Neutral Citation Number: [2023] EWHC 2562 (Ch)

Case No: CR-2023-003149

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

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

Date: 10 October 2023

Before :

DEPUTY ICC JUDGE CURL KC

- -

Between :

BRIDGER & CO LIMITED

Applicant/Debtor

- and -
SPECIALIST LENDING LIMITED
(T/A DUOLOGI)

Respondent/Petioner

- -
- -

Philip Bridger, a director and solicitor of the **Applicant**
Oliver Hyams (instructed by **Ashurst LLP**) for the **Respondent**

Hearing date: 5 October 2023

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APPROVED JUDGMENT

Deputy ICC Judge Curl KC **Tuesday, 10 October 2023**
(**09:02**am)

Judgment by **DEPUTY ICC JUDGE CURL KC**

1. This is my judgment in an application dated 27 July 2023 made under r.7.24 of the Insolvency (England and Wales) Rules 2016 ("Rules") for an injunction to restrain advertisement of a winding up petition. Specialist Lending Limited, trading as Duologi, is the petitioner ("Petitioner"). The company against which the petition has been presented is Bridger & Co Limited, which carries on business as a firm of solicitors ("Company").

2. The petition is based on a debt said to arise under a contract that is described by the parties as a disbursement funding agreement, which I will refer to as the "DFA". There is a disagreement between the parties about whether it was entered into on 9 or 19 March 2020, although nothing seems to turn on that discrepancy. The DFA was an agreement whereby the Petitioner would advance money to the Company to fund disbursements to enable clients of the Company to pursue claims in relation to cavity wall insulation ("CWI Claims").

3. The procedural background to this matter is that on 5 May 2023 a statutory demand was served by the Petitioner on the Company seeking £2.2 million-odd. On 15 June 2023 a petition was presented which was served the next day on the Company. The Company applied on 27 July 2023 for an injunction to restrain advertisement of that petition. Directions were given by ICC Judge Barber on 28 July 2023 and further directions were given by ICC Judge Prentis on 14 September 2023, including that this matter be listed on an expedited basis. The application came before me on 5 October 2023. I heard Mr Bridger, a solicitor and a director of the Company, and Mr Hyams of counsel for the Petitioner. Both served detailed skeleton arguments together with a joint authorities bundle with 33 tabs. In the usual way of these things few of those authorities were referred to in the course of their submissions. I thank them both nonetheless for the efficient way that they dealt with the hearing itself.

4. Until late in the hearing I had expected to give an *ex tempore* judgment on 5 October 2023. Owing to a point that emerged towards the end of the day to do with the capacity of a secured creditor to petition for winding up, and the possibility that a further two authorities not in the bundle might have some bearing on the matter, I reserved judgment in order to consider that point specifically. I am delivering this reserved oral judgment on the morning of 10 October 2023.

5. The parties are agreed on the test that applies when seeking to restrain advertisement of a winding up petition, which is that set out by Mr Justice Norris in *Angel Group Ltd v British Gas Trading Ltd* [2012] EWHC 2702 (Ch); [2013] BCC 265. Although that case concerned an application to restrain presentation of a petition, the principles are equally applicable to an application to restrain advertisement. Norris J gave the following summary at [22]:

> *"The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:*

a) A creditor's 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 part 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 court 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 affidavit 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 judgment: (ibid. at 837B)."

6. As a general rule, the court will take on a hearing of this kind the applicant company's evidence at its highest and assume that it would come up to proof at trial, save where it is incredible or is contradicted by the contemporaneous documents. It was not suggested by Mr Hyams that I should not take the Company's evidence at its highest for these purposes.

7. A number of arguments are raised by the Company in opposition to the advertisement of the petition and these overlap to some degree. Essentially the question is whether the Petitioner is entitled to have recourse against the Company for the repayment of sums that became due some 24 months after they were advanced, or whether the Petitioner is restricted to recoveries from the CWI Claims themselves and from after the event (ATE) insurance policies taken out in relation to those claims. It really boils down to who assumed the risk that the CWI Claims would not lead to recoveries in relatively short order.

