



NEUTRAL CITATION NUMBER: [2021] EWHC 2289 (Ch)

Case No. CR-2021-LDS-00068 2021-LDS-00068

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



RE A COMPANY
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BEFORE HER HONOUR JUDGE KELLY
SITTING AS A JUDGE OF THE HIGH COURT

B E T W E E N :

A

Petitioner

and

B

Respondent

Mr Ian Tucker (instructed by Gunnercooke LLP) for the Petitioner
Mr Nick Taylor (instructed by Clarion Solicitors) for the Respondent

Hearing date: 8 July 2021

Date draft circulated to the Parties: 04 August 2021

Date handed down: 11 August 2021

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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Her Honour Judge Kelly

1. This judgment concerns a Preliminary Hearing held pursuant to the Insolvency Practice Direction (“the Practice Direction”) relating to the Corporate Insolvency and Governance Act 2020 (“the 2020 Act”).
2. The Preliminary Hearing was listed before me on 8 July 2021, following the nonattended pre-trial review by District Judge Goldberg on 14 June 2021. The Preliminary Hearing was ordered so that the court could “determine whether it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test”
3. The Petitioning Creditor was represented by counsel Mr Ian Tucker and the Debtor Company was represented by counsel Mr Nick Taylor. I had the benefit of reading very helpful skeleton arguments from both counsel before the Hearing.
4. I had the benefit of reading the petition, the witness statements of Mr Nathan Priestley (director of the Debtor Company), dated 7 June 2021 and 28 June 2021, the witness statements of Mr Thomas Smith (director of the Petitioning Creditor) dated 10 June 2021 and 28 June 2021, together with the invoices provided by the Debtor Company and the other documents referred to in the skeleton arguments.
5. During the hearing, the Debtor Company also sought permission to rely on the letter from Milners solicitors dated 29 June 2021 concerning the apartments development which was the subject of the contract between the parties. The Petitioning Creditor sought permission to rely upon a third witness statement from Mr Thomas Smith dated 1 July 2021 and the exhibits thereto. Having heard arguments, I gave permission for each party to rely upon that additional evidence which had not been filed in accordance with the directions previously given by District Judge Goldberg. In addition, I had the benefit of reading various documents to which I was taken during the course of the hearing.

6. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing, but I record that I read and considered those arguments as well as all the various documents referred to within the application bundle before coming to a decision.

Background

7. The Debtor Company was the main contractor in respect of a development for which it engaged the Petitioning Creditor as sub-contractor in respect of labour only. The Debtor Company paid the initial instalments due under the contract but failed to pay the final instalment. That final instalment was due by the end of December 2020.
8. The debt was disputed and the parties engaged in adjudication. The debt was found to be owing by the adjudicator. As the debt remained unpaid, the Petitioning Creditor applied to enforce the adjudication decision. By order of His Honour Judge Stephen Davies dated 19 April 2021, judgment was entered against the Debtor Company for the sum of £134,041.91 together with interest of £874.15 and a payment on account of costs of £12,000, giving a total of £146,899.06. Payment was due by 10 May 2021. A number of without prejudice offers to pay in instalments were made by the Debtor Company. Those were not accepted by the Petitioning Creditor. They have been referred to by the Petitioning Creditor in evidence. That should not have happened, but the Debtor Company does not object to the court being aware of what it refers to as “good faith efforts made by the company to negotiate reasonable payment plans for a significant sum”.

The Law

9. The Petitioning Creditor’s application for a winding up petition was issued on 17 May 2021 and seeks to wind up the company pursuant to section 124(1) of the 1986 Act. The petition relies upon section 122(1)(f) of the Insolvency Act 1986 (“the 1986 Act”), that the company is unable to pay its debts.
10. The 1986 Act defines inability to pay debts. Section 123(1)(e), as relied upon in this case, provides:

“A company is deemed unable to pay its debts-

...

