[2021] EWHC 3249 (Ch)

CR-2020 004517

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN RE A COMPANY (APPLICATION TO STRIKE OUT)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 07/12/2021

Before :

ICC JUDGE BARBER

- -

Between :

THE PETITIONER

Petitioner

- and –

THE COMPANY

Respondent

- -

Ms Nicola Allsop (instructed by Sloan Plumb Wood LLP) for the **Petitioner**
Ms Morwenna Macro (instructed by JPP Law LLP) for the **Respondent**

Hearing dates: 10 and 30 November 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 7 December 2021

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ICC Judge Barber

1. This is an application to strike out and/or restrain advertisement of a petition presented by the Petitioner against the Company on 14 December 2020 in respect of sums totalling £30,000 paid by the Petitioner to Wedlake Bell in 2011/12 in discharge of sums owed by the Company to that firm. The petition is based upon an alleged agreement between the Petitioner and the Company 'that, in paying the said £30,000 to .. Wedlake Bell, the Petitioner was making a loan in that same sum to the Company.' The Company denies that it entered into any such loan agreement with the Petitioner. It maintains that the Petitioner has, at best, a claim in unjust enrichment which is now statute-barred.

Introduction

2. This petition was presented on 14 December 2020, within the 'relevant period' for the purposes of the 'old' Schedule 10 to the Corporate Insolvency and Governance Act 2020 (CIGA 2020).

3. At a non-attendance pre-trial review of the petition held on 5 January 2021 in accordance with paragraph 4.1 of the Insolvency Practice Direction relating to CIGA 2020, it was ordered that the petition be listed for a preliminary hearing, for the court to determine whether it was likely that it would be able to make an order under section 122(1)(f) or 221(5)(b) of the Insolvency Act 1986 (IA 1986) having regard to the coronavirus test.

4. By March 2021, the Company had confirmed that it did not contest the petition on CIGA grounds. Instead, it maintained that the petition debt was the subject of a bona fide dispute on substantial grounds.

5. By a consent order approved by Deputy ICC Judge Schaffer on 24 March 2021, the preliminary hearing was adjourned to 10 November 2021 and directions were given for the filing of further evidence. The Petitioner undertook not to advertise until at least 7 days after the adjourned hearing and it was agreed that the petition should remain private in the meantime.

6. It was common ground at the hearing that I should treat the matter before me as an application to strike out and/or restrain advertisement of the petition on the grounds that the petition debt is disputed.

7. Given the nature of the application, this judgment has been anonymised in certain respects.

The Evidence

8. The evidence filed on behalf of the Company comprises (1) the first, second and third witness statements of Mr Waters, dated respectively 29 December 2020, 15 April 2021 and 17 May 2021 (2) the witness statement of Mr Philip Rowley dated 15 April 2021 (3) the witness statement of Mr Ronald Armstrong dated 15 April 2021 and (4) the witness statement of Mr Peter McCulloch dated 17 May 2021. The evidence filed on behalf of the Petitioner comprises the first and second witness statements of the

Petitioner himself, dated 14 December 2020 and 29 April 2021. I have considered all witness statements and their corresponding exhibits, together with the other documents contained in the agreed bundles before me.

Background

9. The Company was incorporated in 2005 and carried on the business of selling software packages to hospitals to assist in infection control. The Petitioner's father, Howard Thomas, ('Howard') was at all material times from 2007 until his death in 2018 the Chairman of the Company, taking over from Mr Ronald Armstrong, who was a director and Chairman of the Company from 2006-2007. The managing director of the Company at all material times was and remains Mr James Waters. The Company currently has two other directors, Peter McCulloch and Philip Rowley.

10. In 2007 or early 2008, shortly after its incorporation, the Company faced the prospect of legal proceedings against Mr Aidan Cartwright and Virrage Industries Limited, who had been engaged by the Company to help develop the software used in the packages sold by the Company to hospitals. A dispute had arisen as to ownership of the software. The Company was not in a position financially to commit to the costs of legal proceedings at this time. The Company's chairman, Howard, however, had a son who was a barrister. Howard's son (the Petitioning Creditor) agreed to assist the Company with its case.

11. Memories differ about what was agreed in respect of the Petitioner's fees as Counsel. Mr Armstrong, the former Chairman of the Company, recalls being told by Howard in the early stages of the Virrage proceedings that the costs of the same were not a problem as his son was a lawyer and would be providing legal advice free of charge. Mr Rowley, a director of the Company since its inception, recalls that it was Howard's suggestion to get the Petitioner involved in the proceedings and that the Petitioner's involvement was 'a favour to his father in an effort to ensure [that the Company] continued as a business, maintaining its IP in the software application in question…'. The Petitioner, however, does not accept that he agreed to waive his fees (Thomas (2) paragraph 17).

12. The Petitioner took a proactive role in the Virrage proceedings from their inception. By email dated 9 October 2008, for example, the Petitioner wrote to Howard and Mr Waters:

> 'Just to say that the proceedings were issued today and are in the post. Good news!
>
> Bad news is that our scanners are down and that I can't send you a copy today. Please note also I have paid the fee to start proceedings which is now a whopping £1,900. I have a receipt and we can claim it from the Defendants in due course.
>
> With regard to the matter going forward, I will look overnight at drafting a letter to them putting them on notice that we are going to seek an expedited hearing and sending them a further copy of the proceedings (in case they claim in due course not to

> have received them - it does happen !!!) …. At the moment, I cannot act for you officially and hence this should all go out in [Mr Waters'] or [Howard's] name and on [Company] paper. However, as and when we come near to a hearing we can work out how best to get solicitors etc on board at no or minimal expense'.

13. In due course, the Petitioner found solicitors to act for the Company in the Virrage case. By email dated 12 November 2008, the Petitioner wrote to Howard and Mr Waters, stating:

> 'Dear Jim [Waters],
>
> … I will ring later but have spoken to my solicitor contact who is prepared to help on as cost efficient basis as possible (ie me doing most of the work). There may inevitably be some costs incurred and I will ring to discuss later.
>
> In the meantime she needs to complete money laundering checks.
>
> Can you provide me with (a) evidence of incorporation of the company (b) a copy of your passport and (c) copies of 2 utility bills?
>
> As I say, I will ring later to discuss in more detail.'

14. The solicitor approached by the Petitioner to work on the case was Ms Anna Cook from Wedlake Bell. The Petitioner had not been instructed by Wedlake Bell or Anna Cook but had met Ms Cook in chambers on a number of occasions. She had an understanding of copyright law, which was relevant to the dispute and, when the Petitioner approached her, she agreed to act for the Company.

15. Mr Waters' evidence is that he cannot recall the Company ever receiving an engagement letter in respect of Wedlake Bell's services, but it must have done. I shall proceed on the basis that it did.

16. In the event, the Company's hopes of bringing the Virrage litigation to a swift conclusion were not realised. The matter went to trial and concluded in a judgment largely in the Company's favour against Virrage and Mr Cartwright in late 2009. By this stage, Wedlake Bell's fees (exclusive of Counsel's fees) came to over £60,000. The Petitioner's fees ran to an additional £89,110 plus VAT.

17. On 22 October 2009, it was ordered that Virrage and Mr Cartwright pay all of the Company's trial costs and 85% of pre-trial costs. Unfortunately, Virrage and Mr Cartwright did not pay any of the costs ordered against them. Virrage went into receivership and Mr Cartwright was made bankrupt.

