**) for the **Appellants**
John Machell KC (instructed by **Thursfields**) for the **Third Respondent**
Neither the **First** nor the **Second Respondent** appeared or was represented

Hearing date: 3 May 2023

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on 17 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This is an appeal from two orders made by Deputy ICC Judge Agnello KC dated 17 November and 15 December 2022. By the first order, the judge dismissed a winding up petition in respect of the First Respondent, Black Capital (the "Winding Up Petition"), set aside a statutory demand and dismissed a bankruptcy petition against the Third Respondent, Mr Ubhi (the "Ubhi Bankruptcy Petition") and dismissed a further application made by the Appellants. By the second order the Appellants were ordered to pay the Second Respondent, Mr Patel, and Mr Ubhi's costs.

2. The judge dismissed the Winding Up Petition and the Ubhi Bankruptcy Petition on the basis that there was a dispute on substantial grounds about whether Mr Ubhi was a partner of Black Capital and whether there was a partnership at all. She also dismissed the Winding Up Petition because she held that it was governed by Article 8 of the Insolvent Partnerships Order 1994 (the "IPO") which requires the service of a statutory demand as the basis for an inability to pay debts and such a demand had not been served. The judge also concluded (albeit obiter) that the Winding Up Petition and the Ubhi Bankruptcy Petition were based upon claims for a liquidated sum. The citation for the judgment is [2022] EWHC 2914 (Ch).

3. The Appellants, who were the petitioners in relation to the Winding up Petition, the Ubhi Bankruptcy Petition and a further bankruptcy petition filed in relation to Mr Patel (together referred to as the "the Bankruptcy Petitions") appeal the orders on three bases. They are that the judge: erred in holding that there was a substantial dispute as to the existence of the alleged partnership in the light of her findings as to part of Mr Ubhi's affidavit evidence; erred in her evaluation of Mr Ubhi's evidence and misdirected herself in holding that his evidence prevented there from being a "clear case" for the purposes of the Winding Up Petition and the Ubhi Bankruptcy Petition; and erred and misdirected herself in holding that the Winding Up Petition fell within Article 8 of the IPO rather than Article 7.

4. An amended Respondent's Notice was filed on behalf of Mr Patel in which he sought to uphold the judge's orders on different or additional grounds. They were: first, that the effect of presenting the Bankruptcy Petitions was to cause Article 8 of the IPO to apply to both the Bankruptcy Petitions and to the Winding Up Petition; and secondly, contrary to the judge's decision, that the debt relied upon in the Winding Up Petition was not a liquidated sum.

5. Neither Mr Patel nor Black Capital appeared nor were they represented before me. Mr Machell KC, who appeared on behalf of Mr Ubhi, sought permission to adopt Mr Patel's Amended Respondent's Notice and to argue the point in relation to the liquidated sum. Mr Lewis, who appeared for the Appellants, did not object and I gave permission for Mr Machell to do so.

6. This matter arises out of what has been described as a Ponzi scheme. Black Capital, which is said to have been operating an unauthorised collective investment scheme, offered high returns upon investments. It is suggested that those returns were being made in some part by paying existing investors from sums received from new investors. It is said that there were more than 300 investors in addition to the Appellants. It is alleged that Black Capital was a partnership and that Messrs Ubhi and Patel were the partners. It seems that this was accepted by Mr Patel, at least.

7. The Appellants are members of the same family and their companies. During the period from September 2018 until around July 2021, they invested considerable sums with Black Capital. The total sums invested plus " Expected Returns" are said to amount to as much as £18.3 million pounds odd. The Appellants became concerned about the security of the investments and the failure to repay them when promised. In September 2022, they obtained an order appointing a provisional liquidator of Black Capital, as an unregistered company, and freezing injunctions against Mr Ubhi and Mr Patel were granted.

8. On 14 September 2022, the Winding Up Petition was presented against Black Capital pursuant to Article 7 of the IPO. The Bankruptcy Petitions were presented on 28 September 2022. Statutory demands in relation to them were dated 26 September 2022. On 10 October 2022, the Appellants sought and were granted permission to amend the Winding Up Petition to refer to the Bankruptcy Petitions. The amended statement in the Winding Up Petition is as follows: "The Court is referred to bankruptcy petitions issued against the Partners Mr Sarju Patel and Mr Ravneet Ubhi on 28 September 2022 which have been issued by virtue of Article 8 Insolvency Partnership Order 1994" (the "Amendment").

