**Neutral Citation Number [2021] EWHC 2905 (Ch)**

CR-2020 004093

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**IN RE A COMPANY (PRELIMINARY HEARING UNDER SCHEDULE 10 TO THE CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020)**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

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

Date: 11/11/2021

**Before** :

**ICC JUDGE BARBER**

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**Between :**

**THE PETITIONER**

**Petitioner**

**- and –**

**THE COMPANY**

**Respondent**

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**Mr Alex Barden** (instructed by Field Seymour Parkes LLP) for the **Petitioner**
**Mr Kavan Gunaratna** (instructed by Boyes Turner LLP) for the **Respondent**

**Hearing dates: 19 and 20 July 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 a.m on 11 November 2021

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**ICC Judge Barber**

1. On 20 July 2021, following a preliminary hearing listed in accordance with the Practice Direction relating to the Corporate Insolvency and Governance Act 2020 ('CIGA PD'), I ordered that the Petitioner's petition, presented to this Court on 5 November 2020, be dismissed forthwith. I did so on the basis that written reasons would follow. This judgment sets out my reasons for dismissing the petition. It should be noted that the matters addressed in this judgment pre-date the changes introduced by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendments of Schedule 10) (No.2) Regulations 2021 (SI 2021 No. 1091), the material provisions of which came into force on 1 October 2021. Accordingly, references in this judgment to Schedule 10 are references to the 'old' Schedule 10, prior to the changes effected by SI 2021 No 1091. In order to protect the interests of the Company, this judgment has been anonymised in certain respects.

**Introduction**

2. The Petitioner and the Company are connected parties. At the time of presentation of the petition, Mrs Goyal (a director of the Company) and her husband ('Mr Goyal') owned 35.5% of the shares of the Petitioner's ultimate parent company. Mr Goyal was also the founder of the Petitioner. He was a director of the Petitioner and of its ultimate parent company until 26 November 2019. In 2020, Mr Goyal commenced proceedings for unfair dismissal and related matters against the Petitioner's parent and various of its directors ('the unfair dismissal proceedings'). The Company maintains that it is this which has prompted the presentation of the petition. The Petitioner denies this.

**Background**

3. The Company was incorporated on 7 November 2013 and its business is property development. Its first (and present) development project is a residential development at a freehold site in Bracknell ('the Site'). The project entails the construction of 8 flats, with the potential for 2 additional flats.

4. The Company acquired freehold title to the Site for £570,000 without the benefit of planning permission 7 or 8 years ago. In 2015/2016, the Company obtained planning permission for the construction of 8 flats following demolition of the existing dwelling at the Site.

5. By a loan agreement dated 6 December 2013 ('the Original Loan Agreement'), the Petitioner agreed to make a loan facility of up to £1.24 million available to the Company for a term of five years from initial drawdown, at a standard interest rate of 5% per annum. The Original Loan Agreement was drawn in generous terms. It did not contain any fixed requirements to prepay capital or interest during the term, but did provide for the interest rate to increase to 7% if unpaid interest exceeded £150,000.

6. The Company's debt to the Petitioner under the Original Loan Agreement was secured by (1) a charge by way of legal mortgage over the (otherwise unencumbered) Site and (2) a personal guarantee from Mr Goyal.

7. On 1 March 2019, the Petitioner and the Company agreed to vary the terms of the Original Loan Agreement ('the New Loan Agreement'). Under the terms of the New Loan Agreement, (1) the parties acknowledged that the new opening balance (based

on the amounts previously borrowed, with rolled up interest thereon ) was £919,584.93; (2) the term of the facility was extended to a new repayment date of 31 March 2020 (a date of the Company's own choosing); and (3) the parties agreed that a 2% higher rate of interest would apply to the account in the event that the loan was not repaid on or by 31 March 2020. The Company's debt to the Petitioner under the New Loan Agreement was again secured by a legal mortgage over the Site and Mr Goyal's personal guarantee.

8. The Company maintains that from 24 July 2019 until the intervention of the pandemic on 24 March 2020, the Site was being developed and good progress was being made towards completion of the 8 flats. The expected development value of the Site with 8 flats was very substantially in excess of the Company's debt to the Petitioner. The Company's sale agents (Prospect) recommended selling the 8 flats for an aggregate sum of £2.455m. The Company originally intended that its secured debt to the Petitioner would be discharged from the sale of 4 of those 8 flats.

9. In September/October 2019, however, the Company decided to apply to the local planning authority (Bracknell Forest Borough Council) for permission to erect 2 additional flats. The Company recognised that this new planning application could result in the development not being completed in time to sell 4 flats and to repay the Petitioner by that method by 31 March 2020. For that reason, in the autumn of 2019, the Company set about (through its directors, shareholders and their joint family unit) raising alternative finance, as follows:

(1) Mrs Goyal and her family put in place arrangements to sell 4 unencumbered properties owned by them personally in India ('the Indian Properties'). These properties were placed on the market in late 2019 and were expected to sell for in excess of £1.048 million. The plan was to complete the sales and realise funds before the end of March 2020. Mrs Goyal and her family agreed that the proceeds of those sales would be invested in or loaned to the Company, with a view to enabling the Company to repay the Petitioner.

