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Case No: CR-2023-000774 and CR-2023-000818

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

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Date: 1 May 2024

Before:

INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF PALLADIAN CAPITAL LIMITED
AND IN THE MATTER OF PALLADIAN (PENFOLD) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

CHETAN KHERA **Petitioner**

- and -

1. **PALLADIAN CAPITAL LIMITED**
2. **PALLADIAN (PENFOLD) LIMITED**

Respondents

- -

Mr Ryan Hocking (instructed by Debenhams Ottaway LLP) for the Petitioner.
Mr Adam Deacock (instructed by Teacher Stern) for the First Respondent (including as a creditor of the 2nd Respondent) and for Two Works Ltd (as a creditor of the 2nd Respondent) and Mr Dara Khera (as a member of the 2nd Respondent).

Hearing date 18 January 2024:

- -

JUDGMENT

This judgment was handed down remotely at 9.30am on 1 May 2024 by circulation to the parties or their representatives by e-mail.

ICC JUDGE GREENWOOD:

Introduction

1. This is the final hearing of two creditor's winding up petitions, both presented by Mr Chetan Khera ("**Chetan**"), the first against Palladian Capital Limited ("**Capital**") on 10 February 2023, and the second against Palladian (Penfold) Limited ("**Penfold**") on 13 February 2023.

2. Chetan is a director of Penfold, which was incorporated on 6 October 2015, and owns 50% of its issued shares; its only other director and shareholder is Chetan's cousin, Dara Khera ("**Dara**"); it is presently deadlocked, and there is no written shareholders' agreement. Chetan's petition was based on a debt of £237,070.80, said to be due in respect of his director's loan account.

3. Until 3 November 2021, when he resigned, Chetan was also a director of Capital, which was incorporated on 24 April 2017; the only other director was Dara, and he is now the sole director. Further, until 4 January 2021, when he transferred them to a company called Two Work Ltd ("**Two Work**"), which is owned and controlled by Dara (its sole director), Chetan owned 50% of Capital's issued shares. Again, his petition was based on a debt said to be due in respect of his director's loan account, in the sum of £612,162.19.

4. Capital opposed by the petition presented against it on the basis that the debt due to Chetan has, at least arguably, been assigned to Dara.

5. Given its state of deadlock, opposition to the petition presented against Penfold was not advanced by Penfold itself, but first, by Dara, in his capacity as a contributory; also by Capital, in its capacity as a creditor, owed c.£1.5 million; and also by Two Work, which has a default judgment against Penfold in the sum of £330,375.29 dated 10 October 2022, secured by an interim third party debt order granted on 24 October 2022 in respect of the sum held to the credit of Penfold's bank account at HSBC, both of which were obtained without Chetan's knowledge. Two Work is a trading company, which has been in business for some 20 years, and which carried out design and build work for Penfold.

6. Essentially, in respect of Penfold, the grounds of opposition were that Dara wishes to assert against Chetan on behalf of the company an alleged cross-claim by means of a derivative action under sections 260-264 of the Companies 2006, based on an allegation that in breach of his duties as a director, Chetan caused Penfold to sell two properties (Flats 1 and 3, 1 Penfold Place, London NW1 6RJ) at an undervalue (for £670,000 and £675,000 respectively) in February and April 2021. It was asserted by Dara that the loss suffered by Penfold as a result of the alleged breach was about £500,000, and in any event, more than the sum due in respect of his loan account.

7. Penfold was incorporated to develop 1 Penfold Place into seven flats, and to sell them; all have now been sold, and its only assets are c. £346,000 in cash (subject to the interim third party debt order in favour of Two Work) and the freehold title to 1 Penfold Place, worth about £45,000; it was not in dispute that it is insolvent, and that it would remain insolvent even if, to the whole extent asserted, the alleged cross-claim against Chetan were to succeed; it was not anticipated that Penfold would engage in any further business. For that reason, having no tangible interest in the outcome, Chetan cannot pursue a contributory's winding up petition.

The Background

8. Dara has worked in the construction industry for more than 30 years; Chetan is also an experienced property developer. Together, in about 2015, they agreed (without any formal written shareholders' or other agreement) to conduct a property development business; essentially, they agreed to split any profits equally. Capital and Penfold are two of the companies through which that business was conducted.

9. Evidently, serious differences arose (precipitated, according to Dara's evidence, by Chetan's failure to reinvest in their enterprise all of the proceeds of sale of Palladian (Kenley) Limited, one of their other companies, and according to Chetan, because he was unwilling to commit further investment in what had become "*a fool's errand*") and the commercial and personal relationship between Chetan and Dara deteriorated.

10. In consequence, on 30 August 2018, Dara wrote to Chetan, setting out his concerns, and to "*call a halt to our business activities*", having decided, "*not to further my interest in the business (beyond the projects that we have in hand), essentially because of a lack of proper business practices, and financial reporting, which has seen me*

struggle to recoup or establish funds owed to me. .... I have approached my accountants to carry out a thorough review of our financial history to ensure that my interests are being served in equal measure, so that we can gain a proper report on our financial standing and tax position."

