Neutral Citation Number: [2022] EWCA Civ 1376

Case No: CA-2022-000020

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
BUSINESS AND PROPERTY COURTS IN MANCHESTER
Insolvency and Companies List (ChD)
His Honour Judge Cadwallader (sitting as a Judge of the High Court)
[2021] EWHC 3478 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2022

Before:

LADY JUSTICE THIRLWALL
LADY JUSTICE ASPLIN
and
LORD JUSTICE BIRSS

- -

Between :

ANNETTE DORAN AND JAMES DONALD DORAN	**Appellants**
- and -	
COUNTY RENTALS LIMITED T/A HUNTERS	**Respondent**

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Arnold Ayoo (instructed by **Athena Solicitors LLP**) for the **Appellants**
Simon Passfield (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 11 October 2022

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on 24 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lady Justice Asplin:

1. This appeal is concerned with the proper construction and effect of Schedule 10, Part 2 of the Corporate Insolvency and Governance Act 2020 (CIGA) in its 2020 form and the Practice Direction - Winding Up Petitions and the Corporate Insolvency and Governance Act 2020, reported at [2020] Bus LR 1847 (the "Practice Direction"). The legislation and the procedure outlined in the Practice Direction were intended to protect companies from winding up where they had been adversely affected as a result of the coronavirus pandemic.

Background

2. In this case, the Appellants, Annette and James Doran (referred to together as the "Dorans") presented a petition for the winding up of the Respondent, County Rentals Limited (the "Company") on 5 October 2020 (the "Petition") on the basis that pursuant to Schedule 10 of CIGA, the Company was insolvent and unable to pay its debts and the Dorans had reasonable grounds for believing that coronavirus had not had a financial effect on the Company or that it had had a financial effect but the Company would still have been insolvent and unable to pay its debts in any event.

3. In summary, the grounds relied upon in the Petition were that: the Dorans are the freehold owners of certain properties; in early 2014 they had appointed the Company as managing agent of those properties and amongst other things, the Company was responsible for the collection of rent; the Dorans had recently discovered that the Company had failed to account to them for all of the rents; a demand was made in the sum of £65,442.55 on 27 August 2020, being the amount of rent which the Dorans believe had not been accounted for during the period from 2014 until August 2020; and the Company had failed to pay that sum or to secure or compound to the Dorans' satisfaction for that sum or any part of it. Accordingly, it was stated that the Company was unable to pay its debts as they fell due and in the circumstances it would be just and equitable that the Company should be wound up.

4. It was common ground that the Company had paid some of the rents into an account at Barclays Bank. The Company alleged that it had done so upon the instruction of the Dorans, although it was unable to produce any documentary evidence of the instruction. It nevertheless relied upon its standard practice to verify bank account changes orally with the client and the fact that it had sent monthly statements of rents collected and payments made to the client. The Dorans on the other hand contend that the account at Barclays Bank is unknown to them. They say that they had provided no such instruction and, accordingly, the monies remain due and owing and had been due from the time they were paid by the tenants of the properties. They had first queried the missing payments and informed the Company that the Barclays Bank account was "totally unknown" to them in March 2020 and had made a formal complaint in June 2020 which was followed up by the demand in August of that year.

5. The Dorans contended, therefore, that the failure to pay the rents to them at the times on which they were due in the period from 2014 until 2019/2020 was enough to deem the Company to be unable to pay its debts as they fell due pursuant to section 123(1)(e) of the Insolvency Act 1986 (the "1986 Act") before the coronavirus pandemic in March 2020 and before CIGA came into force in April 2020. As a result, it was said that the ground would apply even if coronavirus had not had a financial effect on the

Company ("the coronavirus test"). The Company, on the other hand, contended that the Dorans had not adduced any evidence to suggest that it would have been unable to pay the alleged outstanding rent if the issue had been raised pre-pandemic and that in any event, the alleged debt was disputed on substantial grounds.

Decisions below

6. In accordance with paragraph 4.2 of the Practice Direction, the Petition was listed for a preliminary hearing before District Judge Richmond on 9 February 2021. He dismissed the Petition on the basis that it was not likely that the Court would be able to make an order under section 122(1)(f) of the 1986 Act having regard to the coronavirus test, having noted the very unusual set of facts and that the monies were being paid, albeit into the Barclays Bank account.

