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No: CR-2021-002073

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

IN THE MATTER OF SWINDON TOWN FOOTBALL COMPANY LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 25 July 2022

Before :

Deputy ICC Judge Baister

- -

Between :

AC SPORTS WILTSHIRE LLC	**Petitioner**
- and -	
SWINDON TOWN FOOTBALL COMPANY LIMITED	**Company**

Mr Adam Deacock (instructed by **Teacher Stern LLP**) for the **Petitioner**
Mr David Eaton Turner and **Ms Jessica Powers** (instructed by **Hanover Bond Law Ltd**) for the **Company**
Mr Simon Hunter appeared for a **supporting creditor**

Hearing date: 7 July 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' legal representatives by email, and by transmission to The National Archives.

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Deputy ICC Judge Baister:

Introduction

1. Swindon Town Football Company Limited owns and operates Swindon Town Football Club. It does so through a hierarchy of companies, at the apex of which stands Axis Football Investments Limited, the sole director and shareholder of which is Mr Clemente Morfuni. Until 15 August 2019 the club was owned and controlled, similarly indirectly, by Mr Lee Power.

2. At or around the times material for present purposes, three people or entities were interested in acquiring the Company: Mr Morfuni, through Axis, the Petitioner/Able Company Swindon LLC, and a Mr Michael Standing. There was a battle for ownership of the club which was conducted both in and out of court. Much of the detail need not concern us. Suffice it for the moment to note (a) that the present ownership came about on 20 July 2021 when Axis acquired by compulsion Mr Power's shareholding in one of the intermediate owning companies, Swinton Reds 20 Limited, and (b) that there would still appear to be bad feeling between Mr Morfuni and Mr Power, both of which facts are of some relevance to these proceedings.

3. On 9 November 2021 AC Sports Wiltshire LLC presented a petition seeking an order winding up the Company. The basis on which it seeks that order is that the Company is insolvent. Specifically, it contends that on 1 November 2019 the Company entered into a written loan agreement (it actually bears the date 31 October 2019; 1 November was the date on which it was signed), under the terms of which it borrowed £100,000. The loan was made for restricted purposes (clauses 1 and 2). It provided that the sum advanced was to be repaid no later than 7 February 2020 (clause 3) and that, in default of repayment, interest was to be paid on the outstanding balance from 8 February 2020 at an annual rate of 5% above the Bank of England base rate compounded daily (clause 9). The Company failed to repay the loan by 7 February 2020, contractual interest accrued, so at the date of presentation of the petition the Company was said to be indebted to the Petitioner in the total sum of £109,094.52. It is common ground that that sum has not been paid. The Company later became further indebted to the Petitioner for £7,500 due under a costs order. That became due after presentation of the petition but had also not been paid by the time of the hearing, a fact on which the Petitioner relies as an additional indicator of insolvency.

4. In those circumstances, the Petitioner contends that the position is straightforward: there is a written agreement, to the terms of which the Company has not adhered; there is evidence of the lending in the form of a bank statement showing receipt of the loan sum; there has been no repayment on time or at all; so the Petitioner is entitled to a winding up order *ex debito justitiae* (as a matter of right).

5. The Company disputes the debt. It does so on two bases: (a) that the loan agreement was a sham, alternatively there was one or more variations to the original terms of lending ,or as to the nature of the loan, so that it was not liable to be repaid; (b) that the petition is tainted by an improper motive, i.e. it was presented for a purpose collateral to the true purpose of winding up, so amounts to an abuse of process. Mr Deacock, counsel for the Petitioner, contends that the basis on which it is said that the debt can be disputed as due under a sham contract lacks the requisite substance and that the other grounds of dispute relied on are no more than Micawberism, a term to which I shall

come later. He points to the very limited circumstances in which the court will dismiss a petition as an abuse, and in any event says that the matters on which the Company relies for its abuse of process claim are no more than surmise.

