

Neutral Citation Number: [2023] EWHC 1149 (Ch)

APPEAL NUMBER: CH-2022-MAN-000011

IN THE HIGH COURT APPEAL CENTRE MANCHESTER

**ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)**

**On appeal from the Order of District Judge Matharu dated 25 July 2022
Case Number: CR-2022-MAN-000082**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 15 May 2023

Before:

His Honour Judge Pearce

Between:

CITY GARDENS LIMITED

Appellant/Petitioner

- and -

DOK82 LIMITED

Respondent

**Mr BOBBY FRIEDMAN (instructed by Gunnercooke LLP) for the
Appellant/Petitioner**

Mr ASA JACK TOLSON (instructed by Slater Heelis) for the Respondent

Hearing date: 2 March 2023

JUDGMENT

This judgment was handed down remotely at 10.00 am on 15 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

INTRODUCTION

1. This is an appeal from a decision of District Judge Matharu dated 25 July 2022 by which she dismissed the Appellant's petition to wind up the Respondent, recording that the court found the petition debt to be disputed on substantial grounds. She ordered the Appellant to pay the Respondent's costs and conducted a summary assessment thereof.
2. The Appellant appeals with permission of the Vice Chancellor, Fancourt J, such permission having been granted on 12 December 2022. The appeal was heard before me on 2 March 2023 following which I reserved judgment.

BACKGROUND

3. The Appellant is a company that invests in developments of property around Manchester. The investments were mostly in developments undertaken by De Trafford Estates Ltd, part of a group of companies that includes the Respondent. The Appellant contracted with the Respondent, a company wholly owned by Mr Kane Jackson, for the supply of furniture packs for the purpose of such developments, the payments being refundable if a development did not proceed.
4. The Appellant's case is that one such proposed development which did not proceed was the so-called Mary Street Development. The Appellant had paid a substantial sum for furniture packs. The failure to proceed with this development left the Respondent indebted to the Appellant in a significant sum.
5. By a document dated 17 March 2021, headed "Memorandum of Understanding" and signed on behalf of the Appellant and the Respondent, the parties acknowledged the history in respect of the Mary Street development referred to above, and recorded that:

- 5.1. The Appellant had paid the sum of £340,000 to the Respondent which was refundable to the Appellant;
 - 5.2. The Respondent had repaid various sums but still owed “the Principal” (defined as £200,000, amended to £119,785 in accordance with clause 2.1 of the document as set out below); and
 - 5.3. The Appellant owed £80,215 to Mr Jackson.
6. Various clauses of the document are of note:
- 6.1. By clause 2.1 the Respondent and Mr Jackson “*confirm irrevocably that [the Respondent] owes the Principal plus Interest to the Appellant. Upon executing this Agreement, the Parties confirm that the Principal shall immediately reduce to £119,785.*”
 - 6.2. By clause 2.2, the Appellant and Respondent “*agree that the Debt shall be repaid in accordance with the terms of this Agreement but, in any event, before the Longstop Date.*” (The Longstop Date is defined in clause 1.1 as 31 December 2021.)
 - 6.3. By clause 2.4, the Appellant “*shall prepare a statement on the last business day in Hong Kong of each calendar month setting out all movements on the Debt in respect of that month and confirming any balance outstanding.*”
 - 6.4. By clause 6.7, “*This Agreement is governed by and shall be construed in accordance with Hong Kong law and subject to the exclusive jurisdiction of the Hong Kong courts.*”
7. The Appellants’ petition was issued on 7 February 2022. It asserts that the Respondent was liable to pay the sum of £119,785 pursuant to the Memorandum of Understanding; that it had failed to do so by the Longstop Date; and that the debt remained outstanding. It contends that the failure to pay was by reason of the Respondent’s inability to pay its debts and hence sought winding up of the company.

8. In response to the petition, the Respondent filed two statements from Mr Kane Jackson dated 28 March 2022 and 29 April 2022. Based upon those statements, it sought to defend the Petition on four grounds:
 - 8.1. The “agreement” upon which the petition is based, the Memorandum of Understanding, was not intended to be a legally binding agreement between the parties;
 - 8.2. The Memorandum of Understanding is governed by the laws of Hong Kong, as to the effect of which laws there was no evidence before the court;
 - 8.3. As a matter of construction, the court could not determine what sums (if any) were due under the Memorandum of Understanding. By way of example, the court did not have before it evidence as to the meaning in Hong Kong law of clause 2.4 of the agreement, such that the court was unable to determine whether the Appellant had complied with the obligation to prepare statements setting out all movements on the debt, nor indeed did the court know what such a statement was said to amount to;
 - 8.4. The Respondent has a cross claim against the Appellant for furniture packs that had been ordered, the effect of which, if allowed as a set off or cross claim, is significantly to reduce the balance allegedly due under the Memorandum of Understanding.
9. The Appellant filed a statement in reply from Mr Sydney Fulda, its solicitor, dated 31 May 2022.

