



Neutral Citation Number: [2022] EWHC 943 (Ch)

No: CR-2021-000458

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

**IN THE MATTER OF A COMPANY**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**  
**AND IN THE MATTER OF THE CORPORATE GOVERNANCE AND INSOLVENCY**  
**ACT 2020**

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

19 April 2022

**Before :**

**Deputy ICC Judge Baister**

**Ms Emma Loizou** (instructed by **Eversheds LLP**) for the **Petitioner**  
**Mr James Egan** (instructed by **Photiades Solicitors Ltd**) for the **Respondent**

Hearing date: 8 April 2022

**Approved Judgment**

I direct pursuant to CPR PD 39A that para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Deputy ICC Judge Baister:****Introduction**

1. The company was incorporated in 2013. Its business is the cutting, shaping and finishing of stone. At the material times its only substantial contract appears to have been with a company which I shall call M Ltd. Subject to the agreement of a final account, the project to which that contract related appears to have been completed in the latter part of 2019. No final account appears to have been agreed. According to Mr G, the company's sole director, £2.3 million odd remains due from M. The company retained construction consultants, Bunton Consulting Partnership, with a view to enforcing its rights against M by means of adjudication, but no proceedings have ever been commenced. I infer from a message of 11 February 2020 from Mr Bunton that the reason is that his firm had an outstanding fee claim in the sum of £2,000; there is no evidence that it was ever paid, nor is there any indication that anyone else has been instructed.
2. On 17 March 2021 the petitioner presented a winding up petition against the company for outstanding arrears of rent said to be due under a lease of 15 September 2017 of premises in High Wycombe. The lease provides for the payment of an annual rent of £205,000 payable quarterly in advance. Before it took the lease the company occupied the premises under a tenancy at will dated 27 January 2017.
3. The company stopped paying the rent due under the lease at an early stage: the arrears began in May 2018 and have continued to accrue since then. A letter of demand was sent to the company on 29 November 2019. It was accompanied by a statutory demand. The amount due in respect of outstanding rent was then £369,000, in addition to which there was a liability for interest and costs. For reasons I do not know, and which do not matter, the demand was resent on 2 December 2019. A further demand was made by letter on 1 February 2021.
4. The demands have not resulted in payment of any of the arrears due, but on 23 December 2019 a Mr Paul Williams, who described himself as acting as a consultant to the company, contacted the petitioner's solicitor by email to propose a payment plan: subject to the petitioner agreeing not to enforce the statutory demand while payments were being made, the offer was to pay £20,000 just before the new year followed by £30,000 a month commencing on 24 January 2020. Mr Williams also mentioned vacating the premises, but as I understand it, the break clause in the lease was never formally or properly exercised. Be that as it may, no payment plan was ultimately agreed between the parties.
5. As at 28 December 2019 the company's bank account at HSBC was overdrawn in the sum of £415,525.14, but the company may have had a facility that allowed for that or more. I do not know.

**The petition**

6. On 17 March 2021 the petitioner presented a winding up petition for the outstanding arrears, which by then amounted to £676,500, £410,000 of which had accrued due by the end of 2019. By 8 April 2022 the amount outstanding had risen to £943,000.

