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Case No: BR-2019-001490

BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INSOLVENCY AND COMPANIES LIST

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 13/05/2020

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

GO CAPITAL LIMITED	**Petitioner**
- and -	
JAGDEEP SINGH PHULL	**Respondent**

- -
- -

WAYNE LEWIS (**Direct Access**) for the **Petitioner**
JAMES BATTEN (instructed by **Direct Access**) for the **Respondent**

Hearing dates: 11 May 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A 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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 16.20 on 18 May 2020

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs

Introduction

1. This is the adjourned hearing of a petition that seeks to adjudicate Jagdeep Singh Phull (the "Debtor") bankrupt. The petition debt was the subject of a statutory demand served on 3 July 2019. No application was made to set aside the demand. Go Capital Limited (the "Company") press for a bankruptcy order as the Debtor has failed to pay a sum due after demand pursuant to a document entitled "Personal Guarantee and Indemnity Deed of Agreement Transaction Code Mangosteen80". I shall refer to this as the "Guarantee". The Debtor denies any sum is due pursuant to the Guarantee.

2. The case raises some interesting points about the nature of the Debtor's liability to the Company. First, is the purported liability based on a sham transaction? Secondly, has the Debtor's signature been forged? Thirdly does the Guarantee give rise to any liability at all? The basis of this argument is that the Guarantee is not, despite its long title, in the form of a deed and no consideration moved from the promisee Company. If the Guarantee is not by way of deed and there is no consideration, it follows that there is no obligation to make the payment under the Guarantee.

3. These interesting arguments are matters which this specialist court is used to dealing quickly by delivering extempore judgments. It was not possible to do so and ensure a fair hearing on this occasion. The reason for this is that the hearing was held remotely, and several issues arose. First the microphone for one of the advocates did not work leading to a delay of the start time. Secondly the electronic bundle, running to several hundred pages, was not user friendly. The text was not selectable to facilitate comments and highlights; there were no bookmarks; there were several page numbers on each page; tabs were hand written; some pages were missing; the documents had no logical order; some were unreadable and the PDF had two indexes, neither of which were hyperlinked to the pages or documents. Counsel for the Company tried to rectify some of the issues by sending a second bundle but that happened within 30 minutes of the hearing and was missed. No authorities were provided. Navigating such an electronic bundle quickly and efficiently is challenging despite spending more than the allotted time pre-reading.

The Guarantee

4. The Guarantee is said to be made between three parties: the Company, Odyssey Energy LLC ("Odyssey") and the Debtor. The first recital explains that the Company enters negotiations on behalf of clients and introduces financial opportunities. The Company relies on a Joint Venture Funding Agreement (JVFA") made between the Company and Odyssey and various other documents such as a "memorandum of understanding" ("MOU") all dated 5 April 2019. The Guarantee is said to create a primary obligation upon the Debtor to pay a sum of money in the event that Odyssey fails to meet its obligation.

5. The operative clauses are as follows:

   5.1. In consideration for [the Company] making payments on behalf of [Odyssey] as set out within the MOU under Transaction Code: MANGOSTEEN80 in the sum of $75,000 (seventy-five thousand USD) hereinafter referred to as the (fees).

   5.2. [The Debtor] agrees with full legal understanding that in default to Personally Guarantee and Indemnity [the Company] in the amount of $75,000 (seventy-five thousand USD).

   5.3. As evidence of [the Debtor's] financial capacity to meet this liability they have provide a bank statement issued today April 05, 2019 which shows an account balance of £152,448.17.

   5.4. [The Debtor] agrees to maintain a minimum account balance of £62,000 (sixty-two thousand GBP) to meet any claim that may be made under this Deed of Agreement. The funds can be identified as being held at…

   5.5. As such the Parties hereto agree that Odyssey will no longer be required to make payment set out within the MOU, referred to as the lodging fees in the amount of $75,000. [The Company] agrees to meet the terms of the MOU by make payment of the fees in full.