(e) *if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.*”

11. Before the coronavirus pandemic, in accordance with the Insolvency Rules 2016, a winding-up petition would be presented to the court, listed for Hearing (usually in practice in a winding-up list) and served on the Debtor company. A petition would be dismissed if the petition debt was genuinely disputed on substantial grounds.
12. As a consequence of the coronavirus pandemic, the 2020 Act and the associated Practice Direction were enacted. The description at the start of the 2020 Act is that it is “An Act to make provision about companies and other entities in financial difficulty, and to make temporary changes to the law relating to the governance and regulation of companies and other entities”. Part 2 of Schedule 10 of the 2020 Act is headed “Restriction on Winding-Up Petitions and Orders” and for a “relevant period” contains restrictions about the presentation of petitions and the making of winding up orders in circumstances where the company has been financially affected as a result of the coronavirus. The parties agree that the petition was presented during the relevant period.
13. Paragraph 2.1 of the Practice Direction provides that paragraphs 3 to 8 of the Practice Direction applies in relation to winding up petitions brought on the basis of the company being unable to pay its debts when they fall due.

The relevant provisions in Schedule 10 of the 2020 Act

14. Sub-paragraph 2(3) provides:

“A Creditor may not, during the relevant period, present a petition under section 124 of the 1986 Act for the winding up of a registered company on the grounds specified in section 123(1)(e) or (2) of that Act unless the condition in subparagraph (4) is met.”

Sub-paragraph 2(4) provides:

“The condition referred to in subparagraph (3) is that the Creditor has reasonable grounds for believing that coronavirus has not had a financial effect on the company or the relevant ground would apply even if coronavirus had not had a financial effect on the company.”

15. Sub-paragraph 21(3) provides that “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”

16. Sub-paragraph 5(1) provides:

“(1) This paragraph applies where-

- (a) a Creditor presents a petition for the winding up of a registered company under section 124 of the 1986 Act in the relevant period;
- (b) the company is deemed unable to pay its debts on a ground specified in section 123(1) or (2) of that Act, and
- (c) it appears to the court that coronavirus had a financial effect on the company before presentation of the petition.”

17. Sub-paragraph 5(3) provides:

“The court may wind the company up under section 122(1)(f) of the 1986 Act on the ground specified in section 123(1)(e) or (2) of that Act only if the court is satisfied that the ground would apply even if coronavirus had not had a financial effect on the company.”

Relevant provisions in the Practice Direction

18. Paragraph 3 provides:

“3.1 A petition will not be accepted for filing unless it contains the statement required by Rule 7.5(1) as amended by paragraph 19(3) of Schedule 10 to the 2020 Act.

3.2 In addition, the petition shall contain a summary of the grounds relied upon by the Petitioning Creditor for the purposes of the coronavirus test.”

19. Paragraph 4 provides:

“4.1 Upon presentation of a winding-up petition, provided it is not rejected for filing under paragraph 2 above, the petition shall be listed for a non-attendance pre-trial review with a time estimate of 15

minutes for the first available date after 28 days from the date of its presentation.

4.2 The purpose of the non-attendance pre-trial review is to enable the court to give directions for a Preliminary Hearing in order for the court to determine whether it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test.”

20. Paragraph 6 provides:

“6.1 If the petitioner wishes to rely upon any evidence at the Preliminary Hearing, other than that contained in the petition, it must file and serve on the company a witness statement containing such evidence at the same time as the petition.

If the company wishes to rely upon any evidence at the Preliminary Hearing it must file and serve on the petitioner a witness statement containing such evidence within 14 days of service of the petition upon it.

At least two days before the non-attendance pre-trial review the parties shall file and serve a listing certificate stating (i) the identity of their legal representatives (if any); (ii) their availability for the Preliminary Hearing; and (iii) a time estimate for the Preliminary Hearing.”

21. Paragraph 7 provides:

“7.1 At the non-attendance pre-trial review the court may:

(1) in the event that the company does not oppose the petition and the court is satisfied that it is likely to make a winding up order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test, it shall list the petition for a Hearing in the windingup list; or

(2) list the Preliminary Hearing and give such other directions in relation to the Preliminary Hearing as it thinks appropriate.”