6. The evidence is gratifyingly brief. The Company relies on a witness statement of Mr Morfuni, a director, dated 4 January 2022. The Petitioner relies on a witness statement of a director, Mr William Keravuori, dated 8 February 2022 and one from Mr Power of the same date. Mr Eaton Turner and Ms Powers,[1] counsel for the Company, accept that "the current controlling mind of [the Company] [i.e. Mr Morfuni] has no personal knowledge of the alleged loan agreement or any subsequent discussions or arrangements between [the parties];" but they submit that this is no impediment to disputing the petition debt. In the course of the hearing Mr Eaton Turner told me, on instruction, that Mr Morfuni had been hampered, after taking control of the Company, by the fact that it had been largely denuded of documents. Mr Deacock points out that the Petitioner's evidence comes from persons who do have contemporaneous knowledge, so it should be given greater weight than that of Mr Morfuni who does not.

7. With that brief introduction I turn to the bases on which the making of a winding up order is opposed.

The petition debt is disputed

8. For an agreement to be a sham it is necessary to show that it was intended to give the appearance of creating, as between the parties, legal rights and obligations which differed from those (if any) which the parties truly intended to have effect: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786; *Hitch v Stone* [2001] STC 214. Mr Eaton Turner relies on the following matters which he describes in his skeleton argument as "oddities and discrepancies that call into question the veracity and credibility of the transaction represented [by the loan agreement]."

9. First, he calls into question the circumstances of its execution, as to which different accounts have been given from time to time. In essence, it has been said that the agreement was executed by a Mr Steven Anderson on behalf of the Company, whereafter it was executed in counterpart by Mr Keravuori for the Petitioner; but then it emerged that the Petitioner in fact had two different "soft copy versions" (the original "wet ink" version cannot be found, it seems). Mr Eaton Turner complains that no contemporaneous email correspondence or metadata have been disclosed to shed light on the matter in spite of requests for the latter.

10. Secondly, he points out that the money was received only on 4 November 2019, whereas the agreement acknowledged receipt of the funds on the day on which it was signed, 1 November 2019.

11. Thirdly, he says that the money the Company received came not from the Petitioner but from another entity, Consulting Logistics Limited.

[1] I mean no disrespect to Ms Powers's contribution if I hereafter refer only to Mr Eaton Turner as it was he who made the submissions at the hearing.

12. Fourthly, he points out that, although the loan agreement made time of the essence, repayment was not demanded on the due date, 7 February 2020; no demand was made until 12 August 2021.

13. Fifthly, he relies on provisions in the loan agreement that the loan was not to be used to pay creditors but was to be applied to running costs and salaries; in fact it was used to pay Mr Power, a creditor, on the very day the money was received.

14. Finally, he calls into question the purpose for which the £100,000 was paid. He maintains that the documents indicate that it may have been used as a deposit, and a non-returnable deposit at that, rather than for its professed purpose. The original loan agreement appears, then, to have been varied or novated in some way. I must deal with his submissions on that in some detail: they seem to me to go to both respects in which the petition debt is disputed.

15. The Company was in financial difficulty in February 2020. In paragraph 9 of his witness statement Mr Power says,

> "In February 2020 I contacted Mr Keravuori the Petitioner's owner and explained that the Company was not able to repay the Debt and asked for more time to pay. After a lengthy exchange we both agreed that the Petitioner would not seek the immediate repayment of the Debt on the basis that (a) if the Petitioner decided to unilaterally withdraw from negotiations to purchase the shares in the Company, then the Debt would not be refundable thus covering any abortive costs incurred by the Company; (b) if the Petitioner successfully purchased my shares…the Debt would be deducted from the completion purchase price. I therefore considered the loan would be characterised as a deposit; and (c) if for any reason I did not sell the Company to the Petitioner, the Debt would become immediately due and payable."

He goes on to say that in fact he transferred his shares to Mr Morfuni, hence the change in ownership to which I have already referred.

16. Mr Eaton Turner relies on a number of references to the money being a deposit as opposed to a loan. They are set out in his skeleton argument and he took me through them and the relevant documents in his submissions. (I omit one which he abandoned in the course of those submissions.)