11. Broadly, to bring their combined enterprise to a conclusion, Dara's suggestion (as outlined in a further letter, dated 25 August 2020) was that their various companies and businesses be wound down in an orderly but informal fashion, where possible utilising losses to reduce taxable profits, and to that end, that Dara should become the companies' sole shareholder, and that Two Work (which had been profitable) should "*become part of the Group*". As part of that process, Dara apparently envisaged at some point an overall accounting between them, such that, as he wrote on 3 October 2020, "*As we draw a line under joint venture it is very clear that there remains a large gap in the amount invested between us. The sum is so large in fact, that when the companies accounts are fully settled there will be a sum in excess of £1m. This will mean your are not owed any further money from any of the companies.*"

12. In that context, in his 1st witness statement in opposition to the Capital petition, Dara said, simply:

> "*After a series of discussions, and acknowledgement of his de facto exit from the business, it was agreed that I would take on the responsibility of discharging the Company's* [Capital's] *(and others) debts in exchange for the Petitioner's shareholding, and assignment of his director's loan account, in both Icon Ldn Ltd (another jointly owned company), and* [Capital]."

13. Dara did not allege that the assignment of the loan account was in writing.

14. On 4 January 2021, Chetan transferred his shares in Capital to Two Work. At about the same time, he also transferred to Two Work, his shares in Icon Ldn Ltd ("**Icon**"). On 5 February 2021, he emailed Dara, attaching the signed forms, and said, "*As requested, in good faith, please see signed Forms attached*."

15. In his evidence, Chetan described the transfers "*as a gesture of good faith as to ... ongoing discussions ... This was because his preference for the various companies moving forward was that they be subject to a single controlling party i.e. him ….*"

16. It was not in dispute that Dara and Chetan did not reach an overarching agreement or settlement regarding the conclusion of their venture, despite a prolonged effort to do so. Whether that failure was due to the fault of one side or the other, or both or neither, I cannot say, and nor was it relevant in the context of this case. In any event, their discussions continued.

17. Thus, on 17 February 2021, Dara emailed Chetan and said:

> "*Hi Chet,*
>
> *Re: recent discussions please see my responses below.*
>
> *1. CBRE: This 40K bill should be split 50/50 as it is both of us personally who will be pursued by CBRE, it is not a bill that can be placed on any other company.*
>
> *2. It is agreed that the Fishers bill will be split 50/50*
>
> *3. It is agree that WORK we will carry out the work to* [Penfold] *and pay for it until the apartments are sold at which time this will be claimed back.*
>
> *4. It is required that the directors loan assignment is to be signed over to DK from CK, in regards to* [Capital] *and* [Icon].
>
> *5. Icon 6k Maggie is confirming the validity, but believes that this bill is not attributable to WORK or ICOn, but is a case of double accounting perhaps.*
>
> *How this is clear and rational.*
>
> *Best*
>
> *Dara*"

18. Chetan replied, on the next day:

"*Dear Dara*

Thanks for your email. I think we have slightly differing perspectives on some of the points below.

1. This outstanding invoice is not a personal invoice but a company invoice relating to the Kenley project. If pursued, it will be pursued to Palladian Kenley Ltd (now in CCC ownership) who will then be liable to settle the invoice, and would deduct this from any funds outstanding to Palladian Capital. I assume and predict any legal and interest and legal expenses that CBRE would incur would be added to their claim. With respect, I have not agreed to contribute to this invoice. I have not asked, but I dont think CBRE would have any issue assigning these invoices to another company, as they simply seek their due payment.

2. I have agreed verbally to this on the proviso that item 5 of your email is settled to. If you are not acknowledging item 5 as a genuine bill outstanding which Icon Design & Build Ltd, has indeed incurred costs on and paid the VAT to IR, then I will have to personally pay this back to that company . For the avoidance of doubt it is not a case of double accounting as per yours or Maggie's suggestion. Furthermore, if there was a way to write it off, or this was a case of double accounting I would have dealt with it and not be raising this matter.

3.Please be clear on the priority of order for creditors to be paid on the sale of apartments, so there is no confusion, if you are planning to claim costs on these works.

***4. We have agreed this verbally**.*

5. See point 2.

Dara, from receiving your email and its content, there is a good reason why I was keen to discuss al outstanding matters with you at the beginning of the year.

I sense there is some mis-alignment between our perspectives perhaps, at present. My perspective is that you are taking over two companies into your own group, in order to benefit from any assets that those companies may have. ***You are asking me to assign the companies over to you, with my directors loan consideration, at no cost, which is fine, not withstanding that I have to pay the due tax consideration on those amounts (£97k)***

You are asking me to pay invoices which are related to those companies for which I will have zero recourse to. My understanding is that if one is purchasing a company for a nil premium, you are taking the assets and liabilities, hand in hand. I have in good will, agreed to pay half of Fishers bill in tandem with the Icon Design & Build ltd bill, but not further than this.

My thinking is not aligned with yours that I will invest further equity of funds into companies which I will not see a penny returned in any shape or form, and only you stand to recoup or benefit from.