THE JUDGMENT SUBJECT TO APPEAL

10. The judgment was handed down *ex tempore* on 25 July 2022. Having set out the background, the Judge found as follows:
 - 10.1. That the petition was based on the Memorandum of Understanding rather than any pre-existing debt;
 - 10.2. That it was not open to the court to adjudicate on the construction of the terms of the Memorandum of Understanding because of the exclusive jurisdiction clause in clause 6.7. As it is put at paragraph 17: “*this court*

cannot entertain the jurisdiction of this agreement, because the parties contracted to the exclusive jurisdiction of the Hong Kong courts.”

- 10.3. Further, that the court could not rule on matters of construction or set off because they were matters of Hong Kong law. For example, she said at paragraph 18 of the judgment: *“The question put by [counsel for the Respondent] to the court was this: ‘Applying the laws of the jurisdiction of Hong Kong, is the debt properly due?’ That is the question for the court to deal with today and the only court to be able to deal with that is the court of Hong Kong.”*
- 10.4. Equally, the court could not determine the Petitioner’s argument that an estoppel by representation operated so as to prevent the Respondent denying its indebtedness because the existence and operation of the alleged estoppel is a matter of Hong Kong law.
- 10.5. That, accordingly, the Court could not judge whether the sums to which the petition related were due and owing and/or whether the Respondent had a set off. As it is put at paragraph 20 of the judgment:
- “a petition can be brought against a debtor company in the UK, but not when that purported debt is based on a debt that is the subject of an entirely separate jurisdiction and the petitioning creditor cannot show that the debt is one that is within the remit of this court.”*
- 10.6. Finally, in so far as any argument might be raised that the petition was issued prematurely in light of the temporary insolvency measures during the COVID-19 measures, the adjournment of the petition meant that there was no prejudice to the Respondent. The Judge indicated that any failure to comply with the Corporate Insolvency and Governance Act 2020, specifically Schedule 10 thereof as in force at the time of presentation of the petition, would be waived.
11. It should be noted that, whilst the Judge did not expressly deal with the assertion at paragraph 5(a) of the skeleton argument of the Respondent that the Memorandum of Understanding was not intended to be legally binding between

the parties, it is clear that she treated it as being binding, given the passage at paragraph 10 of the judgment cited above as to the exclusive jurisdiction and proper law clauses of the contract. During the hearing of the appeal, counsel for the Respondent conceded that, in those circumstances, it was not open to him to argue that the Memorandum of Understanding did not amount to a binding contract in English law in the absence of his client having filed a respondent's notice. That concession was undoubtedly correct and, given the absence of a Respondent's Notice, the finding of Judge Matharu must stand on this issue.

THE GROUNDS OF APPEAL

12. For the purpose of the appeal, two matters are not in dispute:
 - 12.1. The Appellant accepted (for the purpose of the current appeal only) that the petition is based on the debt recorded in the Memorandum of Understanding, rather than any underlying indebtedness.
 - 12.2. The Respondent acknowledged that, in so far as there may have been non-compliance with the temporary insolvency measures in force during the COVID-19 pandemic, it took no issue with the determination by the Judge that the failure to comply should be waived.
13. The Appellant relies on four identified grounds of appeal, though some are subdivided and the first ground has two parts.
14. **Ground 1A:** The Judge erred in law and/or fact in determining that the Petition should be dismissed because the petition debt arose from a contract that is the subject of an exclusive jurisdiction clause in favour of Hong Kong. The Judge should instead have asked herself whether the Petition Debt was disputed on genuine and substantial grounds.
15. **Ground 1B:** Further or alternatively the court wrongly took into account the exclusive jurisdiction clause, in determining whether there was a genuine dispute on substantial grounds.
16. **Ground 2:** The Judge was wrong as a matter of law and/or fact to conclude:
 - 16.1. To the extent that she did so, that the petition should be dismissed on the basis of a finding that, merely because the contract is subject to Hong

Kong law, the court could and should not consider whether the petition debt was genuinely disputed on substantial grounds.