7. The agreed note of his judgment records that: the district judge noted that there was a "strangeness" about the Petition; that the Dorans had not queried the missing payments for six years; and that "[H]ad you asked the Company in, for example, 2019, whether they had been discharging their obligations, they would have said 'of course'".

8. He also noted that he had been asked to "grasp the nettle" because the debt was disputed on substantial grounds. He declined to do so on the basis that unless it was a "no-hope petition", the preliminary hearing was not a suitable forum to dispose of the Petition on the merits. He also noted that the evidence had not been directed to that issue as fully as it might have been and that he was not satisfied that he had the answers to the questions which would be posed at a final hearing, namely: where did the Barclays authority come from?; and why did the Dorans not pursue the question earlier? He concluded, therefore, that he was not minded to grasp the nettle and noted that "it would have to be much clearer".

9. The district judge then noted what was described in the agreed note as the "unusual factual situation". The note records as follows:

> "It is not a usual trading situation where a debt for goods/services has been incurred and invoices have been rendered. A fundamentally and important differing factor, is that the Company was paying these debts as they went along, which is evidence of their solvency at the time.
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> . . .
>
> The fact that the Company seems to have been paying rents into the Barclays account suggests that they were able to pay debts as they fell due up to and including the commencement of the coronavirus pandemic. I ask myself the question, would they be unable to pay their debts without the covid pandemic? There is no evidence that is the case. Before the pandemic they were paying their debts – albeit paying into the Barclays Bank account."

He concluded, therefore, that he should not allow the Petition to go any further and that he would dismiss it.

10. Permission to appeal was granted by Snowden J, as he then was, by an order dated 18 June 2021. Despite the fact that the district judge had been sitting in the High Court, Snowden J also directed that the appeal should be heard by a High Court Judge or a deputy High Court judge. The appeal was heard by HHJ Cadwallader, sitting as a judge of the High Court. The citation for his judgment is [2021] EWHC 3478 (Ch).

11. HHJ Cadwallader dismissed the appeal. The judge held that:

    i) It is open to the court on a preliminary hearing, in the exercise of its case management powers, to strike out and dismiss a petition on grounds other than a failure to meet the coronavirus test if it is consistent with the overriding objective and the proper exercise of the court's case management powers to do so [36];

    ii) CIGA and the Practice Direction do not require the court to consider whether the grounds of the petition are likely to be made out when determining whether the coronavirus test is satisfied: [37]. He went on, also at [37], as follows:

> ". . . CIGA requires the Court to make a determination whether it is likely that the court will be able to make an order under s.122(1)(f) or 122(5)(b) of the 1986 Act before any notice, publication or advertisement of the petition – without which a petition cannot ordinarily proceed. In context, that means 'likely given the restrictions on winding-up petitions for which Sch.10 provides'. The gloss on the statute provided by the Practice Direction is therefore not inaccurate."

    The restrictions are those in paragraph 5 of Schedule 10 of CIGA. Under that paragraph:

> ". . . an order may be [made] if the court is satisfied that the relevant ground would apply even if coronavirus had not had a financial effect on the company. As a matter of construction, the words 'even if' direct the Court to the financial effect of coronavirus, not to the applicability of the relevant ground. The question is the effect of coronavirus on the company. The court is to assume that the ground applies, rather than determining whether it is likely to apply or not, when considering whether, on the assumption that it does apply, it would be applied even without the effect of coronavirus."