(2) At or about the same time (autumn 2019), the Company set about raising alternative/bridging finance against the security of the Site. To this end, the Company consulted mortgage brokers including Mr Carl Bennett of Think Mortgages Ltd in September 2019 and also Mr Nick Thring of Duncan Yeardley. Refinancing proposals were explored with Stondon Capital Limited ('SCL'). SCL valued the Site at £1.76m (based on planning permission for only 8 rather than 10 flats).

**The impact of the pandemic**

10. The Company's evidence is that on 24 March 2020, the first national lockdown caused all work on the Site to cease immediately for more than 14 weeks until July 2020. (The Petitioner contested this at one stage but adduced no evidence of continued construction work over the relevant period. In contrast, Mrs Goyal's first witness statement dated 23 November 2020 exhibits (inter alia) an email dated 17 November 2020 from a neighbouring owner, Mr Hemington, whose property shares a boundary with the Site. By his email, Mr Hemington states that to the best of his recollection, the Site was not operational during the first national lockdown). In the meantime, the Company's workers and its subcontractors were sent on furlough. The

Company maintains that the construction industry experienced widespread adverse impacts and that, even when work on the Site could commence again in July 2020, the Company was subject to continued 'knock-on' delays in the delivery of goods and services (and material and labour shortages) required to complete the development. The delays were then compounded by the imposition of the second national lockdown.

11. The Company also maintains that the pandemic delayed and disrupted the sale of the Indian Properties.

12. At paragraphs 36 and 37 of her first witness statement, Mrs Goyal gave evidence that sales were agreed in respect of two of the Indian Properties (M-28 Anasgar Link Road, Ajmer and 5/365, SFS Mansarovar, Jaipur, for sums representing (in sterling) approximately £476,022 and £217,755 respectively. Both sales fell through. Exhibited to Mrs Goyal's first witness statement is correspondence from the prospective purchasers, confirming the sales that fell through. This correspondence is addressed below:

(1) By an undated letter (which, given the reference to Diwali, it is common ground must have been written in November 2020), the prospective purchaser of M-28 Anasgar Link Road, Ajmer, Mr Anil Pokharna, an Advocate of Rajasthan High Court, wrote as follows:

> 'Dear Dr Goyal,
>
> Reference our discussion when you approached me around this time last year to sell your family property at M-28 Anasagar Link Road, Ajmer.
>
> You did accept my offer of INR 47 million [in sterling, approximately £476,022], which was to be funded through resale of my ancestral property in Dhan Mandi, Ajmer.
>
> Unfortunately, I lost my buyer at the onset of the current pandemic and, as a consequence, I had to withdraw my offer to buy your property.
>
> Hopefully we should see the end of this world crisis soon and I shall be in touch with you again the moment I have a creditable offer on my property which continues to be on the market.
>
> Hope you all had a good Diwali. My best wishes for the Season.
>
> Regards
>
> Anil Pokharna'

(2) By email dated 17 November 2020, the prospective purchaser of 5/365, SFS Mansarovar, Jaipur wrote as follows:

> 'Dear Doctor-sahib,
>
> This has reference to my earlier offer to buy your family home at 5/365, SFS Mansarovar, Jaipur for Rs.21.5 million [in sterling, approximately £217,755]. I had to raise the funds through a mortgage from my bank and equity through savings and sale of my investment in stocks & shares.
>
> The share market tanked as COVID-19 fears started to set in, completely paralysing my ability to raise equity to go ahead with the deal. Even if the pandemic was delayed by a few weeks, we would have had the deal through!
>
> I'll be in touch with you again once the pandemic is over and my financial situation changes, hoping the property was still available.
>
> Wishing you all a happy Diwali!
>
> Regards
>
> Gaurav Singh'

13. At paragraph 50 of her first witness statement, Mrs Goyal described the impact of these two sales falling through. In her words 'This prevented a significant amount of funding becoming available to the Company which it had earmarked for paying to the Petitioner'.

14. Also exhibited to Mrs Goyal's first witness statement is an email dated 17 November 2020 from Gita Estate Agency in Mumbai. This confirmed that the remaining two Indian Properties, based in Mumbai (B701-702 Jai Chitrakoot and G4/1 Jal Padma) had been on the market for over a year at Rs 23 million and Rs 12 million respectively (sterling equivalents £232,947 and £121,537) and further that, in the estate agent's opinion, these properties 'would have long been sold if it was not for Coronavirus'. The email goes on to state:

> 'The properties are in a saleable state and rightly priced.
>
> As you must have seen in the media reports, the government has introduced tax concessions on buying homes. Hopefully, these sops will help us secure buyers for your property soon.'

15. In a later email dated 10 July 2021, exhibited to Mrs Goyal's second witness statement dated 13 July 2021, Gita Estate Agency adds:

> 'In general, it is a very sorry state of affairs in India due to the ongoing pandemic. The property market is worst hit and has completely sunk after the resurgence of Covid and the ongoing second wave.

> In between the two waves, things started to look up and we did have decent interest ….'