- 16.2. Further or alternatively, to the extent that the court did consider the question of whether the petition debt was bona fide disputed on substantial grounds, it was wrong to conclude that the fact that the contract is subject to Hong Kong law meant that there was a genuine dispute on substantial grounds (or was a factor to be considered in so concluding).
17. **Ground 3:** If the Court had in fact considered whether the petition debt was genuinely disputed on substantial grounds, it ought to have concluded that it was not (alternatively, to the extent that the court did consider this question, it was wrong in fact and/or law to conclude that the petition debt was disputed in good faith on substantial grounds).
18. **Ground 4:** The court was in any event wrong as a matter of fact and/or law:
 - 18.1. To determine that the question of whether the contract contained a representation that the petition debt was owing was a matter of Hong Kong law.
 - 18.2. To refuse to consider whether there was a genuine dispute on substantial grounds as to the representation on the basis of the court's incorrect finding that the matter was one of Hong Kong law and/or for the Hong Kong court.
 - 18.3. The court ought to have considered that there was no genuine dispute on substantial grounds concerning the representation. In any event, to the extent it did consider whether there was a genuine dispute on substantial grounds concerning the representation, it was wrong to conclude that there was such a dispute.
19. This ground only arises if the contract does not amount to a binding agreement between the parties. In the light of the concession by counsel for the Respondent referred to above, this point does not arise and I do not consider it further.

THE RELEVANT LAW

20. It is common ground that:
- 20.1. A company may be wound up if it is unable to pay its debts (section 122(1) of the Insolvency Act 1986);
 - 20.2. The relevant threshold of indebtedness required for the making of a winding up order was, at the time relevant to this case, the increased figure of £10,000 pursuant to the temporary COVID-19 insolvency measures (specifically paragraph 8 of Schedule 10 to the Corporate Insolvency and Governance Act 2020);.
 - 20.3. A company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due (section 123(1)(e) of the Insolvency Act 1986);
 - 20.4. The section 123(1)(e) deeming provision does not apply where the debt upon which the petition is based is disputed in good faith on substantial grounds (see for example the summary of the law in Angel Group v British Gas [2012] EWHC 2702).
 - 20.5. The test for whether a debt is disputed on substantial grounds is akin to whether there is a real prospect of success in disputing the debt, the test for summary judgment. As Arden LJ put it in paragraph 21 of her judgment in Collier v P & M J Wright Ltd [2008] 1 WLR 653:

“There has to be something to suggest that the assertion (sc. that the debt is disputed) is sustainable. The best evidence would be incontrovertible evidence to support the applicant’s case, but this is rarely available. It would in general be enough if there were some evidence to support the applicant’s version of the facts, such as a witness statement or a document, although it would be open to the court to reject that evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation ... But a mere assertion by the applicant that something had been said or happened would not generally be enough if those words or events were in dispute and material to the issue between the parties. There is in the result no material

difference on disputed factual issues between real prospect of success and genuine triable issue.”

21. As to the grounds upon which an appeal may be allowed, it is agreed that the test that the court must apply is that contained in CPR 52.21(3):

“The appeal court will allow an appeal where the decision of the lower court was

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.”

There is no suggestion of a procedural or other irregularity here; the appeal turns on whether the decision of the lower court was wrong.

22. The appeal is limited to a review of the decision of the lower court unless the court considers in the circumstances of the individual appeal that it would be in the interests of justice to hold a re-hearing (CPR52.21(b)).

THE PARTIES' CASES

GROUND 1

23. The Appellant contends that the decision of the Judge on the jurisdiction issue was *“simply wrong.”* In support of this proposition, it cites paragraph 7.637 of French on Applications to Wind Up Companies (4th edition):

“The fact that a creditor petitioner and the company sought to be wound up have agreed that a court outside England and Wales is to have exclusive jurisdiction to decide disputes about the debt on which the petition is based does not preclude the English court from deciding whether there is a dispute about the debt sufficient to prevent the winding-up petition proceeding.”

The authors of French cite BST Properties Ltd v Reorg-Apport Penzugyi RT [2001] EWCA Civ 1997 and Citigate Dewe Rogerson Ltd v Artaban Public Affairs Sprl [2009] EWHC 1689 in support of this proposition.

24. The Respondent's starting position on this issue is to invite the court to consider the position where a winding up petition is based on a debt alleged to arise from

a contract containing an arbitration clause. In that situation, if the debt is not admitted, the court will dismiss or stay the petition so as to compel the parties to resolve the dispute through arbitration rather than through the court process. The Respondent cites as support for this proposition the judgments of Lord Etherton, then Chancellor of the High Court, sitting in the Court of Appeal, in Salford Estates (No 2) Ltd v Altomart Ltd (No 2) at paragraphs 39 to 41 and the current Master of the Rolls, then Chancellor of the High Court, sitting in the High Court, in Telnic Ltd v Knipp Medien Und Kommunikation GmbH [2020] EWHC 2075 (Ch) at paragraphs 26 and 27.