> (a) In an email dated 22 January 2021 solicitors for Mr Power, Terrells, stated that "[Able Company Swindon LLC] have paid a £100,000 non-refundable deposit to show their serious intent. Our client would require the same non-refundable deposit. Please confirm [Axis] is prepared to do likewise.""
>
> (b) In an email dated 15 February 2021 solicitors for Mr Power, Terrells, explaining part of the process commonly used in the acquisition of a football club, said that "[…] Wigan Athletic Ltd had over forty enquiries from potential buyers but only two were

> prepared to put down a non-refundable deposit to illustrate real interest. Our client believes it is standard practice in the industry to pay a £100,000 non-refundable deposit and if the matter proceeds the value of the deposit is set against the purchase price."
>
> (c) In an unsigned document described as a statement dated 29 April 2021 attached to an email of the same date from Mr Anderson, one of the signatories of the loan agreement (see above), Mr Power stated, "I have every confidence that Able have the ability to take the club forward. They have confirmed *they are willing for the £100,000 deposit to remain in the club and for it not to be repaid*" (my emphasis).
>
> (d) In a judgment given in one of the hearings concerning the ownership dispute, *Standing v Power* [2021] EWHC 1295 (Ch), Nicholas Thompsell (sitting as a deputy judge of the Chancery Division) commented that counsel for Mr Power had submitted that Axis's bid to purchase the club could not be regarded as credible, as compared to the Petitioner's bid, because "Axis has not been prepared to put up a non-returnable deposit to demonstrate that its offer is in earnest."
>
> (e) In or around March 2021, heads of terms were prepared in the form of a letter from the Petitioner to Seebeck 87 Limited in relation to the former's proposed purchase of the club. In clause 4.3(d) of the heads of terms, "the amount of £100,000.000 being the sum already paid by [the Petitioner] on 31 October 2019" was described as "a deposit for the Proposed Transaction." The heads of terms were signed by a director of Seebeck on 30 March 2021. (Mr Eaton Turner points out that that signature appears to be Mr Power's.)
>
> (f) Mr Keravuori explained in a witness statement dated 13 May 2021, relied on in the *Standing v Power* litigation that "Preliminary due diligence began in November 2019 […]. As a condition of Able's commitment it agreed and duly paid the Club £100,000 for the due diligence exercise to continue."

17. In the light of all that, Mr Eaton Turner submits that his client has a real prospect of establishing at trial that the loan agreement was a sham in that the £100,000 was in fact paid as a non-refundable deposit and not as a loan, a point that is also relevant to the more general basis on which the petition debt is disputed.

18. As to that, there are, Mr Eaton Turner submits, issues as to whether the terms of the loan agreement (if that is what it was) were varied. On 10 September 2021 the Company's solicitors wrote to the Petitioner's solicitors asking about execution of the agreement and for an explanation for the delay in demanding repayment of the loan. In their reply of 15 September 2021 the Petitioner's solicitors emphasised the "unequivocal" terms of the loan agreement and of the intention of the parties to it, going on to say, "There has never been any variation of the Loan Agreement such that the

sums paid thereunder would morph into a gift or a non-refundable deposit as your client would appear to have it…;" yet on 24 September 2021, whilst emphasising the same point ("There has been no agreement to vary the loan agreement"), they went on to say:

> "Upon the request of Mr Lee Power our client did agree to deduct the loan amount from the final purchase price if our client had purchased the club. It was also agreed that if our client's efforts to purchase the club were not successful then the loan would be repaid on demand in accordance with the terms of the loan agreement. However, this was not a variation of the loan agreement but a simple supplemental agreement to net two sums off against each other if our client had purchased the club.
>
> Consistent with this agreement our client did not make demand or seek repayment of the loan whilst negotiations to purchase the club were ongoing. Given that our client did not purchase the club it was then entitled to be repaid the full loan, with interest."