22. Paragraph 8 provides:

“8.1 At the Preliminary Hearing:

(1) if the court is not satisfied that it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test, it shall dismiss the petition; or

- (2) if the court is satisfied on the evidence before it that it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test, it shall list the petition for a Hearing in the winding-up list.”
23. In addition to the statutory provisions, I was also referred to case law. The parties agree about the tests and about whom the burdens of proof apply to in relation to the various aspects of the test to be applied.
24. In the case of *Re A Company (Application to Restrain Advertisement of a Winding Up Petition)* [2020] EWHC 1551 (Ch), ICC Judge Barber identified a two-stage approach:
 - (1) initially, the Debtor Company has the evidential burden of showing that the coronavirus has had a financial effect on the company before the presentation of the relevant petition. She stated in terms of paragraph 44 of her judgment that this was intended to be a “low threshold” and that “the requirement is simply that ‘a’ financial effect must be shown; it is not a requirement that the pandemic must be shown to be the (or even a) cause of the company’s insolvency”. What has to be demonstrated is a “prima facie case, rather than prove the ‘financial effect’ relied upon on a balance of probabilities”.
 - (2) If the Debtor Company establishes that coronavirus has had a financial effect, the burden then shifts to the Petitioning Creditor who has to demonstrate that if the financial effect of the coronavirus is ignored, the Debtor Company would still be insolvent within the meaning of s123(1)(e) or (2).
25. As this is the hearing of the preliminary issue, the issue for the court is whether, based on the evidence before it, it is considered *likely* that the court will be able to make an order at the hearing of the petition.
26. In addition, I was also referred to the case of *PGH Investments Limited v Sean Ewing* [2021] EWHC 533 (Ch). In that case, Deputy ICC Judge Passfield was asked by the Petitioning Creditor to find that Parliament could not have intended that the 2020 Act would enable a company adversely affected by coronavirus to incur new debts incurred as a result of an obligation entered into after the commencement of the coronavirus pandemic, which it cannot pay, without being liable to a winding up order. In response,

the Debtor company argued that was precisely what Parliament must have intended because otherwise a company rendered cash flow insolvent by the coronavirus pandemic would be unable to continue to trade without the risk of being wound up. The judge decided 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.”

27. As to the quality of the evidence, I was also referred to the case of *Wetton v Ahmed* [2011] EWCA Civ 610 when Arden LJ emphasised at paragraph 14 of her judgment that:

“contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.”

The positions of the parties

28. The Petitioning Creditor contends that the Debtor Company has not established on the evidence that coronavirus has had an effect on it, even at the low threshold which is agreed to apply. Even if I do not find that to be the position, the Petitioning Creditor maintains that the Debtor Company would not have been in a financial position to pay in any event, even if coronavirus had not had an impact on the Debtor Company.
29. The Debtor Company asserts on the evidence that it easily discharges the low burden of showing that the coronavirus pandemic has had an effect on its financial position. The Debtor Company accepts that the debt is due and owing. However, it refutes the Petitioning Creditor’s position that the Petitioning Creditor can establish on the evidence that the Debtor Company would not have been able to pay in any event.

The Evidence

30. In his first witness statement, Mr Priestley described that “due to short-term cash flow issues”, the Debtor Company was unable to make the payment by the due date of 10 May 2021. The Debtor Company had sought to agree a payment plan with the Petitioning Creditor but the parties were unable to reach agreement. Mr Priestley described that he is the CEO and founder of the Debtor Company and has been heavily involved in its financial affairs. The Debtor Company is part of a group of 46 companies. The Debtor Company is involved in construction, predominantly for private sector clients. Since the start of the pandemic, his role had changed from being mainly engaged in the strategic overview of the 46 companies in the group to being much more hands on and attending sites to assist with the delivery of projects on time given the “numerous obstacles” encountered as a result of coronavirus. He described his knowledge as being therefore of the day-to-day operation of the Debtor Company both on the ground level and at board level.