16. The Company maintains that the pandemic also had an adverse impact on its attempts to raise bridging finance. By paragraph 54 of her first witness statement, Mrs Goyal produces an email dated 19 November 2020 from Mr Carl Bennett of Think Mortgages Ltd confirming the Company's attempts to raise alternative finance. Mr Bennett's email of 19 November 2020 provides inter alia as follows:

> 'Dear Jyoti,
>
> I am writing as requested to confirm that you had first approached me in September 2019 for a bridging loan against remortgage of Brackworth, a development project you have been running for your company.
>
> Having visited the site, you had already started the project and had done the foundations etc., my advice to you was to get the building airtight before we approached lenders. As I had explained at that time, most lenders would want to be either involved at the onset or once at least the building skeleton was in place. … You had expected to get to this stage by January 2020. You did get in touch with me with an update on the project.
>
> This type of funding generally takes 6 to 8 weeks to complete but on that point, unfortunately, the coronavirus concerns started to set in and many lenders simply stopped lending altogether, the High Street lenders became very nervous of falling property prices particularly in this arena and effectively tighten their belts.
>
> After the first lockdown in March, we witnessed exceptional times and I have not seen the industry in a worse position in over 30 years and that includes the credit crunch. It has simply been horrendous.
>
> In recent weeks the problems are finally abating and despite the current lockdown, many lenders are now coping better with the benefits of hindsight and experience learned from the initial lockdown, so things are improving slowly. I'm sure you would have experienced the improvement yourself and there is a high chance that you will be able to secure a bridge financing. In summary, I could conclude that it was a realistic plan to have secured a bridge finance on Brackworth by the end of March 2020 when we started looking at options in January 2020 if we did not have the pandemic.

> I hope this goes some way to explain the exceptional issues the industry has experienced due to COVID-19 and shed some light on the reasons for your delays.
>
> kind regards
>
> Carl Bennett
>
> MD Think Mortgages Ltd'

17. It will be noted that Mr Bennett's email of 19 November 2020 referred to his recommendation that the Company should 'get the building airtight' before approaching lenders. At the hearing before me, a further email on the subject of 'getting the building airtight' was relied upon (albeit in differing respects) by both parties. The email was dated 15 July 2021 and was from Mr Duncan Griffin, a building control surveyor, of Building Control Partnership Ltd, to Mrs Goyal. It provided inter alia as follows:

> 'As per the works schedule discussed with us in January 2020, the building was planned to be airtight before the end of March 2020. When we visited the site on 16 July 2020, the building needed about a week's work to be airtight. We were told that the site had been closed during lockdown and a new works plan was being drawn in view of the new COVID-19 restrictions. If we had visited the site just before its closure in March 2020, and it was in the same state as we found it in mid-July, it can be said that the building would have been airtight before the end of March 2020 had the site not closed because of COVID-19 provided works had continued for another week in March 2020'.

18. On the question of how long it would take to re-finance, the Company also relied upon a letter dated 12 July 2021, exhibited to Mrs Goyal's second witness statement dated 13 July 2021, in which Mr Bennett (of MD Think Mortgages) stated:

> 'in normal times, that is pre-Covid times, a bridging finance on a development like this can be arranged within weeks as, I would think, the LTV would have been less than 50% of the current value of the project. Our main challenge is the never-ending corona pandemic. One thing the financiers do not like is uncertainty and unfortunately the pandemic provides that in abundance..'

**Demand under the New Loan Agreement**

19. No demand was made by the Petitioner for repayment on 31 March 2020. The repayment date of 31 March 2020 prescribed under the New Loan Agreement simply passed and the higher rate of interest specified in the agreement began to apply.

20. In 2020, Mr Goyal commenced his whistleblowing and unfair dismissal proceedings against the Petitioner's parent company and various of its directors.

21. On 30 June 2020, the Petitioner sent the Company a letter of demand by first class post, exercising its rights under clause 25.2 of the New Loan Agreement 'to declare the loan and all accrued interest and all other amounts accrued or outstanding to be immediately due and payable, whereupon they shall become immediately due and payable' and requesting the Company to repay the total sum forthwith.

22. On 27 October 2020, the Company's then solicitors wrote to the Petitioner setting out the impact which the pandemic had had on the Company's plans to repay the debt through the sale of the Indian Properties and re-finance.

23. On 28 October 2020, the Petitioner's solicitors responded, rejecting the Company's contentions and stating that the Petitioner would be presenting a winding up petition. The winding up petition was presented shortly thereafter, on 5 November 2020.

**The Petition**

24. The petition was based upon the ground specified in s.123(1)(e) IA 1986, which so far as material, provides:

> 'Definition of inability to pay debts
>
> 123. (1) 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'

25. The petition states that:

> 'The Company has failed to repay the loan in full (or any part of it) or the accrued and unpaid interest (or any part of it) on or by 31 March 2020 (or at all). The Company was served with a letter of demand by the petitioner's solicitors dated 30 June 2020. As at 31 March 2020, being the loan repayment date, the capital sum outstanding was £919,584.93 and the accumulated accrued unpaid interest outstanding was £50,002.43, producing a combined overall figure of £969,587.36.
>
> In the period from 1 April 2020 to 30 June 2020, a further £16,921.29 in default interest had accrued. From 1 July 2020 to 24 September 2020, a further £15,991.55 in default interest has accrued; such that the overall sum due and outstanding as at 24 September 2020 is £1,002,500.10.'