19. Mr Eaton Turner says that the position has since "developed even further" as a result of the evidence given by Mr Keravuori and Mr Power, both of whom, he points out, now aver that an oral agreement was reached between them on behalf of the parties in February 2020 pursuant to which repayment of the loan was to be deferred or, in certain circumstances, waived. Mr Keravuori deals with this in paragraphs 12 and 13 of his witness statement, and Mr Power in paragraph 9 of his.

20. Mr Eaton Turner invites the court to accept that, even if the loan agreement was not a sham, the Company has a rational prospect of establishing that the parties subsequently agreed that the £100,000 paid was to be treated as a non-refundable deposit. In support of that he also relies on the absence of any documentary evidence at all of the terms of the oral agreement.

21. I turn next to the abuse of process point. Mr Eaton Turner did not address me at any length on this: his arguments are succinctly set out in his skeleton argument from which I take what follows.

22. He relies on two matters. First, he says the petition is an improper attempt to force the Company to pay a disputed debt; and secondly, he says it is in reality an attempt to force the Company into administration so that the Petitioner or persons connected with it can make a further attempt to acquire the club.

23. In support of the first proposition he relies on the following:

> (a) In spite of the apparent repayment date for the petition debt, no demand was made for repayment until 12 August 2021.
>
> (b) The Company sent three substantive emails/letters in response to the demand, which included requests for documentary evidence of any supplemental agreement and metadata. Those requests were ignored.

> (c) The Company provided evidence that it was able to pay the petition debt, but in spite of that the Petitioner proceeded to serve notice under the Corporate Governance and Insolvency Act 2020 and present this petition.

24. In support of the second he relies on the following as evidence of the true purpose of the petition:

> (a) In early 2021, Mr Power was prepared to see the Club/the Company go into administration rather than Axis becoming its owner. In support of that he relies on passages from the judgment of Nicholas Thompsell.
>
> (b) He relies on statements by Mr Keravuori in a witness statement in the same proceedings that he was "extremely interested" in purchasing the Club, and that Able's "determination [to purchase it] remain[ed] strong" as at May 2021.
>
> (c) He invites attention to Nicholas Thompsell's expression in his judgment of a suspicion that Mr Power had what he (Mr Eaton Turner) calls *mala fides* reasons for preferring Able's bid to that of Axis (see paragraph 40 of the judgment).
>
> (d) It became apparent to Mr Power and the Petitioner in or around July 2021 that Able's bid to purchase the Club was not going to succeed.
>
> (e) Demand for repayment of the petition debt was made just three weeks after Axis became the indirect owner of the Club, and the petition was presented just over three months thereafter, even though there had been no prior attempts to recover a debt.
>
> (f) Mr Power supports the petition in respect of an alleged unsecured debt of £1.869m whilst at the same time "taking appropriate advice as to what action [he] should take to enforce [his] rights pursuant to [his] debenture" (see paragraph 20 of his witness statement).

Winding up: the legal principles

25. I shall deal with the law on winding up briefly: the applicable principles are well known to all involved, and there is no disagreement about them, only as to their application to this petition. Again, for the sake of brevity, I take what follows largely from counsel's respective skeleton arguments.

26. The starting point is that a petitioner with an undisputed debt is generally entitled to a winding up order as a matter of right: *Maud v Aaber Block Sarl* [2015] BPIR 819 has been cited, but the proposition is well established in earlier authority. The converse is that it is not entitled to a winding up order where the petition debt is disputed on substantial grounds. Mr Eaton Turner sets out Norris J's exposition of the relevant

considerations in *Angel Group Ltd v British Gas Trading Ltd* [2012] BCC 265 at paragraph 22.

27. As Mr Deacock points out, the test as to whether a debt is disputed on substantial grounds is the same as that applicable to summary judgment, namely whether there is a real prospect of success: *Bryce Ashworth v Newnote Ltd* [2007] BPIR 1012, paragraphs 31-33. That means a realistic as opposed to a fanciful prospect, carrying some degree of conviction and not merely arguable: *Swain v Hillman* [2001] 1 All ER 91; *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; or, as Norris J put it in *Angel v British Gas* (drawing on *Re A Company (No 012209 of 1991)* [1992] 1 WLR 351), "A dispute will not be 'substantial' if it has really no rational prospect of success;" and, "A dispute will not be put forward in good faith if the company is merely seeking for itself credit which it is not allowed…".

