Neutral Citation Number: [2021] EWHC 1760 (Ch)

CR-2021-000143

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN RE A COMPANY: IN THE MATTER OF AN APPLICATION TO RESTRAIN PRESENTATION OF A WINDING UP PETITION
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 01/07/2021

Before :

ICC JUDGE BARBER

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Jonathan Trussler (instructed by Northern Fides Ltd) for the **Applicant**
Oberan Kwok (instructed by Cripps Pemberton Greenish LLP) for the **Respondent**

Hearing date: 14 May 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.00 a.m on 1 July 2021

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ICC Judge Barber

1. On 14 May 2021, I granted an order restraining presentation of a winding petition against the Applicant based on the sums claimed in a statutory demand dated 4 January 2021. I did so on the basis that written reasons would follow. This judgment sets out my reasons for granting the order.

Background

2. The Applicant is a Swiss-registered company with a London branch. The London branch was registered as a UK Establishment on 1 February 2019 ('the UK establishment'). According to its filings at Companies House, the 'permanent representative' of the Applicant (the person authorised to represent the Applicant as a permanent representative of the Applicant in respect of the UK establishment) is Mr Mario Gesue. For the purposes of this application, both parties invite me to treat Mr Gesue as a director of the Applicant.

3. The Respondent carries on business in the provision of risk, governance, compliance, HR and associated services. Mr Geoffrey Dadswell is a director of the Respondent.

The statutory demand

4. For the purposes of this application I am invited to put to one side the current prohibition on statutory demands under paragraph 1 of Schedule 10 to the Corporate Insolvency and Governance Act 2020, on the footing that a petition could be presented under s.123(1)e) of the Insolvency Act 1986 instead. It is nonetheless relevant to consider the statutory demand, as it sets out the basis of the debt claimed.

5. The statutory demand seeks payment of the sum of £79,264.92 pursuant to a written agreement dated 1 October 2019 purportedly signed by Mr Gesue on behalf of the Applicant ('the Agreement'). The Agreement provides for a fixed retainer fee of £21,000 (+ VAT) to be paid by the Applicant to the Respondent on a monthly basis.

6. Section 2 of the demand ('details of debt') provides:

> 'An Agreement was entered into between the Creditor and the Company whereby the Creditor provided consultancy services to the Company (the Agreement). A copy of the Agreement is attached to this demand.'

7. Attached to the demand is a very poor photocopy of the Agreement. A better copy is exhibited to Mr Dadswell's statement dated 17 March 2021 at GD1 pp12-21. It is common ground that they are one and the same.

8. The sum of £79,264.92 is said to comprise the total of three invoices issued pursuant to the Agreement. The three invoices are dated 01/09/2020 (1123), 05/10/2020 (1126) and 03/11/2020 (1127). Each invoice refers simply to 'Consultancy Fees: Consultancy Services' for a named month. There is no breakdown attached to any of the invoices.

9. Mr Gesue maintains that he did not sign the Agreement and did not agree to a fixed retainer fee. His case is that the signature on the Agreement is an electronic signature of his, which has been used on the Agreement without his authority. His evidence is that the first time he saw the Agreement was on 29 October 2020.

10. The Applicant accepts that the Respondent has carried out work for it in the past but maintains that any such work falls to be charged for on a 'time spent' basis rather than on a 'fixed retainer fee' basis.

11. Mr Gesue's evidence is that the business activities of the Applicant were greatly reduced after July 2020 due to the pandemic and that, as a natural consequence, the services provided by the Respondent to the Applicant were greatly reduced as well.

12. His evidence is that it was in October 2020 that his auditors brought to his attention the invoices dated 01/09/2020 and 05/10/2020 (each of which was addressed to a Mr Franco Mignemi rather than to Mr Gesue). His auditors queried what the invoices related to. It is clear from contemporaneous correspondence that Mr Gesue immediately followed up these queries with the Respondent.