26. It will be noted that the petition makes express reference to the letter of demand dated 30 June 2020. The reference to a letter of demand in a petition based on s123(1)(e) is not unusual. In the absence of a statutory demand, a petitioning creditor relying on the non-payment of *one* debt owed to it (to prove the company's *general* inability to pay its debts as they fall due) will ordinarily make a demand for payment prior to presentation and will refer to such demand and the failure to comply with it in the petition itself: see by way of example, In Re a Company (No. 006798 of 1995) [1996]

1 WLR 491 (Chadwick J); Re Easy Letting & Leasing [2008] EWHC 3175 (Ch). I shall return to this point in due course.

**The Company's response to the petition**

27. The Company has adduced in evidence accounting information which demonstrates balance sheet solvency as at 21 November 2020. I was taken to no evidence to suggest cashflow insolvency other than the Company's failure to repay the sums due under the New Loan Agreement. The Company admits that it received the demand letter dated 30 June 2020 in early July 2020 and that it did not comply with it. The Company does not dispute the sums due under the New Loan Agreement. The Company's case is that it is a victim of the pandemic. It maintains that were it not for the financial effects of the global pandemic, it would have been able to comply with the demand dated 30 June 2020 and pay the sums due under the New Loan Agreement.

**CIGA 2020**

28. On behalf of the Company, Mr Gunaratna submitted that the purpose of the restrictions in Schedule 10 to CIGA 2020 (as it was at the time of the hearing) was to protect companies in positions such as that of the Company from being wound up. In this regard, Mr Gunaratna referred me to the Explanatory Notes to CIGA 2020, the material parts of which provide:

> '1. The overarching objective of this Act is to provide businesses with the flexibility and breathing space they need to continue trading during this difficult time. The measures are designed to help UK companies and other similar entities by easing the burden on businesses and helping them avoid insolvency during this period of economic uncertainty.
>
> 2. This Act has three main sets of measures to achieve its purpose:
>
> - to introduce greater flexibility into the insolvency regime, allowing companies breathing space to explore options for rescue whilst supplies are protected, so they can have the maximum chance of survival; [and]
>
> - to temporarily suspend parts of insolvency law to support directors to continue trading through the emergency without the threat of personal liability and to protect companies from aggressive creditor action;…
>
> 3. Due to the COVID-19 pandemic, many otherwise economically viable businesses are experiencing significant trading difficulties. In addition, the Government-enforced social distancing measures and reduced resources are making it hard for many businesses to continue to trade and meet their legal duties. This Act is aimed at ensuring businesses can maximise their chances of survival.'

## Schedule 10

29. Paragraph 5 of the 'old' Schedule 10, so far as material, provides as follows:

> 'Restrictions on winding up orders: registered companies
>
> 5(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 the presentation of the petition.
>
> …
>
> (3) 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 the Act only if the court is satisfied that the ground would apply even if coronavirus had not had a financial effect on the company…'

30. The meaning of a 'financial effect' for the purposes of paragraph 5 is prescribed by paragraph 21(3), the material parts of which provide:

> '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'.

31. As accepted by Mr Barden on behalf of the Petitioner at paragraph 9 of his skeleton argument:

> 'The Company bears the burden of showing that coronavirus prima facie had a financial effect, and if it does so the question is then whether, on the balance of probabilities, the Petitioner can show that the ground for winding up would apply even absent that effect (see the judgment of ICC Judge Barber in re A Company (A v B) [2020] EWHC 1551 at [40] and [43]).'

## The CIGA PD

32. The CIGA PD provides for these matters to be considered at a preliminary hearing. Paragraph 8.1 of the CIGA-PD provides as follows:

> '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) … of the 1986 Act having regard to the coronavirus test [i.e. 'whether… the condition in paragraph 5(3) of Schedule 10 to the 2020 Act is met'], 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) .. of the 1986 Act having regard to the coronavirus test it shall list the petition for a hearing in the winding-up list'

**Paragraph 5(1)**

33. Mr Barden invites the Court to conclude that coronavirus has not had any 'relevant' effect on the Company (paragraph 13 skeleton). I pause here to note that the term 'relevant' is not employed in Paragraph 5(1): see generally paragraphs 5(1) and 21(3), quoted above.

34. Mr Barden further submits that in the context of a preliminary hearing, the Court will consider the Company's evidence 'with a critical eye' (skeleton, paragraph 11). In this regard he referred me to PGH Investments Ltd v Ewing [2021] EWHC 533 and Re A Company (3009 of 2020) [2021] EWHC 3740. Whilst such references are helpful, I remind myself that when determining any contested issue, the Court should be reviewing all evidence on that issue 'with a critical eye'. Ultimately the question whether the paragraph 5(1) threshold (or indeed the paragraph 5(3) threshold) has been cleared in a given case will inevitably turn on the facts of the individual case.

35. Mr Barden contended that the Company's evidence was very thin.

36. In relation to the Indian Properties sales, Mr Barden submitted that whilst Mrs Goyal had identified 4 properties, 2 of which were said to be subject to offers which fell through 'none of the evidence comes close to suggesting that, absent coronavirus, property sales of £1m could have been concluded prior to 31 March 2020'. Pausing there, the relevant period for the purposes of paragraph 5(1)(c) is the period up to the date of presentation on 5 November 2020, not 31 March 2020. Mr Barden went on to list, at paragraph 18 and 19 of his skeleton argument, the following factors which he maintained the Court should take into account:

    (a) Mrs Goyal's evidence gives no clear timeline about when or how the properties were marketed, acceptance and receipt of offers, or timeline to completion;

    (b) The emails exhibited to Mrs Goyal's statements are 'exhibited as single documents, in splendid isolation', without verification from the purported senders, and with no evidence as to how they were procured;

    (c) None of the emails is contemporaneous. No contemporaneous documents showing the proposed sales have been produced.

    (d) The coronavirus pandemic had hardly touched India by the end of March 2020. So for the entirety of the 'relevant period' there cannot have been any material Covid effect.