28. Bare assertions will not suffice: *Re Swan Campden Hill Ltd* [2021] EWHC 2470 (Ch), but again there is much authority to the same effect.

29. It is open to the court to reject evidence because of its inherent implausibility or because it is contradicted by or not supported by the documents: *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453; *Portsmouth v Alldays Franchising Ltd* [2005] BPIR 1394.

30. The court must be alive to and ready to dismiss "a smokescreen of unfounded assertion" raised to avoid summary judgment or insolvency. Mr Deacock relies on a colourful observation of Megarry V-C in *Lady Anne Tennant v Associated Newspaper Group Ltd* [1979] FSR 298:

> "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism."

As Mr Deacock referred in passing to the better known "cloud of objections" formulation adopted by Chadwick J in *Re a Company (No 006685 of 1996)* [1997] 1 BCLC 639; [1997] BCC 830, I should mention that too. (It was used by Norris J in the *Angel* case as well.)

31. Raising a *bona fide* dispute is to be distinguished from "going fishing." Mr Deacock points out that:

> "[O]ne does not set aside a statutory demand merely because a party wishes to put the opponent to the trouble of further litigation" (*Williamson v Governor of the Bank of Scotland* [2006] BPIR 1085).

The same point must apply equally to the hearing of a winding up petition.

32. Mr Eaton Turner submits the court should not conduct a long and elaborate hearing, examining in minute detail the cases made on each side. He cites *Re Swan Campden*

Hill Ltd (*supra*) again and *LDX International Group LLP v Misra Ventures Ltd* [2018] EWHC 274 (Ch) in support of that. I note, however, Norris J's *dictum*:

> "The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment."

There is, of course, not necessarily a tension between the two propositions.

33. With all that in mind I turn to my conclusions. I should say that I have not found some of them easy to reach and have given the disputed debt issue a great deal of thought, which is one of the reasons it has taken me longer than I had hoped to produce this judgment.

Conclusions

34. I shall deal first with the improper motive aspect of the abuse issue.

35. As Mr Deacock points out, the presentation of a petition by a person who has an undisputed debt will only be an abuse in two situations:

> "The first is where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors" (*Maud v Aabar Block Sarl* (*supra*)).

36. The allegation of improper motive is denied by Mr Keravuori (paragraph 39 of his witness statement). I agree with Mr Deacock that neither limb of the test set out above has been made out. The material on which Mr Eaton Turner relies must, in my view, be seen in its context (the judgment on which he draws, in particular, was given in proceedings involving a different dispute affecting different parties) and in any event is thin. I accept Mr Deacock's description of it as no more than surmise so that no weight can be given to it. Nor can it be said that the Petitioner is acting other than in the interests of the general body of creditors. The evidence alludes to other creditors, and one has appeared by counsel to support the petition. I therefore decline to dismiss the petition on that ground. I shall deal with the disputed debt aspect of the abuse issue later.

37. In his oral submissions, Mr Deacock pointed out that, in relying on sham, the Company was, in effect, asserting fraud, yet the allegation was not put with the detail that would generally be required. I am not convinced that in this summary jurisdiction fraud needs to be pleaded with the same level of particularity as would be required at trial. That said, I do not think that any of the matters set out in paragraphs 9-14 above, either individually or taken together, are of sufficient substance to make good the Company's case.

38. Mr Keravuori's evidence (paragraph 20 (a) of his witness statement) explains that he signed two copies of the agreement, one of which was signed by Mr Anderson, and another which was not. He relies on clause 18 of the agreement which provides that it could be executed "in any number of counterparts." In my view, those points are sufficient to put paid to the contention that something untoward was going on. The Company's request for any relevant metadata was no more than a fishing expedition.