25. The Respondent contends that the same principle should apply in the context of an exclusive jurisdiction clause, on the ground that the parties should be required to adhere to their chosen mode of dispute resolution, in this case the jurisdiction of the Hong Kong courts. It cites the judgment of Hon G Lam JA sitting in the Hong Kong Court of Appeal in Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP [2022] HKCA 1297. Having considered the authorities on how arbitration clauses were to be given effect in a petition for winding up, including Salford Estates v Altomart referred to above, the judge concluded:

“[86] Under the statutes the court has a discretionary power whether to make a winding up or bankruptcy order. The presence of an exclusive jurisdiction agreement between the parties in favour of another forum does not mean that the court is bound to stay or dismiss the petition. But, adopting the same approach as in ordinary actions, such an agreement should ordinarily be given effect unless there are strong reasons to the contrary. It follows that where the debt on which a winding up or bankruptcy petition is based is disputed and the parties are bound by an exclusive jurisdiction clause in favour of another forum precluding the determination of that dispute by the Hong Kong court, the petition should not be allowed to proceed, in the absence of strong reasons, pending the determination of the dispute in the agreed forum. As in the case of ordinary actions, it is neither possible nor desirable to define what may constitute strong reasons. One can conceive of cases where the debtor may be incontestably and massively insolvent quite apart from the disputed petition debt, or it may for other reasons be a menace to commercial society if allowed

to continue to trade, or there may be other creditors seeking a winding up whose debts are not subject to any jurisdiction agreement, or the assets may be in jeopardy, or there may be a need to investigate potential wrongdoings, or the effect of a dismissal or stay of the petition would be to deprive the petitioner of a real remedy or would otherwise result in injustice. Under this approach the court retains flexibility to deal with the case as the circumstances require, taking into account other powers of the court that may become relevant, such as the power to allow the petitioner to be substituted by other creditors and the power to appoint a provisional liquidator or interim trustee.”

26. In response, the Appellant contends that the Respondent’s argument must fall at the first hurdle, since there is binding Court of Appeal authority that the existence of an exclusive jurisdiction clause in favour of the determination of the dispute in a foreign jurisdiction is not only not determinative of whether the domestic companies court should proceed with the determination of whether the petition debt is bona fide disputed on substantial grounds, it is irrelevant to that task. To this end, the Respondent cites the judgment of the Court of Appeal in BST Properties Ltd v Reorg-Apport Penzugyi RT [2001] EWCA Civ 1997. This was an appeal from a decision of Laddie J, in which he dismissed an application by BST seeking to restrain Reorg-Apport Penzugyi from proceeding upon a winding up petition against BST. It is apparent from paragraphs 2 and 15 of the judgment that permission to appeal was granted by Chadwick LJ on the ground that there was an arguable case that petition should be struck out in light of an exclusive jurisdiction clause in the loan agreement upon which the debt was based. Clause 18 of that agreement provided (in its English translation): “*The parties shall attempt to settle disputes, occurring in connection with this contract, amicably; in the case their attempt is unsuccessful, they stipulate the exclusive competence of the Metropolitan Court of the Republic of Hungary.*” Laddie J found that the debt was not bona fide disputed on substantial grounds and was not persuaded that the petition should be struck out by reason of the existence of the exclusive jurisdiction clause. In determining the permission application, Chadwick LJ agreed with the conclusion on whether the debt was genuinely disputed and refused permission on the issue, as did the Court of

Appeal on the substantive hearing. However, he granted permission on the narrow issue of the effect of the exclusive jurisdiction clause and consequently the Court of Appeal had to consider the effect of clause 18. Parker LJ, in a judgment with which Dyson LJ agreed, said at paragraph 31, “*whether or not proceedings raising a dispute as to the effect of the loan agreement could be stayed on the basis of clause 18, that does not in my judgment affect the question which was facing the Company namely whether the petition debt is bona fide disputed on substantial grounds.*”

27. Accordingly, even if the court found the judgment of Hon G Lam JA in Lam v Tor Asia to be attractively reasoned from first principles and/or persuasive (which the Appellant disputes in any event), this court is bound by the decision in BST v Reorg-Apport Penzugyi to find not only that the exclusive jurisdiction clause in this contract did not prevent the court from determining the issue under Section 123 of the Insolvency Act 1986 but that it was irrelevant to that exercise.
28. I should note that it would seem that this authority was not cited before the lower court. It is certainly not referred to in the judgment below.