18. Wedlake Bell sent credit notes in respect of the Petitioner's fees (of £89,110 plus VAT) to the Company, stating that the Petitioner would discuss them with the Company direct. The Petitioner then arranged for the Company to be invoiced in

respect of his fees. These fees remain unpaid, but do not form any part of the petition debt.

19. By September 2011, Wedlake Bell's fees still had not been paid. A substantial number of communications regarding Wedlake Bell's unpaid fees were exchanged between Wedlake Bell and the Petitioner. Whilst the Company, rather than the Petitioner, was Wedlake Bell's client, it appears that the Petitioner came under pressure to arrange payment.

20. By email dated 6 September 2011 from the Petitioner to Ms Anna Cook, for example, the Petitioner wrote:

> 'Dear Anna,
>
> Very, very sorry not to return your calls … I am not ignoring you but have been trying to track down Howard (who was away the end of last week) and then Jim [Waters]… I had thought they had paid! I will give you a call today or tomorrow once I have attached electrodes to them both ☺'

21. Ms Cook responded by email the same day, stating:

> 'Thank you! I have my finance meeting today and so the threat of electrodes is timely … I confirm that we will knock 10% off the bill for payment this month!'

22. The Petitioner responded the same day, stating: 'Understood and thanks!! Also my apologies again!'

23. Ms Cook followed up her requests for payment with a further email dated 19 September 2011, again addressed to the Petitioner, in which she wrote:

> 'Rob,
>
> Following on from our previous exchanges, I attach our statement of account (the sums are inclusive of VAT). I confirm that we will reduce our fees by 10% (ie by £6,209) if we are able to secure payment by the end of the month'.

24. Set out in the email was a statement of account, showing £62,099.29 outstanding.

25. By email of 27 September 2011, the Petitioner forwarded Ms Cook's email of 19 September 2011 (and a chaser from Ms Cook dated 22 September 2011) to his father and Mr Waters, stating:

> 'Jim,
>
> FYI … also received this from Anna .. figure is higher than I remembered but if we take out VAT and the discount it comes down .. I should suspect that she will in fact take what she can

> get from us. But I assume there is no prospect of any money before the end of the month?
>
> Rob'

26. On the same day (27 Sep 2011), Mr Waters, cc-ing Howard, replied:

> 'Hi Rob,
>
> We would not be able to pay until at least the software is sold.'

27. The Petitioner initially replied by email on 27 September 2011, addressed to Mr Waters and cc-ing Howard, stating simply 'OK … understood :-)'.

28. The following day, however, the Petitioner received a further chaser from Anna Cook. By email dated 28 September 2011 at 16.33 addressed to the Petitioner, Anna wrote:

> 'Is there any news about this? My accounts department is chasing me.
>
> Best regards
>
> Anna'

29. By email dated 28 September 2011 at 19.33, the Petitioner then wrote to Mr Waters and Howard as follows:

> 'Dear Jim/Howard
>
> I have given some further thought to this. As you know I pulled in a big favour from Anna and don't think I can let this go on any further. I understand from others who know Anna well that this is really causing her problems with her colleagues (though she would not be so blunt with us). We have to make a substantial payment without further delay. I don't know precisely how we structure it but can you confirm that if I transfer £30,000 to the company tomorrow it will immediately be sent onto Anna? In particular, can you confirm that the company's bank will NOT take it in payment of any outstanding debts ?? if there is a risk, I will look at paying direct but I assume that you will be able to claim the VAT back on the next return???
>
> Subject to your views, I would like this to go down as a loan - preferably secured if possible but in any event to be paid back as soon as possible.
>
> If you have a problem with this please let me know. If you think that payment can be made without problems with the bank, can you please let me have the bank account details?'

30. There is no contemporaneous correspondence before me evidencing any reply from Howard or Mr Waters (or anyone else at the Company) to the Petitioner's email of 28 September 2011. Mr Water's evidence is that he did not reply to it or confirm that the Company would be prepared to treat any such payment as a loan.

31. It is clear that the Petitioner did not receive a reply from the Company, as the following morning, he sent a rather terse chaser. By email dated 29 September 2011 (at 10.10), the Petitioner wrote to Mr Waters, again cc-ing his father Howard, stating simply:

> 'Jim
>
> Thoughts please?!'

32. There is no contemporaneous correspondence before me evidencing any reply from Howard or Mr Waters (or anyone else at the Company) to the Petitioner's email of 29 September 2011.

33. Howard did raise the matter internally, with Mr Waters. By email dated 30 September 2021, Howard messaged Mr Waters about the Petitioner's proposal to lend the Company £30,000, stating:

> 'Dear Jim
>
> Holiday nearly over
>
> I am a little concerned about Robert lending the company thirty thousand
>
> The court case has already cost him [in] excess of fifty thousand. He had to pay his clerks and juniors himself
>
> Where are we in terms of trying to sell the software ____ have you had any joy from your contacts …
>
> Regards Howard'

34. The Petitioner's evidence was that, at some (unspecified) time after his emails of 28th and 29 September 2011, Howard and Mr Waters expressly confirmed that the money would be treated as a loan. As put at paragraph 20 of the Petitioner's second witness statement:

> 'Neither Mr Waters, nor my father confirmed that they had a problem with the payment being treated as a loan. To be clear, there was never any suggestion that the money would not be treated as a loan. In fact, my very clear recollection is not just that no objection was raised but that both my father and Mr Waters expressly confirmed that the money would be treated as a loan'.

35. In contrast, Mr Water's evidence was that, in the event, the Company did not agree to borrow £30,000 from Howard. His evidence was that the confirmation sought by the Petitioner's emails of 28 and 29 September 2011 was not given, and that the Petitioner simply went ahead and made payments to Wedlake Bell 'on his own volition'.

36. By email dated 7 October 2011 (at 10.05), the Petitioner wrote to Howard and Mr Waters:

> 'Jim/Howard
>
> I would like to send the money today.. just to check it is okay with you if I send it direct? Will this cause any problems recouping VAT or similar?'

37. There is no contemporaneous correspondence before me evidencing any reply from Howard or Mr Waters (or anyone else at the Company) to this email. Mr Water's evidence is that he did not reply to it.

38. By further email dated 7 October 2011 and timed at 14.08, the Petitioner wrote again to Mr Waters and his father Howard, stating:

> 'Jim/Howard
>
> FYI, I have arranged for £30,000 to be paid to Wedlake Bell in 3 tranches over the next 3 days…
>
> I trust you can get the VAT element back but please let me/Anna know if you need any more
>
> Rob'

39. There is no contemporaneous correspondence before me evidencing any reply from Howard or Mr Waters (or anyone else at the Company) to this email. Mr Water's evidence is that he did not reply to it.

40. In the event, the Petitioner did not make three payments of £10,000 'over the next 3 days' as suggested in his email of 7 October 2011. It is common ground that he made two payments of £10,000 each to Wedlake Bell on 11 October 2011 and 12 October 2011. A third payment of £10,000 was not made until 22 October 2012.

41. There was no evidence before me to suggest that the Company did reclaim the VAT element on any of these payments. On instruction, Ms Macro confirmed that the Company had not reclaimed the VAT.