    [38];

    iii) As a matter of case management, the court could, nevertheless, consider whether the petition ought to be struck out on other grounds although for that purpose, the test was not mere likelihood [38]; and it was unlikely that Parliament would have intended to raise the threshold for petitions on grounds unrelated to coronavirus [39];

iv) Non-payment of a single undisputed debt may be sufficient to satisfy the court under s.123(1)(e) of the 1986 Act that a company is unable to pay its debts as they fall due but normally, it must be shown that the company was notified and given an opportunity to pay and that this is because it is a matter of inferring inability to pay from non-payment: [41]; He went on, also at [41]:

> "The petitioners did not appear to dispute that the Company believed it was making payments to the Barclays account on instructions and there was no evidence that it was aware that it had any outstanding indebtedness to the Petitioners until March 2020. The fact that the alleged debt had accrued prior to the pandemic was not evidence that the Company was unable to pay its debts as they fell due before the pandemic";

v) It was wrong to say that the district judge considered the Company's pre-pandemic payment of rental monies to the Barclays Bank account to be evidence of payment of debts as they fell due. He considered it as evidence that "it was not unable to pay its debts as they fell due up to and including the commencement of the coronavirus pandemic." [42]. He noted further that:

> "No doubt a failure to discharge debts when they fall due may found an inference that the debtor is unable to pay its debts as they fall due. But where, . . there is a dispute about whether the debts had been discharged and, if they have not, the natural inference that it was only as a result of a mistake, it is impossible to infer from the failure to discharge debts an inability at the time the payments were made, to do so." [42];

vi) The district judge rightly regarded it as relevant to the question of whether non-payment could found an inference of inability to pay that it was only in March 2020 that the matter had been raised with the Company. "If the Company did not know that it was being said that the debt had not been discharged until then, then its failure to discharge it until then [it] (sic) did not support such an inference." [44];

vii) It was common ground that coronavirus had had a financial effect on the Company before presentation of the Petition. The burden was, therefore, upon the Dorans to demonstrate that the Company would have been unable to pay its debts as they fell due even if coronavirus had not had a financial effect on it: [46];

viii) The fact that the rental income allegedly not paid had fallen due before the pandemic was far from sufficient to discharge the burden upon them: [47]; and

ix) There was no need to consider whether to dismiss the Petition on the merits [51].

Legislation and Authorities

12. Before turning to the grounds of appeal, it is important to have the legislative framework and the effect of the main authorities in mind.

13. A company may be wound up by the Court if, amongst other things, it is unable to pay its debts: section 122(1)(f) of the 1986 Act. A company is deemed to be unable to pay its debts in various circumstances set out in section 123 of the 1986 Act, including at section 123(1)(e), "if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due". As Lord Walker put it at [25] of *BNY Ltd v Eurosail plc* [2013] 1 WLR 1408, section 123(1)(e) is not what one would usually describe as a deeming provision. He went on:

> ". . . It does not treat proof of a single specific default by a company as conclusive of the general issue of its inability to pay its debts. The focus is on all the company's debts as they fall due. . . . It may open up for inquiry a much wider range of factual matters, on which there may be conflicting evidence. The range is wider because section 123(1)(e) focuses not on a single debt (which under paragraphs (a) to (d) has necessarily accrued due) but on all the company's debts "as they fall due" (words which look to the future as well as to the present)."

14. Further, it is not in dispute that:

    i) where a debt is due and an invoice has been sent and the debt is not disputed, the failure to pay the debt is itself evidence of an inability to pay unless there is a substantial reason for non-payment:. A bad reason put forward honestly is insufficient, however: *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 and *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44 per Dillon LJ at 50B -D;

    ii) although section 123(1)(e) enables the court to come to the conclusion that a company is unable to pay its debts as they fall due on any evidence which satisfies it of that fact and it is not necessary that there be a demand at all, the court should be slow to reach such a conclusion from the mere non-payment of a debt which has never been demanded of the company: *In re A Company (No. 006798 of 1995)* [1996] 1 WLR 491per Chadwick J at 502D;

    iii) the company should have had an opportunity to pay the undisputed debt: *Re: Easy Letting & Leasing* [2008] EWHC 3175 (Ch) per Morgan J at [11]; and

    iv) section 123(1)(e) requires the court to determine whether the ground is made out at the time of the hearing of the winding up: *Re A Company* [2022] EWHC 1690 (Ch) per Miles J at [54].

15. As I have already mentioned, Schedule 10 of CIGA contains provisions which restricted the winding up of companies in order to provide a measure of protection from the effects of the Coronavirus pandemic. The Explanatory Notes to CIGA state the mischief to which the statute was directed. At paragraph 3 reference was made to the fact that many otherwise economically viable businesses were experiencing significant trading difficulties as a result of the pandemic and that the government enforced social distancing measures and reduced resources were making it hard for many businesses to continue to trade and meet their legal duties. It went on to state that: "This Act is aimed at ensuring businesses can maximise their chances of survival".