8. Although several different points of law have been advanced by the Company, there appears to be relatively little disagreement between the parties on what the law is. Instead, it is the consequences of that law for the current facts that is disputed.

9. I take the arguments in the order in which they are addressed in the Company's skeleton argument, which is not necessarily the same order as they were taken at the hearing.

Misrepresentation

10. The Company's first argument concerns misrepresentation, although the Company has titled the relevant section in its skeleton argument *"inducement"*, which is a clear indication of the way it advanced its case on this point. I have been referred to *Chitty on Contracts*, 34th edn, §9-006 and following, for the relevant principles of actionable misrepresentation. To make any progress at all, the Company needs to show arguable grounds that there was a misrepresentation (i.e. a false statement of fact), which then operated on the mind of the Company (i.e. inducement). Mr Bridger has focused in his skeleton argument on the question of inducement, rather than on the prior requirement for present statement of a present fact that is false. The skeleton argument takes it as read that there was a misrepresentation, without analysing what it is that the Petitioner is said to have represented that was false.

11. In deciding whether there is a substantial dispute on the question of misrepresentation, it is necessary to pay close regard to the Company's evidence and I shall come to that in a moment. First, however, to place that evidence in context, it is necessary to consider two provisions of the DFA. Clause 4 of the DFA is headed "Repayment" and it reads:

> *"Subject to our rights under clause 5(b), you must repay the total value of Disbursements funded by this facility, outstanding in respect of each individual Claim, plus all interest accrued on the earliest to occur of the following:*
>
> *(a) you cease to act in respect of a Claim in respect of which you have drawn down available funds; or*
>
> *(b) you have received payment(s) of settlement proceeds in respect of the Claim; or*
>
> *(c) you receive payment from the relevant insurer under an after the event insurance policy in respect of a Claim; or*
>
> *(d) the expiry of 24 months following the first drawdown in respect of an individual Claim,*
>
> *Any sums due from you in respect of this agreement shall be made in full and cleared funds no later than 7 days after their due dates for payment without deduction, set off or counterclaim for any reason whatsoever."*

12. Next clause 6(c) of the DFA, which is set out under the heading "Covenants":

> *"For the duration of the facility:*
>
> *...*
>
> *(c) 100% of the value of funded Disbursements must be within 24 months of the date that they were funded.*

Breach of the covenant in clause 6 (c) will result in a Draw Stop and if, after a period of 7 days remain in breach will be an Event of Default."

13. Where an *"Event of Default"* occurs, the Petitioner is entitled by clause 5(b) to cancel all outstanding obligations and declare that all sums are immediately due and payable. The Petitioner also has the right by clauses 2(c) and 5(d) to recover the case files and transfer them to an alternative solicitor.

14. Mr Hyams says that the DFA, properly construed, requires the disbursements advanced to be repaid by the Company on a rolling 24-month basis after they have been incurred. In other words, the facility permits sums to be drawn on an ongoing basis up to the credit limit but drawings must be serviced on an ongoing basis once each drawing reaches its 24-month anniversary. Although the DFA is not a model of drafting, in my judgment that is the correct interpretation of the arrangement.

15. Mr Bridger says that the Petitioner misrepresented the position to the Company such that the Company was induced to enter into the DFA. As I have said, it is necessary to consider carefully the Company's evidence on what the relevant representation is said to have been. I turn now to the candidates for any *"misrepresentation"* in the Company's evidence. In Mr Bridger's first witness statement dated 20 July 2023 he says at §11 and §12:

> *"11. It was explained to us that the only reason why '24 months' had been inserted into the DFA was because an agreement of this nature had to have an end date and the Petitioner and their partners having been aware of [cavity wall insulation] claims for almost 2 years or more by then and funded large quantities of cases, had projected that such cases would take 12-15 months to conclude, meaning that the drawdown for each case could be discharged well before the expiration of the said 24 month period. This gave us confidence, placated my concern and induced us into the agreement.*
>
> *12. In assuring me further, the Petitioner added that if the cases happened to take longer, which they doubted, then they would not be heavy handed concerning the funding as they wanted to enjoy a fruitful relationship with the solicitors' firms on their panel and really wanted to expand out further into litigation funding."*