42. Mr Waters gave evidence that he had asked Howard why his son was making the payments and was told that 'the Petitioning Creditor got a lot of business from that firm of solicitors and he did not want to sour the relationship'. Whilst that is not entirely accurate, as the Petitioner himself has never been instructed by anyone at Wedlake Bell on any case other than Virrage/Cartwright proceedings, it is clear from the evidence that Wedlake Bell was well known to the Petitioner's chambers and

instructed other barristers in those chambers. The Petitioner came to know Anna Cook through chambers and Wedlake Bell clearly knew the clerks there well enough to raise with them the issue of the non-payment of their fees on the Virrage case.

43. At the end of 2011, Anna Cook told the Petitioner's clerk, Pauline Roberts, that she was leaving Wedlake Bell. Ms Roberts emailed the Petitioner about this on 23 December 2011, saying:

> 'Dear Rob,
>
> Anna Cook of Wedlake Bell phoned to mention that they still have £32k on their books in respect of Wedlake Bell's own fees. Anna is leaving .. Wedlake Bell at the end of March and is keen to sort out this matter before she goes.
>
> I didn't get the impression that she is chasing payment, more that she needs to know one way [or] the other if any more money is going to be coming through in order that she clears the books before she goes. She is concerned that if this amount is left sitting on their books after she has left Wedlake Bell's debt recover[y] team will swing in action and she is keen to avoid this….'

44. The Petitioner's interpretation of this communication was that Anna was 'implicitly asking for payment'. He recalls speaking with her about it, although he is not sure of the exact date. His evidence is that he also took the matter up with Howard and Mr Waters.

45. In the event, no payments to Wedlake Bell were made by the Company by the time that Anna left Wedlake Bell at the end of March 2012 and joined her new firm, Radiant Law. Anna, however, was still involved in collecting in the remaining fees owed to Wedlake Bell.

46. By email dated 19 April 2012 to the Petitioner, Anna wrote as follows:

> 'Dear Rob,
>
> I hope you are keeping well. I am helping Wedlakes with their credit control (Jamie Beecham is reading in copy) and wondered whether you had managed to speak to [the Company] about paying a final instalment to WB [Wedlake Bell] of £10,000. WB has confirmed to me that they agree that a payment of £10,000 will be in full and final settlement of all outstanding debts from [the Company].
>
> Best regards
>
> Anna'

47. By email dated 19 April 2012, the Petitioner forwarded Anna's email of the same date to Howard and Mr Waters, stating:

> 'Dear Howard/Jim
>
> FYI. Anna has moved firms and is trying to resolve all outstanding matters. As you know, we owe them £30k still but as per the below they would write it off for 10k. I don't know where we are with [the Company] or what the financial position is but if we could discuss at some convenient time that would be great
>
> Rob'

48. On 25 April 2012, Mr Waters responded, asking if the Petitioner had a contact number which he could call. The Petitioner sent his number and they agreed to speak over the weekend.

49. The Petitioner's evidence is that he and Mr Waters did speak over the weekend in late April 2012, as envisaged by their email exchange, and that Mr Waters 'again said he was hoping to sell the software'.

50. Pausing there, it will be seen that the Company was not pressing (or even asking) the Petitioner to make the payment; it was instead making clear when it hoped to be in a position to pay the outstanding sum itself, namely, on sale of the software.

51. The sale of the software did not happen. By October 2012, the Petitioner was, in his words, again 'chased by Wedlake Bell for payment', this time by Simon Freeman of Wedlake Bell. By email dated 19 October 2012 from the Petitioner to Simon Freeman, the Petitioner wrote as follows:

> 'Dear Simon,
>
> Further to our call this week, the £10,000 should be with you on Monday. I should be grateful if you could look out for it and once it arrives if you could provide something confirming we are now "done and dusted", that would be appreciated.
>
> Kind regards,
>
> Rob'

52. Mr Freeman responded by email the same day, saying:

> 'Rob,
>
> Many thanks for sorting this out this week. I will be sure to let you have an acknowledgement of receipt.
>
> Kind regards
>
> Simon'

53. The Petitioner made the payment of £10,000 on 22 October 2012. I was taken to no contemporaneous correspondence between Howard, Mr Waters (or anyone else of the Company) and the Petitioner regarding this payment in the run-up to it being made, or correspondence after it had been made confirming the same. By his second witness statement, the Petitioner stated that he spoke to Howard and Mr Waters and that it was agreed that the Petitioner would pay the £10,000 'on the same basis as before.' Mr Waters does not address this allegation specifically in his third witness statement in reply. It is clear from his evidence overall, however, (including but not limited to paragraph 1 of his initial defence statement dated 29 December 2020) that Mr Waters denies that there was any such conversation or agreement.

54. The Petitioner accepts by his evidence that 'the matter rested there for a long time.' He contends that this was because 'the Company was largely moribund in the years that followed', a contention not accepted by the Company.

55. At paragraph 29 of his second witness statement, the Petitioner states

> 'It is fair to say that the matter rested there for a long time. There were, however, numerous calls with Mr Waters in which he acknowledged the company's indebtedness to me.'

56. Again, there is no contemporaneous documentation evidencing such calls. It is clear from Mr Waters' evidence overall that Mr Waters denies that there were any acknowledgements of the petition debt by the Company.

57. Some 2-3 years after the payments to Wedlake Bell, by an internal email dated 16 July 2014, Mr Waters wrote to Howard suggesting (inter alia) that the Petitioner should have some shares in the Company because of 'the debt we owe him'. The Petitioner relies upon this as evidence of a loan agreement. Mr Waters maintains that he was referring to a debt of gratitude for all that the Petitioner had done in relation to the litigation.

58. There was some dispute as to exactly when the Petitioner first asked the Company for payment of the £30,000 but the correspondence in evidence suggests that it was in 2020, some 8/9 years after the payments were made to Wedlake Bell.

59. The Petitioner's evidence is that, while representing his mother at a shareholders meeting of the Company on 27 May 2020 and raising questions about the Company's financial position, he reminded 'them', (presumably a reference to the directors of the Company in attendance at the meeting) that 'they owed me money' and 'asked for a full reconciliation of the Company's debts'. It is unclear from his evidence, however, precisely what money he claimed to be owed at that meeting; and in particular, whether he made specific reference to the sum of £30,000 which he had paid to Wedlake Bell.

60. The Company did not provide a full reconciliation of its debts immediately. The Petitioner claims that Mr Waters was 'stalling'. By his third witness statement, Mr Waters denies this, stating that the accounts were being drawn up by the company accountants and that he had wanted to wait until the accounts had been finalised before providing an up-to-date picture of the Company's financial position.