9. The judge was concerned with three main issues. They were: (i) whether there was a dispute on substantial grounds as to whether Mr Ubhi was a partner in the alleged Black Capital partnership; (ii) whether the Winding Up Petition was for a liquidated sum; and (iii) whether the Appellants should be granted various remedial orders waiving certain defects in the processes and granting permission retrospectively to have presented the Bankruptcy Petitions after the Winding Up Petition. She considered the application of Articles 7 and 8 of the IPO under this head.

10. The first issue, namely, whether there was a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital, arose out of an application to set aside the statutory demand which had been served on Mr Ubhi. The judge concluded that the source of the issue did not affect the test which she had to apply, which was whether there was a real prospect of success as to whether there was a dispute on substantial grounds [8] and [9]. In this regard, she quoted a passage from the judgment of Arden LJ in *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329 at [21] confirming the test and commenting upon its application as follows:

> ". . . In my judgment, the requirements of substantiality or (if different) genuineness would not be met simply by showing that the dispute is arguable. There has to be something to suggest that the assertion is sustainable. The best evidence would be incontrovertible evidence to support the applicant's case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant's version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation: see also per Lawrence Collins LJ in the Ashworth case, para 34. But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no

> material difference on disputed factual issues between real prospect of success and genuine triable issue."

11. The judge went on to note that it was not for her to conduct a mini trial and that where there are bare assertions in a witness statement which were contradicted by contemporaneous documents, it was open to the court to determine that the statements were inherently implausible but that such a determination is reserved for clear cases [10]. In that regard, she quoted a passage in Lord Hamblen's judgment in the Supreme Court in *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc* [2021] 1 WLR 1294 at [110] in which he had addressed the circumstances in which factual assertions might be rejected, as follows:

> "110 In his judgment at para 190 the Chancellor rejected the complaint that Fraser J had conducted a mini-trial and considered that he was doing no more than subjecting the evidence to critical analysis. He cited para 10 of Potter LJ's judgment in ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51 in which it was observed that factual assertions do not have to be accepted by the court if it is "clear" that there is "no real substance" in them, "particularly if contradicted by contemporary documents" - ie if they are demonstrably unsupportable. That is only going to be so in clear cases. As Carnwath LJ observed in Mentmore International Ltd v Abbey Healthcare (Festival) Ltd [2010] EWCA Civ 761 at [23], referring to both Potter LJ's judgment in the ED & F Man case and Lord Hope's judgment in the Three Rivers case [2003] 2 AC 1: "
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> "If Mr Reza was hoping to find in those words some qualification of Lord Hope's approach, he will be disappointed. The Three Rivers case was specifically cited by Potter LJ. He was in my view intending no more than a summary of the same principles. Lord Hope had spoken of a statement contradicted by "all the documents or other material on which it is based" (emphasis added). It was only in such a clear case that he was envisaging the possibility of rejecting factual assertions in the witness statements. It is in my view important not to equate what may be very powerful cross-examination ammunition, with the kind of "knock-out blow" which Lord Hope seems to have had in mind.""

12. Having considered the nature of the *Opkapi* case and its relevance in relation to the application of the summary judgment test, at [13] the judge held as follows:

> ". . . It is only in clear cases that a court may determine that a particular defence etc is inherently implausible. Contemporaneous documentation which supports a particular defence in a case where there are contemporaneous documents which contradict that defence is an example of a case where a Judge would not necessarily be facing one of those clear cases. There may well be cases where the contemporaneous

> documentation relied on which contradict other documentation are clearly capable of being rejected, but this is not the time to speculate on those types of cases. In my judgment, the test to be applied remains as set out by Lady Justice Arden and is one which is well understood. The Supreme Court cases provides a useful reminder of these well known principles and also that courts must not fall into the mini trial trap and must ensure that an evaluation, or critical analysis by the court of the evidence before it does not lead to findings as occurred in *Okpabi* at first instance and also in the Court of Appeal."