13. By email dated 21 October 2020, Mr Gesue wrote to Mr Dadswell:

> 'Good morning Geoff,
>
> As you may have heard from Andrea, these days I'm having an external firm carry out a small audit on the costs incurred by Starboard and its subsidiaries, including NF Money in the last year. In this audit…. we have noticed that there are two invoices, the last ones, of a considerable amount without any narrative on how this amount was generated. Before proceeding to confirm the goodness of the invoices, I would need a complete breakdown of the items in the invoices.'

14. By email dated 21 October 2020, Mr Dadswell replied, claiming that with effect from September 2019, there was a fixed retainer fee contract in place. The email states that whilst the Respondent had previously provided timesheets setting out the services which it provided to the Applicant and its affiliates when invoicing for the same, and had in the past invoiced 'a number of different entities in the Group, including NF Money Limited and PortIT Limited', with effect from September 2019, a new contract was in place, which provided for the Applicant to pay the Respondent a 'fixed retainer'. By his email, Mr Dadswell went on to state that the Respondent's new contract with the Applicant did not require the Respondent 'to account for each and every item' or 'to provide any sort of timesheet'. He pointed out that all previous invoices had been paid.

15. By email dated 28 October 2020, Mr Gesue responded:

> 'Hi Geoff,
>
> Excuse me on the basis of what signed contract are you talking about?

Many thanks

Mario'

16. By email dated 29 October 2020, Mr Dadswell sent Mr Gesue a copy of the Agreement. The email went on to state that if payment of invoices 1123 and 1126 was not received by 4 November 2020, the Respondent would be instructing its solicitors 'to commence legal proceedings in order to recover the monies owed'.

17. Shortly thereafter, the Respondent sent to the Applicant the third of the three invoices referred to in the statutory demand, numbered 1127 and dated 03/11/21. On this occasion, the invoice was addressed to Mr Gesue and not to Mr Mignemi.

18. Mr Gesue maintains that he saw the Agreement for the first time on receipt of the email dated 29 October 2020. He queried the authenticity of the Agreement with the Respondent and asked for full breakdowns of the invoices.

19. In response, the Respondent instructed its (then) solicitors, Bracher LLP, to write a letter before action dated 5 November 2020 to the Applicant. Interestingly, the letter before action dated 5 November 2020 does not refer to the Agreement at all, still less enclose a copy of it. Instead it enclosed (and relied upon) a copy of a reference letter dated 16 July 2020 provided by the Applicant to the Respondent (in another context) to evidence a working relationship between the Applicant and the Respondent.

20. Mr Gesue responded to the letter before action by letter dated 13 November 2020. The letter of 13 November 2020 provided as follows:

> 'As your client is aware, I disputed invoices 1123 and 1126, and hereby dispute the latest invoice 1127 (dated 3 November, which to date is neither due nor payable). I requested Geoff Dadswell to provide me with a narrative for the invoices to understand what services have been carried out in connection with the invoices he raised and to date no narratives have been provided. Moreover, I asked for a copy of the contract between Starboard Capital and your client, since I could not find a copy. I am aware of only one contract between Northern Fides and your client.'

21. Pausing there, the reference to Northern Fides appears to be a reference to Northern Fides Limited, one of a number of entities 'associated' with the Applicant.

22. Mr Gesue's letter of 13 November 2020 continues:

> 'However, your client sent me a contract between [the Applicant] and [the Respondent], by email in a very poor quality PDF format allegedly signed by both me and your client. Despite the quality of the attachment, I readily identified that I did not sign the contract, and I queried the veracity of the signature and the contract. To date, I have not received a reply

> nor a copy of the contract which can be examined by a specialist. On the contrary, I received your letter before action which did not attach the contract but a reference letter. I want to know exactly what is the basis for the invoices being raised and what services were carried out. I did not agree to a retainer and did not sign the contract he sent me by email including a copy of my signature. …
>
> I only now note that invoices 1123 and 1126 are not addressed to me, but to Franco Mignemi, that is incorrect and I have also just been told that all the past invoices were incorrectly addressed to Franco Mignemi even though they were sent only to the invoice email account, of which neither Franco Mignemi nor I have oversight. …
>
> I expect to receive within and no later than 18th November 2020, the following:
>
> 1. A credit note for the disputed invoices,
>
> 2. A copy of the corrected invoices, together with the narratives,
>
> 3. A copy of the contracts in respect of which the services were allegedly rendered,
>
> 4. A certified copy of the contract your client sent me between [the Applicant] and your clients dated 1 October 2019.
>
> I reserve any and all rights in law and will take all actions to ensure there is no wrongdoing against me or my company.'

