IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMPANIES COURT (Ch)
ON APPEAL FROM ICC JUDGE BARBER
[2022] EWHC 1690 (Ch)

No. CR-2021-000259

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 10 June 2022

Before:

MR JUSTICE MILES

(In Private)

RE A COMPANY

Mr A. Barden (instructed by Field Seymour Parkes LLP) appeared on behalf of the Petitioner.

Mr K. Gunaratna (instructed by Boyes Turner LLP) appeared on behalf of the Company.

APPROVED JUDGMENT

Mr Justice Miles:

1 This is an application for permission to appeal. The dispute concerns winding up proceedings. The appellant was the Petitioner in the court below. For convenience I shall refer to the parties as the Petitioner and the Company. In accordance with the relevant Practice Direction, the judge anonymised the names of the parties in her judgment, and I shall do the same.

2 ICC Judge Barber dismissed the petition by order dated 20 July 2021. She also refused permission to appeal. The judge gave her reasons in a reserved judgment on 11 November 2021. The appeal is now, in reality, about costs: following the dismissal of petition the Company paid all the sums claimed in the petition.

3 The decision of the judge concerned the Covid-19 provisions of Schedule 10 of the Corporate Insolvency and Governance Act 2020. These ceased to have effect from 30 September 2021, when they were replaced by a different regime which has itself now been repealed.

4 The judgment below was concerned with Schedule 10 as it applied at the time of the hearing before the judge on 19 July 2021, and where I refer to Schedule 10 it is to its then form.

5 The Petitioner applied for permission to appeal by notice of 30 November 2021. On 8 February 2022 Joanna Smith J ordered a rolled up hearing of the application for permission to appeal and the appeal itself if permission were granted. The Petitioner and the Company have therefore both been represented and made submissions before me on permission to appeal and the substance of the appeal. Both counsel advanced well-structured and focused arguments.

6 The facts may be taken from the judgment. The Petitioner and the Company are connected parties. At the time of the presentation of the Petition Mrs G, a director of the Company, and her husband, Mr G, owned 35.5 per cent of the shares of Petitioner's ultimate parent company. Mr G 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 G commenced proceedings for unfair dismissal and related matters against the Petitioner's parent and various of its directors. The Company maintains that this prompted the presentation of a Petition. The Petitioner denies this.

7 The Company was incorporated on 7 November 2013. 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 eight flats with the potential for two additional flats. The Company acquired the freehold title to the Site for £570,000 with the benefit of planning permission some seven or eight years before the decision of the judge.

8 In 2015 to 2016 the Company obtained planning permission for the construction of eight flats following demolition of the existing dwelling at the Site.

9 By an original loan agreement dated 6 December 2013 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 cent per annum. The judge said that 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 per cent if unpaid interest exceeded an agreed amount. The Company's debt under the original loan agreement was secured by a charge by way of legal mortgage over the Site and a personal guarantee from Mr G.

10 On 1 March 2019 the Petitioner and the Company agreed to vary the terms of that agreement and entered a new loan agreement. The parties acknowledged that the new opening balance was £919,584.93. The term of the facility was extended to a new repayment date of 31 March 2020, a date of the Company's choosing. The parties agreed that a 2 per cent 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 debt was again secured by a legal mortgage over the Site and a personal guarantee.

11 The Company maintained that from 24 July 2019 until the start of the first lockdown measures caused by the covid-19 pandemic on 24 March 2020, the Site was being developed and good progress was being made towards completion of the eight flats. The expected development value of the Site with eight flats was substantially in excess of the Company's debt to the Petitioner. The Company's sale agents recommended selling the eight flats for an aggregate sum of some £2.455 million. The Company originally intended that its secured debt to the Petitioner would be discharged from the sale of four of the eight flats.

12 In September or October 2019 the Company decided to apply to the local planning authority for permission to erect two further flats. The Company recognised that this could result in the development not being completed in time to sell the four flats and repay the Petitioner by 31 March 2020. For that reason, in the autumn of 2019 the Company set about raising alternative finance in two ways: first, Mrs G and her family put in place arrangements to sell four unencumbered properties owned by them personally in India. These were placed on the market in late 2019 and were expected to sell for in excess of £1 million. The plan was to complete the sales and realise funds before the end of March 2020. Mrs G and her family agreed that the proceeds of these sales would be invested in or loaned to the company with a view to enabling the company to repay the Petitioner.