(e) The email from Gita Estate Agency dated 17 November 2020 relied upon by the Company stated that two properties had been on the market 'for more than a year now' ie since November 2019. The failure to sell these properties in November, December, January, February 2020 (at least) cannot be blamed on Covid.

(f) The letter from Anil Pokharna relied upon by the Company (sent in November 2020) refers to an agreement to buy the property in question 'around this time last year' - so also approximately November 2019. It suggests that the purchase fell through because the proposed purchaser lost his buyer. Yet that is said to have occurred 'at the onset of the current pandemic' so could only have been many months later.

(g) The email from Mr Gaurav Singh dated 17 November 2020 relied upon by the Company makes no reference to dates at all, but suggests that there was an offer to buy the property which fell through after a stock market crash.

37. At paragraph 19 of his skeleton argument, Mr Barden submitted that the evidence adduced by the Company was 'typical of the thin or shadowy material the Court would ordinarily reject in the context of a disputed petition', adding that, 'if any weight at all is to be given to it, and so far as anything can be gleaned':

(a) The properties were put on the market in about November 2019.

(b) No offers were made on two of the properties at any point before end March 2020 - even though at least the vast majority of that period was unaffected by coronavirus.

(c) In relation to the other two, there are said to have been offers. Those offers only amounted to a total of £693,000 before tax, fees etc., so would have been insufficient to pay off the Loan (ie the sums due under the New Loan Agreement) in any event.

(d) At least one of those offers was made as early as November 2019, but the transaction had not gone through by March 2020, despite Mrs Goyal's assertion that the Indian property market moves quickly to completion (Goyal (1) para 34).

(e) There is no specificity, let alone evidence, as to when the offers fell through. The references to the onset of the pandemic in India strongly suggested it was after 31 March 2020.

(f) More than a year later, none of the properties have been sold (even at a reduced price).

38. I shall address these points in turn, by reference to the paragraphs of this judgment in which they are summarised. With regard to paragraph 36 (a), Mr Barden is not correct to suggest that Mrs Goyal's evidence gives no indication of the timing of the sales of two of the Indian properties or the dates upon which such sales fell through. The letters from the two prospective purchasers exhibited to Mrs Goyal's first witness statement state, in relation to M-28 Anasgar Link Road, that the purchaser lost his own buyer 'at the onset of the current pandemic' and as a result had to withdraw his offer and, in the case of 5/365, SFS Mansarovar, that the purchaser's ability to fund the purchase price through the sale of shares was 'paralysed' when the share market 'tanked as COVID-19 fears started to set in'.

39. With regard to paragraph 36(b) and (c), I accept that no contemporaneous documentation has been adduced. That is undoubtedly a factor to take into account when considering whether the prima facie 5(1) threshold has been met. It is not, however, the only factor. The court has before it correspondence from a number of third parties which supports the Company's account of events. To the extent that the Petitioner might be taken to be implying or alleging that the Company has concocted evidence from imaginary correspondents, inventing false email domain names and postal addresses along the way, or that the Company has procured false evidence by encouraging a range of third parties to tell untruths, there was not a shred of evidence to support such implications or allegations. When this was raised with Mr Barden, he was at pains to stress that he was 'not inviting the Court to disbelieve a witness', but simply to reject the conclusions drawn by Mrs Goyal in her evidence.

40. With regard to paragraph 36(d), I reject Mr Barden's attempts to introduce evidence by his skeleton argument of when the pandemic reached India. Moreover, even if one were to assume, for the purposes of argument, that the number of confirmed cases of Covid-19 in India was relatively low until some time after March 2020, that does not lead inexorably to the conclusion that the property market, stock market, banks and other financial institutions in India were not adversely affected by the impact of the Covid-19 pandemic elsewhere in the globe in the meantime.

41. Paragraph 36(e) is noted.

42. With regard to paragraph 36(f), Mr Pokharna's letter speaks for itself. I reject Mr Barden's attempts to introduce evidence by his skeleton argument of when the pandemic reached India. Paragraph 40 above is repeated.

43. With regard to paragraph 36(g), Mr Singh's letter speaks for itself.

44. With regard to paragraph 37, I reject the suggestion that the evidence adduced by Mrs Goyal is 'typical of the thin or shadowy material the Court would ordinarily reject in the context of a disputed petition'. The evidence before me supports the Company's case that the Indian Properties were put on the market in or about November 2019 and that sales were agreed in relation to two of the four properties which fell through for reasons connected with Covid-19. The Company has very openly accepted that no offers were received in relation to two of the Indian Properties before lockdown. Stepping back, if the Company was seeking to fabricate a case of lost property sales as a result of the pandemic for the purposes of clearing the paragraph 5(1) threshold, it is difficult to see why it would do so in respect of only two out of four properties.

45. I accept that the sales proceeds anticipated in relation to the two sales agreed amounted to only £693,000 before tax, fees and related sales expenses, so would have been insufficient of themselves to pay off the Loan. That said, even allowing a generous margin for tax and sales related expenditure, those sales proceeds would have reduced significantly the sums required to be raised by bridging finance (and the LTV ratio) for the purpose of discharging the loan.