   5.6. [The Debtor] unconditionally agrees by signing the Deed of Arrangement that in default (such terms of default stated below), that [the Debtor] will have a separate and primary obligation to [the Company] to pay the sum of $75,000 (seventy-five

thousand USD] and unconditionally and irrevocably Guarantee to make full payment without delay or withholding of any kind. (sic)

6. It is apparent from these operative clauses that (1) the Company was to pay the fees and (2) Odyssey was to pay the Company and (3) the Debtor would only be liable for the fees in the event of a default by Odyssey. This is said to be the trigger of the Debtor's obligation (clause 8):

"In default [the Debtor] …unconditionally and irrevocably Guarantees to make payment in the amount of $75,000…without any deductions, withholding or set off of any kind within 3 banking days of a copy of the default notice being served on [the Debtor]…"

7. The Company signed the Guarantee through its agent and director Bruce Robertson and a signature appears on behalf of the Debtor. No witnesses attest the signature. I turn to the documentation recording the underlying transaction.

The Transaction

8. The transactional documentation is all dated 5 April 2019. I note that there are many typographical errors in the documentation, but oddly Party "A" to the JVFA is named as Ms Somrudee Boontanonda, not the Company. The witness to "Party A" is Mr Vourakis and Mr Robertson, a director of the Company, is named as a witness to Mr Pallone and cited as "Party B" to the JVFA. On the face of it the JVFA concerns individuals only.

9. In addition to the JVFA there exists the MOU, a letter of authorisation, an acceptance letter on behalf of Odyssey, a "Confirmation of Window Time" letter which purports to set out the time frame when the funding would be transferred, and an "Irrevocable master fee protection agreement" where by Ms Boontanondha confirmed her personal commitment to pay "the participating beneficiaries" consulting fees for "services performed for both Parties to originate and complete the Transaction" (which included a non-disclosure agreement).

10. I should now explain that Mr Pallone is an American citizen and director of Odyssey which is registered in Nevada, USA. Odyssey is stated as carrying on business in "Green Energy". Its registered office and mailing address are said to be in North Carolina and it used a law firm in California. The transaction, quintessentially the provision of US$500

billion, was to be conducted through a bank in Hong Kong. The Company held a Hong Kong and Shanghai Bank account in Hong Kong. As a prerequisite for the provision of US$500 billion, Odyssey was required to demonstrate that it had "proof of funds" in the amount of US$20 billion. No reason is provided for this condition.

11. The term "Joint Venture" does not appear to describe the transaction. As stated above the transaction involved the provision of funds. Upon "Total Drawdown" the Company would pay to Odyssey $20 billion as a "Bonus". All procedures set out in the JVFA concern proof of funds, verification, timing for draw down and payment of the "Bonus". The documentation is silent about an enterprise or commercial undertaking. Money is simply moved around and siphoned off in the form of commissions and "Bonus" payments. I asked Mr Lewis during the course of the hearing if he could elaborate on the venture. He responded that "it's all in the documentation". Mr Batten informed me that he was unable to understand it and preferred therefore to present his argument based on lack of formality.

12. The fees and expenses (the petition debt) are described as service charges payable by the Company to HSBC, Hong Kong "and other financial organizations in order to engage the Bank as Host Bank to handle the transaction". There is no provision or obligation on Odyssey to do anything under the JVFA (other than demonstrate that it had US$20 billion in an account) or repay the UD$500 billion advanced. That may explain why no security was taken. No other explanation has been provided. The letter of authorisation is expressed "We, [Odyssey] …hereby authorise Ms Somrudee Boontanondha …to verify and authenticate my bank account…having case on deposit in an amount equivalent to Twenty Billion Dollars USD…" It is signed by Mr Pallone only. The use of the possessive pronoun is confusing. It has not been submitted that there was no intention to use the pronoun.