13. Mr Lewis, who appeared on behalf of the Appellants, both before me and before the judge, accepts that the judge directed herself correctly as to the test to be applied. As I have already mentioned, his complaint set out in his first two grounds of appeal go to the judge's evaluation of the evidence. By ground 1, it is said that there is a gap in the judge's logic when determining that there was a substantial dispute in relation to the partnership issue and that this was not a clear case. In summary, Mr Lewis says that in the light of her findings about Mr Ubhi's affidavit evidence, and in the light of the fact that it was not suggested that Mr Ubhi was dishonest, the only conclusion available to the judge was that Mr Ubhi signed the Managed Fund Agreements (the "MFAs") honestly and that they meant what they said and that there was a partnership called Black Capital of which he was a partner. Accordingly, the judge should have decided that this was a clear case in which she should reject the documentation before her rather than find that there was a substantial dispute.

14. By his second ground of appeal, Mr Lewis challenges the judge's evaluation of the evidence once again. He says that in the light of her findings in relation to Mr Ubhi's affidavit evidence, the unanswered evidence of the provisional liquidator that Black Capital had perpetrated a fraud on its investors, the fact that Mr Ubhi had refused the provisional liquidator access to the books and records of Black Capital and that the documents were not inherently incompatible with the existence of a partnership, she erred in her evaluation of the evidence and misdirected herself in concluding that the documents prevented her from deciding that this was a clear case. He says she gave the documents before her a weight they do not have, attributed to them a significance which they do not have on their own terms, failed to subject them to critical scrutiny and to evaluate them in the context of Mr Ubhi's ability to have produced much more. In the circumstances, it is important to consider the judge's treatment of the evidence in some detail.

15. In summary, at [14] the judge referred to Mr Ubhi's affidavit of 6 October 2022, in which he: denied that Black Capital was a partnership in which he was a partner, stating that he was an agent acting for Mr Patel who was a sole trader, trading as Black Capital; stated that from 2017 he had a sales role and was paid 10% commission on returns earned by the client; stated that he signed an independent contractor agreement in June 2018 which was also signed by Mr Patel; and he stated that he became an employee of Black Capital in April 2019 and was paid a wage. She also recorded that Mr Ubhi had produced a copy of the independent contractor agreement, the employment agreement, two payslips which show the deduction of tax on a PAYE basis and relied upon a letter of 13 June 2019, signed by Mr Patel in which he stated that Mr Ubhi "worked for "us"

regularly as a contractor at Black Capital on an ad hoc basis from 4 June 2018 until the role because (sic) a full time and permanent position on 5 April 2019" [14].

16. She then went on to consider the evidence relied upon by the Appellants "in order to assess this evidence alongside Mr Ubhi's position" [15]. She referred to:

    i) the MFAs entered into by the Appellants and Black Capital, some of which were physically signed by Mr Patel and Mr Ubhi as partners in Black Capital and some of which were electronically signed and noted that Mr Ubhi denied that he gave authority for the use of his electronic signature but did not deny that he had physically signed some of the MFAs [16];

    ii) the fact that the MFAs stated amongst other things that "Black Capital is a partnership between Mr Sarju Patel and Mr Ravneet Ubhi", that each page had been initialled by Mr Patel and Mr Ubhi which Mr Ubhi did not dispute and that the last page of each MFA was signed by Mr Patel and Mr Ubhi as "Partner" [17];

    iii) the statement at paragraph 33 of Mr Ubhi's affidavit to the effect that some contracts had been issued in his name but that he did not appreciate the potential legal implications and that he did not deal with the contracts after mid 2018 [18];

    iv) Mr Ubhi's business card which referred to him as a partner of Black Capital [21];

    v) emails sent to potential investors which contained contact details for both Mr Patel and Mr Ubhi and included phrases such as "Sarj and Rav really enjoyed meeting you and would be happy for you to invest with them", "we would set up" and "we would pay" [22];

    vi) Mr Ubhi's membership of a WhatsApp group with Mr Patel and Mr Mitchell, one of the Appellants, which showed Mr Patel and Mr Ubhi replying in relation to investments and payments through to 2021 [23];

    vii) a video of a Christmas party at which Mr Ubhi stated that he and Mr Patel were partners [24];