61. In early October 2020, Mr Waters provided the Petitioner with the most recent company accounts. The Petitioner then pressed for more information. By email dated 15 October 2020, the Petitioner wrote to Mr Waters as follows:

> 'Dear Jim,
>
> …. The contents of the accounts are noted but they don't fully answer the questions I asked on 18th September. It seems to me that it is vital for the shareholders to have a full appreciation of the company's financial position.
>
> I should therefore be grateful if you could let us all know
>
> 1. What expenditure you anticipate committing the company to before we have the business plan?
>
> 2. What debts/loans in total etc the company presently has? The accounts only identify shorter term debts and I should like to understand the full picture. As I have previously mentioned, I understand there is a loan to my mother, Mike and Trevor, and money owed to me …. what other debts are there? Confirmation would be welcome.
>
> Kind regards
>
> Rob'

62. Mr Waters' substantive reply was made by email dated 19 October 2020, in which he wrote:

> 'Hi Rob,
>
> Of the £100,101 listed on the accounts as creditors £98,512 was made up of loans.
>
> Of the £98,512 Howard's loan is £29,010 and mine is £44,002.
>
> However, as far as payments owing to you I must admit that you took me completely by surprise, as I was unaware of any outstanding amount to you.
>
> As far as the invoice for your services you will remember that [Wedlake Bell] gave us a credit note for them and said that you would talk directly to us.
>
> You then gave us an invoice in order that we could chase Cartwright and Virrage.
>
> Once it became apparent that they couldn't pay I asked Howard what the position was and he said that you were not going to pursue us for the debt.

> I accrued the amount just in case and checked with Howard every year, if the position had changed with you and he said it hadn't. I finally wrote off the balance at the end of 2015 but continued to check with Howard until the six year statute of limitations was passed.
>
> You also wrote to us saying that you were going to pay the £30,000 that we owed to [Wedlake Bell] and asked if we would treat it as a loan that could be repaid when we were in a position to do so.
>
> I cannot find a confirmation from us, but you paid the £30,000 in three tranches.
>
> I did raise a creditor for £30,000 but again Howard confirmed that you were not going to pursue it and I finally wrote it off at the end of 2017 and it subsequently became statute barred.
>
> However, I personally do believe there is a difference between an invoice and a loan so I will ask my fellow directors to reinstate the £30,000 as a loan to be repaid when the company is in a position to do so, if you agree that covers all payments due to you.
>
> Rob, if you want to speak to me about this please give me a call on [number].
>
> I am around all day tomorrow up until 6.
>
> Best wishes
>
> Jim'

63. The Petitioner relies upon the email of 19 October 2020 as an admission of the petition debt. Mr Waters' addresses the email at paragraph 18 of his third witness statement, which provides as follows:

> 'The Petitioner states … that I expressly acknowledged his loan in my email of 19 October 2020. I agree that my email at first reading is ambiguous. However, when I stated that I had 'raised a creditor to £30,000' I was referring to the £30,000 balance that the Company was potentially liable to Wedlake Bell for (ie the balance of the £60,000 invoice), not the £30,000 that the Petitioning Creditor had paid to Wedlake Bell. I reiterate that what I said in my email was my personal view. I could not promise to the Petitioner that the Company would 'reinstate the £30,000' he paid as a loan rather than an invoice (which I believed to be statute barred and had been written off) until I put it to the board and it was agreed. However, I can categorically say, there was NEVER a loan amount to the petitioner for £30k recognised in the Company's accounts. This

> was clearly pointed out in my letter to the Petitioning Creditor of 19 November 2020… following the Company's board meeting that week.'

64. The Petitioner responded to Mr Waters' email of 19 October 2020 by email dated 20 October 2020, stating:

> 'Jim
>
> I read your email below with a combination of consternation and disbelief although it is now clear why you have sought to avoid providing straight answers to my recent requests.
>
> Your position is unacceptable. It is only my intervention that stopped [the Company] from not only losing its rights in the software but from being bankrupted. The suggestion that the company is now unwilling to repay me is astonishing.
>
> I should also say that it is quite extraordinary that you did not contact me direct on these matters. Whatever may have been said by Howard (and I make no admissions in that regard), he had no authority to speak on my behalf or indeed to waive my rights against the company. I very much doubt you thought otherwise. It is inexplicable in those circumstances that you did not contact me directly.
>
> As for the suggestion you make that somehow the statute of limitation has extinguished your indebtedness, I am saddened to see you make this threat. It is also wrong - my position is no different to that of you or Howard in respect of the monies that you are owed by the company. Or do you accept that your loan is now statute barred?
>
> Given your unfortunate stance, I now require you to confirm by return that (a) the company acknowledges that it owes me the sum of £120,000 and (b) that it will repay the same.
>
> If I do not receive confirmation by close of business tomorrow, I will have little option but to seek recovery of the sums in question.
>
> On a personal note, this is a very sad day, Jim, and you should hang your head in shame.
>
> Yours sincerely
>
> Robert'

65. It will be noted that the Petitioner did not by his response of 20 October 2020 make reference to any express agreement with the Company regarding treatment of the

£30,000. His focus in the response appears to be more on the moral obligation of the Company to reimburse him.

66. Mr Waters responded by email dated 21 October 2020 confirming that a board meeting was arranged at which the matter would be discussed. Following a board meeting on 27 October 2020, Mr Waters reported back to the Petitioner by email dated 28 October 2020, stating:

> 'As promised the [Company] board discussed your email at yesterday's board meeting and I was asked by the board to inform you that we have no record of any outstanding payments due to you.'

67. The Petitioner responded in terse terms by email of the same date, stating simply: 'Are you people serious?'.

68. Again, there was no reference made in the Petitioner's response of 21 October 2020 to an express agreement regarding treatment of the £30,000.

69. Shortly thereafter, by two letters dated 13 November 2020 addressed to the directors of the Company, the Petitioner made formal demand of (a) £30,000 'provided by way of loan(s) to the Company in 2011 and 2012 and (b) £89,110 (ie Counsel's fees) 'provided by way of a loan to the Company in 2011'. Each letter threatened to wind up the Company in the event that the said sums were not paid by close of business on 20 November 2020.

70. It will be noted that both the sum of £30,000 and the sum of £89,110 were described as 'loans'.

71. By letter dated 19 November 2020 (wrongly headed 'without prejudice'), the Company acting by Mr Waters responded inter alia as follows:

> 'Dear Robert,
>
> I write in reference to your letters of 13 November 2020, which were discussed at [a Company] board meeting this week.
>
> The first two points that I will make are;
>
> 1. We have no record of accepting any loans from you and none have ever been shown in our accounts and
>
> 2. You are well aware that the debt is disputed, which is shown by my email to you of the 19th October 2020 and your response of the 20th October 2020. This was further reinforced by my email of 28th October 2020 and your reply on the same day...'

72. The Petitioner responded by email dated 20 November 2020, stating inter alia:

> 'Dear Jim,

> I refer to your letter of yesterday's date. …
>
> With regard to the substance, what you say is with respect inaccurate and at no stage have you articulated a credible defence to either of my claims. If we take the £30,000 as an example, in your email dated 19 October you acknowledged that this was a loan that was on the company's books but claim to have spoken to Howard about it. As I have explained, this provides you with no defence even if true. Nor is the claim time-barred. The position is likewise for the £89,110 albeit you have been unwilling to acknowledge that this was a loan to the company.
>
> In these circumstances, you leave me with no choice. I will be issuing a petition to wind up [the Company] in the first instance on the basis of the £30,000 loan which you are refusing to repay. I reserve the position to bring a further petition for the £89,110 without further notice….'

73. Again, there is no reference in the Petitioner's response dated 20 November 2020 to an express loan agreement, written or oral, regarding either sum.