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7. The preliminary hearing of the petition took place on 19 October 2021. It was adjourned to 3 December, again until 7 February 2022, before being listed for the hearing to which this judgment relates. The result has been not only delay in dealing with the preliminary issues provided for by paragraph 4 of the Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020 (the purpose of which is for the court to determine whether it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test), but to tack on two further issues. The result is that four issues fall to be decided. I shall deal with each in turn, adopting, with minor changes, the formulations used by Mr Egan in his skeleton argument.
8. The first two issues concern the application of the provisions of Sch 10 Corporate Insolvency and Governance Act 2020. The law is set out by Ms Loizou in paras 20 ff of her skeleton argument and by Mr Egan at para 7 ff. I detect no or no significant differences between them as to these, so I shall not set out the provisions here in detail. They are well known now, as is the approach the court should take to them (see *Re A Company (Application to restrain advertisement of a winding up petition)* [2020] EWHC 1551 (Ch)).
9. Before turning to the issues, I should say a little bit about the evidence. The adjournment of the preliminary hearing has resulted in several rounds of evidence. I need say little about that of Maria Garton on behalf of the petitioner: it states briefly the basic facts on which the petitioner relies, exhibiting documents and inviting inferences. Mr G's evidence on behalf of the company also exhibits documents, but he gives them very little context. Much (but not all) of what he says amounts to little more than assertion. He consistently fails to put flesh on the bare bones of what he says and omits to give evidence about a number of matters that are of obvious importance. For example, he says that coronavirus had various effects on the company but fails to spell out the nature and extent of them; and he says nothing about the trading of the company after the end of the M contract, so I have no idea whether the company even had much or any work thereafter or continued or continues to trade. This has left Mr Egan at a serious disadvantage in making the company's submissions.

The first issue

10. The first issue is whether the petitioner had reasonable grounds for believing that (a) coronavirus had not had a financial effect on the company or (b) the relevant ground would have applied if coronavirus had not had a financial effect on the company. The matters relied on in the petition are the accumulation of arrears in the sum of £471,500 before 23 March 2020 and the absence of any response to the February 2021 demands for payment.
11. Para 2(3) Sch 10 CIGA 2020 prevents a creditor from presenting a petition unless the condition in sub-paragraph (4) is met. Coronavirus is defined in sub-paragraph 21(3) as having a "financial effect" "if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus."
12. I agree with Mr Egan that the petitioner bears the burden of satisfying the court that it had reasonable grounds for holding the required belief. I hold that it did for the reasons on which it relies. I agree with the petitioner that, since the rent arrears had been outstanding and increasing since May 2018, long before the effects of the pandemic

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were beginning to be felt, the petitioner had good reason to believe that that the company's inability to pay what was then an uncontested debt was plainly unconnected with coronavirus. I say that in spite of Mr Egan's submissions as to the information about the company publicly available at the relevant time. He points to the insolvency report dated 11 March 2021, which the petitioner itself commissioned and which gave the company a clean bill of health as to its solvency, and to the healthy state of its accounts as then filed (to the year ended 30 September 2019). Those are good points, but a healthy balance sheet is not necessarily to be equated with solvency. Nor is general awareness of the possible effects of coronavirus (which I consider below), in the circumstances of this case, sufficient to detract from the reasonableness of the petitioner's belief, at least to the extent that it was founded on non-payment of the indebtedness that had arisen before the onset of the pandemic.

13. For those short reasons I determine the first issue in favour of the petitioner.

The second issue

14. The second issue is whether it appears to the court that coronavirus had a financial effect on the company before presentation of the petition but is satisfied that s 123(e) Insolvency Act 1986 would apply even if coronavirus had not had a financial effect.
15. As ICC Judge Barber pointed out in *Re a Company*, it is only necessary to show "a" financial effect, and the evidential burden is low: whilst the burden is on the company, the word "appears" denotes a lower threshold than "satisfied," so that the company merely has to establish a *prima facie* case as opposed to proving a financial effect on the balance of probabilities.
16. Although Mr Egan relies on various general matters which, he contends, must demonstrate a financial effect, to refute the contention that the petitioner cannot have had the reasonable belief discussed above (see paragraph 10 of his skeleton argument), they seem to me to be of at least equal, and arguably greater, relevance to this issue. In brief, he refers to the well known effects of coronavirus on the business and the economy and of the three lockdown periods on the construction industry, the existence of the furlough scheme, and the impact of the infection rates. His points are well made, and he invites judicial notice of some of them or aspects of them. I must also, however, take judicial note of the fact that construction work in London continued during the pandemic. I do not say it was unaffected, but I observed it going on both near the Rolls Building and where I live. Mr Egan also relies on the company's financial history to demonstrate a marked downturn in its fortunes after the onset of coronavirus (see the summary in paragraph 20 of his skeleton argument) and he invites the court to accept that that resulted from covid. He also relies on:
- (a) A letter of 14 February 2022 from the company's accountants, H A S Thompson & Co, confirming that it was "significantly affected in March 2020 right on until October 2020" and a cashflow, the significance of which, he says, speaks for itself.
  - (b) Recourse by the company to the government furlough scheme.