    viii) A partnership agreement dated 1 July 2016 signed by Mr Patel and Mr Ubhi, the firm name being Black Capital and the purpose being "Property Investment" which stated at clause 15 that no partner should be remunerated for services rendered to the partnership save for the reimbursement of expenses [26] and [27] and Mr Ubhi's explanation in his affidavit that he obtained a template for a partnership agreement and that the agreement related to a property investment business which was never put into effect [28];

    ix) The independent contractor agreement dated 4 June 2018, the employment contract and the two payslips [30] and [31];

    x) An analysis of bank statements for the period 21 September 2018 to 15 February 2019 which showed Mr Ubhi being paid £255,000 and Mr Patel £310,000 [32]; and

xi) Mr Patel's evidence that he and Mr Ubhi were in partnership with the business name of Black Capital.

17. The judge concluded that in the light of the MFAs signed by Mr Ubhi containing the wording relating to him being a partner as well as his signature as a partner which dated from September 2018 to November 2021, the statements in his affidavit at paragraph 33 that he had no dealings with contracts after mid 2018 "lack real credibility" [19]. She also noted that the content of the video of the Christmas party "raises a real lack of credibility in relation to the statements set out in paragraph 33 of Mr Ubhi's affidavit . . ." [24].

18. Further, at [29] the judge stated that in the light of the partnership agreement, the statement in paragraph 33 of the affidavit that Mr Ubhi had signed documents as a partner because Mr Patel had told him to do so "lacks credibility bearing in mind the other paragraphs of the affidavit which demonstrate a level of knowledge relating to setting up a partnership, obligations and liabilities". She went on: "I agree with Mr Lewis that what is set out at paragraph 33 of the affidavit lacks real credence, but this is not the entirety of the evidence relied upon by Mr Ubhi. He maintains in his affidavit that he was not a partner and also relies on certain documents in support of this position."

19. In relation to the independent contractor agreement, the judge noted Mr Lewis' submissions but concluded that one of his difficulties was that the terms of the Partnership agreement in 2016 did not allow for partners to be remunerated for services to the partnership [30]. Further, in relation to the employment contract and the payslips, the judge noted the inconsistency with the Partnership agreement once again. She also went on to state that in her judgment there was a real inconsistency between being an employee and being a partner where earnings come from your partnership drawings [31].

20. In relation to the analysis of the bank statements, the judge stated that she was not certain that the evidence of payments really advanced Mr Lewis' case because under the terms of the employment contract and the earlier independent contractor agreement, Mr Uhbi was due to be paid substantial sums for his services [32].

21. Having also noted Mr Patel's assertion that he was in partnership with Mr Ubhi, the judge went on consider the evidence as a whole at [34]. She stated that there were "a lot of matters in relation to Mr Ubhi's evidence which are unsatisfactory or even extremely unsatisfactory." She went on:

> ". . . For example, his assertion that he signed the numerous MPA agreements which clearly stated that he was a partner because he did not understand the legal significance as well as because Mr Patel told him this is what needed to be done, is, in my judgment, one of those incredible statements. His evidence relating to obtaining and adapting a template to create the Partnership Agreement demonstrates the level of knowledge of Mr Ubhi. The contemporaneous evidence of the MPAs clearly signed by him from the period 2018 until late 2021 also contradicts his evidence that he only signed such agreements early on."

22. The judge concluded, however, that she needed to consider the evidence before her in its entirety. She went on as follows:

> ". . . I remind myself that only in clear cases would I be able to reject evidence before me as being inherently implausible. Despite the powerful submissions of Mr Lewis, I do not consider that, based on the entirety of the evidence, this is one of those clear cases enabling me to reject effectively both Mr Ubhi's statements set out in his affidavits as well as the documents relied upon by him. Despite Mr Lewis' submission that I am able to evaluate the evidence, and in doing so, reject the existence of both the independent contractor agreement as well as the employment agreement, I do not agree. It is the existence of these documents which, in my judgment, prevents this from being one of the clear cases referred to in the authorities I have referred to above. It is difficult to reconcile the existence of the two agreements with the evidence presented to me of Mr Ubhi being a partner. The terms of the partnership agreement which Mr Lewis relied upon are inconsistent, in my judgment, with Mr Ubhi's status as either an independent contractor or an employee. However unsatisfactory and incredible certain aspects of Mr Ubhi's evidence are, this does not enable me to ignore or reject the documentation which he relied upon."