13. The MOU states that Mr Vourakis (an Australian citizen) represents "Party A". As I have mentioned above this appears to be Ms Somrudee Boontanonda and the counterparty "Party B" is Mr Pallone in his own capacity. The pre-amble states that Ms Somrudee Boontanonda "certifies that [she] is required to pay fees and expenses in excess of USD $75,000 … directly to HSBC… to engage the Bank as Host Bank to handle the transaction." If Mr Pallone does not provide proof that he holds US$20 billion in cash on deposit in the same bank, Ms Boontanonda would not be able to recover the fees and

expenses paid. To "discourage" Mr Pallone from "nonperforming" he is "requested" by the MOU to "pay for the first trance a 'lodging fee' equal to the minimum Service Costs of US$75,000…to Party A's Representative". That is Mr Vourakis. The pre-amble states that Mr Pallone accepts the request. By paragraph 4 of the MOU Ms Boontandonda is obliged to repay US$ 75,000 if HSBC (as host bank) fails to perform its obligations within the time frames provided or upon the successful draw down of the first tranche of funds. I observe that the trigger for payment of the Service Charge by the Company is similar to the default relied upon for triggering the Debtor's obligation to pay the fees. And Mr Pallone would forfeit the sum if he failed to provide proof of funds. The MOU is only signed by Mr Pallone.

14. On the same day, 5 April 2019, a transfer of US$75025 is made from an account held at Metro Bank with the Company's name at the top left-hand corner. The Metro Bank statement shows (1) the account is British (2) no payee account or SWIFT reference and (3) the two payments transferred to Theo Vourakis includes a reference that reads "Mangosteen80 Payment under contract BSB 250-39 for contractual obligation". The contract BSB 250-390 is not in evidence. No explanation has been provided as to why Ms Boontandonda did not transfer the funds direct to the bank and if that explanation is that Mr Vourakis was her representative there is a failure to provide an agency agreement between the parties and a failure to demonstrate that the money was sent to HSBC. As this is said to give rise to the underlying debt guaranteed by the Debtor it may have some importance.

15. On 5 April Mr Pallone wrote to Somrudee Boontanondha "We, [Odyssey]… are pleased to inform you that we have agreed to take up the option provided, with furthering our Joint Venture and accepting the Rolls & Extensions, for the said transaction, totalling Five (5) Draw down terms in total as per Transaction Code. MANGOSTEEN80".

16. In a separate letter Odyssy wrote to Somrudee Boontanondha "We, [Odyssey]… am (sic) pleased to inform you that we have set, up the Window Time on Monday, 08 day of April 2019, at 09:30am to 15:30pm, (Hong Kong Time) to commence the transaction of the "Agreement' as per Transaction Code: MANGOSTEEN80, the period of the said Window Time being valid for 10 banking days and will commence on the 08 day of April 2019 and will expire on the 24 day of April 2019".

17. A letter was purportedly sent by HSBC to Odyssey on 2 May 2019. It reads:

> "On Tuesday the 30th day of April 2019, at 9.30am (Hong Kong Time) as appointed Bank Officer checked the account for ODYSSEY ENERGY LLC with account number 514-44703-182216-223-0567105267802012 for the transaction known as Transaction Code: MANGOSTEEN80.
>
> The Resulting outcome during the "Window Time" I can confirm and verify that the account never had a cash holding which was sufficient to proceed. I would also like to confirm that I have checked the account on a daily basis and there was never sufficient funds available for the Drawdown." (sic)

18. The copy letter in the electronic bundle is not whole and the copy shows that it has been hold punched. On the same day the Company wrote to the Debtor seeking payment of US$75,000.

The Evidence

19. I can deal with the written evidence of fact shortly. Evidence has been provided by Mr Robertson and Mr Stockley on behalf of the Company, and Mr Pallone and the Debtor on behalf of himself.