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(c) Evidence from Mr G, the director of the company, that the company had traded successfully until it was affected by Covid-19 and his statement that “The Company works in the construction industry and has suffered closure of site [*sic*] during the Covid-19 lockdown.”

(d) A contention by Mr G in a skeleton argument he prepared for an earlier hearing that settlement with M was “put on hold due to Covid-19” and as to the impact of Covid in terms of extra health and safety costs “and the postponement of many construction contracts.”

He relies on other matters too, such as newspaper articles, but I do not regard those as probative, and they add nothing to our general knowledge of the effects of covid on almost every aspect of life. He invites a finding that coronavirus did have a financial effect on the company, bearing in mind the very low evidential threshold.

17. The most persuasive evidence is the letter of 14 February 2022 and accompanying documents. I think it contains the only concrete reference to post-M contracts (see the reference to the start of “a big contract with shell” in paragraph 3), and it helpfully refers to work on a number of sites, whereas Mr G’s evidence appears only to mention one. But that information does not take me very far without some detail, which I would have expected Mr G to provide in the form of information about the Shell contract and an indication of the number of sites at which the company was operating from time to time and how exactly work on them was affected by covid – or not. The letter only goes as far as to establish a decline in cash flow but without connecting it to covid. A theme of this judgment will be that *post hoc* does not mean *propter hoc*, and that is, unfortunately, a problem here just as it is in the company’s evidence generally.
18. I am not persuaded by the company’s evidence. Whilst I accept, as I must, that the threshold is low, I do not believe that this means that bare assertion of the existence of an effect or effects is good enough: the company’s evidence must provide *some* detail to make good its contention that coronavirus had an effect and that it was not already doomed to fail in 2019. As I have observed, Mr G’s written evidence is devoid of that (or almost any) detail; and there is a great deal he does not say. Dealing with specific points made on behalf of the company, I say as follows:

(a) No link is made between the downturn in the company’s finances and coronavirus. I decline to draw the inference invited in the absence of commentary. *Post hoc* does not necessarily mean *propter hoc*. The sparse evidence of the company’s business activity at the material times gives the firm impression that it was heavily (perhaps totally) dependent on the M contract. Apart from a brief mention of work undertaken for churches, Mr G says nothing about other current or prospective contracts that would generate the company’s future cashflow. (Note the reference to “site” without an article in his written evidence mentioned in paragraph 9 above.) There is no mention of any work or prospective work having been interrupted or cancelled because of the pandemic. Furthermore, as Ms Loizou points out, a major cause of reduction in the company’s assets appears to be

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the removal from the accounts of £2.8 million odd, which is mostly the M claim. Although there is a letter from Mr Williams explaining this, it does not convince me that recovery of that sum, or any sum, from M is likely in the near future: the company appears to have been unable to pay its advisers' fees to get an adjudication off the ground, and there is no evidence that M is going to pay voluntarily at some time in the near future, or indeed ever, unless compelled to. I also remind myself that the M contract was finished before covid began to make itself felt, at which time the company was well in arrears with its rent as well as being unable to pay Bunton. Mr Egan invited me not to attach any weight to the apparent non-payment of Bunton's fees, but the fact is that I do, because it would have been easy for Mr G to say it had been paid and the adjudication was on foot or soon would be, but this is just another of many gaps in his evidence.