23. None of these requests were complied with. Instead, the Respondent changed solicitors (from Brachers LLP to Cripps LLP) and served the statutory demand.

24. Mr Gesue's evidence is that, even from the poor copy of the Agreement which he received on 29 October 2020, he could see at a glance that the signature used on the document was his digital signature. He believes that the Respondent has misused an electronic signature sent to it for an entirely different purpose. In his witness statement, he states that on 1 April 2020, the Respondent sent him a whatsapp message, asking for his digital signature so that it could be affixed to furlough notification letters being sent to employees. The whatsapp message is in evidence. Mr Gesue further states that, in response, on 2 April 2020, he asked Ms Valentina Berretta to forward his digital signature to Mr Dadswell of the Respondent, and that she did so. That too, is confirmed by contemporaneous correspondence in evidence. The furlough letters sent out on 3 April 2020 are also evidenced. At paragraph 21 of his statement, Mr Gesue continues:

> 'I never provided the Respondent with any authorisation to use my digital signature for any matter other than that in relation to the furlough scheme letters.'

25. Mr Dadswell's evidence about the Agreement raises more questions than it answers. While his statement pre-dates that of Mr Gesue, Mr Gesue had made his position on the Agreement known to the Respondent prior to service of the statutory demand, by (among other things) his letter to the Respondent's solicitors dated 13 November 2020, quoted above. The Applicant's position on the Agreement is also set out in trenchant terms at paragraphs (b) and e) of the application notice. Mr Dadswell therefore knew the case he had to meet when preparing his statement.

Mr Dadswell's statement

26. In his witness statement, Mr Dadswell lists a number of companies which he describes loosely as 'affiliates' of the Applicant. Mr Dadswell maintains that in broad terms the 'affiliates' fall into two categories. The first category is described as 'entities with direct or indirect ownership'. These are said to include NF Money Limited and Port IT Limited. The second category is described as 'other entities associated with [the Applicant] (ie where [the Applicant] has financially invested in or otherwise provided resources to (including technological and human)'. These include Northern Fides Limited. On occasion he refers to the companies in both categories and the Applicant collectively as 'the Group', although it appears that this is a description of convenience only; no overall group structure is in evidence.

27. By his witness statement Mr Dadswell states that it was in October 2018 that the Respondent first provided services to any companies within the 'Group'. These services, he says, were not provided to the Applicant itself, but rather to two companies 'associated' with the Applicant, Northern Fides Limited and NF Money Limited, at the request of Mr Franco Mignemi, who was formerly the CEO of NF Money Limited. The initial work done by the Respondent for these two companies led to the Respondent being instructed to carry out other work for different entities within the 'Group' over time.

28. In his email to Mr Gesue of 21 October 2020, Mr Dadswell accepted that, initially, the Respondent charged for its services on a 'time spent' basis (usually a 'day rate' of £1000), for which it rendered invoices (backed by timesheets) on a monthly basis. Whilst invoices were raised with (and paid by) a number of different companies within the Group, in his email to Mr Gesue of 21 October 2020, Mr Dadswell states that, up until the end of August 2019, the Respondent's 'main contract' was with NF Money Limited.

29. The Respondent maintains that invoicing and payment arrangements changed in September 2019. In his witness statement, Mr Dadswell states that, during August and September 2019, there were discussions between a Mr Andrea Piazzatta (described by Mr Dadswell as 'Finance Consultant and acting CFO' of the Applicant) and Mr Dadswell of the Respondent, 'to address the matter of invoicing'. These discussions, Mr Dadswell maintains, led to an oral agreement that the Respondent 'would provide services on a retainer' and would no longer be required to produce timesheets. (I pause here to note that, according to Mr Gesue's evidence, Mr Piazzetta 'has no recollection of entering into verbal agreements on [Mr Gesue's] or [the Applicant's] behalf in relation to the agreement').