13 Second, at about the same time in Autumn 2019, the Company began seeking to raise alternative bridging finance against the security of the Site, and to this end consulted a number of mortgage brokers. Refinancing proposals were explored with a lender, SCL, which valued the Site at some £1.76 million, based on planning permission for eight rather than ten flats.

14 The Company said in evidence before the judge that on 24 March 2020, the date of the first national lockdown, all work on the Site ceased immediately for more than 14 weeks, until July 2020. This was initially contested by the Petitioner, but ultimately the judge accepted the evidence.

15 The Company also maintained that the pandemic had delayed and disrupted the sale of the Indian properties. Mrs G made a statement saying that sales were agreed in respect of two of the Indian properties for sums representing, in sterling, about £476,000 and £217,000 respectively, but that both these sales fell through. Correspondence was exhibited confirming that the sales had fallen through.

16 Mrs G also described the impact of these sales falling through by saying that they prevented a significant amount of funding becoming available to the Company which it had earmarked for paying to the Petitioner.

17 Mrs G also exhibited documentation relating to the two other properties. This included an email from November 2020 saying that the other properties would have been sold had it not been for coronavirus.

18 The Company maintained before the judge that the pandemic also had an adverse impact on its attempts to raise bridging finance, and Mrs G provided some email evidence confirming the company's attempts to raise alternative finance. In the exhibited correspondence, the broker referred to his recommendation that the Company should get the building airtight before approaching lenders. There was a further email exchange which referred to that, and at the hearing the Company relied on a letter of 12 July 2021, in which one of the mortgage brokers said that in normal times bridging finance on a development like this could be arranged within weeks, as the loan to value would have been less than 50 per cent of the current value of the project.

19 The loan was not repaid on 31 March 2020. The repayment date passed and the higher rate of interest specified in the agreement began to apply. The judge said that the repayment date had simply passed.

20 On 30 June 2020 the Petitioner sent the Company a letter of demand exercising its rights under the 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.

21 In October 2020 there was correspondence between the solicitors for the parties about the possible impact coronavirus had had on the Company's attempts to repay the debt. A winding up Petition was presented on 5 November 2020.

22 The winding up Petition was based on the grounds specified in s.123(1)(e) of the Insolvency Act 1986, which so far as material provides:

> "123 **Definition of inability to pay debts.**
> (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."

23 The Petition said 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 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."

24 The Company responded to the Petition by filing evidence which dealt with the impact of the coronavirus pandemic. It maintained before the judge 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 loan agreement.

The legislation

25 Paragraph 5 of Schedule 10 of the 2020 Act provided, so far as material, as follows:

> "(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.
>
> (2) The court may wind the company up under section 122(1)(f) of the 1986 Act on a ground specified in section 123(1)(a) to (d) of that Act only if the court is satisfied that the facts by reference to which that ground applies would have arisen even if coronavirus had not had a financial effect on the company.
>
> (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 that Act only if the court is satisfied that

> the ground would apply even if coronavirus had not had a financial effect on the company.
>
> (4) This paragraph is to be regarded as having come into force on 27 April 2020."

26 Paragraph 21(3) of Schedule 10 provided materially that:

> "... coronavirus has a 'financial effect' on a company if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus ..."

27 The relevant Practice Direction then in force provided for the matters arising under para.5 to be considered at a preliminary hearing. Paragraph 8.1 of the Practice Direction provided 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 s.122(1)(f) [of the 1986 Act] having regard to the coronavirus test, it shall dismiss the petition; or
>
> (2) If the court is satisfied on the evidence before it that it is likely that it will be able to make an order under s.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."

The reference to the coronavirus test was to the condition contained in para.5(3) of Schedule 10.

28 It was accepted by the Petitioner at the hearing before the judge that the company bore the burden of showing that coronavirus, *prima facie*, had a financial effect and that if it did that the question then was whether, on the balance of probabilities, the Petitioner could show that the ground for winding up would apply even absent that effect.

The judgment of the judge

29 The first issue before the judge was whether coronavirus had had a financial effect on the company before the presentation of the Petition within s.5(1)(c). The Petitioner submitted that the company had not established a *prima facie* case that there had been any such financial effect. The Petitioner submitted that the evidence was very thin and should be approached critically and made detailed submissions about the cogency and contents of the evidence. The Company submitted that it had cleared the hurdle and that the evidence showed that coronavirus had slowed down the building project, scuppered or delayed the investment the Company had expected from its shareholders through the sale of Indian properties, and had also scuppered the Company's prospects of promptly refinancing the project and paying off the debt

when it was called in. The judge concluded on this issue that the Company had cleared the para.5.1 threshold. She held that there was clear *prima facie* evidence that before the presentation of the Petition the Company's financial position worsened in consequence of, or for reasons related to, coronavirus.