(b) The accountants' letter is of little probative value for the reasons I have given above. It is, like Mr G's evidence, no more than bald assertion. The cashflow does not speak for itself: it requires explanation; there is none. There is not even an indication that the company is continuing to trade even in a modest way.

(c) Recourse to the government furlough scheme tells me nothing: the provision of furlough funding may be an indication of a financial loss, so a worsening in consequence of, or for reasons relating to, coronavirus, but it could have been neutral, compensating the company such that no loss was suffered. Again, there is a gap in the evidence.

(d) The remaining points relied on are covered by the foregoing.

19. The indications are, then, that the company's declining fortune had nothing to do with coronavirus but was its condition well before the start of the pandemic. As Mr G said in his skeleton argument, the M liability "caused severe cash flow issues." As Ms Loizou points out, that problem arose before and was plainly unrelated to covid.
20. For the foregoing reasons I hold that the company's evidence fails to establish a *prima facie* or any credible case that coronavirus had a financial effect on it in the sense of worsening its financial position and that s 123(1)(e) will apply so that, subject to the two remaining issues, the court is likely to make a winding up order on the petition when it finally comes to be heard. I regard the company's attempt to rely on the provisions of CIGA as opportunistic and disingenuous. In saying that I reiterate my criticisms of the inadequacy of its evidence, something that is the more surprising because of the adjournments the company has secured from time to time to put in yet more evidence that has, in reality, taken matters no further.
21. Accordingly, I determine the second issue in favour of the petitioner.

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22. The third issue is whether the company has a *bona fide* dispute in relation to the petition debt on the basis that the petitioner has failed to mitigate its losses by forfeiting the lease and/or accepting a surrender with a view to reletting it.
23. Mr Egan relies on *Reichman v Beveridge* [2006] EWCA Civ 1659, in which the Court of Appeal held that,

“There is [...] a very limited category of cases in which, although the innocent party to a contract has not accepted a repudiation by the other party, and although the innocent party is able to continue to perform all his obligations under the contract despite the absence of co-operation from the other party, nevertheless the court will not allow the innocent party to enforce his full contractual right to maintain the contract in force and sue for the contract price. The characteristics of such cases are that an election to keep the contract alive would be wholly unreasonable and that damages would be an adequate remedy, or that the landlord would have no legitimate interest in making such an election.”

Mr Egan submits that this is such a case in as much as the petitioner has no legitimate interest in keeping the lease alive, given that its position is that the company is insolvent and should be wound up, with the result that it is unlikely to recover its rent arrears in full. His argument is developed with some ingenuity in paragraphs 46 ff of his skeleton argument.

24. Ms Loizou points out that the lease contains a break clause which the company has failed to invoke, and that the lease contains assignment provisions, although the company failed to meet them. She also points to an attempt by the petitioner to assist the company in marketing the premises on terms that would not amount to a surrender. She also points out that liquidation would enable (but not oblige) her client to bring the lease to an end. Finally, she points to the advantages to the petitioner of holding the company to its obligations under the lease, for example, its obligation to pay business rates.
25. I reject the argument that the company is able to dispute the petition debt for the reasons advanced. I reach that conclusion for the following reasons:
- (a) For the reasons advanced by Ms Loizou. The company itself appears to have failed to take steps to mitigate its obligations; and there are, arguably, good reasons for the petitioner to hold the company to its covenants.
  - (b) The contention that there will be no recovery in the liquidation is speculative: true, the company is insolvent, but it does not follow that investigation by a liquidator will not result in recoveries that might result in a dividend. We simply do not know.

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(c) As Mr Egan concedes, the amount the company might recover would depend on precisely when the court hearing its claim determines the point at which the petitioner ceased to have a legitimate interest in maintaining the lease. Although Mr Egan posits some figures in his skeleton argument, these are no more than supposition. There is, then, no basis on which I can conclude that any claim by the company might equal or exceed the current petition debt or even that part of it which arose before covid.