31. Mr Priestley described the “perfect storm” created by the pandemic when it comes to cash flow. There had been significant delays to the programs on various projects undertaken by the Debtor Company due to staff shortages and contractors having to self-isolate. This had a knock-on effect on delivery of projects under reduced level of income. In addition, suppliers have put up their prices which had an impact on profitability. In addition, the Debtor Company had over £2 million worth of unpaid invoices as at 3 June 2021. That level of debt was much higher than had been the position before the pandemic hit when the average overdue invoice position would be around £1 million at any given time.

32. In addition to those difficulties, he noted that he had observed a sharp decline in new contracts being awarded since March 2020 which also adversely affected the Debtor Company’s profits. This was demonstrated by the comparison of the Debtor Company’s finances between 2019 and 2020. Although the filed accounts for 2020 were not yet due, a year-on-year comparison could still be made as follows:

	2020	2019
	£	£
Turnover	4,644,566.91	6,295,535.26
Cost of Sales	(5,605,671.02)	(5,370,930.19)
Gross Profit	(961,104.11)	924,605.07
Administrative Costs	(1,060,535.31)	(861,919.23)
Operating Profit	(2,020,639.42)	62,685.84

33. Before the pandemic, the Debtor Company had been growing year on year and that trend was expected to continue. Those figures demonstrated a 26% decrease in turnover. When that reduced turnover was coupled with increased costs and the other difficulties caused by the pandemic, the Debtor Company went from making a modest profit to a significant loss.
34. Mr Priestley described how many companies in the industry are struggling with cash flow, leading to more companies attempting to insure their debts and insurance companies tightening up criteria to enable insurance to be purchased. In addition, credit is more difficult to negotiate. To support his assertion that these difficulties were industrywide, Mr Priestley exhibited in article from Construction News which summarised difficulties faced by the construction industry, that summary being based on analysis by Begbies Traynor.
35. Mr Smith, the director of the Petitioning Creditor, responded to Mr Priestley's evidence. He asserted that the Debtor Company was not experiencing short-term cash flow problems because the debt was originally due in December 2020. Thereafter, despite offers of payment, the debt remains unpaid. Although Mr Smith acknowledges the presence of £2 million worth of unpaid invoices for the Debtor Company, he criticises the redaction of those invoices and the fact that they are not put into any context to enable the court and the Petitioning Creditor to understand why they have not been paid.
36. Further, Mr Smith criticises Mr Priestley's reliance on the articles relating to difficulties with the construction industry, in that those difficulties are not specifically related to the Debtor Company's financial performance and their difficulties. Mr Smith also

attached some research showing that housing sales were booming and that construction output was increasing to assert that the Debtor Company's business was booming.

37. Mr Smith also questioned the accuracy of Mr Priestley's evidence as to the difficulties which the Debtor Company was facing by relying upon a series of LinkedIn posts issued by Mr Priestley "trumpeting" the Debtor Company's ongoing buoyant business. Further, Mr Smith asserts that the construction industry is buoyant and the "project pipeline" for the Petitioning Creditor is healthy. He presumes that the Debtor Company is also healthy given the number of projects offered by the Priestley group.
38. That evidence was then responded to by Mr Priestley in his second statement. He asserted that the Debtor Company's inability to make payments as per the instalment offers (none of which were accepted) emphasised how the company was still struggling with the effects of the pandemic. Further, in relation to the redacted invoices, he confirmed that they were not subject to dispute but demonstrated (by reference to the previous year's debtors in the same period) how the Debtor Company was struggling to recover outstanding debts since the onset of the pandemic.
39. Further, the Debtor Company's largest debtor was an inter-group company. The company had difficulties selling the various apartments as a result of the coronavirus, there had been a delay in paying the Debtor Company. That evidence was supplemented by the letter from Milner's solicitors dated 29 June 2021. That letter described how, despite the fact that contracts have been exchanged in off plan sales before completion of the apartments, once completion notices were served on the buyers, "all buyers were in breach of contract" because not a single sale completed on time. Of the 102 apartments sold off plan, 24 had to be rescinded due to the buyer's inability to proceed and eight months after the first tranche of apartment sales should have completed, only 87 sales out of 153 had in fact been completed. As a result of those difficulties, any revenue generated had been paid to the principal lender.
40. Mr Smith responded to the further evidence by exhibiting experience credit reports showing that the Debtor company's profile had remained stable over the previous year.