30. Mr Dadswell further states in his witness statement that the Respondent began providing services under the new 'verbal' agreement on 1 September 2019 and issued its first invoice to the Applicant pursuant to this agreement on 4 October 2019, in relation to services provided in September. The invoice dated 4 October 2019 is in evidence. It is addressed to the Applicant but not to any named individual.

31. Mr Dadswell maintains by his witness statement that the oral agreement was subsequently 'formalised in writing'. He states that he was sent a draft agreement by James-Antony Platania 'on behalf of [the Applicant]' by email dated 29 October 2019.

32. The email of 29 October 2019 is in evidence. It is from Mr Platania, described as 'Group General Counsel' of the Applicant, and addressed simply to Mr Dadswell. Mr Gesue is not copied in. The email reads:

> 'Geoff,
>
> Please find attached a draft consultancy agreement for your review. I have highlighted in yellow text which requires your attention in addition to the Schedules.
>
> I welcome your comments to update and approve the agreement accordingly.
>
> Regards
>
> James'

33. Attached to the email dated 29 October 2019 is a draft agreement naming the Applicant as client. The name of the proposed counterparty, described as the 'Consultant', is left blank. Clause 2 of the draft agreement provides:

> '2.1 The Client engages the Consultant, and the Consultant accepts the engagement, to serve the Client as a consultant for the performance of the Services.
>
> 2.2 The terms of this Agreement will be effective from _____________2019, and this Agreement will continue in force until the termination of this Agreement in accordance with clause 7.'

34. By clause 1.1 of the draft, 'Services' is defined as 'the services to be provided by the Consultant under this Agreement and as detailed in Schedule 1'. Schedule 1 of the draft is blank, providing simply 'Insert scope of services'.

35. Clauses 4 and 9 of the draft deal with fees. Clause 4 provides

> 'In consideration of the Services rendered by the Consultant, the Client will pay to the Consultant a fee, in accordance with Schedule 2'.

36. Clause 9.1 provides

> '9.1 Client shall pay Consultant a fee plus VAT, if applicable, for providing the Services under this Agreement. The Consultant shall invoice the Client at the end of each month in which Services have been provided for the days worked during such month or such other period as may be set out in Schedule 2. Provided always that if the Consultant provides Services for less than a working month or such other period as may be set out in Schedule 2, the Consultant shall only invoice for the proportionate amount of time worked for the Client and Client shall only be liable for such proportionate fee'

37. Schedule 2 of the draft is left blank.

38. As at the time this draft was sent to Mr Dadswell, therefore, (29 October 2019), it was in very early form, with key provisions (such as start date, scope of services and fee structure) to be completed.

39. Given the state of the draft, one would expect to see correspondence in evidence, exchanging travelling drafts of the Agreement, finalising terms and thereafter making arrangements for (and references to) board approval and signing. Mr Dadswell's statement is singularly silent on such matters and exhibits no such documentation. Instead, having introduced the draft agreement at paragraph 15 of his statement, he continues at paragraph 16:

> '16.1 It should be noted that neither party signed this agreement until around mid-February 2020 at Starboard's office despite the fact that invoices were raised and paid prior to this date, as outlined below. This demonstrates that both parties had already entered into a verbal agreement for [the Respondent] to provide services, albeit that this agreement was only formalised into writing later. The written agreement was dated 1 October 2019 to reflect the fact that [the Respondent] had already been supplying services under the new arrangement by the time the written agreement was signed. The agreement was signed by myself on behalf of [the Respondent], and by Mario Gesue on behalf of [the Applicant].
>
> 16.2 The signed copy of the Agreement is exhibited as follows…'

40. Exhibited to Mr Dadswell's statement is then a signed copy of the Agreement. The signed version is clearly based on the earlier draft (attached to the email of 29 October 2019), but has had added to it the name of the Respondent as 'Consultant', the start date, a summary of 'Services' in Schedule 1, and the fee structure at Schedule 2, described as:

> 'A fixed retainer of £21,000 (+ VAT) per month or, by agreement, a proportionate fee, on a time cost basis at a rate of £1000 (+ VAT) per day.'