16. In Mr Bridger's second witness statement he replies to the witness evidence of the Petitioner, the witness being Helen Edwards of the Petitioner, and at §23 he refers to what the representations are said to have been as follows:

> *"HE1 [Ms Edwards' first witness statement] is at pains to recite the DFA with specific reference to clause 4(c) and 5(a)(xv). Dealing firstly with the 2 year Draw Stop, I stress that the Petitioner sold us the scheme on the basis that they were confident that the cases would be settled within 12-15 months. We had never done these cases before so knew no better and were reliant upon the Petitioner in this respect. They further allayed our concern by confirming that the DFA had to have a Draw Stop because it was a contract and for no other reason and they were confident that 24 months would be more than enough to settle the cases, settle the costs and repay the investment in the disbursements. It was made clear to us that the Company would never have to call upon its separate reserves to repay the investment in the disbursements as this would be met*

by the costs and success fee from the successful cases, or a claim against the ATE insurance for those claims that had not been successful and that this was why the Petitioner took security of the case, rather than over the firm. These were implied terms of the DFA and had we not had this assurance, we would never have entered into it as it would have had no appeal at all."

17. As I have said, it was not suggested by the Petitioner that I should do anything other than take that evidence at its highest, and I have done so, although it is fair to note that Mr Bridger remarked during his oral submissions in reply that he was not too sure what had happened when. I also note that the Company's evidence is very short on particulars (who, when, where, etc) in relation to the alleged representations.

18. Mr Hyams submits that the matters alleged would not be understood by a reasonable person as a representation of existing fact. That seems in my judgment to be correct. But further, and in any event, the alleged misrepresentations set out in Mr Bridger's first statement are not actually inconsistent with what happened. The *"misrepresentations"* are not said to have suggested that clause 4(d) of the DFA was a dead letter. Rather, the Company's allegation is that someone said that the contract *"had to have an end date"*.

19. In my judgment, the Company's argument that this precludes the Petitioner from relying on clause 4(d) does not make sense: an *"end date"* is only required if there is to be a due date for repayment. If the Petitioner was to be repaid only using recoveries from CWI Claims or ATE as and when they came in, if they ever did, then there would be no need for an *"end date"*. The explanation said to have been proffered by the Petitioner, namely that there needed to be an end date, is in my judgment a recognition that there will come a time when the sums fall due for repayment in the event that there have not been recoveries from CWI Claims or ATE. This is entirely consistent with both parties having held the hope or expectation that it would be unnecessary for the Company to be required to make payment itself because recoveries would be sufficient.

20. Moreover, the representation that the Petitioner would not be heavy handed if the CWI Claims took longer than 24 months to pursue does not say or imply, in my judgment, that the Petitioner would not be entitled to have recourse against the Company if sums were unpaid. In fact, it suggests the opposite: it indicates that the Petitioner would have rights of recourse but would not be heavy handed in exercising them. Mr Bridger's second witness statement adds little: the *"misrepresentations"* were, at their highest, an expression of an expectation that recoveries from the CWI Claims and related ATE were likely to be sufficient to repay the sums advanced under the DFA within 24 months, but I do not consider that the allegations go any further than that.

21. Overall, in my judgment there is nothing to suggest that the alleged representations were false statements of existing fact and accordingly there is no substantial dispute over the debt claimed in the petition on the ground of misrepresentation.

22. I should also mention that clause 12(d) of the DFA is a complete agreement clause, and although there is no need ultimately to have regard to this, the combination of the words alleged to have been used in the context of the existence of clause 12(d) firmly underlines that there is no substantial dispute on the misrepresentation issue.