She concluded, therefore, that there was a dispute on substantial grounds as to whether Mr Ubhi was a partner in Black Capital [35].

Legal principles

23. As I have already mentioned, Mr Lewis does not suggest that the judge misdirected herself as to the applicable test for determining an application to set aside a statutory demand. Rule 10.5 (5)(b) of the Insolvency (England and Wales) Rules 2016 provides that the court may grant the application if "the debt is disputed on grounds which appear to the court to be substantial". Similarly, a winding-up petition will not be made on the basis of a debt which is genuinely disputed on substantial grounds: *Re a Company No. 006685 of 1996* [1997] BCC 830. Any dispute raised under rule 10.5(5)(b) must have a real prospect of success: *Re Kerkar* [2021] EWHC 3255 at [8] citing *Ashworth v Newnote Ltd* [2007] EWCA Civ 793.

24. It is also well known that for the purposes of the summary judgment test, the court considers whether the claim has a "realistic" as opposed to a "fanciful" prospect of success and that a realistic claim must carry some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [7] and [8]. Further, the court is not required to take at face value everything which a party states in his witness statement: *Re Kerker* at [34] and *ED&F Man Liquid Products Ltd v Patel* in which Potter LJ stated at [10] as follows:

> "10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini−trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91

> at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL 16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]."

Furthermore, the court may find assertions in a witness statement unreliable without the benefit of cross-examination and reject them: *CFL Finance Ltd v Bass* [2019] EWHC 1839. All of this is clear from the passages which the judge quoted from the *Collier* and *Okpabi* cases which I have already set out.

25. There is also no dispute about the position of an appeal court in circumstances in which it is contended that the lower court erred in its evaluation of the evidence before it. It was accepted that in order to succeed on appeal, it is necessary to show that the judge was wrong in law or there was an identifiable flaw in the judge's treatment of an issue, such as a gap in logic, an inconsistency, a failure to take account of a relevant factor or the inclusion of an irrelevant factor and/or that the decision was one which a reasonable judge could not have come to. See for example, *Re Sprintroom Ltd* [2019] EWCA Civ 932, *Assicurazioni Generali* [2003] 1 WLR 577 per Clarke LJ at [16] and *Volpi v Volpi* [2022] EWCA Civ 464 per Lewison LJ at [37]. In this case, the judge did not hear oral evidence and came to her conclusion on the basis of the affidavit and documentary evidence before her. Even so, the appeal court should be reluctant to interfere with the lower court's findings of fact: *R(Z) v Hackney LBC* [2019] EWCA Civ 1099 per Lewison LJ at [67] citing Lord Kerr in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, [2017] NI 301, at [80].

Discussion and conclusion

26. As I have already mentioned, Mr Lewis submits that the judge's findings that Mr Ubhi's assertions that he did not understand the legal significance of the MFAs and followed Mr Patel's instructions were "incredible", lacking "real credibility" and "real credence" meant that Mr Ubhi had understood the legal significance of the MFAs and that they referred to the Black Capital partnership and himself as a partner. Since no one suggested that Mr Ubhi had been dishonest, the only conclusion available, therefore, was that the MFAs meant what they said. Accordingly, there was a gap in the judge's logic and she should have held that this was a clear case in which she should reject the other evidence and decide that there was not a substantial dispute in relation to the partnership issue.

27. It seems to me that Mr Lewis' gap in the judge's logic which he relies upon in order to bring himself within the narrow compass of the circumstances in which an appeal court will interfere with a decision of this kind, is artificial. He says that the judge's conclusions in relation to Mr Ubhi's affidavit must lead, inevitably, to the conclusion that a partnership existed of which Mr Ubhi was a member. I disagree. Mr Lewis seeks

to present the position as if it were binary. In my judgment, it is not. A rejection of Mr Ubhi's evidence that he only signed the MFAs because Mr Patel told him to do so, did so only in the early days and did not understand the potential legal implications, does not lead inexorably to the conclusion that a partnership existed of which Mr Ubhi was a member. In order to come to such a conclusion, the judge would have had to analyse the remainder of the evidence by way of a mini-trial. That route was not open to her and she did not take it.