41. Other than the email dated 29 October 2019 enclosing the initial draft Agreement, I was taken to no other correspondence or documentation in evidence relating to the drafting of the Agreement or the arrangements around its execution.

Principles to be applied

42. The well-known principles governing applications to restrain were summarised in Angel Group Ltd v British Gas Trading Ltd [2013] BCC 265 at [22] by Norris J as follows:

> 'The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:
>
> (a) A creditors petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court : Mann v Goldstein [1968] 1 WLR 1091.
>
> (b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).
>
> c) A dispute will not be 'substantial' if it has really no rational prospect of success: in Re A Company (No.012209 of 1991) [1992] 1 WLR 351 at 354B.
>
> (d) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: ibid. at 354F.
>
> e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in Re A Company (No.006685 of 1996) [1997] BCC 830 at 832F.
>
> f) But the courts will not allow this rule of practice itself to work in justice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavits in order to

> claim that a dispute exists which cannot be determined without cross examination (ibid. at 841C).
>
> g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid. at 837B)'.

Discussion and Conclusions

43. On the evidence before me, the Applicant has raised a seriously arguable case

(1) that no contractually binding oral agreement, providing for the payment of a fixed monthly retainer fee, was reached between the Applicant and the Respondent in August/September 2019;

(2) that the Agreement was not approved by the Applicant orally, in writing, or by conduct;

(3) that the purported signature of Mr Gesue on the Agreement is a forgery, in that it is his electronic signature but has been appended to the Agreement without his knowledge or approval; and

(4) that the Respondent, acting by Mr Dadswell, has knowingly relied on a false document (the Agreement).

44. In addition to Mr Gesue's written testimony on this issue, the factors supporting these conclusions are the following.

45. First, the 'blanks' in the draft agreement sent under cover of the email dated 29 October 2019; and the terms of the covering email itself. If, as the Respondent contends, a contractually binding agreement had been reached in or by September 2019 for the Applicant to pay the Respondent a fixed retainer fee of an agreed amount in consideration of given services provided by the Respondent to the Applicant and its affiliates, one would expect (1) the terms of the covering email to reflect that and (2) the draft enclosed with that email to include the Respondent's name as a party, the start date, the definition of 'services' in Schedule 1 and details of the fee structure in Schedule 2.

46. Second, the lack of correspondence in evidence charting the finalisation of the terms of the Agreement and the arrangements around its execution: see paragraphs 38 -41 above.

47. Third, Mr Dadswell's evidence that he signed the Agreement, taken together with the lack of detail in his statement – and the questions left unanswered - with regard to execution of the Agreement. At paragraph 16.1 of his statement, Mr Dadswell states that the Agreement was signed 'around mid-February 2020 at [the Respondents'] offices'. He does not state who was present at the signing. He states simply 'The

agreement was signed by myself on behalf of [the Respondent], and by Mario Gesue on behalf of [the Applicant].' He does not state why, if the signing took place at a physical meeting at the Respondent's offices, Mr Gesue's electronic signature was used. He does not state whether Mr Gesue's signature was attached in his presence (and if so who by). He does not state that he was handed the Agreement to sign with Mr Gesue's signature already on it. He does not state why, if the agreed plan was to use Mr Gesue's electronic signature, there was any need for the signing to take place at the Respondent's offices at all. The sparce nature of his account of the signing has to be considered in context. Mr Dadswell's statement is a 58-paragraph statement with a 320-page exhibit.

48. Fourth, the contemporaneous correspondence evidencing the context in which invoices 1123 and 1126 were first queried by the Applicant in October 2020. The queries were first raised by the Applicant's auditors, which in turn suggests that there was no copy of the Agreement, or record of it having been entered into by the Applicant, among the Applicant's books and records.

49. Fifth, the timing of the queries raised by Mr Gesue once prompted by the auditors. The queries were raised by email dated 21 October 2020, (addressed to Mr Dadswell but 'cc'd' to Mr Piazzetta), before any 'chasing' correspondence demanding payment of the invoices.