46. The fact that none of the Indian Properties have sold more than a year later does not undermine the Company's case. In this regard I remind myself of the accounts given of the impact of the pandemic on the Indian property market summarised in the emails

from Gita Estate Agency dated 17 November 2020 and 10 July 2021 quoted at paragraphs 14 and 15 of this judgment. Whilst the Petitioner has objected to such accounts being given by way of email rather than by way of witness statement, the Petitioner has adduced no evidence to challenge the authenticity of the emails or to controvert the accuracy of the contents of the same. In this regard I remind myself that the Company's task is to establish a prima facie case under paragraph 5(1). If it clears this hurdle, it is for the Petitioner to satisfy the court on a balance of probabilities under paragraph 5(3). Paragraphs 39 and 40 of this judgment are repeated mutatis mutandis.

47. Mr Barden went on to maintain that the evidence adduced by the Company in relation to bridging finance was 'even thinner'. At paragraph 20 of his skeleton argument, he argued as follows:

(a) The Company's evidence suggested that it first approached the financial adviser in September 2019, before providing an 'update' in January 2020. There was no documentary evidence of the contents of those approaches or what was said about timing.

(b) The email from Mr Bennett to Mrs Goyal dated 19 November 2020 did not assist the Company, as:

(i) Mr Bennett explained that it would be necessary to get the building 'airtight' before approaching a lender, and finance might then take 6 to 8 weeks from that point.

(ii) The email dated 15 July 2021 from Mr Duncan Griffin of Building Control Partnership Ltd stated that the position just before the closure in March 2020 was that the building would have required 'about a week's work' to be made airtight.

(iii) It followed, argued Mr Barden, that, absent lockdown, the Company might, on its own case, have just about been able to get to the stage of having the building airtight by 31 March 2020. But according to its own adviser, it would then (absent Covid-19) have taken a further 6-8 weeks to obtain bridging finance. This meant, argued Mr Barden, that it could not possibly have been in a position to repay the loan by this means on 31 March 2020.

(c) Some 8 months after the email of 19 November 2020, it was still the case that no bridging finance had been forthcoming.

(d) The evidence relating to refinance suffered from the same defects as the evidence about the Indian properties, in that there were no contemporaneous documents at all and the emails from third parties, in Mr Barden's words, 'simply appear from nowhere without any context'.

48. Again, I shall address these points in turn by reference to the paragraphs in which they are summarised in this judgment. With regard to paragraph 47(a), it is correct that the Company's evidence suggests that it first approached the financial adviser in September 2019, before providing an 'update' in January 2020. It is also correct that no documentary evidence of the contents of these approaches has been adduced. On the evidence as a whole, however, it is clear that the approaches in question related to the bridging finance referred to by Mrs Goyal in her witness statements, which was

being sought with a view to repaying the sums due or shortly to fall due under the New Loan Agreement. Mr Bennett's emails confirm the timing of the approaches and their purpose. Those emails also address the Company's prospects of securing bridging finance absent the pandemic and how long it would ordinarily take to arrange such finance. Again, whilst the Petitioner has objected to the lack of contemporaneous documentation and to the Company's reliance upon accounts of events given by way of email rather than by way of witness statement, the Petitioner has adduced no evidence to challenge the authenticity of the emails or to controvert the accuracy of the contents of the same. Paragraph 39 is repeated mutatis mutandis.

49. With regard to paragraph 47(b), I reject the submission that the email from Mr Bennett to Mrs Goyal does not assist the Company in clearing the Paragraph 5(1) threshold. On the Company's evidence, but for Covid, the Building would have been airtight by the end of March 2020. It would then have taken 6-8 weeks to obtain bridging finance (end of May 2020), which would in turn have enabled repayment of the loan at or about the end of May 2020, or on any footing, prior to the written demand dated 30 June 2020. I would add that, for the purposes of paragraph 5(1), Mr Barden's attempts to establish that the Company could not have repaid the loan by 31 March 2020 are in any event misplaced. For the purposes of clearing the paragraph 5(1) threshold, the Company needs simply to establish a prima facie case of a 'financial effect' (as defined) *before the presentation of the petition*. The petition was presented on 5 November 2020. For the purposes of paragraph 5(1), 31 March 2020 is not the governing date.

50. With regard to paragraph 47(c), the fact that, some 8 months after the email of 19 November 2020, no bridging finance has been forthcoming, is hardly surprising, given the presentation of the petition on 5 November 2020; a point recognised in the correspondence from Mr Bennett in evidence before the Court. It does not, of itself, lead inexorably to the conclusion that the Company has failed to clear the paragraph 5(1) threshold.

51. With regard to paragraph 47(d), whilst the Petitioner has objected to the lack of contemporaneous documents and to the Company's reliance on the accounts of third parties being given by way of email rather than by way of witness statement, the Petitioner has adduced no evidence to challenge the authenticity of the emails or to controvert the accuracy of the contents of the same. Paragraph 39 is repeated mutatis mutandis.

52. On behalf of the Company, Mr Gunaratna submits that the Company does clear the paragraph 5(1) threshold. He submits that on the evidence before the Court, the Company has established (at the very least) a prima facie case that coronavirus has had a negative effect on the Company, in that (in broad summary) it has (i) slowed down the building project (ii) scuppered (or delayed) the loan/equity investment which the Company expected to receive from its shareholders (Mrs Goyal and her sister and their joint family) through the sale of the Indian Properties and (iii) scuppered the Company's prospects of promptly re-financing the project and paying off the Petitioner before the debt was called in.