74. By email dated 23 November 2020, the Company acting by Mr Waters responded as follows:

> 'Dear Rob,
>
> I reply in respect of your email of 20th November 2020.
>
> Firstly to clarify the position, we have never shown a loan from you in [the Company's] accounts.
>
> You sent [the Company] an invoice for your fees in the Virrage case on 26th May 2011.
>
> The invoice was for £104,704.28 consisting of Fees of £89,110 and VAT of £15,594.28.
>
> The first request for payment of any sum that you felt was owed to you was in an email of 2 July 2020, when you demanded the immediate payment of the £90,000 you felt was owed to you by [the Company].
>
> The original invoice was reserved in [the Company's] accounts but at the end of the six-year statutory limit it was no longer in the accounts.
>
> Following subsequent emails I reminded you that you informed us you paid £30,000 to Wedlake on our behalf asking us to treat it as a loan, which we never agreed to.

> We kept the Wedlake creditor in our books until 2017.
>
> However I did offer in my email to you of 19th October to ask the [Company] Board to agree a loan from you of £30,000 to be paid to you when the company was in a position to do so.
>
> This was on the condition that you agreed that it would cover all payments due to you.
>
> Unfortunately you did not accept this offer.
>
> However, we have had a Board meeting this morning with the result that as a full and final settlement of your dispute against [the Company], we are willing to formally recognise your £30k payment as a loan and will commit to repaying this amount to you at our absolute discretion as and when funds allow.
>
> Your loan will rank pari passu with the other loans in [the Company].
>
> If you agree to this resolution, then your letter of agreement needs to specifically state that it is in full and final settlement and that you withdraw your claim to the £89k plus VAT invoice….'

75. Having initially threatened by his letters of 13 November 2020 to present a winding up petition based on non-payment of both (1) the sum of £30,000 paid to Wedlake Bell and (b) the sum of £89,110 plus VAT in respect of Counsel's fees, the Petitioner ultimately presented a petition based only on the sum of £30,000 paid to Wedlake Bell.

The Petition

76. The grounds set out in the petition were as follows:

> 'A winding-up order is sought on the ground that the Company is unable to pay its debts pursuant to section 122(1)(f) of the Insolvency Act 1986.
>
> During 2011 and 2012 the Petitioner paid (using the Petitioner's own monies), on behalf of the Company, the aggregate sum of £30,000 to Wedlake Bell (solicitors). Such amount was paid in three instalments of £10,000 each on 11 October 2011, 12 October 2011 and 22 October 2012 respectively. The aggregate sum so paid was in payment of the indebtedness owed by the Company (to Wedlake Bell) in respect of legal services provided by the said Wedlake Bell to the Company in relation to proceedings brought by the Company against Virrage Industries Limited.

> It was agreed between the Petitioner and the Company that, in paying the said £30,000 to the said Wedlake Bell, the Petitioner was making a loan in that same sum to the Company. The Company has, by its email to the Petitioner of 19 October 2020, acknowledged and agreed that such a loan (in the said sum of £30,000) was made by the Petitioner to the Company.
>
> By letter dated 13 November 2020 and a further email dated 20 November 2020 from the Petitioner to the Company, the Petitioner made demand for repayment (by the Company) of the said loan but, notwithstanding such demand, the Company has failed to repay the said loan nor any part of it, or to secure or compound to the Petitioner's satisfaction for the same or any part thereof.
>
> The Company is unable to pay its debts as they fall due.'

77. The Petition went on to address the coronavirus test, but those aspects are not material to the issues presently before me.

The Company's Response to the Petition

78. The Company's initial response to the Petition was by way of a short witness statement of Mr Waters dated 29 December 2020 exhibiting what was described as a 'defence' of the same date. The 'defence' comprised a letter dated 29 December 2020 from Mr Waters; I pause here to note that the Company had not instructed solicitors by this stage. Mr Water's letter inter alia provided as follows:

> 'We deny that there is any debt whether by way of loan or otherwise owing from [the Company] to the Petitioner.
>
> The Petitioner asserts that it was agreed between the Petitioner and [the Company] that when the Petitioner paid £30,000 to Wedlake Bell in 2011/2012, the Petitioner was making a loan to [the Company]. For the avoidance of doubt, at no time did [the Company] (or anyone acting on its behalf) (a) request that [the] Petitioner enter into any transaction with that firm on [the Company's] behalf or (b) ask [the] Petitioner to incur a financial liability on [the Company's] accounts by way of loan or under any other category.
>
> [The Company] did not agree at that time that the said £30,000 was a loan to [the Company] and the Petitioner has produced no documentation from [the Company] in either 2011 or 2012 that confirms it accepted it as a loan.
>
> In its email of 19 October 2020, [the Company] explicitly stated that it had not been treated as a loan by [the Company] and I have confirmed with the Chartered Accountant, Mr Gerald Ashman, who prepares and submits the financial statements of [the Company] to Companies House, that it is and

> always has been the case that no such liability has at any time been reflected in [the Company's] balance sheet .'

79. The letter went on to refer, inter alia, to financial statements for the Company to 29 December 2020 prepared by Mr Ashman, which showed that the Company had made a profit of £27,113 in the year and was balance sheet solvent; and to other matters which it was maintained indicated a healthy future for the business.

Principles to be applied

80. The settled principles governing applications to restrain are helpfully 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 parts 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 injustice 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 judgement: (ibid. at 837B).'

81. On behalf of the petitioner, Ms Allsop also referred me to the cases of LDX International Group LLP v Misra Ventures [2018] EWHC 275 (Ch) and Re Swan Camden Hill Ltd [2021] EWHC 2470, in support of the propositions that:

(1) It is for the company to demonstrate, with evidence, that its defence is genuine, serious and of substance. Bare assertion will not suffice.

(2) In assessing that evidence, the court should take a realistic view of whether the company is likely to establish a genuine and substantial dispute: Re Swan, para 11.

(3) It is open to the court to reject evidence because of its inherent implausibility or because it is contradicted by or not supported by documents. The mere fact that a party asserts that a thing did or did not occur, is not sufficient in itself to raise a triable issue. That evidence must inevitably be considered against the background of all the admissible evidence and material in order to judge if it is an allegation of any substance: Re Swan, para 12.

The Company's submissions

82. The Company does not dispute that the Petitioner paid Wedlake Bell a total of £30,000 on the dates alleged. It simply denies that it entered into any loan agreement with the Petitioner.

83. As rightly submitted by Ms Macro, a loan is a contract and all elements of a contract need to be established. She contends that the Petitioner's case rests on a somewhat vague allegation of an oral agreement, which is not supported by contemporaneous documentation and is very much disputed by Mr Waters' written testimony. She points out that none of the contemporaneous emails in evidence show the Company agreeing to the Petitioner's suggestion that he pay Wedlake Bell or agreeing that his payments should be treated as a loan to the Company. She maintains that the Petitioner simply told the Company that this was what had been done, on a 'FYI' basis.

84. Ms Macro also drew my attention to the timing of the payments. The solicitors were paid in three tranches, one payment being made a year after the other two, with no relevant correspondence between the Petitioner and the Company in the interim suggesting or referring to a loan agreement.

85. Ms Macro argued that the Petitioner's attempts to rely on subsequent correspondence, in the form of two emails (of 16 July 2014 and 19 October 2020) said to 'acknowledge' the so-called debt, do not assist him. She submitted that, leaving aside the fact that the emails are at best ambiguous, they do not of themselves create a contract of loan. They were long after the event.

86. Ms Macro also pointed to the length of time which elapsed (8 years) before any demand was made for payment; and the lack of any persuasive explanation for such a delay.