28. As Mr Machell pointed out, the judge did not reject the entirety of Mr Ubhi's affidavit evidence. She was left with Mr Ubhi's explanation of the history of his involvement with Mr Patel and the investment business, the other witness statements and the documentary evidence. The judge was both entitled and obliged to take into account all of the evidence before her, which she did. She considered that the employment contract, the payslips and the independent contractor agreement were contrary to the existence of a partnership, which she was entitled to do. There is nothing to suggest that she left anything out or took into account anything which was irrelevant. Having considered all of that evidence she was entitled to decide that there was a real prospect of success rather than a fanciful one in arguing that there was no partnership of which Mr Ubhi was a member, and that this was not a clear case in which the documents and other evidence could be ignored because she had rejected some of Mr Ubhi's evidence.

29. In my judgment, therefore, there is no gap in the judge's logic here. Accordingly, I dismiss this ground of appeal.

30. As Mr Lewis explained, the second ground of appeal focusses on the other side of the coin being the documents rather than the affidavit evidence. He submitted that the judge erred in her evaluation of the evidence and misdirected herself as to Mr Ubhi's evidence demonstrating a substantial dispute which prevented this from being a "clear case" because she put too much weight on the documents before her. He says, for example, that the independent contractor agreement was irrelevant because it was dated 4 June 2018, long before the MFAs which were relied upon and was allegedly superseded by a contract of employment. Furthermore, he says that the contract of employment was only of tangential relevance.

31. In some respects this ground is a further rehearsal of ground 1. Mr Lewis has not identified any flaw or error in the judge's approach in relation to this ground of appeal, however, and does not submit the judge came to a conclusion which was not open to her or that a reasonable judge could not have arrived at. He contends that the judge put too much weight on the documents.

32. It is clear from [34] of the judgment, however, that the judge considered all of the evidence in the round. It seems to me that despite her conclusions about parts of Mr Ubhi's affidavit evidence, she was entitled to take account of the remainder of his evidence and the content of the other witness statements and the documentation, and to conclude that this was not a sufficiently clear case to enable her to decide that there was no substantial dispute. There is no suggestion that she placed undue weight on the documents and in any event matters of weight are generally considered to be for the judge. The appeal court is reluctant to interfere.

33. As Mr Machell explained, the judge was entitled to take into account the remainder of Mr Ubhi's narrative in his affidavit, including his explanation that the Partnership

Agreement related to something else, the "to whom it may concern letter" from Mr Patel dated 13 June 2019 and the existence of the independent contractor agreement, the employment contract and the payslips which, on the face of it, were incompatible with the existence of a partnership. Furthermore, as the judge was asked to decide whether there was a substantial dispute in relation to whether there was or was not a partnership, rather than the position at any particular time, there is nothing in Mr Lewis' points about the dates of the independent contractor agreement and the employment agreement. Had the judge been asked to determine whether there was a substantial dispute as to whether there was a partnership at a particular time, she would have had to have conducted a mini-trial, which was a course which was not open to her.

34. Accordingly, for all of the reasons set out above, I dismiss the second ground of appeal.

35. At the hearing, counsel accepted that if I were against the Appellants on grounds 1 and 2 it was not necessary to address the third ground of appeal or the question arising from the Amended Respondent's Notice as to whether the MFAs gave rise to a claim for a liquidated sum. However, subsequently, Mr Machell has submitted that the liquidated sum issue remains relevant, a conclusion from which Mr Lewis does not demur.

Articles 7 and 8

36. Before turning to the issue in relation to the liquidated sum, I should mention that the third and final ground of appeal was concerned with whether the judge was correct to decide that the Winding Up Petition became an "Article 8 petition" having begun life under Article 7 of the IPO, the effect of which was to render it invalid as it had not been preceded by a statutory demand [48]. It raises an interesting and difficult question which it is unnecessary to decide. Suffice it to say for these purposes, that I am not convinced by what appears to be the judge's conclusion at [45] and [48] of her judgment. It seems that she concluded that the Winding Up Petition was converted from a petition proceeding under Article 7 of the IPO to one which was proceeding under Article 8 by reason of the Amendment. This is not the place for a full consideration of the relationship between Articles 7 and 8, however. That will have to await a decision in which the issue is determinative.