16. The provisions and purpose of CIGA are explained in more detail as follows:

> "22. The Government is legislating to temporarily prevent winding-up proceedings being taken on the basis of statutory demands and to temporarily stop winding-up proceedings where COVID-19 has had a financial effect on the company which has caused the grounds for the proceedings.
>
> 24. The Act also creates an additional condition that must be satisfied before a creditor can obtain a winding-up order against a company on the grounds that it is unable to pay its debts. During the restriction period, any creditor asking the court to make a winding-up order on those grounds must first demonstrate to the court that the company's inability to pay its debts was not caused by the Coronavirus pandemic."

17. Initially, the provisions applied to winding-up petitions presented in the period from 27 April 2020 to 30 September 2020. That period was extended on four occasions. Thereafter, the provisions were replaced with effect from 1 October 2021: regulation 3 Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) (No. 2) Regulations 2021/1091. Despite the fact that they no longer apply, we are concerned with the provisions as they stood at the date that the Petition was presented in October 2020.

18. Paragraph 2 of Schedule 10 of CIGA is concerned with the circumstances in which a creditor has standing to present a petition. Where relevant, it is in the following form:

> "(3) A creditor may not during the relevant period present a petition under section 124 of the 1986 Act for the winding up of a registered company on the ground specified in section 123(1)(e) or (2) of that Act ("the relevant ground"), unless the condition in sub-paragraph (4) is met.
>
> (4) The condition referred to in sub-paragraph (3) is that the creditor has reasonable grounds for believing that—
>
> (a) coronavirus has not had a financial effect on the company, or
>
> (b) the relevant ground would apply even if coronavirus had not had a financial effect on the company."

Having been extended by regulation 2(3) of the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020/1031, the "relevant period" was defined for the purposes of this part of Schedule 10, in paragraph 1(3) as beginning on 1 March 2020 and ending on 31 December 2020. It was for this reason that the Petition contained grounds which purported to satisfy paragraph 2(4).

19. Paragraph 5 of Schedule 10 of CIGA is concerned with the circumstances in which the court may wind up a company. Where relevant, it provides that:

> "(1) This paragraph applies where-
>
> (a) a creditor presents a petition for the winding up of a registered company under section 124 of the 1986 Act in the relevant period.
>
> (b) The company is deemed unable to pay its debts on a ground specified in section 123(1) or (2) of that Act; and
>
> (c) It appears to the court that coronavirus had a financial effect on the company before the presentation of the petition.
>
> . . .
>
> (3) The court may wind the company up under section 122(1)(f) of the 1986 Act on the ground specified in section 123(1)(e) or (2) of 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."

Both paragraphs 2 and 5 of Schedule 10 were regarded as having come into force on 27 April 2020 (paragraphs 2(5) and 5(4) respectively).

20. Paragraph 19 of Schedule 10 applies to a petition which is presented under section 124 of the 1986 Act after the schedule came into force and before the end of the relevant period. It applied, therefore, to the Petition in this case. Paragraph 19(2) of Schedule 10 makes clear that notice, publication or advertisement of such a petition may not take place "until the court has made a determination in relation to the question of whether it is likely that the court will be able to make an order under section 122(1)(f) . . . of the 1986 Act."

The Practice Direction

21. The Practice Direction is concerned with the procedure to be adopted in relation to winding-up petitions in consequence of the Coronavirus pandemic and came into force on the same day as CIGA: paragraph 2.3. It applied to winding-up petitions presented during the "relevant period" as defined in paragraph 21(1) of Schedule 10 of CIGA: paragraphs 2.1 and 1.1(7).

22. Paragraph 4.1 provides that upon presentation a petition should be listed for a non-attendance pre-trial review with a time estimate of 15 minutes for the first available date after 28 days from the date of its presentation. The purpose of the non-attendance pre-trial review was set out at paragraph 4.2 as follows:

> ". . . to enable the court to give directions for a preliminary hearing in order for the court to determine whether it is likely that it will be able to make an order under section 122(1)(f) . . . of the 1986 Act having regard to the coronavirus test."