20. A feature of the evidence provide by Mr Stockley is that it sheds no light on the transaction. Despite the documentation he avers that the Company was required to pay US$150,000 as an "advance payment" for fees. There is no evidence that corroborates the figure of US$150,000. It contradicts the reasons provided for the payment made to Mr Vourakis. If, as Mr Stockley says, the Company and Odyssey or Mr Pallone were responsible for making a payment of US$75,000, it is unclear how or why the Company could recover US$75,000 from Odyssey's guarantor.

21. Mr Stockley says he attended Lloyds Bank with the Debtor for the purpose of obtain proof of funds. Yet there was no contractual obligation on the Debtor to show proof of funds. In evidence is a print-out of the Debtor's bank statement.

22. Mr Robertson's statement does not contain a statement of truth. One statement produced by the Debtor appears to have been cut short in the electronic bundle under his signature. It is possible that the words underneath the signature is a statement of truth. He has

produced two statements and the first does contain a statement of truth. The essence of his evidence is as follows: (1) he did supply Mr Stockley with his bank account information and passport (2) the agreement for the transaction was never concluded (3) the documents do not bear his signature and (4) the Guarantee is not witnessed. Mr Pallone states that the transaction was never agreed but his statement is in the form of a letter. I shall lend little weight to his evidence.

23. The evidence on both sides is poor and poorly produced electronic versions of WhatsApp message do not assist.

Legal considerations

24. Section 271 (4) of the Insolvency Act 1986 provides that no bankruptcy order may be made on a creditor's petition unless the court is satisfied (1) the debt in respect of which the petition has been presented was payable at the date of the petition or has subsequently become payable and (2) the debt has not been paid secured or compounded for. In this matter a statutory demand has been served but no application was made to set it aside. Consequently, no decision was made under r10.5 of the Insolvency Rules 2016 on the merits of the case. One of the grounds to set aside a statutory demand under the rule is if the debt is disputed on grounds which appear to the court to be substantial.

25. In *Guinan III v Caldwell Associates* [2004] BPIR 531, ChD Neuberger J (as he then was) held that there is no distinction between the test to be applied whether on an application to set aside a statutory demand, or on the hearing of a petition, or on an application to annul on the ground that it ought not to have been made. The test is whether there is a genuinely disputed debt. Neuberger J's reasoning is as follows [16]:

"I turn then to what at least to my mind is the central point in the case, which is whether or not Mr Caldwell has an arguable case. In this connection it is I think common ground, and consistent with what was said by Laddie J in para [60] of his judgment in Everard v The Society of Lloyd's [2003] EWHC 1890 (Ch), [2003] BPIR 1286, that: "The court's assessment of the seriousness of the challenge should [not] differ from one stage to the other." In other words, if there is what he called "a genuine triable issue" then, whether it is raised at the statutory demand stage, the petition stage, or the annulment stage, it is an equally valid point. However, as I mentioned, that is not the end of the matter in this case,

because, even if there is a genuine triable issue, that does not automatically mean that I should annul the bankruptcy; I still have a discretion. But, subject to that, as I think Mr De La Rosa, albeit sub silentio has accepted, the test is the same: is there a genuine dispute?".

26. The hearing of a petition for bankruptcy provides no opportunity for cross-examination. If the court finds that cross-examination is required that is a good indicator that the matter is suitable for a Part 7 claim. Nevertheless, the court should apply critical analysis to the assertions made. The evidence must be considered against the background of all the other admissible evidence and material in order to judge whether the assertion has substance: *CFL Finance Ltd v Bass, Khalastchi and Gertner* [2019] BPIR 1327 para 91.

27. The starting point to determine whether a transaction is a sham is *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, where Diplock LJ said at 802:

"It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities, that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived."

28. In *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214, Arden LJ laid down certain principles at para [64] *et seq*:

"[64] An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.

[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties'

explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.

[66] Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.

[67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.

[68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: see for example *Garnac Grain Co Inc v HMF Faure & Fairclough and Bunge Corp* [1966] 1 QB 650.