GROUND 2

29. Turning to the court’s determination that it was not capable of making appropriate findings of Hong Kong law, the Appellant contends, in similar light to its argument about the exclusive jurisdiction clause, that the court wrongly failed to exercise its judgment as to whether the debt was genuinely disputed on substantial grounds.

29.1. The court’s conclusion that it could not determine this issue because the contract was subject to foreign law is wrong and contrary to authority. For example, in Citigate v Artaban the Applicant sought to restrain the presentation of a petition based on invoices in a contract that was governed by Belgian law. As HHJ Hodge KC put it in his judgment, “[26] ...[Counsel for the Applicant] *has made the point that the agreement upon which those invoices are founded is governed by Belgian law; but there is at this stage no evidence of Belgian law before the Court...*[27]

The relevance of Belgian law is only as to the question whether there is a bona fide and substantial dispute as to the respondent's entitlement to the invoiced sums. In the absence before this court – and the position may, as Mr Blakeley acknowledges, be different before the court exercising its jurisdiction on any winding-up petition; but in the absence of any evidence of Belgian law, the court proceeds on the footing that it is no different from the law of this country.” That passage is consistent with Rule 2 of Dicey, Morris and Collins on the Conflict of Laws, 16th edition (paragraph 3R-001) which provides:

“(1) Where a party relies on foreign law, that law must be pleaded and proved as a fact to the satisfaction of the court by evidence or sometimes by other means.

(2) In a case involving a foreign element in which foreign law is not pleaded, the court will apply English law.

(3) Where foreign law is recognised to be applicable, but there is no evidence, or sufficient evidence, of the content of the following, it will in general be presumed to be the same as English law.”

- 29.2. There was no material before the court that suggested that Hong Kong law differed from English law in any respect material to the existence of the alleged debt, whether by way of evidence or even submission.
- 29.3. Following on from the above, the Respondent failed to show that the debt was disputed on genuine and substantial grounds, since it did not adduce evidence that Hong Kong law differed from English law.
- 29.4. Further and in any event, even if the Appellant is wrong to argue that the burden lay on the Respondent to prove that Hong Kong law differed from English law, the presumption of similarity set out above as the third sub-rule of Rule 2 in Dicey, Morris and Collins would apply. In FS Cairo v Brownlie [2022] AC 995, Lord Leggatt noted at paragraph 119 of his judgment that the presumption of similarity between English and foreign law is “*the basis on which English courts (and courts in other common*

law jurisdictions) have historically applied domestic law in cases where foreign law is recognised to be applicable but the content of the foreign law has not been proved.” Having considered why such a presumption might apply, he went on at paragraph 126:

“These factors provide good pragmatic reasons for applying the presumption in a range of cases, but they also determine its proper limits. There is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)?”

In this case, the Appellant argues that there is good reason to think that the law of Hong Kong, being a common law system, is likely to be similar to the law of England when dealing with issues of general contract law. There is certainly no material to suggest that it is different.

30. In response, the Respondent argues that it is for the Hong Kong courts, applying Hong Kong law to determine whether the debt is indeed due and owing. That is a pre-requisite of the presentation of a winding up petition in England because, without such a determination, the English courts cannot know whether the petitioner is truly a creditor at all.

GROUND 3

31. Given the lower court’s findings on the issue of jurisdiction and applicable law, the Appellant argues the judge wrongly did not go on to consider whether in fact the debt was disputed in good faith on substantial grounds. The appeal court should therefore determine this issue.
32. The Appellant identifies that three grounds to dispute the debt appear to have been raised:

- 32.1. That the memorandum of understanding is not a binding contract. For the reasons identified above, the Respondent agrees that it is not open to it to take this issue on appeal and I do not need to deal with it further.
- 32.2. That the Appellant has not proved that it complied with clause 2.4 of the Agreement, obliging it to “*prepare a statement on the last business day in Hong Kong of each calendar month setting out all movements on the Debt in respect of that month and confirming any balance outstanding.*”
- 32.3. That there is an ambiguity in the contract as to whether the Appellant needs to give credit for the sum of £80,215 acknowledged to be due and owing from the Appellant to Mr Jackson, as against the original principal of £200,000 or the reduced principal of £119,785 acknowledged in clause 2.1 of the agreement.
33. On the issue of compliance with clause 2.4, the Appellant accepts that, within its skeleton argument for the purpose of the hearing before Judge Matharu, the Respondent had asserted that there was no evidence that the Appellant had provided a monthly statement of sums due in accordance with that clause. It should be noted that the Appellant does not concede that such statements have not in fact been provided but accepts that the court should proceed on the basis that the Respondent can raise an arguable case that they have not been.
34. However, the Appellant queries where this takes the Respondent’s case. The high point of the significance of the alleged failure to provide statements seems to be that asserted at paragraph 10(a) of the Respondent’s skeleton argument for the purpose of the hearing before the lower court, namely that “*It is likely that this has led to the further dispute in this matter as to the existence of a possible set off.*” The Respondent concedes an arguable cross claim that may be set off against the petition debt of £38,500. But, since that fails to take the petition debt below the relevant threshold of £10,000, the Appellant contends that the set off is irrelevant. If the most that the Respondent can argue is that the Appellant’s alleged failure to provide monthly statements strengthens its case as to the existence of a set off in the amount asserted of £38,500, the failure is irrelevant to the issue before the court.

35. If on the other hand, the Respondent is seeking to argue that the alleged breach of clause 2.4 raises some other argument by way of defence or a set off in a larger figure, it is for the Respondent to raise that case. It has not done so and hence shows no genuine dispute on substantial grounds.
36. The Appellant contends that this gap in the Respondent's case is not bridged by the point made in submissions to Judge Matharu and noted in her judgment as to the lack of clarity on the effect of clause 2.4. At paragraph 18 of the judgment, the point is put thus: *“What does ‘setting out all movements’ mean? Was that adhered to? That is something this court cannot consider, it does not have any evidence in this respect. This was an obligation of the Petitioner. Was it complied with? If not, what is the sanction in the courts of Hong Kong? What is the effect of non-compliance, if there has been non-compliance, on the assumed liability sum of the company?”* The Appellant replies that these are issues for the Respondent to raise, consistent with its obligation to show that the debt is genuinely disputed on substantial grounds. The only point that the Respondent has raised is that referred to in paragraph 10(a) of the Respondent's skeleton agreement and dealt with above.
37. As to the argument that there is ambiguity as to the appropriate treatment of the sum of £80,215 acknowledged to be owed by the Appellant to Mr Jackson, the Appellant contends that the position is entirely clear. The contract starts with the principal sum of £200,000 owed by the Respondent to the Appellant; records the sum of £80,215 as owed by the Appellant to Mr Jackson; and therefore upon execution of the agreement, credit is given for £80,215 against the principal of £200,000, reducing that sum immediately to £119,785.
38. The Appellant notes that the Respondent has never proffered an alternative interpretation of the contract but has simply said that there is an ambiguity about how the sum of £119,785 is calculated and whether or not it takes account of the sum due from the Appellant to Mr Jackson.
39. The Respondent, within its skeleton argument, raised four bases upon which the court was entitled to find that the petition was genuinely disputed on substantial grounds:

- 39.1. The Memorandum was a mere memorandum of understanding and not legally binding between the parties;
- 39.2. The Appellant had failed to comply with the mandatory requirement to provide a monthly statement of sums due pursuant to clause 2.4 of the Memorandum;
- 39.3. Clause 2.1 already reduced the Principal to £119,785 such that clause 3.2 at least arguably additionally reduces the Principal by £80,215 to £39,570. Coupled with the cross claim referred to in the next sub paragraph this would potentially leave a debt of less than the £10,000 threshold for a petition;
- 39.4. The Respondent had a cross claim valued at a minimum of £38,500 for furniture packs ordered and for sales which would operate to reduce any sums under clause 2.3.
40. The Respondent concedes, as I have indicated, that the first of these cannot be maintained in the absence of a Respondent's Notice. As to the fourth, it concedes that a cross claim of no more than £38,500 would not without more bring the debt down below the relevant threshold, if the Appellant were otherwise able to maintain its case.
41. However, the Respondent contends that, in the light of these various disputes, Judge Matharu was entitled to dismiss the petition. In the alternative, if the court finds that the District Judge erred in her findings on the issue of the exclusive jurisdiction clause and/or the application of Hong Kong law, the court should remit the case for a further determination of the issue as to whether the debt is genuinely disputed on substantial grounds.