The Liquidated Sum

37. The judge addressed the question of whether the Appellants are entitled to a liquidated sum under the MFAs at [37] – [42] of her judgment. At [37] the judge rejected the proposition that the Appellants were entitled to a liquidated sum in respect of original capital invested and estimated returns and at [38] she rejected an alternative that the Appellants were entitled to the return of £13 million odd being their initial investments. She reached the latter conclusion on the basis that the MFAs do not contain an entitlement to the return of sums invested save at the end of the fixed investment period.

38. She addressed the third alternative at [39] – [41]. That was that the Appellants were entitled to the return of £6.9 million odd, being 90% of the sums invested under MFAs where the fixed terms under those agreements had expired. At [41] the judge pointed out that in order to be a liquidated debt, the relevant sum needs to be identifiable and be due and owing under the terms of the relevant agreement. She held that the obligation upon Black Capital in the MFAs to return "90% of the Relevant Investment after the expiry of the 12 month term creates a liquidated debt for that sum" which arose

under the MFAs and the fact that the liquidated debt was much smaller than what was claimed in the Winding Up Petition made no difference. She went on to state that:

> "It may well be that the much larger sum claimed is not properly characterised as being a liquidated debt, but this does not in some way prevent Mr Lewis from asserting, as he does, that a smaller sum is a liquidated debt and that this forms part of the sum being claimed in the petition." [41] and [42].

39. Having adopted the Amended Respondent's Notice and the argument on behalf of Mr Patel, Mr Machell submitted that any liabilities owing under the MFAs relied upon by the Appellants were unliquidated. None of the MFAs provide for the payment of a fixed sum or a sum to be calculated by reference to a formula which can be applied without further investigation or some form of account being taken. In particular, it is said that:

    i) while each of the MFAs describes the return that the client can expect, either at the end of the term or on a monthly basis, this is - in every case - described as an "Expected Return";

    ii) all of the MFAs relied upon expressly contemplate that the actual return might be less than expected, by providing that – if that situation arises – Black Capital will not take its fees; and

    iii) all of the MFAs expressly contemplated that there might be no return at all, and that the clients might suffer a capital loss of 10%.

40. Mr Machell also takes issue with the judge's finding at [42] that, while having found that the total monies owing under the MFAs "may well be" unliquidated, Black Capital nevertheless owed a liquidated sum equal to 90% of the monies invested under the MFAs (relying on the 'Risk' clauses of the MFAs which provided that the investors' maximum risk was 10% of their investment). He submits that this is wrong because:

    i) the MFAs do not contain a promise to repay the Petitioners at least 90% of the sums invested but a warranty that "the maximum financial loss the Client is exposed to under the terms of this Agreement is the maximum drawdown amount [10% of sums invested]". In other words, if Black Capital had managed the sums invested and lost more than 10% of those sums, the Petitioners' remedy would have been an unliquidated damages claim for breach of warranty rather than a liquidated debt claim: and

    ii) in any event, a liability is either liquidated or unliquidated. One cannot treat an unliquidated liability as a liquidated sum and an unliquidated remainder, as it is submitted the Judge purported to do. *Truex v Toll* [2009] EWHC 396 (Ch), as applied in *Dusoruth v Orca Finance UK Ltd* [2022] EWHC 2346 at [123], provides that "a person may have no prospect of defending a claim for damages in excess of the statutory minimum but that does not convert the claimed sum into a [liquidated] sum".

41. The relevant legal principles are not in dispute. A liquidated sum "is a sum that is 'pre-ascertained' or 'a specific amount which has been fully and finally ascertained' although that allows for calculation in accordance with a contractual formula or mere addition": see the *Dusoruth* case at [123]. The difference between liquidated and unliquidated sums was also explained by Patten LJ in *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286 at [36]:

> ". . . a debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure. Ex parte Ward is the obvious example of that. Claims in tort are invariably unliquidated because they require the assistance of a judicial process to ascertain the amount due by way of damages. In some cases the calculation of the award will be straightforward and obvious but the unliquidated nature of the claim excludes it from being a good petitioning creditor's debt which satisfies the requirements of s.267."