Implied terms

23. The Company's next argument is that there were implied terms in the DFA that preclude the Petitioner from petitioning for winding up. The parties were again essentially agreed on the relevant legal principles. I had cited to me the summary of the principles in *Yoo Design Services Ltd v Iliv Realty Pte Limited* [2021] EWCA Civ 560 per Lady Justice Carr at [51]:

> "51. In summary, the relevant principles can be drawn together as follows:
>
> *"i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;*
>
> *ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;*
>
> *iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;*
>
> *iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;*
>
> *v) A term will not be implied if it is inconsistent with an express term of the contract;*
>
> *vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;*
>
> *vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;*
>
> *viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."*

24. No specific proposed implied term was identified in the Company's written submissions. When asked at the hearing what term should be implied into the DFA, Mr Bridger had some difficulty in identifying quite what term, on the Company's case, needed to be implied. Mr Bridger accepted in oral submissions that he *"struggled on the wording"* but that it really came down to the proposition that *"if the cases could not be settled within two years of each drawdown, then the [Petitioner] must exercise its right to seize the files"*. In other words, the Company's case was that the Petitioner's recourse was against the CWI Claims themselves, not the borrower Company.

25. I asked Mr Bridger what would happen, on the Company's analysis, if the borrower under the DFA, i.e. the Company, simply stopped doing the work, essentially drowning tools and walking off the job. Mr Bridger considered that there would still be no recourse by the Petitioner against the Company. Mr Bridger nonetheless confirmed that the Company had hoped to make a profit from the arrangement under the DFA. Thus the Company's case is that all the risk is on the Petitioner; the Company gets the chance to make a risk-free profit even if the claims are unsuccessful and even if the Company gets fed up halfway through and stops work.

26. I disagree with Mr Bridger that such a term is so obvious that it must be implied into the contract for it to have business efficacy. In my judgment, the term proposed shifts the DFA from a facility that is subject to a repayment obligation, as it appears to be on its face, to effectively a non-recourse facility where the lender has to take a chance on the CWI Claims. But the DFA as drafted clearly puts the risk of the CWI Claims not succeeding on to the borrower, i.e. the Company. Far from being needed for business efficacy, I consider that proposed implied term would be an uncommercial one and it would require clear wording to bring it about.

27. In reaching this conclusion, I am also mindful, as Mr Hyams pointed out, that an implied term cannot cut across an express term, which in my judgment this proposed implied term plainly would. The DFA works perfectly well if, as it says, after 24 months the borrower Company starts servicing such part of the debt that has fallen due for repayment. There is nothing stopping the Company doing that other than the fact that it has insufficient money to do so. There is nothing about the situation that requires an implied term to re-allocate the risk under the contract. In my judgment that is the clear and obvious architecture of the DFA and there is no substantial dispute on this point either.

Frustration

28. I move on now to the arguments based on frustration that were raised by the Company. Again, the parties were essentially agreed on the law. Both sides referred me in their skeleton arguments to the case *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. Mr Hyams summarised Lord Simon's judgment in the *Panalpina* case as follows: frustration of a contract takes place when there supervenes an event, without default of either party and for which the contract makes no provision, which so significantly changes the nature, not merely the expense or onerousness, of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the strict terms of the contract in the new circumstances. In such a case the law declares both parties to be discharged from further performance.

29. Mr Bridger submits that performance of the DFA has been frustrated. Five heads of frustration are put forward in his first witness statement. It is fair to say that the main ones put forward are the advent of the COVID-19 pandemic and what is said to have been an industry-wide problem with experts in cavity wall cases. I take each of the five in turn.

30. Firstly, Mr Bridger identifies a problem with ATE insurance. I do not consider there is any evidence that this was an event of frustration. ATE is an obligation of the Company under the DFA under clause 9(j) and there is simply no evidence that any problem with ATE insurance stopped any cases from being progressed.

31. The second head of frustration identified by the Company is that the Petitioner put a stop on drawdowns until August 2020 because of COVID. I remind myself here that the DFA was entered into in March 2020 and so there was a period of around five months when no drawdowns were permitted by the Petitioner owing to COVID. However, it is common ground that the stop on drawdowns was lifted in August 2020 and that the Company then began to draw down either in late August or early September 2020. There is some uncertainty about the precise date of the first drawdown by the Company but nothing appears to turn on that.

32. In my judgment this is not an event of frustration and it makes no difference to anything that actually happened under the performance of the DFA by either party. This is because the Company had not drawn down any funds by the time that the Petitioner put a COVID-induced stop on such drawdowns, which means that there was no liability on the part of the Company to repay at that time; the 24-month clock for the servicing of any drawdowns had not started running because there had been no such drawdowns. Subsequently, the Company chose to begin making drawdowns in late August or early September; that was when the liability to repay was incurred and the 24 months then began to run. I am unable to see how the stop on drawdowns until August 2020 is said to have frustrated the contract.