50. Sixth, the nature of Mr Dadswell's explanation for the invoices, as set out in his email dated 21 October 2020 (addressed to Mr Gesue but again cc'd to Mr Piazzetta). He states that the contract was moved from NF Money Limited to the Applicant with effect from September 2019 'at the request of the CFO' but does not name the CFO he is referring to. If the 'CFO' who made that request was, as Mr Dadswell later claimed in his witness statement, Mr Piazzetta, one would expect Mr Dadswell to have referred to him directly and by name in this email, given that he was copied into it. Moreover, if Mr Dadswell had signed the Agreement with Mr Gesue as recently as February 2020, one would expect Mr Dadwell to point out in this email that Mr Gesue had himself signed the Agreement only a few months prior. It is also telling that in referring to the 'contracted services' in the email, Mr Dadswell states 'as you may know' and not 'as you may recall'.

51. Seventh, the nature of Mr Gesue's response to Mr Dadswell's email dated 21 October 2020 referring to a fixed retainer contract between the Applicant and the Respondent. The response was of spontaneous surprise: 'excuse me on the basis of what signed contract are you talking about?': see email dated 28 October 2020.

52. Eighth, the letter before action dated 5 November 2020 from the Respondent's (then) solicitors, Bracher LLP, to the Applicant, which did not refer to the Agreement at all, still less enclose a copy of it; instead placing reliance on a reference letter dated 16 July 2020 to evidence a working relationship between the Applicant and the Respondent.

53. Ninth, the Respondent's failure during pre-action correspondence to comply with the Applicant's requests for a certified copy the Agreement to be produced.

54. Tenth, the Respondent's change of solicitors over the same period.

55. On behalf of the Respondent, Mr Kwok submitted that the argument over whether Mr Gesue signed the Agreement is 'a complete red herring'. I reject that submission. The Applicant has raised a strongly arguable case of knowing reliance upon a forged document as a means of extracting payment and knowing reliance upon false evidence in the context of court proceedings. These are extremely serious matters. They cannot be waved away as an irrelevance.

56. I accept that the draft agreement provided under cover of Mr Plantania's email of 29 October 2019 supports the Respondent's case that there were discussions between the Applicant and the Respondent regarding a retainer at that time. The draft provided however lacked essential details, such as the name of the consultant, the start date, the services to be provided and the fee structure. The draft does not evidence a concluded agreement as at 29 October 2019; quite the contrary, it points the other way.

57. Mr Kwok sought to rely upon the principles summarised by the Court of Appeal in Reveille Independent LLC v Anotech International (UK) Limited [2016] EWCA Civ 443 at [40]-[41], submitting that if the Applicant consented to the Agreement by its conduct, then the Agreement is binding on the Applicant in any event, regardless of whether or not it physically signed the Agreement. The passage he relied upon from Reveille at [40] to [41] confirms the following:

(1) Acceptance can be by conduct so long as that conduct, as a matter of objective analysis, is intended to constitute acceptance;

(2) Acceptance can be of an offer on the terms set out in a draft agreement drawn up between the parties but never signed;

(3) If a party has a right to sign a contract before being bound, it is open to it by clear and unequivocal words or conduct to waive that requirement and to conclude the contract without insisting on its signature;

(4) If signature is the prescribed mode of acceptance an offeror will be bound by the contract if it waives that requirement and acquiesces in a different mode of acceptance. Where signature as the prescribed mode of acceptance is intended for the benefit of the offeree, and the offeree accepts it in some other way, that should be treated as effective unless it can be shown that the failure to sign has prejudiced the offeror;

(5) A draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly; and

(6) The subsequent conduct of the parties is admissible to prove the existence of a contract, and its terms, although not as an aid to its interpretation.