Moylan LJ adopted the same approach in *Blavo v Law Society* [2018] EWCA Civ 2250.

42. I was referred to two examples of the MFAs relied upon by the Appellants. The first is what has been called a "wet signed" MFA dated 1 July 2021 and the second is an electronically signed version dated 3 August 2020. The wet signed version refers to an "Investment value" of £359,721 having been committed for a period of 12 months. Under the heading "Term", it provides (where relevant) as follows:

> "Subject to the clause below entitled "Key Man Event", the client agrees to commit the investment for 12 months. Notwithstanding any other term of this Agreement, after the 12-month period has ended, the client may in its sole discretion either:
>
> . . . .
>
> (ii) Requires that some or all of the Investment be returned to the Client. In the event the Client requires the return of some or all of the Investment, the Trading Agreement shall return the funds to the bank account nominated by the client within 10 days. . . ."

"Investment" was defined as ". . . any funds placed into the Account by the client and any profits or loss related to these funds." Further, under the heading "Risk", it was stated that "the Client agrees to allow a maximum drawdown of 10% of the Investment . . . The Client and the Trading Agent therefore agree that the maximum financial loss the Client is exposed to under the terms of this agreement is the maximum drawdown amount". It is accepted that the reference to the "Key Man Event" is not relevant.

43. The electronic version of the MFA does not contain a definition of "Investment". It refers, instead, to commencing managing the "Account" no later than 6 August at an equity level of £50,000 which is defined as the "Principle Sum" (sic). Under the heading

"Term", it is provided that subject to the "Key Man Event" clause, the Client agrees to commit the Principal Sum for 12 months and when that period has ended, "the client may in its sole discretion:

> ". . .
>
> (ii) Request that some or all of the Principle Sum (sic) and any profit be returned to the Client. In the event the Client requires the return of some or all of the Principle Sum (sic) and/or profit, the Trading Agent shall return the funds to the bank account nominated by the Client within 10 days."

Under the heading "Risk" it is stated amongst other things that the "client agrees to allow a maximum drawdown of 10% of the Principle Sum (sic)" and that the "Client and the Trading Agent therefore agree that the maximum financial loss the Client is exposed to under the terms of the Agreement is the maximum drawdown amount".

44. In short, in relation to the wet signed version of the MFA, Mr Machell submits that the Appellants sought the return of the whole and that in the light of the definition of "Investment" which includes profits and losses, one would need to carry out an account in order to determine the amount due. To put it another way, he says that there is no pre-ascertained sum which is due at the end of the 12 month term or which can be determined by reference to a formula. Further, in relation to both the wet signed and the electronically signed MFAs, he says: that there is no covenant to repay at least 90% of the sums invested, only a warranty as to maximum financial loss; and in any event, a liability is either liquidated or unliquidated. It cannot be both.

45. In relation to the wet signed version of the MFAs, I agree with Mr Machell that: at the end of the fixed term, the client is entitled to demand the return of the "Investment" or any part of it; that the definition of Investment includes profits and losses upon the sum originally invested; and, therefore, it cannot be ascertained without some form of an account. The sum due is not ascertained and is not determined by means of a formula within the MFA. Nor does the "Risk" provision create a covenant to pay 90% of the original investment or that sum plus profits and/or losses. In the same way, under the electronically signed MFA, there is no clear covenant to repay 90% of the sum invested.

46. It follows that I do not consider that the Appellants were entitled to rely upon a liquidated debt created at the expiry of the 12 month fixed term under the MFAs in relation to 90% of the original investments. I should add that I also agree with Mr Machell's submission that a sum cannot be liquidated and unliquidated in parts. Had there been a covenant to repay 90% of a specified sum or a sum which could be calculated under a contractual formula however, it would have been possible to rely upon the liquidated sum due at the expiry of the 12 month fixed term under the MFAs. In those circumstances, had the Appellants based their Petitions on such a sum, the issue which was considered in the *Truex* case would not arise. In that case, the entirety of the bill for solicitors' fees was for an unliquidated sum and it was not possible to say that any part of the fees for work done had been quantified or was quantifiable. See *Truex* at [37].

47. For all of the reasons set out above, I dismiss the appeal and to the extent necessary, allow the ground in the Respondent's Notice in relation to whether there was a liquidated sum.