DISCUSSION

Ground 1

42. Having considered the judgment of the Court of Appeal in BST Properties Ltd v Reorg-Apport Penzugyi RT, I am satisfied that the Appellant is correct in its argument that the exclusive jurisdiction clause was of no relevance to the determination of the issue before the lower court. That decision is binding

authority for the proposition that the Companies Court, in considering the exercise of its power to wind up under section 122 of the Insolvency Act 1986, is itself charged with determining whether the petitioner is genuinely a creditor. For that purpose, it has to determine whether the alleged debt is disputed in good faith on substantial grounds. Even where the alleged debt is based upon a contract which has an exclusive jurisdiction clause in favour of a foreign jurisdiction, the judgment as to the exercise of the winding up power remains that of the domestic court. It follows that the petition should not have been dismissed on the grounds of the existence of the exclusive jurisdiction clause, whether because, on account of the clause, it had no power to hear the petition or because it should (or indeed could) decline in its discretion to hear the petition.

43. Had I not been bound by Court of Appeal authority, an interesting question might have arisen as to whether the English courts should follow the judgment in Lam v Tor Asia, finding that, by analogy with the position in cases with arbitration clauses, the court should, wherever a debt is not admitted, give effect to an exclusive jurisdiction clause by requiring the issue on the debt to be tried in the foreign jurisdiction before permitting a winding up order to be made. In the event, it is unnecessary for me to consider that question in this appeal, notwithstanding Mr Friedman's careful analysis of the Hong Kong judgment and his attractive argument that it should not be followed.

Ground 2

44. Again, the Appellant's argument is well made. As the passages from Dicey, Morris and Collins make clear, the burden here lies on the Respondent to assert (and show) that Hong Kong law differs from English law. It has not done so, but rather simply argued that the English court cannot know whether there are differences and, if so, what those differences are. But there is nothing in the material before the court to suggest that Hong Kong law differs from English law on the proper interpretation of the contract. The jurisdictions are both common law systems. As one might expect, the Hong Kong courts can be seen

to be leaning on English principles of law – see the judgment in Lam v Tor Asia as an example.

45. It follows that, whether this is properly seen as a case where English law is applied because the Respondent has failed to prove the application of different legal principles or as a case where the presumption of similarity is applied, the court must apply English law to the alleged dispute on the debt.

Ground 3

46. The result of the errors on the jurisdiction issue and the Hong Kong Law issue is that the judge below did not go on to deal with the matters that were raised in disputing the debt in accordance with English law but rather found that the merits of the dispute were not something that were open to the Companies Court to examine. It would be possible to remit this case to the lower court for a reconsideration of those issues. That would accord with the starting position adopted by CPR 52.21 that an appeal is normally a review rather than a rehearing.
47. In reality however, I have available all of the material necessary to determine the issue afresh and I have considered that material for the purpose of determining the first two grounds of appeal. If I were to remit the issue as to whether the debt is genuinely disputed on substantial grounds, additional cost and time would be wasted. That would not accord with the overriding objective and accordingly I go on to determine whether, applying English law, the Respondent shows that the petition debt is genuinely disputed on substantial grounds. I deal with the three grounds that the Respondent still advances before turning to how I deal with the discretion to make a winding up order.
48. As to the failure to comply with the requirements of clause 2.4 of the Memorandum, the Respondent's opposition in its skeleton argument at first instance only raised the failure to provide such statements as being of relevance to the cross claim. The skeleton argument for the appeal hints, through the use of the word "mandatory," at an argument that the provision of monthly statements was some form of condition precedent to the Respondent's liability under the agreement. This hint became express during counsel's oral

submissions on behalf of the Respondent, though even then there was no analysis as to how the term was said to amount to a condition precedent.

49. If the Respondent intended to advance this case, it was incumbent upon it to raise the issue clearly. I accept that it was open to the Respondent to run this argument on the appeal given that I was rehearing the issue as to the whether the debt was genuinely disputed on substantial grounds.

50. The caution to be exercised in classifying a term as a condition precedent is well expressed in the judgment of Beatson LJ in Heritage Oil and Gas Ltd v Tullow Uganda Ltd [2014] EWCA Civ 1048 (a case relating to the sale of rights to explore for petroleum), where he starts his analysis of the issue with the following:

“[33] The starting-point of my analysis of this issue is the general appreciation by courts for over half a century that, while classifying a term as a condition precedent or as a condition may provide certainty, it can also have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss. It was for that reason that, in the context of international sale and carriage contracts, the courts became more reluctant to classify terms as conditions precedent and conditions. This reluctance led to the identification and growth of the category of ‘intermediate’ terms and to require that clear words be used if a term is to be construed as a condition precedent or a condition.”