[69] Fifth, the intention must be a common intention: see Snook's case, above. This is relevant to issue 3 below."

29. At para [85] Arden LJ said:

"I have already noted that it is an established requirement of a sham transaction that the parties should have the common intention that it should not take effect according to its tenor and in addition that a false impression should be given to third parties. But this point raises one of the issues of law that has arisen in this case: common to whom? Mr Price submits that the intention must be common to all the parties to a document save in very exceptional circumstances, which he does not define and which he submits it is not appropriate to define since they were not applicable in this case. Thus, on his submission, all the parties had to have a common intention, and hence the 1984 Deed was incapable on the facts as found by the Special Commissioners of being a sham. He refers to this as the "all or nothing" principle. Mr Vallance submits that this is not a necessary

requirement of a sham and does not apply where (as here) the document implemented more than one transaction. In principle I accept Mr Vallance's submission. In Snook's case Diplock LJ was concerned with the situation where the document implemented a single transaction, and his words must be read in the context of the case before him. In any event, the effect of Mr Price's submission is that the court will be precluded from finding that a document is a sham because it includes an additional provision which is intended to be effective. This might deprive the doctrine of sham of any operation in a situation which is logically indistinguishable from the situation where the doctrine of sham already applies. In my judgment, the law does not require that in every situation every party to the act or document should be a party to the sham. I accordingly reject Mr Price's submission save that I accept that the case where a document is properly held to be only in part a sham will be the exception rather than the rule, and will occur only where the document reflects a transaction divisible into separate parts."

30. Some greater clarity came from Rimer J in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] 2 WLR at para [190]:

"Despite Mr Smith's 12-page submissions to the contrary effect, I respectfully regard the approach adopted by the Royal Court in the Abacus case as correct. It is not only squarely in line with the guidance given by the Court of Appeal in Snook and Hitch, it also appears to me to be correct in principle. When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement. The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand. But unless that intention is from the outset shared by the trustee (or later becomes so shared), I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand on what basis a third party could claim, merely by reference to the unilateral intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property. One might as well say that an apparently outright gift made by a donor can subsequently be held to be a sham on the basis of some unspoken intention by the donor not to part with the property in it. But if the donee accepted the gift on the footing that it was a genuine gift, the donor's undeclared

intentions cannot turn an ostensibly valid disposition of his property into no disposition at all. To set that sort of case up the donee must also be shown to be a party to the alleged sham. In my judgment, in the case of a settlement executed by a settlor and a trustee, it is insufficient in considering whether or not it is a sham to look merely at the intentions of the settlor. It is essential also to look at those of the trustee."

31. The Supreme Court expanded the nature of a sham in an employment context: *Autoclenz Limited v Belcher* [2011] UKSC 41, [2011] 4 All ER 745. There, the Court instructed tribunals to focus on the "reality of the situation" and the "actual obligations of the parties", as derived from their true expectations and conduct, and to assess whether those differ from the contractual "protestations": see more generally the interesting discussion of sham transactions: "It Ain't Necessarily So: A Legal Realist Perspective on the Law of Agency Work" - (2020) 83(3) MLR 558-582, Professor Amir Paz-Fuchs.

32. As regards contracts of Guarantee it is well established that there are three types a Guarantee of a loan. These are: (1) a "see to it" obligation, i.e. an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor; (2) a conditional payment obligation, i.e. a promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments; (3) an indemnity; and (4) a concurrent liability with the debtor for what is due under the contract of loan. The obligations in classes (2) and (4) create a liability in debt. But it is well established that an indemnity is enforceable by way of action for unliquidated damages: *McGuinness v Norwich and Peterborough Building Society* [2012] 2 All ER (Comm) 265 [paras 7 and 8].