39. Similarly, nothing can really turn on the fact that the loan agreement acknowledged receipt of the loan sum, yet it was only paid a few days later. That is, at best, a reflection of careless drafting, signing or dating. These are not unknown occurrences, but, as Mr Deacock says, the short lapse in time does nothing to undermine the fact of or contractual basis of the loan. The main thing, in my view, is that the loan was made.

40. Nothing can conceivably turn on the fact that the money came not from the petitioner but from Consulting Logistics Limited. The Petitioner says that that company acted as its agent, and in the absence of more I accept that explanation. The Company was content to accept the money from that source at the time. It cannot complain now. (Alternatively, it could return it, I suppose.)

41. The fact that there was a delay in demanding repayment amounted to nothing more than indulgence on the part of the Petitioner. Given that the Company benefitted from that indulgence, which was expressly provided for in the loan agreement (clause 17), and in the light of evidence that an extension of time in which to repay was agreed (see below), again I see nothing sinister in the point.

42. All the foregoing points taken by the Company strike me as scraping the bottom of the barrel, and, to be fair, Mr Eaton Turner did not advance them with great force at the hearing.

43. The way in which the loan money was used is odd and does merit some attention. On the same day on which the Company received the £100,000 it paid it to Mr Power in breach of clauses 1 and 2 of the agreement. Clause 1 provided that the loan was to be used to pay salaries and other day to day running costs "and not for any other purpose"; clause 2 provided that the loan could not be used to repay indebtedness to "any other creditor." Mr Power describes what happened in paragraph 18 of his witness statement:

> "[…] I had hoped to secure the loan from the Petitioner in early October 2019 so overheads, staff salaries and other liabilities could be paid by the end of the month. The loan was not received until the 4th November 2019. So, I had to personally find funding to cover the October payments. Upon receipt of the loan, I repaid the money due to me. Effectively, therefore, the loan was not applied in breach of the Loan Agreement. It was used to pay the overheads, staff salaries and other associated costs as provided for in the Loan Agreement, just in a somewhat circular way."

Mr Power's conclusion is wrong. In fact the loan was used to pay a creditor, which is what Mr Power was, either on the basis that he lent money to the Company as something like a bridging loan, alternatively on the basis that he was entitled to be indemnified for discharging the Company's indebtedness. But, I ask rhetorically, "So what?" If the circular arrangement he describes was in breach of covenant, as it plainly was, it was

for the lender to complain, and the lender appears not be doing so (see paragraph 10.1 of Mr Deacock's skeleton argument). Mr Eaton Turner complains about the absence of documentation to support what Mr Power says about the payments he made, but no request for further information was made, so the Petitioner can hardly be blamed for that. In the circumstances, I accept Mr Power's unchallenged evidence as the truth. I should add that the circular arrangement does not, in my view, support the claim that the loan arrangement was a sham either: it represented a minor deviation from what the loan agreement envisaged, but the effect was what the parties wanted to achieve. What actually occurred does not change the fundamental nature of the agreement.

44. I should add that in *Snook* Lord Diplock said that all the parties "must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating." In my view, that common intention has not been established here.

45. What the £100,000 loan was or became, and how it was treated, are more difficult questions. As Mr Deacock says in paragraph 11 of his skeleton argument, the nub of the Company's dispute is that the loan was in fact (or, I suppose, became) a non-refundable deposit.

46. Counsel both agreed at the hearing that there was only one payment of £100,000: there is no question of that sum having been paid twice, once as a loan and then on some other occasion as a deposit (whether refundable or not). There is no basis on which I can find that, when it was paid to the Company, it was paid other than as a loan pursuant to the loan agreement. The timing of the payment (notwithstanding the slight discrepancy mentioned earlier) supports that conclusion, as does the reference to it in the Company's bank statement against its receipt to its being a loan. As I have already observed, the way in which the money was used was also consistent with the purpose for which the loan was made. How, then, can it have "morphed" (to use the Petitioner's solicitors' expression) into a deposit?