53. In my judgment, notwithstanding Mr Barden's arguments to the contrary, the Company has cleared the paragraph 5(1) threshold. The evidence before me

establishes a clear prima facie case that before the presentation of the petition, the Company's financial position worsened in consequence of, or for reasons relating to, coronavirus: paragraph 5(1)(c) and 21(3) of Schedule 10. The Company has established a prima facie case that coronavirus (i) caused material delays in the building project, both during and after the first lockdown (ii) triggered delays in the loan/equity investment which the Company expected to receive from its shareholders (Mrs Goyal and her sister and their joint family) through the sale of the Indian Properties and (iii) caused material delays in the re-financing of the project.

**Paragraph 5(3)**

54. As the paragraph 5(1) threshold is cleared, the next question is whether the Petitioner can satisfy the court that the ground specified in section 123(1)(e) would apply even if coronavirus had not had a financial effect on the company. If the Petitioner is able to satisfy the court of this, the court may properly conclude that it is 'likely' to make a winding up order having regard to the coronavirus test and may then list the petition for a hearing in the winding up list. If, on the other hand, the Petitioner is not able to satisfy the court that the ground specified in section 123(1)(e) would apply even if coronavirus had not had a financial effect on the Company, the court will not be able to conclude that it is 'likely' that it will be able to make a winding up order and should therefore dismiss the petition: paragraph 8.1 of the CIGA PD.

**The date at which the Company's position should be assessed for the purposes of paragraph 5(3)**

55. There was some debate before me on the date at which the Company's position should be assessed for the purposes of paragraph 5(3). Mr Barden contended for 31 March 2020. Mr Gunaratna contended for 30 June 2020 (the date of the written demand) or a few days thereafter, to allow for receipt of the written demand and a reasonable time for payment.

56. As considered previously, for the purposes of paragraph 5(1), the focus of the Court is on whether coronavirus had a financial effect on the company in the period 'before the presentation of the petition': para 5(1)(c).

57. Paragraph 5(3), however, provides that the court may wind up a company under s122(1)(f) (inability to pay debts) on 'the ground specified in s.123(1)(e)' only if the court is satisfied that 'the ground' would apply 'even if coronavirus had not had a financial effect on the company'. It makes no express reference to the date at which the Company's position should be assessed for the purposes of paragraph 5(3).

58. I explored the interrelation of these two provisions (paragraphs 5(1)(c) and 5(3)) with Counsel. It seemed to me that, reading the two together, there was an argument that, for the purpose of the exercise to be undertaken at the preliminary hearing under paragraph 5(3), the court should be looking at the Company's position as at the date of presentation; any earlier date might otherwise require the Court to ignore part or all of the 'financial effect' contended for under paragraph 5(1) which, by paragraph 5(3), the court is tasked with taking into account in the counter-factual analysis provided for in paragraph 5(3).

59. Neither Mr Barden nor Mr Gunaratna invited me to adopt that approach however. Mr Gunaratna said that he did not put his case that high, and invited the court to consider the position as at 30 June 2020 (or shortly thereafter, in early July 2020, to allow for receipt of the written demand dated 30 June 2020 and a reasonable time for payment). Mr Barden stood by 31 March 2020 as the relevant date.

60. The ground relied upon in the petition is s.123(1)(e) ('if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due'). The well-known case of Cornhill Insurance plc v Improvement Services Ltd 1986 1 WLR 114 establishes that a failure to pay a debt which is due and not disputed can qualify as evidence of insolvency under s.123(1)(e), even though there is other evidence showing a substantial surplus of assets over liabilities. On behalf of the Company, however, Mr Gunaratna maintained that, in the absence of a statutory demand, a petitioning creditor relying on the non-payment of *one* debt owed to it (to prove the company's *general* inability to pay its debts) will, save in exceptional circumstances, be required to prove that a demand has been made on the company for payment of the debt and that the company has failed to discharge that debt despite having had an opportunity to do so. By way of example, he took me to In Re a Company (No 006798 of 1995) [1996] 1 WLR 491 (Chadwick J) and Re Easy Letting & Leasing [2008] EWHC 3175 (Ch).

61. In re a Company (No 006798 of 1995), Chadwick J said (at p.502):

> 'There is no doubt that the terms of section 123(1)(e) of the Act of 1986 enabled the court to reach the conclusion that a company is unable to pay its debts as they fall due on any evidence which satisfies it of that fact. It is not necessary for there to be a statutory demand; nor, in exceptional circumstances, is it necessary for there to be a demand at all. But, as it appears to me, the statutory provision which deems inability to pay debts on failure to meet a statutory demand suggests, at the least, that the court should be slow to reach the conclusion that a company is unable to pay its debts from the mere fact of non-payment of the debt which has never been demanded of it at all.
>
> I was, of course, referred to the decisions in Cornhill Insurance Plc v Improvement Services Ltd 1986 1 WLR 114 and In re Taylor's Industrial Flooring Ltd [1990] BCC 44. In the Cornhill Insurance case Harman J explained that, in circumstances where a company fails to pay a debt which is admittedly due, it will be no answer to a winding up petition to show that the company is solvent on a balance sheet basis. He adopted this passage from the judgement of Vaisey J in In re a Company (1950) 94 SJ 369: "Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them".

62. At page 503D, Chadwick J continued:

> 'A feature of both the Cornhill Insurance and the Taylor's Industrial Flooring case is that the company knew what it was being asked to pay and did not or could not, bona fide, dispute that the amount that it was being asked to pay was payable'

63. In contrast, on the case before Chadwick J, the petition debt was in an amount 'which was never communicated to the company and which the company could not have worked out for itself': p.503E.