87. Ms Macro argued that the Petitioner had at best a time-barred claim for unjust enrichment.

88. All things considered, she submitted, the issue of whether or not there was a loan made to the Company was very much a triable issue.

Petitioner's submissions

89. On behalf of the Petitioner, Ms Allsop argued that there was an 'indisputable' debt in the form of an unpaid loan for £30,000 which the Company had 'admitted and confirmed as recently as October 2020'. She maintained that the debt was not subject to a bona fide dispute and that the belated attempts of the Company to suggest that there was a triable issue were 'incredible'. She described Mr Waters' suggestions that there was no response by the Company (whether acting by Howard, Mr Waters, or anyone else) to the emails of 28 and 29 September 2011, or those that followed in early October 2011, as 'wholly implausible'.

90. Ms Allsop relied upon Howard's email of 30 September 2011 to Mr Waters as evidence 'that the Company understood that, if the Petitioner provided money, it was by way of loan'.

91. Ms Allsop also relied upon the first of the two emails sent by the Petitioner to Howard and Mr Waters on 7 October 2011. She submitted that it was clear from the email that the payment was going to be a loan, as the Petitioner had again asked whether a direct payment, rather than a payment by him to the Company, would cause a problem in terms of recouping VAT. Ms Allsop submitted that Mr Water's position, that there was no response by the Company to this communication, was 'not credible'.

92. Ms Allsop argued that if no agreement had been reached, it was hard to imagine that Mr Waters would not have responded to any of the Petitioner's emails stating that he did not agree or stating that, as far as he was concerned, the Petitioner was making these payments on his own account.

93. Ms Allsop relied upon Mr Waters' email to Howard of 16 July 2014, in which he suggested to Howard that the Petitioner should have some shares in the company because of 'the debt we owe him', as evidence of the loan agreement. She maintained that Mr Waters explanation, that he was referring to a 'debt of gratitude' for all that the Petitioner had done in relation to the litigation, was 'wholly implausible'.

94. Ms Allsop maintained that the statement in Mr Waters' email of 19 October 2020 that any suggestion that monies were owed to the Petitioner had come as a 'complete surprise' to him was 'demonstrably untrue', as the Petitioner had raised the issue at a shareholders' meeting in May 2020. She also submitted that it was inconsistent with Mr Waters' promises by email of 15 October 2020 to send the Petitioner the requested information over the weekend.

95. Ms Allsop also contended that Mr Waters' email dated 19 October 2020 (quoted in full at paragraph 62 above) was an express acknowledgement of the Petitioner's loan. She relied upon Mr Waters' confirmation that he 'did raise a creditor for £30,000' but wrote it off at the end of 2017 after Howard had confirmed to him that the Petitioner was not going to pursue it. She also relied upon Mr Waters' proposal that he asked his fellow directors 'to reinstate the £30,000 as a loan to be repaid when the company is in a position to do so'.

96. Ms Allsop invited the Court to reject Mr Waters' explanation in his written evidence for the material parts of his email of 19 October 2020, which she maintained was 'either inconsistent with the message or demonstrably untrue'. She submitted that in light of this email, 'there can be no bona fide dispute over whether the payment of £30,000 was a loan to the company: it clearly was.'

97. Ms Allsop also contended that Mr Water's later email of 23 November 2020, stating that no loan of £30,000 had ever been shown in the Company's accounts, was inconsistent with the email of 19 October 2020.

98. Reliance was also placed upon a screenshot of an entry in the Company's 'supplier' records, produced by the Company in Part 7 proceedings recently issued by the Petitioner against the Company in respect of a number of debts including the petition debt. A copy of the screenshot was included in the bundle before me by agreement. The screenshot named the Petitioner as a 'supplier' and showed an opening balance as at 1 December 2012 of £54,600. It shows a debit of £54,600 on 9 September 2016, leaving a balance of nil. No details are given in the screenshot of the transaction or transactions to which the entries relate. Ms Allsop invited the court to conclude that the figure of £54,600 included the petition debt of £30,000.

99. Ms Allsop went on to submit that the evidence overall demonstrated that the dispute was not being raised 'bona fide'. By way of example, she raised the following:

(1) the suggestion in Mr Waters' email of 19 October 2020 that the Petitioner's claims to be owed money by the Company came as a surprise, which Ms Allsop contended was demonstrably untrue, given that the Petitioner had raised the issue of the loan at a meeting in May 2020 and referred to that fact in his email of 15 October 2020;

(2) the suggestion in Mr Water's witness statement that the Petitioner had been pressing hard to continue with the hearing on 25 March 2021 despite knowing that Mr Waters had recently been incapacitated in a car accident.

100. Ms Allsop also argued that, in considering whether the Company's allegation is of any substance, it is relevant to consider what it says must have happened. In this regard, she maintained that it was not being suggested by the Company that there was some mistaken recollection; rather, the Company's case was that the Petitioner had fabricated and concocted this claim. This was a serious allegation to make against a practising Queen's Counsel. She submitted that it was 'inherently unlikely' that he would be lying.

101. Ms Allsop went on to submit that, even if there was no response from the Company to any of the Petitioner's material emails and he did pay Wedlake Bell without any

express agreement, that did not avail the Company, for it must be estopped from denying the debt.

102. In this regard, Ms Allsop relied upon Spiro v Lintern [1973] 1 WLR 1002 per Buckley LJ at p1011, where he said:

> 'if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the nonexistence of the supposed obligation.'

103. Ms Allsop submitted that if A does not speak in that situation, he is estopped from denying the position. Developing that argument, she submitted that, in this case, the Petitioner made his understanding and the basis upon which he was proceeding (ie that the sums in question were a loan) clear on a number of occasions. She submitted that it was plain that the Company could have been under no illusion in this regard. She further submitted that the Petitioner acted on the understanding and belief that this was the case.

Discussion and Conclusions

104. On the evidence before me, the petition debt is the subject of a bona fide dispute on substantial grounds.

105. Looking at the contemporaneous correspondence in evidence, in my judgment it is clear that there was no acceptance of the offer made by the Petitioner in his email of 28 September 2011 by 29 September 2011; this much is apparent from the chaser email sent by the Petitioner on 29 September 2011, quoted at paragraph 31 above.

106. While Howard sent Mr Waters an internal email about the offer on 30 September 2011, there is no email back to the Petitioner on that date or thereafter, accepting his offer of 28 September 2011.

107. The emails of 7 October 2011 in evidence do not support any contention that confirmation had been given by the Company of its agreement to a loan on or by 7 October 2011. In this regard I remind myself that, as a general rule, silence does not amount to acceptance. The first email of 7 October 2011 repeats a query as to whether the monies should be paid to the Company or directly to Wedlake Bell. This of itself suggests that arrangements had not been discussed or agreed by then. The second email of 7 October 2011 opens with the phrase 'FYI', rather than making any reference to a conversation or agreement. In this regard I remind myself that the Petitioner is a highly intelligent, articulate barrister; had he written either the first or the second email of 7 October 2011 having just reached an agreement with, or even having just spoken to, Howard, Mr Waters, or anyone else at the Company, one would expect a passing reference (at least) to such conversation or agreement in these emails.

108. Mr Waters' evidence is that no confirmation was given by the Company in response to the Petitioner's emails of 28 and 29 September 2011, whether prior to the payments made by the Petitioner on 11 and 12 October 2011 or thereafter.