In addition, further LinkedIn posts trumpeted how well the Debtor Company was doing. The Debtor Company was also recruiting and therefore Mr Smith remained of the view that the Debtor Company was simply avoiding paying for as long as possible.

41. In his third witness statement, Mr Smith disputed the accuracy of the profit and loss account exhibited by Mr Priestley. During the year 2020, the Petitioning Creditor had received payments from the company of over £440,000 in respect of Contract labour and materials. The profit and loss account produced by Mr Priestley showing over £80,000 in respect of labour and other additional sums in respect of materials and those stated subcontract costs were less than that in fact had been paid to the Petitioning Creditor. The accounts he asserted were therefore inaccurate. Further, he asserted that because all of the previous payments due to the Petitioning Creditor had been made on time, the Debtor Company cannot have been in financial difficulty or be affected adversely as a result of the coronavirus or issues in relation to the sale of flats in the development.

Limb 1 – a financial effect caused by coronavirus?

42. Mr Tucker sought to persuade me that the evidence of Mr Priestley is inherently unreliable and that I should place little weight on it because of inaccuracies and deliberately withheld information. When describing the Debtor Company in response to the application, Mr Priestley described it at paragraph 8 of his first witness statement as a construction company which “whilst we operate nationally, the majority of our work is based across the M 62 from Hull to Warrington”. Later, in his second witness statement, at paragraph 14.2 Mr Priestley chose to state “the company’s market is not the North-West, it is localised only to the Yorkshire region”. Mr Tucker argued that such minimisation of the status of the company in an attempt to counter the evidence of the Petitioning Creditor rendered the evidence of Mr Priestley wholly unreliable.
43. Further, whilst Mr Priestley set out that the Debtor Company is owed over £2 million, Mr Tucker argued that the redaction of the invoices also rendered that evidence unreliable. The Petitioning Creditor and the court cannot know if it is the same debtor,

nor if the debt is disputed. Mr Tucker asserted that the evidence in support of the Petitioning Creditor being financially affected by the coronavirus was unsatisfactory because the evidence was little more than a bare assertion that Mr Priestley thought that coronavirus was the cause of the non-payment of invoices and debts owed to the Debtor company. He asserted that had there been more substantial evidence of coronavirus affecting the company, it would have been set out in terms and he sought to rely on adverse inferences as a result of the lack of information.

44. Further, Mr Tucker sought to undermine the figures given in any event. The £2 million invoices were generated between November 2020 and March 2021. Mr Priestley described that was 65% of all of the invoices issued going unpaid in that period. That was in stark contrast to the same period the previous year. Mr Tucker argued that if over a five-month period the unpaid invoice debt was as Mr Priestley suggested (totalling £3.6 million turnover when grossed up), if one contrasted that with the turnover of the previous year to 31 December 2020 whether total turnover was £4.6 million, that would tend to show that 80% of the turnover for the entire year must have been done in that five-month period between November 20 and March 2021. That, he asserted, is highly unlikely.
45. Whilst I accept that Mr Priestley has sought to describe the Debtor Company in different ways depending on the point he was addressing, I do not find that this renders his evidence completely unreliable. This is particularly the case where aspects of his evidence supported by independent articles considering the national position of those involved in the construction industry.
46. I remind myself of the judgment of ICC Judge Barber, that in relation to the first limb of the coronavirus test, whilst the burden is on the Debtor Company to establish that coronavirus has had a financial effect, it is a “low threshold” and that “the requirement is simply that ‘a’ financial effect must be shown; it is not a requirement that the pandemic must be shown to be the (or even a) cause of the company’s insolvency”. What has to be demonstrated is a “prima facie case, rather than prove the ‘financial effect’ relied upon on a balance of probabilities”.