(d) Finally, making good any claim would, as I understand it, involve the company making and prosecuting a claim against the petitioner. In the light of its failure to fund its adjudication claims against M, I think I am entitled to conclude that it is unlikely that it will find funds with which to bring and pursue its claim, if indeed it has one at all.

26. Again, then, I determine this issue in favour of the petitioner.

**The fourth issue**

27. The final issue is whether the company has a genuine and serious cross-claim for an amount which equals or exceeds the petition debt.

28. The company claims it has cross-claims in the sum of £115,000 and £454,000.

29. The company's case is that before entering into the tenancy at will, an agent of the petitioner, Mr Simon Parish, gave an assurance that power and water were available at the premises. Both were needed, and Mr G claims that the business of the company necessitated both, so it would not have agreed to occupy premises to which neither was supplied. The representations were untrue in that there was no power or water available. By the time the company noticed this, it had already paid £115,000 to the petitioner. Quotes for the connection of power (approximately £37,180) and water (£5,421.07) were obtained but "these were not supported by [the petitioner]." The result was that the company had to use alternative premises at a cost of £37,800. The company, it is said, would not have taken the tenancy at will at the time it did had it known that power and electricity were not available. Thus, it has a cross-claim for the advance rent it paid by way of damages for misrepresentation in the sum of £115,000.

30. Furthermore, on or around 27 January 2017 (again before entering into the lease), Mr Parish also orally represented that the premises were secure, and that the petitioner would attend to/provide security at the site. This induced the company into entering into the lease. This representation was also false in that the premises were not secure. The petitioner did not provide security as promised. This resulted in in that £454,000 worth of equipment and materials were stolen, as a result of which the company has a claim for damages.

31. Although Mr Egan began his submissions by pinning his colours to claims in misrepresentation, he also said that they could also be claimed on the basis of an oral contract or contracts, and indeed Mr G's evidence refers, at least to the first claim, as arising as a result of a "clear agreement."



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32. I leave to one side the petitioner's reliance on clause 4.1.1 of the lease, which purports to make payment of the rent "without any legal or equitable deduction, set-off or counterclaim unless required...by law." Such provisions are not always effective in winding up or bankruptcy. I do, however, reject both claims for the following reasons:

(a) To the extent that the purported claims are contractual, the particulars of both are insufficient. In particular, there is no indication of what the consideration was for the provision of the services said to have been promised.

(b) To the extent that the purported claims arise as a result of misrepresentation, Mr G fails to say that the company relied on anything said in deciding to enter into the lease (as opposed to the preceding tenancy).

(c) Whilst there may have been discussion about water, electricity and security, it is simply incredible that anything was said that amounted to a representation or a contractual term. If the services were not available when the company was occupying them under the tenancy, why would it have entered into the subsequent lease, having established that they were not being provided? And why is there no mention of these claims in any correspondence, in particular when Mr Williams was negotiating on behalf of the company in December 2019? The late stage at which these claims have been raised also speaks volumes. Mr G fails to offer any explanation for these oddities.

33. Although it is rare to reject written evidence without its first having been tested in cross-examination, I am satisfied that this is one of those rare cases in which it is right to do so. As Patten J said in *Portsmouth v Alldays Franchising Ltd* [2005] EWHC 1006 Ch:

"[T]he mere fact that a party in proceedings not involving oral evidence or cross-examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance."

This is, adopting another well known phrase, a case of the company seeking to rely on a "cloud of objections."

34. Again, the petitioner succeeds on this issue.

Result

35. For the reasons I have given, the petition should be listed for hearing in the winding up list in accordance with paragraph 8.1(2) of the Practice Direction. In light of the fact that I have determined not only the issues contemplated by the Practice Direction and CIGA 2020 but also that there is no dispute to the petition debt, and certainly not that part that arose before March 2020, I will consider, when this judgment has been handed

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down, whether I should treat the hearing as being a hearing of the winding up list, dispense with advertisement and make an immediate winding up order.