Substantial dispute

(i) Sham

33. As I have outlined, I do not need to make a finding that the transaction was a sham, merely whether there is a substantial dispute or genuine triable issue. Although I have grave misgivings about the efficacy of the transaction, in my judgment there is insufficient evidence to reach a conclusion that there is a genuine triable issue. No evidence has been provided by the Debtor or the Company through its agent Mr Robertson as to their true expectations or conduct. There is no evidence that any

provision in the JVFA, MOU or other documents, including the Guarantee, constitute agreements that the parties did not really intend to be effective, but have merely entered into for the purpose of leading the court or a third party to believing that they are effective. The best that can be said is that the Company had an unspoken intention on behalf of the Company that the JVFA would not provide US$500 billion. As Arden LJ explained in *Hitch v Stone* the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them.

34. The authorities demonstrate that it is necessary to conduct a careful analysis of the documents and "external evidence" which will include witness evidence. The hearing of a bankruptcy petition is not the right forum for such an investigation but even so, there has to be some evidence that there was a common intention to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations, in order to find that there is a substantial dispute.

(ii) Forged signature

35. The second issue is whether the Debtor entered into the contractual arrangements that gave rise to the liability under the Guarantee. Mr Lewis focussed his submissions on the petition procedure arguing that it had been properly followed. He says that the Debtor signed the Guarantee as can be evinced from the following:

    35.1. The signature on the face of the document;

    35.2. Exchanges of e-mails;

    35.3. The client information sheet; and

    35.4. The provision of the copy passport.

36. At first sight it would seem at odds with a case that the Guarantee had not been signed by the Debtor for the Debtor to provide a copy passport and a copy of his bank statement showing that he had available funds to meet the US$75,000 liability if called upon. Mr Lewis argues that the Debtor has failed to provide evidence of a handwriting expert. He

also relies on the reason for the US$75,000 Guarantee and relies on the statement of Mr Stockley.

37. On the other hand, the Debtor has provided sworn evidence that he did not sign the Guarantee and this is supported by Mr Pallone's letter. Mr Stockley claims that the Debtor is legally trained and would therefore understand the documents he is signing. That argument works both ways. He did not sign the Guarantee because he understood it significance. The Debtor argues that if one stands back from the transaction there was nothing in it for him. There was no reason for him to Guarantee a payment to HSBC for fees and furthermore there is no evidence that HSBC incurred charged fees. He has denied any knowledge of the WhatsApp messages or e-mails. Mr Batten raises other issues. He says there is no logical explanation why Mr Stockley's account of meeting the Debtor should be accepted at face value. There was no reason to meet with the Debtor prior to November 2018. The Debtor is said to have attended Lloyds Bank in March but there is no explanation as to how the Debtor came to sign the Guarantee on 5 April 2019.

38. In assessing whether there is a substantial dispute I take account of the main transactional documentation. I have mentioned that the documentation and purported transaction have some unusual features which include (to name but a few): (i) the provision of US$500 billion without documenting the reason for the funding; (ii) the use of bank accounts in Hong Kong although the main representative or individual acting as funder was a Thai national and the receiving party a US national; (iii) the use of many intermediaries acting as representatives such as Mr Vourakis; (iv) a number of spelling mistakes and use of out of place possessive nouns indicating the lack of professional care and skill for a very large transaction; (v) the requirement for the receiving party to demonstrate cash on deposit of US$20 billion without the provision of any documented reason; (vi) the failure to demonstrate to the satisfaction of the court that any fees were paid to HSBC whether in connection with the transaction or at all; (vii) the unsatisfactory communication on 2 May 2019 that purportedly gave rise to the default and (viii) the immediate calling in of the Guarantee. In addition, the Company's own evidence is unsatisfactory. It fails to deal (apart from assertion) with the dispute about the signature, provide evidence from the main actors but does provide inconsistent evidence about the sums it paid to HSBC. The Debtor claims that the passport exhibited contains a facsimile of his signature. This is not answered by the Company.