47. I accept the point made by Mr Tucker that more specific instances of the direct effect of coronavirus on the Debtor company could have been given. However, taking Mr Priestley's evidence as a whole, I accept and find as the fact that the Debtor Company has demonstrated a prima facie case that there has been a financial effect on the company.
48. In this case, I find that the financial effect on the Debtor Company is not only the increased level of debtors which has inevitably affected cash flow, but also difficulties with workers self-isolating (whether as a result of having coronavirus or as a result of being a close contact of someone who has tested positive for the disease) leading to delays in completion of projects which I accept and find has had a knock-on impact on completion and therefore cash flow. In my judgment, that aspect alone would suffice in this case to show that coronavirus had had a financial effect on the Debtor Company.
49. In fact, there is more to support the finding of a financial effect on the Debtor Company. I accept the evidence of Mr Priestley that the Debtor Company has won fewer contracts and that the turnover went down by 26% as a result of coronavirus. Whilst it may well be that more particularised evidence could have been given on this point, the experience of the Debtor Company appears to mirror what was being reported in articles concerning the construction industry generally.
50. In relation to the evidence concerning the outstanding invoices, although the invoices are redacted, Mr Priestley does specifically say at paragraph 14 of his first statement that "an inter-group company" owes the Debtor Company around £2 million. Whilst the inter-group company is not named, I am not particularly surprised that Mr Priestley does not want to identify another company within the Priestley Group which is having financial and cash flow difficulties. As was identified by Mr Smith in his evidence, Mr Priestley is directly involved with other companies in the Priestley Group. In those circumstances, whilst Mr Priestley has not specifically identified the company which owes money on the invoices, in asserting that the debt is from an intergroup company, and that he believes the client has difficulties caused by coronavirus, that suffices in my judgment to pass the low bar and assist in establishing that the company has been subject to a financial effect as a result of coronavirus.

51. I am not surprised that the Debtor Company did not draw attention to its own difficulties before the presentation of the winding up petition. There are inevitably good commercial reasons why a company would not want to alert competitors or clients to the fact it was experiencing cash flow difficulties.
52. I accept that further information could have been given in relation to the financial position of the Debtor Company generally. However, as the debt appears to be from an inter-group company, the same observations would apply when considering why Mr Priestley has not exhibited further chasing letters or other detail in relation to the debt owed. Further documents could have been exhibited but, for the same reasons set out above, they would also have been redacted to hide the identity of the inter-group company. In those circumstances, I do not accept that it is appropriate to draw any adverse inferences against the Debtor Company.
53. I do not find that when comparing turnover figures for the year until the end of December 2020 with the outstanding invoices between November 2020 and March 2021 showing 80% of turnover done in a five-month period (assuming the turnover remained the same as the previous year, as to which I have no evidence) that that position is so inherently unlikely that the accounts must be fundamentally inaccurate.
54. I note that the 2020 figures are from draft accounts and therefore subject to amendment. On the evidence, I cannot find that Mr Priestly has deliberately manipulated the figures (whether fraudulently or otherwise). In any event, in my judgment, the figures produced by Mr Priestley in respect of turnover and the movement of the company from modest profits in 2019 to significant loss in 2020 underlines and supports his assertion that the Debtor Company has been financially affected as a result of the coronavirus.

Limb 2 – would the Debtor Company have been unable to pay its debts even if coronavirus had not had a financial effect on it?

55. Having decided that the coronavirus has had a financial effect on the Debtor Company, the burden of proof now moves to the Petitioning Creditor to establish that even if the coronavirus had not had such financial effect, the Debtor Company would still have been unable to pay the judgment sum.