64. In the later case of Re Easy Letting & Leasing [2008] EWHC 3175 (Ch), Morgan J considered the cases of Cornhill Insurance, Taylor's Industrial Flooring and In re a Company (No 006798 of 1995) referred to above, concluding at [11]:

> 'The first comment to make about these decisions is that it is quite clear that the deeming provision in paragraph (e) of section 123(1) is a true alternative to the statutory demand procedure in paragraph (a) of section 123(1) of the Insolvency Act 1986…. but it also seems to me that there must have been an opportunity for the company to pay and that the company has failed to pay the debt, which it cannot properly dispute. That requirement is, I think, to be found in the passage I have just read from Chadwick J's decision in re a Company [1996] 1 WLR 491 at 503E. Indeed, that requirement is illustrated by the fact of Re a Company itself. At page 503E-G Chadwick J explains how it was, on the facts of that case, that the company did not have an opportunity to pay and so the conclusion was that non-payment in those circumstances did not provide the basis for saying that the company was unable to pay its debts as they fall due.'

65. Mr Barden accepted that in 'many cases' when considering a petition brought on the ground set out in s.123(1)(e) and based on non-payment of a debt, the court would look to see whether a demand for payment had been made prior to presentation. He maintained however that this was not the only basis upon which the court could properly conclude, for the purposes of s.123(1)(e), that a company was unable to pay its debts as they fall due. In the present case, he argued, the Company had admitted that it was unable to pay the sums due under the New Loan Agreement on or by 31 March 2020. The Court, he argued, could proceed on that admission.

66. I reject Mr Barden's submissions on this issue. When considering at the preliminary hearing, in the language of paragraph 5(3), whether the Court is satisfied that the 'ground specified in section 123(1)(e)' would apply even if coronavirus had not had a financial effect on the company, the Court must have regard to the petitioner's pleaded case; that is to say, the basis, as set out in the petition, upon which the petitioner relies upon s.123(1)(e). In the present case, the petition expressly relies upon the letter of demand dated 30 June 2020. Reading the petition as a whole, I am satisfied that it is the Company's failure to comply with the demand for payment dated 30 June 2020 and not the due date for payment set out in the New Loan

Agreement which forms the basis of the Petitioner's pleaded reliance upon s.123(1)(e). There would be no point otherwise in referring to the letter of 30 June 2020 in the petition. I am fortified in this conclusion by the terms of the demand letter of 30 June 2020 itself. The letter gave notice of the Petitioner's election to exercise its rights under clause 25.2 to cancel all its outstanding obligations under the agreement and to 'declare the loan and all accrued interest and all other amounts accrued or outstanding to be immediately due and payable…' Moreover, pleading points aside, in the circumstances of this case, including those summarised in paragraphs 2 and 5 to 7 of this judgment, the Court would clearly wish to see a demand for repayment before concluding, for the purposes of s.123(1)(e), that the Company was unable to pay its debts as they fell due. In such circumstances, in the words of Chadwick J, the court should be slow to reach the conclusion that a company is unable to pay its debts from the mere fact of non-payment of a debt which has never been demanded of it at all: In re a Company (No 006798 of 1995) and Re Easy Letting & Leasing. Absent the demand letter of 30 June 2020, in the circumstances of this case, ground s.123(1)(e) would not be made out.

67. I shall therefore proceed on the basis that for the purposes of the exercise to be undertaken pursuant to paragraph 5(3), the Court should take 30 June 2020 (or a few days thereafter) as the relevant date and not 31 March 2020. In doing so, I remind myself that the burden of proof is on the Petitioner.

**Discussion and Conclusions**

68. On behalf of the Petitioner, Mr Barden contended that the Company's case was a 'try-on'. He submitted that the evidence of the alternative means of repaying the loan being pursued (sales of the Indian Properties and re-finance/bridging finance) did not 'support a conclusion that it was more probable than not that, absent the pandemic, the Company would have re-financed by 31 March 2020' (skeleton argument, paragraph 21(b)).

69. I pause here to note that (1) for the purposes of paragraph 5(3), the burden of proof is on the Petitioner and not the Company and (2) for reasons previously explored, the date at which the Company's position falls to be considered for the purposes of Paragraph 5(3) is 30 June 2020 (or a few days thereafter; hereafter 'the determination date'), not 31 March 2020.

70. On the evidence before me, the Petitioner has failed to satisfy me on a balance of probabilities that the ground specified in s.123(1)(e) would apply as at the determination date even if coronavirus had not had a financial effect on the Company.

71. Quite the contrary; on the evidence before me, I am satisfied that it is more likely than not that, but for the pandemic, the Company would have been in a position to refinance the project and repay the debt owed to the Petitioner by the end of May 2020/first week of June 2020. The building would have been airtight by the end of March 2020 (or the first week in April 2020 at the latest) and arranging refinance on an LTV of less than 50% would have taken 6-8 weeks, even if one were to leave out of account the anticipated proceeds of sale of the two Indian properties. If those proceeds are taken into account, the LTV on any refinancing package would have

been even lower, thereby increasing the range of such packages available to the Company within such timescales.

## Conclusion

72. In the light of my conclusions, I have dismissed the petition. I shall hear any submissions on costs on the handing down of this judgment.

**ICC Judge Barber**