58. Mr Kwok further submitted that a judge should assess the matter using the reasonable expectations of honest, sensible business people. In this regard he relied upon Reveille at [42], which provides:

> 'These rules take effect against the background of legal policies recognised in the case law. One such policy is the need for certainty in commercial contracts … That need for certainty applies as well in commercial negotiations and to the question of whether a contract has come into existence … A second policy is that in commercial dealings the reasonable expectations of honest, sensible business persons must be protected .. When considering whether a contract has come into existence, "the governing criterion is the reasonable expectations of honest sensible businessman. Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance … The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations … In my view the same realistic approach must be taken in deciding whether a party has accepted an offer through its conduct"'

59. Naturally I accept with gratitude the guidance given by the Court of Appeal in Reveille. This is not a case, however, of acceptance 'of an offer set out in a draft agreement drawn up between the parties but never signed'. In this case there is no evidence of a travelling draft going back and forth, with key provisions, such as the services to be provided and the fee structure, being agreed (or even 'essentially agreed') and added to the draft in its later iterations. There is no final draft in evidence, which the parties simply stopped short of signing. Leaving aside the paucity of the evidence as to the drafting of the Agreement in its final form and its ultimate execution, there is no correspondence in evidence in which the Applicant confirms (or even refers to) its agreement to a fixed monthly retainer fee of £21,000 plus VAT.

60. The Respondent relied upon a number of invoices which were paid by the Applicant from October 2019 onwards, prior to the Applicant querying invoices 1123 and 1126 in October 2020. Mr Kwok submitted that, applying *Reveille*, the Applicant's payment of the Respondent's invoices up to August 2020 of itself constituted 'clear and unequivocal' conduct which objectively signified the Applicant's consent to the Agreement. I reject that submission.

61. Save for Mr Dadswell's witness statement (which, for reasons already explored, raises more questions than it answers) and the Agreement itself, there is no evidence that the Applicant ever had sight of the Agreement in its final form (ie with the key blanks completed) at any time prior to 29 October 2020.

62. Viewed in context, the mere payment by the Applicant of invoices rendered by the Respondent over the period October 2019 to August 2020 is in my judgment equivocal. The Applicant had a pre-existing relationship with the Respondent involving the provision by the Respondent to the Applicant of services for which, historically at least, the Respondent had invoiced on a 'time cost' or 'daily rate' basis. In this regard it highly material to note that, with only one or two exceptions, the

invoices sent by the Respondent to the Applicant over the period October 2019 to August 2020 are *couched in terms suggestive of a daily rate* rather than a monthly consultancy fee. For the most part they specify a 'quantity' of '20' or '21' and a 'rate' of '1000', with a total arrived at by multiplying 'rate' by 'quantity'.

63. It is also material to note that the invoices over the period October 2019 to August 2020 do not all total £21,000 plus VAT. Again, this is inconsistent with the payment terms set out in the Agreement. The invoice dated 10/01/2020, for example, (quantity '20', rate '1000') is in the sum of £20,000 plus VAT. The invoice dated 04/02/2020 is in the sum of £24,180.41. Two invoices are rendered in respect of June 2020; one dated 07/07/2020 (quantity '4', rate '1000') in the sum of £4000 plus VAT, the other dated 06/08/2020 (quantity '17', rate '1000') in the sum of £17,0000 plus VAT. There are other examples, but these will suffice.

64. Applying the test of the 'honest, sensible business person', in my judgment an honest sensible business person could not reasonably conclude from payment of invoices couched in such terms and in such sums that a fixed monthly consultancy fee of £21,000 had been agreed.

65. Moreover, it is accepted by Mr Dadswell that no invoices were sent to or paid by the Applicant in respect of the months of March, April and June 2020. This is clearly inconsistent with the Applicant being liable to pay the Respondent a monthly fixed retainer fee under the terms of the Agreement regardless of the amount of work done in any given month. Mr Dadswell's evidence is that he was 'asked' (he does not state by whom) to submit invoices for those months to Port IT Limited instead. Mr Dadswell suggested in his evidence that these invoices may have been charged to Port IT Limited 'to rebalance an apportionment of costs' but I was taken to no evidence to support this suggestion. If the invoices related to a fixed monthly consultancy fee payable by the Applicant to the Respondent pursuant to the Agreement (or to the terms set out in the same), an honest sensible business person would reasonably expect the invoices to be addressed to (and paid by) the Applicant, not Port IT Limited.