30 The second issue which is the material one for present purposes was whether the Petitioner can satisfy the court that the grounds specified in s.123(1)(e) would apply even if coronavirus had not had the financial effect on the Company. This is the condition contained in para.5(3).

31 I should say a bit more at this stage about the way the judge approached this second issue in her judgment. The judge started by considering an issue raised by the parties' submissions as to the date as at which the Company's position should be assessed for these purposes. The Petitioner argued that the Company's position should be assessed as at 31 March 2020, being the date the debt fell due for payment and was not repaid. The Company argued that the test should be assessed as at 30 June 2020 when the demand was served, or a few days thereafter to allow a reasonable time for payment. The Company emphasised the date of the demand because it said that events had happened between March 2020 and that date which, but for the coronavirus, would have enabled it to be in a position to pay.

32 The judge noted in [57] of her judgment that the term "financial position of the Company" was used in both paras. 5(1)(c) and 5(3) of Schedule 10. She noted that para. 5(3) does not specify the relevant date for the purposes of counterfactual enquiry mandated by that paragraph. She recorded in [58] that there was at least an argument, reading the provisions together, that when conducting a preliminary hearing under the Practice Direction the court should consider the Company's financial position and the impact of coronavirus as at the date of the Petition. At [58] the judge said:

> "Any earlier date might otherwise require the court to ignore part or all of the financial effect contended for under para. 5(1) which, by para. 5(3), the court is tasked with taking into account in the counterfactual analysis provided for in para. 5(3)."

33 However, neither party invited the judge to adopt an approach that the court should consider the position as at the date of presentation of the Petition. She therefore went on to consider the alternatives by reference to the date of the debt arising (31 March 2020) or the date of the demand (30 June 2020).

34 The judge then turned to consider cases where a Petitioner had sought to establish a company's inability to pay its debts generally as they fell due by relying on the failure of the company to pay an undisputed debt to the Petitioner. The judge referred to the well known case of *Cornhill Insurance Plc v Improvement Services Limited* [1986] 1 WLR 114, which showed that a failure to pay an undisputed debt could provide evidence of cash flow insolvency. I note in passing that in that case there was a demand for repayment that was not met, so it is no authority for the position where there is no demand.

35 In other cases, the court has said that it will be slow to reach a conclusion that a company is unable to pay its debts from the mere fact of repayment of a debt which has never been demanded - see for instance *Re A Company (No 006898 of 1995)* [1996] 1 WLR 491 and *Easy Letting & Leasing* [2008] EWHC 3175 (Ch).

36 The Petitioner submitted that where there was no question about the amounts due and the debt was acknowledged there was no need for a demand.

37 The judge decided that in the present circumstances the demand was part of the Petitioner's case. The Petitioner had pleaded the demand in the petition; and the demand itself explained that all amounts owing under the loan agreement were now immediately due and payable. The judge also recorded, as already explained, that the contractual payment date had simply passed, and that the debt was secured. The judge specifically referred in [2] of the judgment to the association between the parties, and in [5] to [7] explained that the loan agreements were in some ways generous to the Company, that the payment date in the second agreement had been at the option of the Company, that the loans were fully secured by mortgages and guarantees, and that in the second agreement there was a contractual rate of interest that would apply uplifting the overall interest rate in the event that sums were not paid in full by 31 March 2020. She referred back to these features of the case in concluding that the court considering the winding up petition in this case would have required to see a demand.

38 As she put it: "Absent the demand letter of 30 June 2020, in the circumstances of this case ground 123(1)(e) would not be made out."

39 The judge therefore decided that she should address the position as at the date of the demand rather than as at 31 March 2020.

40 The judge then reviewed the evidence and the parties' submissions on it and concluded that the Petitioner had failed to satisfy her on the balance of probabilities that the ground specified in s.123(1)(e) would apply as at that date even if the coronavirus had not had a financial effect on the company. She said in [71] that she was satisfied on the balance of probabilities that but for the pandemic the company would have been in a position to refinance the project and repay the debt by the end of May 2020 or the first week of June 2020. She therefore dismissed the Petition.