47. Mr Deacock says it did not. He submits that the non-refundable deposit argument does not get off the ground. The Petitioner he says, "admits and avers that in a telephone conversation between [Mr Keravuori] and Mr Power in February 2020 it agreed with Mr Power that the loan could be treated as part payment of the purchase price and that it would not be refundable in the event that the Petitioner pulled out [of the purchase of the club]" (I retain his emphasis). But, as he points out, there was no purchase: Mr Power was unable to sell to Able because he was compelled to sell to Axis. He also points out that both Mr Keravuori and Mr Power, who actually made the agreement, both agree that: (a) the loan was non-refundable if Able withdrew; but (b) it was repayable if Mr Power sold to anyone else. He further points out that neither Mr Keravuori nor anyone on behalf of the Petitioner has ever referred to the loan as a "non-refundable deposit." The reference in the heads of terms is to a deposit, which, he says, was in substance true as a result of the agreement to which I have referred above; and Mr Keravuori's statement that it was paid to enable due diligence to be completed was also true in that the Petitioner made the loan to stave off insolvency and permit due diligence to take place (paragraph 28 of his witness statement), which I say, in passing, seems a bit of a stretch. More persuasively, he relies on the commercial unreality of the Company's position: if the Petitioner were right in what it now asserts, the Petitioner would have been making a gift of the loan sum to the Company, an inherently unlikely proposition.

48. I should set out here what Mr Power's evidence is as to what he describes as his use of the term "non-refundable or non-returnable deposit" (paragraph 13 of his witness statement):

> "My use of [the terms] was my shorthand description of the agreement reached with the Petitioner as set out in paragraph 9 above. These were not phrases used or accepted by the Petitioner nor did they reflect what had been agreed concerning repayment of the Debt. In my mind I had every intention of selling the Company to the Petitioner so the Debt would simply be deducted from the final purchase price and thus be not returnable, so I considered it to take the form of a deposit, Alternatively, if the Petitioner chose to withdraw from the discussions, it agreed to forego repayment of the Debt. Again, the Debt would not need to be paid. My use of this language was never intended to reflect any agreement where the Company had no obligation to repay the Debt unless the Petitioner unilaterally withdrew its interest."

He goes on to deal with the use of the term "deposit" (*sic*) in the heads of agreement and himself makes the commercial unreality point of giving the Company a windfall.

49. I leave to one side Mr Deacock's admirable efforts to find case law on the meaning of a non-refundable deposit. It seems to me that the law, if there were any, could only be of limited assistance. The phrase should, in my view, be given its natural meaning; alternatively, it should be given the meaning the parties agreed to give it or intended it to mean or the meaning appropriate to the context. This is not the place for carrying out a detailed exegesis; and neither party invites me to embark on such a course.

50. For reasons that will now, I hope, be clear, I have no difficulty in proceeding on the basis of the validity of the loan agreement. It was not a sham. There was a subsequent agreement to allow more time to pay, but nothing turns on that. There was then the oral agreement of February 2020. The agreement appears to have been a perfectly sensible one, and what Mr Deacock says about the commercial reality of it carries considerable force. (See also paragraph 15 of Mr Power's witness statement.) For all those reasons, I find myself again generally in sympathy with the arguments put forward on behalf of the Petitioner for rejecting the contention that something occurred, the effect of which was to make the loan not repayable. There is nothing in the evidence that is explicit to that effect. In spite of that, however, I do have doubts about what the position of the parties was in and after about February 2020, and I do not feel I can sweep aside the possibility that the basis on which the £100,000 came to be treated changed over time, as it did as a result of the oral agreement, and may have in more respects than the written evidence covers. I say that for a number of reasons.

51. First, the agreement now relied on by the Petitioner as to the matter of the deposit was an oral agreement. There is nothing wrong with an oral agreement, but it does give rise to uncertainties in a way that does not apply to written agreements. That is the more so where, as appears to be the case here, there is no contemporaneous correspondence or other documentation recording or evidencing the precise, or even broad, terms agreed. It may be, as Mr Deacock says, that the Petitioner never referred to a non-refundable deposit, but the terms were used, as Mr Eaton Turner has demonstrated, and the reference to a deposit *simpliciter* in the March 2021 heads of terms is not insignificant:

if there was only one £100,000 it cannot have been a deposit and a loan at the same time (except, of course under the terms of an agreement of the kind *now* relied on by the Petitioner and about which I would want greater clarity than I have).