39. In my judgment, the Guarantee will be regarded as subject to the condition that the signature of the Debtor was necessary for its validity, and that liability as a guarantor will only be imposed on him if his signature was genuine. If the Debtor's signature was forged, he will not be liable under the Guarantee. Despite acknowledging that the Debtor has said he is not liable to meet the liability claimed on the basis that he did not sign the Guarantee, Mr Robertson fails to provide any evidence that he did so. The only evidence concerning 5 April 2019 provided by Mr Robertson in his witness statement is that the Debtor sent an e-mail attaching the Guarantee.

40. The answer to whether a substantial dispute has arisen lies partly in the submission made by Mr Lewis. There is no expert evidence. Expert evidence would be suitable in a Part 7 claim, directions could be given, and Part 35 of the CPR applied. The hearing of a bankruptcy petition is not a suitable forum to decide such questions. The unusual nature of the transaction and the idiosyncrasies in the documentation further persuade me that the Debtor has raised a substantial dispute.

41. As a result of this conclusion there is no requirement to deal with the other matters raised. I shall set out in conclusions and reasons in brief form.

(iii) The Guarantee

42. Although I raised the issue of construction of the Guarantee it was not argued that it constituted anything other than a "see to it" obligation.

43. Mr Batten refers the court to section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act"). Section 1(2) of the 1989 Act provides that (where relevant):

> (2) An instrument shall not be a deed unless—
>
> (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and
>
> (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties

44. Section 1(3) of the 1989 Act provides that—

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b)it is delivered as a deed.

45. In my judgment there was a failure to execute the Guarantee in the manner required for it to be constituted a deed. First the signature was not witnessed. Secondly there is nothing on the face of the Guarantee that describes it as such or in any way makes it clear that it is intended to be a deed. Lastly the Guarantee was not delivered as a deed.

46. Mr Lewis argues that if it is not a deed it is still a contract. However, he does not demur from the principle that there need be consideration. He was unable to advance an argument that consideration had been provided in the manner required to form a contract.

47. In my judgment, as a matter of law, the Guarantee fails to bind the Debtor.

Conclusion

48. At the hearing of a bankruptcy petition the court may make an order for bankruptcy if satisfied that the statements in the petition are true and that the debt on which it is founded has not been paid, or secured or compounded. I am not satisfied that the statements in the petition are true. There is at best a substantial dispute as to whether the debt claimed on the petition is due and at worst there is no debt. There is a substantial dispute regarding the signature of the Debtor and there is no contractual obligation for the debt stated on the petition.

49. In any event there is a lack of evidence concerning the underlying transaction. The transaction does not appear to have any commercial imperative. The reliance on the Company making the payment to HSBC for hosting fees in unsatisfactory. The transfer from the Metro Bank is not made to HSBC but to Mr Vourakis. There is no evidence provided by HSBC that it charged hosting fees in advance of a transaction or at all. There is no evidence that the Company paid HSBC the purported fees (see paragraphs 14 and 20

above). On this ground alone I would have found that there is a genuine triable issue as to whether the purported obligation under the Guarantee was triggered.

50. I would add that during submissions I asked Mr Lewis why the Company had brought bankruptcy proceedings. He responded that it was a quick and inexpensive way to enforce the debt. The courts have stated many times that there are important differences between insolvency proceedings and an ordinary civil action. First, insolvency proceedings are class actions designed to secure distribution of an insolvent's assets *pari passu* between all creditors. They are not merely a debt collection process. The primary purpose of the proceedings is to enable an independent person to ascertain and preserve the debtor's assets and to achieve that *pari passu* distribution. Secondly, unlike ordinary civil proceedings, the presentation of a petition has the effect that any disposition of property made without the consent of the court by a person who is subsequently adjudicated bankrupt is void. Insolvency proceedings should not be used as a method of enforcement. Where they are so used the petitioner faces the prospect of an adverse indemnity costs order.

51. I invite the parties to agree an order