33. The third aspect put forward is said to be the consequences that the advent of COVID specifically had after drawdowns had been made. It is alleged by the Company that COVID caused problems with experts attending properties and, Mr Bridger suggests, the courts largely shut their doors.

34. For the Petitioner, Ms Edwards points out at §28 of her first witness statement that the Company's first drawdowns under the DFA took place around five months after the first COVID lockdown. Even without this evidence, I would be prepared to take judicial notice of the fact that the initial COVID shock, the first lockdown, and the shift by the courts and many other industries to online working happened towards the end of March 2020. As I have said when dealing with the second alleged head of frustration, it is common ground that there was no drawdown by the Company until either late August or early September 2020. That is what started the clock ticking on the 24-month period before drawings would fall due to be serviced on a rolling basis. As at late August/early September 2020 COVID could not, on any view, be regarded as a supervening event which so significantly changed the nature, not merely the expense or onerousness, of the outstanding contractual rights that the parties could not reasonably have contemplated it.

35. COVID was plainly in contemplation in August and September 2020. Anyone assuming a commercial liability at around that time would certainly have factored COVID into their

reckoning. On any view, COVID was baked into the commercial scene and every other kind of scene by late summer 2020. At that time, the Company could, as Mr Hyams points out, have walked away and made no drawdown, but it chose to do so at a time when COVID and the most extreme disruption caused by it were by then facts of life. The first drawdown was made in a climate of great uncertainty about when the crisis would lift. If COVID could be regarded as a supervening event, then it had well and truly supervened prior to the Company drawing down any money at all under the DFA.

36. Mr Hyams also points out that the Company did not draw down for one or two CWI Claims and see how things went; they drew down on 221 claims, *"they went in quite hard"*, as Mr Hyams puts it. In reply to that, Mr Bridger says that when the Company drew down they hoped COVID would soon clear up. The Company was, of course, entitled to think that and I do not suggest that they were wrong to have entertained those kind of hopes; almost everyone entertained hopes of that kind in the summer of 2020. But the failure of those hopes to eventuate cannot be regarded as giving rise to a supervening event on or after the drawdowns having been made, because COVID was an everyday reality by that time.

37. The fourth alleged head of frustration concerns expert evidence. Mr Bridger submits that there were a number of problems with getting in expert evidence for the CWI Claims. These problems are said by the Company to have included the fact that a particular expert that the Company had expected to use had had his integrity questioned in court proceedings; the existence of a problem procuring experts generally in the market; and developments in the relevant case law in July and August 2021 requiring experts to have actually visited people's properties, rather than simply signing off on reports, as I am told was the previous practice. The Company submits that these features produced an urgent need for what were described as *"resurveys"*. Mr Bridger criticises the Petitioner for not having identified a suitable expert between certain dates. He emphasises that the scheme was sold to the Company by the Petitioner on the basis that the Petitioner would supply an expert.

38. In my judgment, the first critical point to note is that there is nothing in the DFA or in any other material I have seen requiring the Petitioner to procure or provide an expert. Mr Bridger was asked about this during the hearing and did not really have an answer to it. Further, when considering whether any of the problems with the experts can be regarded as a supervening event that is so beyond the contemplation of the parties that it renders performance impossible, one has to have regard to the fact that the DFA was a funding arrangement whose object was to fund litigation. In my judgment, changes in case law and changes in market dynamics surrounding the availability of experts can be expected to be priced in as known risk factors when parties undertake litigation. That is particularly so where a specific form of litigation is being done on a volume basis with a view to speculative profit. I do not mean to suggest there is anything wrong with engaging in an enterprise of that kind, but matters that are obviously inherent in the nature of the particular business or asset class that is the subject of a contract, which in my judgment the issues surrounding the experts are in this case, cannot seriously be regarded as events of frustration.