66. Mr Kwok went on to submit that no reason, other than acceptance of the terms of the Agreement, had been put forward by the Applicant to explain why it paid the invoices sent to it by the Respondent over the period September 2019 to August 2020. I reject that submission. It is clear from the evidence that all of the invoices over that period were sent to a dedicated email address ('invoices@[the Applicant].com'). By his letter to the Respondent's former solicitors dated 13 November 2020, Mr Gesue confirmed that he had 'no oversight' of that email account, which I take to mean that he was not involved in monitoring the invoices sent to that account. The amount being charged in these invoices was spotted by the Applicant's auditors in September/October 2020 and was immediately queried. Against that backdrop, I reject Mr Kwok's submission that the 'only possible explanation' for the Applicant's payment of the invoices sent to it by the Respondent over the period October 2019 to August 2020 was that the Applicant 'was accepting the Respondent's services under the Agreement and paying for such services as it was required to by the Agreement'. In my judgment a far more likely explanation was that Mr Gesue didn't spot how much the Respondent was charging (or that the Respondent had switched to charging

a fixed monthly consultancy fee) until the auditors queried invoices 1123 and 1126 in October 2020.

67. Mr Kwok went on to submit that the Respondent must be entitled to some monetary payment for its services, even if not under the Agreement. Leaving to one side the impertinence of this submission, given the questions raised over the authenticity of the Agreement, the short answer to this submission is that the Respondent has not invoiced the Applicant, or made a written demand for payment, on any basis other than pursuant to the Agreement. As matters stand, therefore, s.123(1)(e) and *Cornhill Insurance plc* do not, even in principle, provide an alternative route to presentation of a winding up petition based on non-payment of any sum demanded on a 'time spent' or 'daily rate' basis. There has been no demand for payment of any such sum. It follows that non-payment of such a sum cannot be relied on as evidence of insolvency for the purposes of s123(1)(e). There was no other persuasive evidence of insolvency before me.

68. I would add that on several occasions prior to service of the statutory demand, the Applicant asked for a breakdown of the work which the Respondent claimed to have done for the Applicant over the months to which invoices 1123, 1126 and 1127 relate. No breakdown was provided. Even since the issue of this application, the Respondent has failed to provide a meaningful breakdown. The evidence filed in answer to the application is padded with a considerable amount of documentation relating to work done in earlier months. It is opaque and unhelpfully presented.

Conclusion

69. Even leaving to one side the current bar on presentation of a winding up petition based on a statutory demand imposed by paragraph 1 of Schedule 10 to CIGA 2020, in my judgment the Respondent should not be permitted to present a petition under s.123(1)(e) IA 1986 based on non-payment of invoices 1123, 1126 and 1127. Those invoices have been prepared on the basis of a monthly retainer fee claimed pursuant to the Agreement. The Applicant has established a strongly arguable case that the Agreement is a forgery and that the Applicant did not agree to its terms. The debt claimed in the statutory demand is disputed on substantial grounds.

70. As at the date of the hearing before me, the Respondent had not invoiced the Applicant, or made a written demand for payment, on any basis other than the fixed monthly consultancy fee claimed by invoices 1123, 1126 and 1127 pursuant to the Agreement. As at the date of the hearing, therefore, the Respondent could not, even in principle, use s.123(1)(e) and *Cornhill Insurance plc* as an alternative route to presentation based on non-payment of any sum demanded on a 'time spent' or 'daily rate' basis, leaving aside the practical challenges that such an alternative route would entail, given the credibility issues which have arisen from the highly questionable circumstances in which the Respondent came to rely upon the Agreement and adduce it in evidence in court proceedings.

71. Overall, this matter is plainly unsuitable for disposal by way of winding up proceedings. As made clear in Re A Company (No.006685 of 1996) [1997] BCC 830 at 832F, it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide

grounds. The effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action. If the Applicant and the Respondent are not able to settle their dispute, it must be determined by way of ordinary action, with the benefit of full disclosure and cross-examination.

72. For all these reasons, I have granted an order restraining the Respondent from presenting a winding up petition against the Applicant.

73. I shall hear submissions on costs and any consequential matters on the handing down of this judgment.

ICC Judge Barber