In the case of a petition to wind up a registered company on the basis of section 123(1)(e), the "coronavirus test" is defined by reference to paragraph 5(3) of Schedule 10 of CIGA: Practice Direction paragraph 1(3).

23. Amongst other things, paragraph 5 of the Practice Direction provides that: "[U]ntil the court has concluded that it is likely that it will be able to make an order under section 122(1)(f) . . . of the 1986 Act having regard to the coronavirus test", the petition was to remain private.

24. Paragraph 6 contains provisions in relation to the filing of evidence for use at the preliminary hearing, should the petitioner or the company wish to do so.

25. Paragraph 7 provides that at the non-attendance pre-trial review, if the company does not oppose the petition and "the court is satisfied that it is likely to make a winding-up order under section 122(1)(f) . . . having regard to the coronavirus test", the court shall list the petition for a hearing in the winding- up list. If not, the court may list the preliminary hearing and give such directions as it considers appropriate.

26. Paragraph 8 of the Practice Direction is concerned with the preliminary hearing itself. Paragraph 8.1 provides that at the preliminary hearing:

> "(1) if the court is not satisfied that it is likely that it will be able to make an order under section 122(1)(f) . . . of the 1986 Act having regard to the coronavirus test, it shall dismiss the petition; or
>
> (2) if the court is satisfied on the evidence before it that it is likely that it will be able to make an order under section 122(1)(f) . . . of the 1986 Act having regard to the coronavirus test it shall list the petition for a hearing in the winding up list."

If the court is satisfied in the terms of paragraph 8.1(2) or paragraph 7.1(1) and a direction for listing of the petition is made, the provisions of the Insolvency Rules in relation to giving notice of the petition and its further conduct come into effect: paragraph 8.2. The effect of that paragraph, therefore, is that the petition ceases to be private at that stage.

27. It was such a preliminary hearing which took place before the district judge in this case.

Grounds of Appeal

28. There are five grounds of appeal. They overlap to some extent. In essence, they are:

i) that the judge was wrong in fact and law to decide that the fact that the alleged debt had accrued before the pandemic was not evidence that the Company was unable to pay its debts as they fell due before the pandemic because the Dorans did not appear to dispute that the Company believed that it was making the payments to the Barclays Bank account on instructions, it contended that the debt had been discharged and even if it had not been discharged it was as a result of a mistake. In fact, for the purposes of the preliminary hearing, the Dorans' case should have been taken at its highest and, accordingly, it should have been assumed that no instructions to pay monies to the Barclays account had been given. The fact that it was alleged that if there were no instructions,

the payments to that account had been made by mistake and that the Company believed it was acting on instructions was irrelevant: (Grounds 1 and 4);

ii) the judge was wrong to characterise the district judge's finding that the Company's pre-pandemic payment of rental monies into the Barclay's Bank account was evidence that it was "not unable to pay its debts as they fell due up until the commencement of the coronavirus pandemic". The district judge held that it was positive evidence that the Company was able to pay its debts as they fell due. Even so, it was wrong. Payments to an account which did not belong to the Dorans could not discharge the Company's contractual obligation to pay the Dorans or represent an ability to discharge monies owed to them. It was wrong, therefore, to hold that there was evidence that the Company was not unable to pay its debts as they fell due: (Grounds 2 and 3); and

iii) the judge erred in holding that the supposed failure to pay when the sums fell due does not go to the question of inability to pay because the Company was not told until a much later date that the monies were going into the wrong account. The contractual obligation existed and ignorance of one's failure to pay is irrelevant: (Ground 5).

Discussion and Conclusions

29. This appeal might be considered to be somewhat academic in the light of the fact that CIGA no longer applies. It is relevant to this case, however, and it may be that there are more legacy cases to which it applies. In any event, what was the nature of the enquiry which the court was required to engage in at a preliminary hearing pursuant to the Practice Direction?