39. Mr Bridger further submitted in support of this point that without further funding for replacement expert reports there was no way the CWI Claims could progress. For that reason, he submitted, clause 4(d) of the DFA (i.e. the requirement for repayment of any drawdown 24 months after it was drawn) was incapable of performance. In my judgment the premise does not justify the conclusion. This is essentially the same point as that mentioned

earlier when dealing with the argument on implied terms: clause 4(d) was not *"incapable"* of performance in the necessary sense; it could have been performed by the Company simply servicing that part of the debt that had fallen due. Such performance could have been made, just not from recoveries from CWI Claims or associated ATE. The only thing that prevented the Company from performing the contract was the fact that it did not have cash available to do so, and that in my judgment is not an event of frustration.

40. The fifth head of alleged frustration raised is essentially the same as the fourth head. It is said that sorting out the experts took a long time and took them past the 24-month backstop. I do not accept that this is an event of frustration for the same reasons as I have already given.

41. That concludes the arguments raised on frustration and, for reasons that will be evident from what I have said, I do not consider there to be a substantial dispute arising from the Company's frustration arguments.

Agency

42. I move on then to the arguments raised by the Company concerning agency. I was unable to follow the Company's submission under this heading. Mr Bridger contended that the Company had become the Petitioner's agent, but he was not able to articulate, at least in a way that I was able to understand, what the consequence was said to be of that for the petition debt.

43. Mr Hyams pointed to clause 12(g) of the DFA, which provides that the Company shall not become the Petitioner's agent. But even if I assume for present purposes that a clause of that nature may not necessarily be decisive, Mr Bridger was unable to explain where that got the Company. I do not understand how the agency point is said to disclose a defence, and in my judgment it does not do so.

Repudiation

44. Repudiation was the next legal argument raised by the Company. There was again no dispute between the parties that what is required here is a failure of performance that amounts to a repudiation, although I should make clear that the parties did not agree on what the legal consequence would be if there was found to have been a repudiatory breach.

45. Mr Bridger submitted that the Petitioner's refusal to lend more money to fund experts was the particular matter relied on by the Company as giving rise to a failure of performance amounting to a repudiation. The immediate difficulty for the Company is that there is no suggestion in the evidence that any request for drawdown was refused by the Petitioner at any time before 24 month period since the first drawdown had expired. In other words, there is no evidence of any refusal to fund on the part of the Petitioner prior to the Company incurring an *"Event of Default"*. Mr Bridger's evidence does not address this point with particularity. Indeed, Mr Bridger made clear in oral submissions that he did not personally make any requests for drawdown and I note that there was no evidence before the court from those that did.

46. In my judgment, the evidence taken as a whole indicates that, after the Company had made it clear, as it did in its email of 8 July 2022, that it could not repay its existing

drawings, no further request was made by the Company for any further drawdown until 27 September 2022, which was after the expiry of 24 months since the first drawdown. The Petitioner made it clear on 19 December 2022 that without a payment plan from the Company it was not prepared to entertain any further drawdowns. In my judgment no substantial dispute on repudiatory breach is disclosed by this evidence. There is simply no evidence of a refusal by the Petitioner of any drawdowns until after an *"Event of Default"* had occurred.

Force majeure

47. I turn to the arguments raised on force majeure. The parties made detailed submissions on whether a particular force majeure clause in the DFA was effective. Mr Bridger says that the clause is not binding to cover off the supervening events that occurred, in particular the COVID and expert issues. Given my conclusions on frustration, I do not need to deal with this argument because I do not find that any of the matters put forward would, but for that force majeure clause, have frustrated the contract. Accordingly, it is unnecessary for me to deal with this argument and I decline to do so.

Abuse of process

48. The final argument raised by the Company concerned abuse of process. The legal position is that it is an abuse of process for a petitioner to present a winding up petition not for the purpose of obtaining a winding up order but for some other purpose. I was referred by Mr Bridger to the case of *Re Majory (a debtor)* [1955] Ch 600, although I have also had regard to the most recent high authority on the point, that being the Privy Council decision in *Ebbvale Limited v Hosking* [2013] UKPC 1; [2013] 2 BCLC 204.