The appeal

41 There is a single ground of appeal. The Petitioner says that the judge erred in applying the test in para. 5(3) by reference to the position as at the date of the 30 June 2020 demand. The Petitioner says that the judge should have assessed the position as at 31 March 2020 when the petition debt fell due. The Petition was based principally on the non-payment of that admitted debt, and the demand was not an essential part of the Petitioner's case. On the judge's own findings of fact and the evidence before the court, the Company was not able on 31 March 2020, or shortly thereafter, to repay the debt. A demand is not a necessary condition under s.123(1)(e) where the debt is not disputed. Had the judge applied the correct test under para.

5(3), she would have concluded that the condition was met as the Company did not have sufficient means to pay the debt at that time.

42 In elaboration of these grounds, the Petitioner advanced further submissions as follows. The judge had misconstrued the Petition, the demand was pleaded in order to establish the accrued interest to that date, but the principal ground relied on was the unpaid and undisputed debt. The cases where the court had said that a demand was needed were very different. They concerned cases where the company did not know the amount being claimed and had not had an opportunity to repay. In the present case the loan agreement told the Company how much was owed and no demand was needed. When construing para.5(3) of Schedule 10, the ground in question was that the debt that fell due in March 2020 was unpaid and that ground would have applied in the counterfactual world where there was no coronavirus.

43 The Petitioner contended that the broad purpose of the statute was to protect companies that became unable to meet their debts because of the coronavirus. It was not to protect companies which had become unable to meet their debts for other reasons. The Petitioner's approach gave proper effect to that purpose, but if the judge were right a creditor which had given its debtor more time to pay would be worse off than one which had aggressively petitioned for winding up at an earlier stage. That is a perverse, or at least surprising, reading of the statute.

44 In addition to the cases referred to in the judgment, counsel for the Petitioner also referred to the cases of *Re Flagstaff Silver Mining Company of Utah* (1875) 20 Equity Cases 268, and *Byblos Bank SAL v Al-Khudhairy* [1986] 2 BCC 99, 549. The first of those cases establishes that where there is an admitted inability to pay an undisputed debt that is a proper ground for bankruptcy. *Byblos* establishes that a petitioner may properly petition to wind up a company which lacks the means to pay its debts. If a debt presently payable is not paid because of lack of means that that would normally suffice to prove that the company is unable to pay its debts.

45 The Company argued that the judge was right. I will not summarise the Company's arguments here, but will refer to them as necessary in what follows.

Conclusions

46 I am unable to accept the Petitioner's submissions. I do not think there is any warrant in the wording of para. 5(3) to conclude that it is to be applied or tested narrowly as at the date when the debt being claimed in the Petition fell due.

47 As the judge observed, para. 5(3) is to be read together with para. 5(1). Paragraph 5(1) refers to the financial effect of the coronavirus on the company before presentation of the Petition. Paragraph 5(3) requires the court to carry out a counterfactual exercise and ask whether the grounds in s.123(1)(e) or (2) of the Insolvency Act would apply even if coronavirus had not had a financial effect on the company. That is naturally to be read as a reference to the same financial effect as is referred to in para. 5(1) - that is to say any such effect before presentation of the Petition.

48 I consider that the counterfactual question has to be considered as at the time the court is considering the application of Schedule 10, and that this includes considering the financial effect of coronavirus on the company up to that date, or at least up to the date of the presentation of a winding up petition.

49 This, it seems to me, better accords with the purpose of the statute, which is to provide protection to companies which would not have been wound up but for the financial effects on them of the coronavirus. That is best achieved, as it seems to me, by asking the question in relation to winding up petitions issued after the effective date of para. 5, whether the conditions set out in that paragraph are satisfied.

50 The statutory counterfactual exercise requires the court to ask what would have happened absent the coronavirus and in particular whether the grounds in s.123(1)(e) or (2) would have been made out. Here the judge decided that the company would have been able to repay the debt in May or June 2020 but for the coronavirus. Had there been no pandemic there would have been no debt to pay by the date of the petition and the ground under s.123(1)(e) would not have applied.

51 The Petitioner says that it could have presented a petition at any time after 31 March 2020, and that had it done so the company would not have been able to rely on the provisions of the Schedule, but that involves another and different counterfactual, namely one where the Petitioner had commenced winding up proceedings in early April 2020.

52 But it did not do that. The statute does not require the court to assume that the winding up proceedings were commenced earlier than they were.

53 Instead it requires the court to ask in relation to the actual winding up proceedings whether the ground in s.123 of the Insolvency Act would have been made out in the absence of coronavirus.