56. The starting point for the grounds relied upon by the Petitioning Creditor are contained in the petition itself. The grounds relating to the coronavirus test for seeking the winding up of the company are set out in paragraphs 9.1 to 9.3:
- 9.1 The debt is for a sum found property (sic) due under the Contract which was entered into in May 2020 and for payment due December 2020.
 - 9.2 At no time until the Judgment Sum fell due for payment, namely by email dated 11 May 2021 has the company ever suggested that it is unable to pay the sum awarded or any sum awarded.
 - 9.3 In the email dated 11 May 2021 no reference is made to the impact of coronavirus on the company. The company does offer to pay but over three months, which is not acceptable. The company has paid previous applications for payment prior to the debt the subject of this petition.
57. The fact that the judgment debt is in respect of a contract entered into after the start of the coronavirus pandemic, with payment due in December 2020, does not assist me in finding that the Debtor Company would have been unable to pay its debts in any event. Indeed, Mr Smith's own evidence is to the effect that previous payments due under the contract were in fact made. It is only the final payment, which was disputed and referred to adjudication, which remains unpaid. That fact would appear to undermine any assertion that the fact of entering into the contract during the coronavirus period has a bearing on whether or not the Debtor Company could pay its debts at that time.
58. As I stated earlier in relation to the first limb of the test, it is not a great surprise that the Debtor Company did not suggest until the May 2021 email that it was unable to pay. I accept the submission of Mr Taylor that as a matter of common sense and commercial reality, it is unlikely that any company would wish to advertise the fact that it was experiencing cash flow difficulties.
59. Although the email of May 2021 did not make reference to the impact of coronavirus on the company, I note the evidence of Mr Priestley in responding to this assertion in the petition at paragraph 13.3 of his first statement where at the end of that paragraph he states: "To be perfectly honest, I thought it would go without saying that the pandemic has had a negative impact on the Company's financial position".

60. What evidence is there to show that even without the impact of the coronavirus, the Debtor Company would be unable to pay its debts as they fell due? A bare assertion is made at paragraph 10 of the petition that the Debtor Company was and has remained unable to pay its debts when they fell due since no later than 14 November 2018. In my judgment, the evidence of Mr Smith goes nowhere near establishing that this is the position.
61. Indeed, apart from commenting on the likely accuracy of the profit and loss account comparison between the year 2020 and 2019, which would appear to show some inaccuracy as the Petitioning Creditor had been paid more than the Debtor company stated had been paid in respect of the project, he cannot give evidence directly on the finances of the Debtor Company at all. As Mr Taylor observed, if Mr Smith is right about the additional payments being made to the Petitioning Creditor over and above that which is demonstrated in the account, that would only go to worsen the position of the Debtor Company in terms of its finances.
62. Mr Tucker sought to persuade me that because the Debtor Company has over £2 million worth of unpaid debts (which in 2019 when the company made a modest profit would have equalled approximately one third of total turnover), if that £2 million worth of debts remained unpaid in the good times, the Debtor Company would still have been unable to pay its Creditors. I do not accept that submission. The financial position of the Debtor Company in 2020 was completely different to its financial position in 2019 when it made a profit. It is too simplistic in my judgment simply to say that if the same level of debt were compared to earlier years, the Debtor Company would in any event have been unable to pay its debts.
63. I accept the submission made by Mr Taylor that the financial effect of the coronavirus pandemic on the Debtor Company is “inextricably linked” to its inability to pay the judgment debt. I also accept his submissions that more evidence would be needed than is before the court to enable me to find that it is likely that the Debtor Company would

have been insolvent within the meaning of section 123 of the 1986 Act in any event and therefore that a court could make a winding up order if the petition was heard.

64. Having made that finding, it follows that the petition must be dismissed.

Final Remarks

65. This judgment will be handed down on 11 August 2021 without the attendance of the parties.

66. A hearing will be listed at 10am on 24 September 2021 to deal with the matters not agreed between the parties and the time for making any application for permission to appeal is extended until that hearing. The date of sealing of the order made will be the date on which the time for service of any Appellant's Notice shall start to run.

67. I am grateful to counsel for their very able assistance in this matter.