49. I can deal with this point shortly. There is nothing in the evidence, in my judgment, to indicate the presence of any abuse. I am unable to identify where the abuse might lie. On the proper construction of the contract, £40,680 fell due for repayment at the end of August or beginning of September 2022, being 24 months after first drawdown. The Company had indicated that it was unable to repay by an email dated 8 July 2022 and it then failed to repay when called upon to do so at the expiry of the 24 month period. That gave rise to an *"Event of Default"*, which entitled the Petitioner to declare all sums due. The Company's case on abuse seems to come down to an allegation that the Petitioner knew that the Company would seek to raise a dispute and knew that the Company could not repay. In my judgment, neither of those points is unusual and they do not, of themselves, render a petition an abuse.

50. That the Petitioner knew that a dispute would be raised by the Company does not, of itself, render the petition an abuse. If the dispute is not a good one, i.e. it does not disclose a substantial dispute in the sense discussed by Norris J at §5. above, then it is not an abuse to present a petition in the face of it. The fact that the Petitioner knew that the Company could not pay is, self-evidently, not an unusual feature within the context of winding up.

51. There is no evidence that the Petitioner does not genuinely want to achieve a winding up order, which is the object of the petition process, and there is nothing to suggest that its real purpose is to obtain a collateral advantage as opposed to obtaining a winding up order. Accordingly, I reject the contention that the petition is an abuse of process on the evidence before the court.

52. That concludes my reasoning on the legal arguments raised by the Company and I turn now to the point that meant that this judgment was not delivered on the day of the hearing.

Security

53. As will be evident from what I have said, Mr Bridger's submissions were focused on the central premise that the Petitioner's only recourse was against the CWI Claims that it had funded and associated ATE insurance, rather than against the Company. Key to this was the Petitioner's security interest in the CWI Claims that it had funded. Mr Bridger's argument was that the true effect of the contractual arrangements was that the Petitioner was required to stand on its right, as he put it and as I am told is an expression used in the funding industry, to *"lift and shift"* the CWI Claims and put them with other solicitors to be pursued. The Petitioner's rights over the CWI Claims are described in the documents as security rights. In brief terms, there is an Agreement to Assign in the bundle, which gives the Petitioner a right, on the occurrence of an *"Event of Default"*, to call for an assignment of the benefit of the Company's contract with its clients, who are the claimants in the ongoing CWI Claims, and to call for the case files. Those assets are defined as the *"Secured Assets"* and they are expressed to be security for what are defined as the *"Secured Liabilities"*.

54. Although Mr Bridger did not suggest that the Petitioner was precluded simply by the existence of security from petitioning, and instead based his argument on what he said was the effect of the DFA, his argument was essentially that the Petitioner must stand on its security.

55. Having heard both parties' submissions, I raised towards the end of the hearing whether, if the Petitioner held security for the petition debt, this affected its ability to present a petition and seek a winding up order. This was based on the proposition that a secured creditor's rights take effect outside the liquidation and such a creditor does not have an interest in the assets subject to the statutory trust for creditors that arises when a winding up order is made.

56. The point is discussed in *McPherson & Keay on the Law of Company Liquidation*, 5th edn, at §3-103. This refers to two cases as authority for the proposition that a secured creditor may petition. Those cases are *Re Lafayette Electronics Europe Ltd* [2006] EWHC 1006; [2007] BCC 890 and *Re Sushinho Ltd* [2011] All ER (D) 32 (Mar). The learned editors of *McPherson & Keay* conclude that a secured creditor is a creditor for the purposes of a petition, but they go on to say at the end of paragraph 3-013:

> *"While a secured creditor is a creditor for the purposes of a petition, the views of such creditor are not likely to be regarded as highly by a court considering whether or not to make a winding-up order as those of the unsecured creditors."*

57. There is then a detailed discussion at paragraph 3-108 of *McPherson & Keay* concerning the relative weight to be given to creditors of different classes, including secured and unsecured creditors, when it comes to the hearing of the winding up petition.

58. In *Re Lafayette*, His Honour Judge Norris QC, as he then was, sitting as a High Court judge, accepted a submission that former administrators with the benefit of a statutory charge over the company's assets to secure their fees nonetheless had standing to present a petition based on those fees. The particular point that Judge Norris QC treated as decisive

appears to have been the inability of the administrators to sue for those fees, rather than the petitioner's general submission that the existence of a security did not deprive them of their standing as creditors: see [7]. There is nothing in the judgment, however, to suggest that the judge did not also accept that general submission.