51. The question as to whether a clause amounts to a condition precedent is a question of construction of the contract. The clause does not have to be labelled as a condition precedent to have that effect, but, applying conventional principles of construction, the failure expressly to state that it is a condition precedent will make it difficult to argue that it should operate as such. In AstraZeneca UK Ltd v Albemarle International Corp [2011] EWHC 1574, Flaux J as he then was said:

“[250]...in the absence of an express term, performance of one obligation will only be a condition precedent to another obligation where either the first obligation must for practical reasons clearly be performed before the second

obligation can arise or the second obligation is the direct quid pro quo of the first, in the sense that only performance of the first earns entitlement to the second.”

52. The Respondent has not advanced any clear argument as to why clause 2.4 should be seen as a condition precedent to the Respondent’s liability for the Principal as defined in the agreement, rather than an obligation the breach of which does not debar the Appellant from recovering the debt. The clause is not said to operate as such, either expressly or by necessary implication. If it did so operate it would risk having exactly the kind of draconian consequences that Beatson LJ identified in Heritage Oil and Gas. By way of example, the Respondent would have to meet the obvious problem that, if the condition precedent contended for was simply in the terms of clause 2.4, it would appear that the most minor default, such as a single statement being a day late, would be a bar to recovery of the whole of the Principal. An argument that such a term should be construed as a condition precedent to the Respondent’s liability under the agreement would therefore be met with a compelling argument that it was commercially nonsensical. If instead the supposed condition precedent were in qualified terms (for example that the clause only became a condition precedent to liability if the statements remained outstanding at the time that repayment of the debt was due), it would raise the question as to whether the court should countenance an argument that anything other than a clear express term of the contract is capable of amounting to a condition precedent to liability.
53. Whatever the reason for not having put the case on the alleged condition precedent previously, the Respondent has failed to set out with any clarity an argument for the construction of clause 2.4 as a condition precedent so as, absent evidence of compliance with that clause, to raise genuine and substantial grounds for disputing the debt.
54. On the issue of the correct interpretation of the contractual provision relating to the alleged failure to give credit for the sum of £80,215 by virtue of clause 3.2 of the Memorandum of Understanding, again it is notable that the Respondent does not advance any clear case as to how the payment of £80,215 should be

treated (as opposed to how it might be treated). It is an obvious point to be made on behalf of the Appellant that the deduction of £80,215 owed by the Appellant to Mr Jackson from the original Principal of £200,000 which was acknowledged to be owed by the Respondent to the Appellant results in a figure of £119,785, exactly the amount of the reduced Principal acknowledged to be due on execution of the agreement. It would be a strange coincidence if this figure were in fact calculated by some other method.

55. But two further points can be made:

55.1. One would wonder why the indebtedness of the Appellant to Mr Jackson is mentioned in the agreement at all unless it forms some part of the overall deal that was reached.

55.2. If the Respondent truly considered that the petition was claiming a debt that failed to give credit for the sum of £80,215 due from Mr Jackson to the Appellant, it would be highly surprising that he did not mention this point in either of his witness statements.

56. The Respondent has no answer to these obvious points. In my judgment, it is fanciful to consider that the explanation for the reduction in the principal due under the Memorandum of Understanding on its execution is anything other than a reflection of the sum admittedly due from the Appellant to Mr Jackson. In these circumstances, there is no dispute that the Principal of £119,785 is owing.

57. As to the third issue, the Appellant concedes that the Respondent raises a genuine issue on substantial grounds by way of its prospective cross claim. However, the value of that cross claim (as far as the Respondent puts a value on it) does not come close to reducing the admitted debt to below £10,000. Whilst I note that the Respondent's case is that the cross claim is no less than £38,500, the truth of the position is that Mr Jackson is only able to verify a cross claim to the tune of that sum. Whilst the Respondent may suggest that it is a minimum, such a suggestion does not give sufficiently substantial grounds to conclude that a cross claim of greater value should be brought into account.

CONCLUSION

58. Given that the Respondent does not take issue with the Judge's decision that it would have been appropriate to waive the technical non compliance with Schedule 10 of the Corporate Insolvency and Governance Act 2020 (a finding with which I agree), such non-compliance is no bar to the appeal being allowed.
59. It follows that the Appellant shows that a debt well in excess of the relevant threshold is due and owing and it defeats any argument based on genuine grounds for disputing the debt beyond the putative cross claim which does not take the debt below the statutory threshold. It follows that the Respondent has not paid a debt when it fell due. Having not raised any substantial argument in defence of the debt, the natural inference is that the Respondent is unable to do so. No argument has been advanced against the making of a winding up order other than the issues addressed in this appeal. In those circumstances, I am satisfied that the appropriate order is a winding up order.
60. For the reasons given above, I allow the appeal and set aside the order below, substituting an order for the winding up of the Respondent.