109. The Petitioner maintains at paragraph 20 of his second witness statement that his 'very clear recollection' is 'not just that no objection was raised but that both my father and Mr Waters expressly confirmed that the money would be treated as a loan.'

110. This 'very clear recollection', however, was not referred to in any of the pre-petition correspondence to which I was referred; it was mentioned for the first time in the Petitioner's witness statement. I do not suggest for one moment that the Petitioner would knowingly mislead the Court. It is entirely possible however, that as the dispute has intensified, he has persuaded himself of what, in his view, 'must have been'. This is a well-recognised phenomenon: see by way of example Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) per Leggatt J (as he then was), in particular at [19] and [20].

111. The Petitioner's witness statement gives no particulars of when Howard and Mr Waters are said to have 'expressly confirmed that the money would be treated as a loan' (Petitioner (2), para 20). It does not state whether such express confirmation is alleged to have been given in person or by telephone or in writing, for example, if given in person, and if so where, and in whose presence. As experienced Counsel, the Petitioner may be taken to appreciate the importance of such particulars.

112. The Petitioner's witness statement gives no adequate particulars of the terms of the alleged agreement either. On the Petitioner's own evidence, the Company had made clear to him at all material times that it would not be in a position to pay Wedlake Bell until the software was sold. There was nothing in the evidence to suggest that the Company would be able to pay the Petitioner any earlier than that. The Petitioner does not state, in terms, whether on his account, the agreement reached was that the alleged loan (or loans) would be repayable on demand, or payable on the occurrence of an event (such as sale of the software), or by a given date, and if so what date.

113. It is also unclear from the Petitioner's evidence whether he maintains that there was one loan agreement or two. In this regard I note that his demand letter of 13 November 2020, sent shortly before presentation, refers to 'loan(s)'. The petition refers to 'a loan'.

114. Whilst it is possible for one loan agreement to cover several advances, this does not sit well with the Petitioner's account of events in this case. If the Company and the Petitioner entered into an agreement in or around late September/early October 2011, under which the Petitioner agreed to lend the Company (and the Company agreed to borrow from the Petitioner) the sum of £30,000, the Petitioner's email to the Company dated 19 April 2012 (quoted at paragraph 47 above) and the Company's response (summarised at paragraph 49 above) make little sense. If, by September/October 2011, the Petitioner had agreed to lend the Company £30,000, he would not be approaching the Company in April 2012 to inquire whether the Company was in a position to pay the third tranche of £10,000 itself. Moreover, had there been such a loan agreement in place, one might expect to see some evidence of surprise on the part of the Company on being approached by the Petitioner in April

2012 regarding payment of the third tranche of £10,000. Instead, the Petitioner's evidence was that when he asked Mr Waters whether the Company was in a position to pay a further £10,000 in April 2012, Mr Water's response was that the Company would need to sell some software first. Mr Water's response was not said to be 'I thought you were covering that'.

115. The reasons for the delay of a year between payment of the second and third tranche of £10,000, and for the delay of 6 months between the Petitioner's conversation with Mr Waters in April 2012 and payment of the third tranche in October 2012, are entirely unexplained by the Petitioner. There is in evidence no correspondence between the Petitioner and the Company in the period running from the Petitioner's email of 19 April 2012 to payment of the third tranche in October 2012. From such correspondence as there is in evidence, it appears that the Petitioner paid the third tranche of £10,000 in October 2012 because he was being chased for it by Wedlake Bell.

116. The Petitioner's witness statement gives no particulars of the alleged agreement reached with Howard and Mr Waters regarding the third tranche of £10,000 paid by the Petitioner to Wedlake Bell in October 2012. It does not state when the agreement was reached, whether the agreement was reached in person or by telephone or in writing, and if reached in person, where, and in whose presence. Again, as experienced Counsel, the Petitioner may be taken to appreciate the importance of such particulars. At paragraph 28 of his second witness statement, having stated that by October 2012, he was being chased by Wedlake Bell for payment, the Petitioner states simply: 'Again, I spoke to my father and Mr Waters and we agreed that I would pay on the same basis as before'.

117. As noted by Ms Macro, the Petitioner's case rests on an extremely vague allegation of an oral agreement, which is not supported by contemporaneous documentation and is very much disputed by Mr Waters in his written testimony. None of the contemporaneous emails in evidence show the Company agreeing to the Petitioner's suggestion that he pay Wedlake Bell and that his payments should be treated as a loan by him to the Company. I was taken in evidence to no pre-petition correspondence even referring to any such agreement. Such correspondence as there is in evidence supports the Company's contention that the Petitioner made these payments of his own volition. On the evidence before the Court, it is at the very least seriously arguable that Wedlake Bell's outstanding bill was a source of embarrassment to the Petitioner, given that he had, in his words, 'pulled in a big favour from Anna' (email dated 28 September 2011, quoted at paragraph 29 above) and given also Wedlake Bell's connections with his chambers: see by way of example paragraphs 42 and 43 above.

118. Turning then, to the specific points raised by Ms Allsop, by reference to the paragraphs in this judgment in which they are summarised: with regard to paragraph 89, in my judgment, Mr Waters' evidence that there was no response by the Company to the Petitioner's emails of 28 and September 2011, or those that followed in October 2011, cannot be rejected as 'wholly implausible'. It is clear from the evidence as a whole that Mr Waters and Howard adopted a 'head in the sand' approach to the issue of Wedlake Bell's outstanding fees; it is in that context that Wedlake Bell found themselves chasing the Petitioner, rather than their client, for payment in the first

place. Against that backdrop, it cannot be said to be entirely implausible that Mr Waters and Howard would adopt a similar approach to the Petitioner's attempts to sort things out.

119. With regard to paragraph 90, Howard's email of 30 September 2011 to Mr Waters evidences a reluctance to accept the Petitioner's offer of a loan. There is no contemporaneous documentation before me evidencing any subsequent acceptance of that offer.

120. With regard to paragraph 91, whilst I accept that it was clear from the first email dated 7 October 2011 that the Petitioner proposed to make payment to Wedlake Bell by way of a loan to the Company, there is no contemporaneous documentation before me evidencing any acceptance by the Company of that proposal. I reject the submission that Mr Water's evidence that the Company did not respond to that proposal is 'not credible'. In this regard I refer to paragraph 118 above. I also take into account the fact that the second email dated 7 October 2011 opens with 'FYI' and makes no reference to any conversation or agreement between the Petitioner and Mr Waters, Howard, or anyone else at the Company.

121. With regard to paragraph 92, I refer to paragraph 118 above. I also remind myself that silence does not amount to acceptance.

122. With regard to paragraph 93, I do not consider Mr Waters' explanation for the quoted comment in his email of 16 July 2014 to be implausible. Howard himself had made reference in his email of 30 September 2011 to how much the Petitioner had invested in the litigation; it was something which clearly weighed heavily with both Howard and Mr Waters. From the correspondence in evidence, it is clear that both Howard and Mr Waters did feel they owed the Petitioner a debt of gratitude. This sort of point, upon which the Petitioner relies heavily as a 'smoking gun', is in my judgment, when considered in the context of the evidence overall, little more than a cross examination point.