54 I reject the submission that the statute requires the court to consider only the events giving rise to the debt claimed in the Petition and the immediate non-payment of the debt. To determine whether the ground in s.123(1)(e) is made out the court considers at the time of the hearing to wind up whether the company is unable to pay its debts. The test is expressed in the present tense. The non-payment of a historical debt may or may not constitute good evidence that the company is unable to pay its debts as at the time of the hearing. That is shown by cases such as *Byblos*. But s.123(1)(e) does not require the court to consider events only at the time when the petition debt accrues due and the immediate aftermath. Nor does para. 5 of Schedule 10.

55 Applying the words of Schedule 10 to the actual winding up petition issued by the Petitioner in November 2020, on the judge's findings of fact the position is clear: the Petitioner would not have been able to establish a ground under s.123 of the Insolvency Act as the Company would have been able to pay - and indeed would actually have paid.

56 I do not think that this interpretation of para.5 provides unduly broad protection to companies in the position of the Company here. The paragraph itself contains the

relevant conditions. The Company has first to establish that its financial position was adversely affected by coronavirus. That having been shown, the Company is only protected by the provisions if the adverse effect of the coronavirus would have made a difference in the winding up proceedings. If a company would have been unable to pay its debts in any case the court will proceed with the winding up proceedings notwithstanding any adverse impact of the coronavirus.

57 I therefore reject the Petitioner's timing argument.

58 Though it is unnecessary for my decision, I also consider that the judge was in any case entitled to reach a view that in the present circumstances the Petition could not properly have been presented without a demand for payment. As to this, the judge did not hold that a demand was always required before a winding-up petition could be issued. She referred to the authorities, including the decision in *Re A Company* in which Chadwick J said that the statutory provision which deems inability to pay debts on failure to meet a statutory demand suggests that, at the least, the court would be slow to reach a 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.

59 The judge based her conclusion on the particular features of the case which would have been relevant to the suggested inference that the Petitioner sought to draw from non-payment of the debt. I have already outlined these: the debt was between associated companies, it was on terms that appear generous to the Company, the repayment date in the second loan agreement was inserted at the Company's behest, and the indebtedness was fully secured and provided for additional interest if payment was not made on the due date. The judge also recorded that the payment date under the loan agreement had "simply passed" with no action at all being taken. It was only some months later that the demand for payment was made.

60 The judge concluded that these features meant that a court would have required a demand for payment to be made before being willing to draw an inference of insolvency from non-payment of a debt. I consider that the question of what weight should be given to these features was an evaluative one for the judge and that the judge was entitled to reach this conclusion. The combination of features highlighted by the judge was, it seems to me, well capable of leading to the conclusion that in the absence of a demand the inference that the Company was unable to pay its debts from the failure to repay the Petitioner immediately would not have been made out. This conclusion was also supported by the fact that the Petitioner chose to serve the letter of demand in June 2020 saying that all sums were now immediately due and payable and that both the fact of the non-payment and the demand were pleaded in the Petition. I do not think that the judge erred in saying that when assessing the counterfactual it was appropriate to assess matters up to at least the date of the letter of demand. It was open to her to read the case advanced in the Petition as including the failure to pay even after demand was made. She did not say that that was the only point relied on, or ignore the fact alleged by the Petition that the debt had not been made, but she was, it seems to me, entitled to read the Petition as a whole as including reliance on the letter of demand. I do not therefore consider that she made any error of principle in this regard.

61 For all of these reasons I have concluded that the appeal lacks real prospects of success and I shall refuse permission to appeal.

62 As this judgment concerns the interpretation of the 2000 Act it may be cited in later cases.

Costs

63 It is not disputed that, as a matter of principle, the Petitioner should pay the costs incurred by the Company in relation to the appeal. The Company seeks the summary assessment of its costs. The total amount sought is £18,433. Some specific points were taken by the Petitioner about the statement of costs. First, that the hourly rates charged by solicitors are about a third higher than the guideline hourly rates. Second, some points are taken about the amount of work carried out by the solicitors, particularly in relation to attendance on others. Counsel for the Company says that the hourly rates published in the guidelines are only that, and that in specialist cases, or cases of importance, the court may award higher amounts.

64 It seems to me there is some force in the point about the hourly rates. It does not appear to me that this is a case of particular expertise or special sensitivity. It also appears to me, on reading the schedule, that the work carried out was somewhat top heavy in the sense that most of it appears to have been carried out by the Grade A fee earner, and it does seem to me that the amount of time spent on attendance on others on a matter of this kind was somewhat on the high side. I have to reach an overall view of the amount which I think is appropriate given the requirements of reasonableness and proportionality. It seems to me that the right amount to award taking into account all of these points is £14,000.

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CERTIFICATE

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