30. In this case, it was accepted that the coronavirus pandemic had had an effect on the Company and that in those circumstances, the onus was upon the Dorans to satisfy the court that the Company was unable to pay its debts as they fell due even if coronavirus had not had a financial effect upon it: paragraph 5(3) of Schedule 10 of CIGA. They sought to do so by reference to the non-payment of the rents due to them over the period since 2014, albeit that it was alleged that those monies had been paid into the Barclays Bank account on instruction, they had not been demanded before the pandemic and if no instruction had been given, the natural inference was that they had been paid into the account by mistake.

31. Mr Ayoo, on behalf of the Dorans, submits, however, that at the preliminary hearing the court should have taken the petitioner's case at its highest and assumed that a debt arose and there had been no instructions to pay to the Barclays Bank account. He says that at the preliminary hearing, the court is concerned only with whether the ground would apply *even if* coronavirus had not had an effect on the company (emphasis added). The focus, he says, is on the effect of the virus on the company and the court should not consider the substantive ground at all. That, he says, is for the final hearing of the petition when the petition is heard in the winding-up list, the court having been satisfied that the coronavirus test has been met.

32. For this reason, Mr Ayoo submits that whether the Company believed that it had instructions to pay monies into the Barclays Bank account and that it was discharging

its contractual obligations or whether there was a mistake in that regard, was irrelevant. Neither the district judge nor the judge should have taken those matters into account when determining whether paragraph 5(3) of Schedule 10 of CIGA was satisfied. If the Dorans' case had been taken at its highest, it would have been assumed that no instructions to pay monies into the Barclays Bank account had been given and that there could be no reasonable basis for the Company's belief that it was acting on instructions. A debt had fallen due prior to the pandemic which had not been paid from which it was possible to infer that the Company was unable to pay its debts as they fell due, any mistake was irrelevant, the coronavirus test was satisfied and the Petition should have been listed in the winding-up list pursuant to paragraph 8.1(2) of the Practice Direction.

33. It seems to me that when seeking to determine the nature of the enquiry before the court at a preliminary hearing, it is important to stand back and consider the entirety of the temporary regime created by CIGA which was put in place in order to seek to ameliorate the effects of the pandemic upon companies facing winding up.

34. First, a creditor was not permitted to present a petition on the ground specified in section 123(1)(e) of the 1986 Act unless the condition in paragraph 2(4) of Schedule 10 of CIGA was met. In this case, the relevant condition is at paragraph 2(4)(b), that the creditor has reasonable grounds for believing that the ground in section 123(1)(e) (that the company is unable to pay its debts as they fall due) would apply even if coronavirus had not had a financial effect on the company.

35. Secondly, the court's powers to wind up a company were restricted in the terms of paragraph 5 of Schedule 10 of CIGA. It is important to read paragraph 5 as a whole. Paragraph 5(1) makes clear that the paragraph itself applies where all three requirements set out at (a) – (c) apply. The first is that the petition has been presented in the relevant period. There is no doubt that that was the case here. The second requirement at (b) is that "the company is deemed unable to pay its debts on a ground specified in section 123(1) or (2)" and the third requirement at (c) is that it appears to the court that coronavirus had a financial effect on the company before the presentation of the petition. The third requirement was common ground in this case.

36. What of the second requirement? The natural and ordinary meaning of the words are clear. The paragraph applies where a company is deemed unable to pay its debts on a ground specified in section 123(1) or (2). Further, if paragraph 5 is read as a whole and paragraph 5(3) is read in the light of paragraph 5(1), it is clear that the test in paragraph 5(3) applies only where the requirements in paragraph 5(1) are met. In other words, the company must be deemed to be unable to pay its debts as they fall due in order for the test in paragraph 5(3) to come into play.

37. One comes to the same conclusion if one focusses on the ordinary and natural meaning of the words in paragraph 5(3) themselves. In order to be "satisfied that the ground would apply even if coronavirus had not had a financial effect on the company" it is a matter of common sense that the court must be satisfied that the substantive ground itself applies in order to be in a position also to be satisfied that it would apply, even if coronavirus had not had a financial effect on the company.