59. The report of *Re Sushinho* cited in *McPherson & Keay* ([2011] All ER (D) 32 (Mar)) regrettably does not include the judgment itself, which appears to have been delivered *ex tempore* and not to have been transcribed. The report to which I have referred is simply a headnote digest. It is unfortunate not to have the benefit of the judgment, which the summary headnote indicates was delivered in strong terms. The headnote indicates that *Re Sushinho* was more directly relevant to the instant facts than *Re Lafayette*. It concerned a petitioner landlord who held a rent deposit that was more than sufficient to satisfy the petition debt. The petition was ultimately withdrawn and there was an argument about costs. The debtor said that the petition had been improperly presented as the landlord was fully secured by the rent deposit and could have just taken payment from that deposit, as indeed it appears ultimately to have done. Mr Justice Mann rejected that argument and held that the petitioner was entitled to its costs, having properly presented a petition, despite the existence of the rent deposit. The headnote records that Mr Justice Mann held that it was *"trite law that a secured creditor could get a winding up order"* and continued:

> *"In the instant case, there was clear evidence that the applicant could not pay its debts as they fell due. The ability to pay rent was a crucial obligation and failure to pay it was an indication of its inability to pay. The respondent was merely entitled, not obliged to take the rent money from the deposit held on trust for the applicant and there were many good reasons to leave the deposit intact. The respondent therefore had locus standi to bring and serve a statutory demand and was entitled to petition for winding up…"*

60. That is similar to the instant case, where under the DFA the Petitioner has a right, but not an obligation, to *"lift and shift"* the cases. Indeed, the current case would seem to be a stronger case for the Petitioner than *Re Sushinho* was for the landlord, in that there is considerable doubt, which I will come back to in a moment, over the adequacy of any security, which was not the case in *Re Sushinho* where the rent deposit appears to have been adequate to satisfy the outstanding rent.

61. The report I have of *Re Sushinho* does not include the judgment itself and I bear this limitation in mind. The content of the headnote is, however, consistent with *Re Lafayette*. Those cases are also consistent, as Mr Hyams pointed out, with the absence of any restriction in the Insolvency Act 1986 or the Rules on the ability of a creditor to present a winding up petition based on a secured debt, a position that falls to be contrasted with the detailed provisions restricting the right of a creditor to present a bankruptcy petition based on such a debt. Taking all this into account, it is clear in my judgment that the Petitioner has standing to present the petition, even if it has security for the petition debt.

62. I should record that Mr Hyams made clear at the hearing that he may well want to contend, should the point become relevant, that the Petitioner is not properly to be regarded as a secured creditor or, if it is, that any security it holds for the petition debt has no value. In my judgment, those are arguments that are more appropriately dealt with at the hearing of the petition, when the court will have to weigh up the Petitioner's interest in seeking a

winding up order and to take into account the views of any other creditors who may appear following advertisement of the petition. I note that there is currently one supporting creditor, despite the fact that the petition has not yet been advertised, although Mr Bridger has equally made clear that the Company will seek to raise a dispute on the supporting creditor's alleged debt at the appropriate time. Nothing in this judgment should be taken as saying anything at all about those questions, on which the court has heard no submissions beyond the bare identification by the parties of their positions in outline. I am deciding no more than that, if the Petitioner is secured, then it has standing nonetheless to present the petition and to be heard on it. This court is not considering whether or not to make a winding up order; rather, it is considering the prior question of whether or not the petition should be advertised. The purpose of advertisement is to enable notice of the petition to be given to other creditors and to enable them to come forward and be heard either in support or in opposition to the making of a winding up order. What weight to attach to any of those creditor voices, including that of the Petitioner, is a matter for the court hearing the petition.

Conclusion

63. I conclude that none of the grounds put forward in this application to restrain advertisement gives rise to a substantial dispute and I decline to make an injunction to restrain advertisement. I will now ask Mr Hyams what directions he seeks for progress of the petition and hear the parties' submissions on that. That concludes my judgment.