52. Significant too, in my view is an apparent inconsistency in Mr Keravuori's evidence. His position in these proceedings is plain, but it does not sit easily with what he said in his witness statement in the *Standing v Axis* proceedings. It is dated 13 May 2021, so comes after the loan agreement and the oral agreement. He said:

> "5. Following numerous conversations with Mr Power over a period of some months it was agreed that Able could have access to all salient records and information so a detailed due diligence exercise could be carried out which, if successful, would lead to an informed proposal to purchase the Club and its assets.
>
> 6. Preliminary due diligence began in November 2019 involving continuous dialogue with Mr Power and his advisors, resulting in an outline agreement being reached for the acquisition of the Club in early December. *As a condition of Able's commitment it agreed and duly paid the Club £100,000 for the due diligence exercise to continue*" (my emphasis).

Mr Deacock says that that evidence needs to be read in the context in which it was given, but I do not think the context explains away what appear to be two positions adopted by Mr Keravuori which are potentially hard to reconcile. If the £100,000 was used to fund due diligence, it must be arguable that it no longer fell to be repaid. I bear in mind here Mr Anderson's email of 30 April 2021 and Mr Power's statement, "I have every confidence that Able have the ability to take the club forward. They have confirmed they are willing for the £100,000 deposit to remain in the club and for it *not to be repaid*" (my emphasis again). That does not accord with the position the Petitioner now takes in its evidence in these proceedings. It has the benefit of being something in writing that is relatively close in time to the relevant events: it represents evidence of the parties' intentions at that time.

53. There is a final point, not expressly taken by Mr Eaton Turner, but one which, it seems to me, flows from his submissions. It goes to the particulars given in the petition. The Petitioner relies solely on the loan agreement and asserts that the debt was repayable by 7 February 2020. That was untrue because, as we have seen, the time for repayment was extended. No mention is made of the oral agreement now relied on, which effectively suspended the operation of the loan agreement, or at least the obligation to repay, but then brought it back into force, as I now broadly understand the Petitioner's case. A fuller story of how the loan was treated from time to time has only emerged as a result of opposition to the petition. That leads me to suspect that even more might emerge if full and proper disclosure (including the Petitioner's own documents) is given and the witnesses are cross-examined. In my view, the Company is entitled properly to test the Petitioner's case, which it cannot do in a summary proceeding such as this. Furthermore, if the date for repayment of the loan was changed such that it fell due "on demand in accordance with the terms of the loan agreement", as the Petitioner's solicitors later asserted, the question arises as to whether interest still ran from the original date, because the terms of the loan agreement were preserved, or from the date of demand. The oral agreement appears to have been silent on the point, which may

mean that it was overlooked. Given the rate at which interest accrues, this could make some difference to the petition debt. The Company is entitled to clarity as to that and other matters (such as, arguably, consideration), and so is the court. The point about interest may be said to be insignificant if the status of the principal sum were not in question because that would itself be ample to justify a winding up order if it were incapable of being disputed. That, and the other matters I have mentioned about the particulars of debt, could have been cured by an application to amend and reverify the petition, which the Company could not have resisted, but no such application has been made, and it is too late to apply now. None of that, of itself, would justify refusing a winding up order: I simply say that it adds to the lack of clarity as to the petition debt and its true contractual basis or nature after the oral agreement.

54. If this had been an application for summary judgment, I would probably have given conditional leave to defend. That I am unable to do so is a consequence of the procedural route the Petitioner has chosen to adopt, one that, for a number of reasons, Hoffmann J once referred to as "a high risk strategy." For all those reasons, by a narrow margin and with misgivings, I hold that the debt is capable of being disputed on grounds that are not fanciful but of sufficient substance to warrant dismissing the petition, which is the order I shall make.