38. The court is required, therefore, to consider whether the company is unable to pay its debts as they fall due. There is no room for the assumption to that effect which Mr

Ayoo would like the court to make. Nor is there any reason why the court should take the petitioner's case at its highest for the purposes of the preliminary hearing. The ordinary and natural meaning of the words in paragraph 5 of Schedule 10 of CIGA cannot bear the weight of such a construction.

39. An interpretation of paragraph 5 of Schedule 10 which requires the court to consider whether the company is unable to pay its debts as they fall due is consistent also with paragraph 2 of the schedule which is concerned with standing to present a petition. Paragraph 2(4)(b) provides that the creditor must have reasonable grounds for believing that the ground in section 123(1)(e) (that the company is unable to pay its debts as they fall due) would apply even if coronavirus had not had a financial effect on the company. It cannot be correct that a creditor would have standing even if there were no reasonable grounds to believe that the substantive ground would be made out.

40. Does the Practice Direction require something different at the preliminary hearing stage? Paragraph 4.2 of the Practice Direction provides that the preliminary hearing is "for the court to determine whether it is likely that it will be able to make an order under section 122(1)(f) . . . having regard to the coronavirus test". As I have already mentioned, the "coronavirus test" is defined by reference to paragraph 5(3) of Schedule 10 of CIGA. If one reads paragraph 5(3) into paragraph 4.2 of the Practice Direction, the effect is that at a preliminary hearing the court is required to determine whether it is likely that it will be able to make an order on the substantive ground even if coronavirus had not had the effect referred to. In order to be in a position to determine whether it is likely that such an order will be made, it must be likely that the substantive ground will be made out despite the effect of the pandemic. If it is unlikely that the substantive ground will be proved, the requirement in paragraph 4.2 of the Practice Direction which incorporates paragraph 5(3) of Schedule 10 of CIGA by reference, cannot be met. Furthermore, just as with paragraph 5(3) of Schedule 10, there is nothing in paragraph 4.2 to suggest that the court is required to make any assumptions for the purposes of determining whether it is likely that the court will be able to make an order.

41. Such an approach is consistent with the temporary regime as a whole. In order to avoid damage and prejudice, petitions presented during the "relevant period" were to remain private until the court had determined whether it was likely that the court would be able to make an order under section 122(1)(f) of the 1986 Act. Notice, publication or advertisement of the petition were prohibited. That is the effect of paragraph 19(2) of Schedule 10 of CIGA. As a result, whilst the provisions were in force, it was not necessary for a company to apply for an injunction to restrain advertisement of a petition on the basis that the debt was disputed on substantial grounds or that the petition was otherwise defective, in order to avoid damage to its business and reputation.

42. At the hearing of an injunction to restrain advertisement, if the court were satisfied that there were genuine and substantial grounds for disputing the petition debt, it would be open to it, not only to restrain advertisement of the petition but also to restrain further proceedings on the petition, or to strike it out.

43. It seems to me that privacy having been ensured by virtue of paragraph 19(2) of Schedule 10 of CIGA (until it has been determined whether it is likely that the court will make an order under section 122(1)(f) of the 1986 Act), paragraph 5(3) and the

procedure in relation to preliminary hearings contained in paragraph 4.2 of the Practice Direction had a similar effect. At the preliminary hearing the court was required to consider whether it was likely that a winding-up order would be made, taking into account the effects of the pandemic. In doing so, the court might conclude that it is not likely that the court will be in a position to make an order to wind up the company having regard to paragraph 5(3) of Schedule 10 because there are genuine and substantial grounds for disputing the alleged debt, and dismiss the petition accordingly. The exercise which the court undertakes at the preliminary hearing, therefore, is similar to that which would have been undertaken had it been open to a company to apply to restrain advertisement of the petition. In my judgment, therefore, there is no question of the threshold for petitions having been substantially altered by CIGA, save for the safeguards which were imposed in order to protect companies from the effects of the pandemic.