123. With regard to paragraph 94, it is clear from the evidence that a number of matters had been explored at the shareholders meeting in May 2020 regarding the Company's financial position overall. If Mr Waters' recollection of the matters raised at that meeting was incomplete or inaccurate at the time of writing his email of 19 October 2020, little turns on that in the current context. To the extent that Ms Allsop is inviting me to conclude that Mr Waters was lying when saying in his email of 19 October 2020 that he had been taken by surprise, I decline that invitation. I would add that I do not see Mr Waters' promises by email of 15 October 2020 to send the Petitioner the requested information over the weekend as in any way inconsistent with his email of 19 October 2020. The email of 15 October 2020 was simply a holding email confirming that the request for information (which covered more ground than the issue of any debts owed to the Petitioner) would be complied with shortly. The substantive response was made by Mr Waters' later email of 19 October 2020.

124. With regard to paragraphs 95 to 98, much was made of the email of 19 October 2020, which the Petitioner relied upon heavily as a purported acknowledgement or admission of the petition debt. As noted by Ms Macro, however, the email was written some 8 or 9 years after it is alleged that the loan contract was entered into; it

does not of itself give rise to any contract (any consideration being past) and, read as a whole, it is far from an unequivocal admission of any sums owing to the Petitioner.

125. The email of 19 October 2020 openly accepts that the Petitioner paid £30,000 to Wedlake Bell and that he had asked that it be treated as a loan by him to the Company, but goes on to state that Mr Waters can find no confirmation of the Company's agreement to that proposal.

126. The Petitioner points to the words 'I did raise a creditor for £30,000' and the reference to 'reinstating' the loan as supporting his case, but such words have to be considered in the context of the email read as a whole.

127. The explanation given by Mr Waters in his third witness statement for raising a creditor of £30,000 is undoubtedly confused. The final tranche of £10,000 paid by the Petitioner in October 2012 was accepted by Wedlake Bell in full and final settlement of their bill, with the result that there was no need to 'raise a creditor for £30,000' in respect of any balance outstanding to Wedlake Bell. That said, there is no contemporaneous documentation before me confirming that the Petitioner or Wedlake Bell informed the Company that the October 2012 payment had been accepted in full and final settlement; whilst Wedlake Bell had indicated that they would accept such a sum in full and final settlement in April 2012, their earlier offer of a 10% discount (by email of 19 September 2011) had been conditional on payment by the end of the month, so it could not simply be assumed that an offer of a further £10,000 in full and final settlement would survive a delay of 6 months.

128. The reference in the email of 19 October 2020 to there being a difference between an invoice and a loan does suggest that whatever entry had originally been made in respect of the £30,000 related to an invoice; there was no evidence before me that the Petitioner had ever invoiced the Company in respect of the £30,000 which he paid to Wedlake Bell. This lends support to Mr Waters' explanation that the entry related to a balance considered to be remaining due on an invoice.

129. The suggestion that Mr Waters would ask his fellow directors to 'reinstate the £30,000 as a loan', read in context, does not lead to the conclusion that the £30,000 had appeared in the Company's accounts as a loan originally. Read as a whole, the email suggests that the £30,000 had originally appeared as a debt based on an invoice. In my judgment, as a matter of construction, it is at the very least seriously arguable that Mr Waters was proposing that he ask his fellow directors whether the £30,000 could be reinstated, but this time, not as an invoice, but rather as a loan.

130. The Petitioner further relied upon a passage in the email of 19 October 2020 in which reference is made to Howard telling Mr Waters that the Petitioner (rather than Howard Bell) was 'not going to pursue it'. Whilst I accept that, read in vacuo, this lends support to the creditor being seen as the Petitioner rather than Wedlake Bell, this reference does have to be seen in the context of the dealings between the parties overall; in reality, the pattern of dealings appears to have been that Wedlake Bell chased the Petitioner for its fees and the Petitioner would then chase the Company. Given that pattern, the reference to the Petitioner pursuing it is explicable.

131. Overall, muddled though Mr Waters explanation may be in certain respects, it does not point unequivocally to an admission that the Company entered into one or more loan agreements with the Petitioner in 2011/12.

132. Moreover, the email of 19 October 2020 has to be considered in the context of the evidence as a whole. The Company's evidence includes confirmation from Mr Waters that he later checked with the accountants who prepare the Company's accounts and that they have confirmed that no debt of £30,000 in respect of the Petitioner's payments to Wedlake Bell has ever been recorded in the books and records of the Company.

133. I would add that I was taken to no accounting evidence showing unequivocally that any such debt had ever been recorded in the Company's accounts. The screenshot of supplier records relied upon, showing an opening balance as at 1 December 2012 of £54,600, raises more questions than it answers. Absent any information confirming what that figure relates to, in the context of the evidence considered as a whole, the Court cannot simply proceed on an assumption that the figure includes the sum of £30,000 paid to Wedlake Bell, particularly given that the opening balance is dated over a year after the first two tranches of £10,000 were paid to Wedlake Bell and the closing balance of nil is recorded at 9 September 2016, rather than the end of 2017 (which is the point at which, according to Mr Waters' email of 19 October 2020, the £30,000 was written off). Moreover, even if an entry had been made in the Company's accounts in respect of the £30,000 payments made by the Petitioner to Wedlake Bell, that would only be one of many factors to consider.

134. With regard to paragraph 99, I do not consider that either of the examples posed demonstrate a lack of bona fides on the part of Mr Waters or the Company in disputing the petition debt. I have already addressed point (1). With regard to point (2), Mr Waters makes clear in his third witness statement that there was an error in his second witness statement relating to the timing of his admission to hospital. Read in the context of the evidence overall, the error is of little consequence. For the sake of completeness, I would add that on the evidence as a whole, I am satisfied that the dispute raised by the Company is a bona fide dispute.

135. With regard to paragraph 100, I do not accept this as the correct analysis. Nowhere in the Company's evidence is it alleged that the Petitioner has 'concocted' or 'fabricated' the claim. The Company has simply put forward its account of events, which differs from that put forward by the Petitioner. The evidence of Mr Waters bears a statement of truth, as does that of the Petitioner. To the extent that Ms Allsop is inviting me to afford more weight to the testimony of the Petitioner by reason of his status as leading counsel, I reject that invitation. Moreover, the function of this Court when hearing a disputed winding up petition is not to weigh up which of two competing accounts is the most likely to be true. It is to determine whether, on the evidence as a whole, the petition debt is the subject of a bona fide dispute on substantial grounds.

136. With regard to paragraph 101, Ms Allsop's laudable attempt to salvage her client's position by submitting that the Company should be treated as estopped from denying that the payments were loans does not succeed. As rightly noted by Ms Macro, for an estoppel to get off the ground, the Petitioner must be shown to have acted in the

mistaken belief that the loans were agreed. The Petitioner's evidence does not directly address what he believed at the time of making each of these payments and, in any event, the issue of what he believed at such times would clearly need to be tested in cross examination. The issue of whether the Company acting by its directors knew of the Petitioner's mistake would also need to be explored in cross examination.

Conclusion

137. In my judgment, this is not a matter suitable for disposal by way of petition. On the evidence before me, the petition debt is disputed on genuine and substantial grounds.

138. The Petitioner has already started an ordinary action in which he is pursuing the £30,000 and his outstanding Counsel's fees, together with other sums. That is the appropriate forum for this dispute.

139. For all of these reasons, I shall dismiss this petition.

140. I shall hear any submissions on costs on the handing down of this judgment.

ICC Judge Barber