44. In this case, therefore, it was appropriate for the court to consider whether the inference that the Company could not pay its debts as they fell due could be drawn from the failure to pay the rents over to the Dorans in the circumstances. The court was entitled to consider all the relevant facts including the Company's contractual obligation to pay over the net rents to the Dorans. In doing so, it was also entitled to take into account: the Company's undisputed evidence as to its procedure when taking instructions as to designated bank accounts; its belief that it was paying the rents over to the Dorans as they were collected; the statements of account which were rendered; the fact that the Company had been wholly unaware of the alleged indebtedness until March 2020 and that a formal complaint was not made until June 2020 after the commencement of the pandemic; and the inference that if payments had been made to the wrong account it was as a result of a mistake. Furthermore, there was nothing before the court which would have required it to assume that the Company's belief was not genuine or that it was irrationally held, as Mr Ayoo suggested before us.

45. In those circumstances, the court was entitled to refuse to draw the inference necessary to render it likely that the company would be deemed unable to pay its debts for the purposes of paragraph 5(1)(b) of Schedule 10 of CIGA and the test in paragraph 5(3), included by reference in paragraph 4.2 of the Practice Direction.

46. Furthermore, and in any event, as I have already mentioned, the onus was on the Dorans to satisfy the court that the Company was unable to pay its debts as they fell due *even if* coronavirus had not had a financial effect upon it, in order for the court to be likely to make an order pursuant to paragraph 4.2 of the Practice Direction. They chose to rely solely upon the alleged non-payment of rent in the period from 2014 – 2019/20 to prove an inability to pay debts as they fell due despite the pandemic, in the circumstances to which I have already referred, including the fact that the "formal complaint" asserting that the Dorans had not received the rental income was not made until June 2020, after the temporary regime created by CIGA had come into force.

47. At the preliminary hearing, therefore, the court was required to consider whether it was likely to be able to make a winding-up order having regard to the coronavirus test on the basis that the alleged debt which had arisen *before* the pandemic was evidence that the Company was also unable to pay its debts as they fell due *before* the pandemic. In doing so, the court was not required to make any assumptions. On the contrary, it was entitled to consider the undisputed evidence before it and to take into account the Company's belief that it was fulfilling its contractual obligations and if

not, that the payments to the Barclays Bank account were as a result of a mistake. The court was not required merely to take into account the Company's contractual obligation and to ignore the remainder of the evidence.

48. In my judgment, in the circumstances, on the undisputed evidence before it, the court was entitled to refuse to draw the necessary inference and therefore, to conclude that the onus upon the Dorans had not been satisfied. I agree with Mr Passfield that in the circumstances of this case, in order to satisfy the onus upon them, in the absence of a substantial dispute in relation to the alleged debt, the Dorans would have needed to demonstrate that if they had notified the Company of its alleged indebtedness and made a demand for payment, prior to the pandemic, the Company would have been unable to pay prior to the pandemic.

49. It follows from the reasons I have set out that: I disagree with the judge that the use of the phrase "only if" in paragraph 5(3) of Schedule 10 of CIGA directs the court solely to the effect of the pandemic upon the Company and that the court must make an assumption that the substantive ground is made out; but I agree with the judge that on the facts of this case, where there was a dispute about whether the debts had been discharged and, if they had not been discharged, the natural inference was that it was as result of a mistake, it was not possible to infer from the failure to discharge debts an inability to do so prior to the pandemic.

50. In my judgment, therefore, the judge correctly concluded that the Dorans had not discharged the burden upon them and the coronavirus test was not satisfied and that there was ample reason for the district judge to conclude that the court was not likely to be able to make a winding-up order because the court would not be likely to be satisfied that the Company would have been unable to pay its debts as they fell due even if coronavirus had not had a financial effect on it. I come to this conclusion despite the fact that it appears that the judge may have mischaracterised the district judge's approach to the payments made into the Barclays Bank account as evidence that the Company was "not unable" to pay its debts as they fell due up to the commencement of the pandemic.

51. It follows, therefore, that I would dismiss the appeal on all grounds. In those circumstances, it is unnecessary to consider the Respondent's Notice in which we are asked to dismiss the Petition on the basis that it is disputed on substantial grounds. I should add, however, that even if I am wrong about the proper construction of CIGA and the Practice Direction, I can see no reason why, at a preliminary hearing, in accordance with overriding objective, a district judge would not have been entitled also to consider whether a petition ought to be struck out on its merits.

Lord Justice Birss:

52. I agree.

Lady Justice Thirlwall:

53. I also agree.