I hope you can consider my perspective alongside yours.

Call if you wish, anytime to discuss the above. It is not a pleasant conversation and one which we both need to figure out and resolve for the benefit of the whole.

Best

Chet"

19. I have highlighted in bold Chetan's answer numbered "4", which was relied upon in particular by Dara.

20. Negotiations continued, and on 19 April 2021, Dara emailed Chetan, and said, amongst other things:

"*Chet,*

I do not want to deal with you privately and it hurts me even to have to write to you now, I want as little to do with you as possible. You are extremely bad for my physical health and mental well being.

Though your email language is conciliatory, I still do not understand the reason for delay. Your manners and your charm precede you, however, it is difficult to get you to action anything, with clarity or without the fear that you are coming back to renegotiate again. Each round of negotiation is cost in time, money and energy.

I have found it difficult to get you to take any action. It sometimes times takes months of pointless process and negotiations with you, and still no action will be taken by you at the end.

...

If you do have any intention to wrapping matters up please answer the following below. We can then assess if there are any matters that require any further information.

Bank and HW Fishers

Are you going to sign the bank mandate, it is soon to expire and it will take weeks to arrange again? This will undoubtedly cause suffering to those who are owed payment. This is an action that does you no harm, but allows the money to be transferred to the bank account from the lawyers client account.

Please be clear on the following: 1. Will you sign the bank mandate today? If not state why, there are no related matters to this, and it can do you no harm to sign a bank mandate that will require both of our signatures to withdraw funds. Y/N

2. Ahmed from Fishers is stating he will send the accounts to HT, please ensure he does this today or let us know if there is a problem. Y/N

3. Signing over the directors loan accounts as agreed for the companies that I am taking over. Y/N

On a last matter, I have no idea why you keep asking about Martine's loan to the company. You bring out the subject that some of the 100k was used to pay my TW ltd company debt, though that may have some truth to it it was only a temporary cash flow measure, retentions monies from Brooks Mews and a variety of other sources for money that I injected have covered that short term cash flow issue over and over again.

We have gone over and over this subject. You have no money due to you. Please confirm if you agree or disagree. Y/N

Until we separate the company ownership, we cannot part ways. I am investigating how I can do this, as quickly as possible, with or without you signing over the ownership as agreed.

For now at a minimum, I want to return all capital sums borrowed from our creditors, so if you want to argue or negotiate any further, any remaining sums will be left in the bank, giving you time to make any further investigations that you might deem necessary.

Agreed / disagree Y/N

…"

21. In effect, those questions became part of a template for Dara and Chetan to carry on their negotiations, and to state their positions. Accordingly, on 20 April 2021, Chetan emailed Dara, and said, "*We are making some progress, albeit small steps. ... May I suggest you make comments to each section as you see fit, with the aim of Resolution. The more points we can Close out and agree upon, the closer we will get to Resolution. Please do your best to Close out points listed, and trust I am doing so too. …*"

22. Following that, in what became 17 differently numbered parts (in an email document that covered 6 printed pages) they each said, amongst other things, as follows. In respect of each comment, I have inserted, in square brackets, the name of the author.

"*1.*

For now at a minimum, I want to return all capital sums borrowed from our creditors, so if you want to argue or negotiate any further, any remaining sums will be left in the bank, giving you time to make any further investigations that you might deem necessary. Agreed / disagree Y/N [DARA]

1. *I assume you are referring to Loans from Preet, Neelam, Chaya, Martine.*

   I agree, they should be paid as swiftly as possible, independent of any dispute we may have between us. [CHETAN]

   This would mean Martine's full sum 362K [DARA]

   I take it this is your agreed intention, and supersedes your previous email which stated that all company matters to be resolved before addressing these loans, and indeed a suggestion that you would like to settle Preet and Martines loans independently, and me to address Chaya and Neelam's. Could you confirm this is the case? [CHETAN]

   No this is not the case, I want it all concluded. All business conclude once and for all. The entire deal is conditional on a full and final settlement of all elements.

   Though you are not taking my warnings seriously, dealing with you is severely effecting my health and so I am keen to conclude this episode, and move on with my life.

   We have verbally agreed to things many times. You never keep to any them in my experience. All matter to be resolved, nothing to be left. [DARA]

   I think we are chasing our tails here. I simply requested substantiation as to Martine DC loan, and this has not been furnished to date, nor have I received it, nor on my emails as you have suggested. If it was, I would be furnishing this information to you. We are going in circles, and the reality is, that it does not affect the bottom line between us. Please as Maggie to provide the breakdown.

Notwithstanding, the total amount to be released of £362,398.65, can be agreed but please provide the breakdown as requested.

I note your amended intent, not to release funds to any any party until all matters are resolved, which is a departure from your previous position. [CHETAN]

…

11.

Signing over the directors loan accounts as agreed for the companies that I am taking over. Y/N [DARA]

In principle, I am happy to sign over Directors loan account, but with respect this is subject to the following:

-Four family members final accounts being agreed and paid in Full. [CHETAN]

I can only agree to capital sums at this stage. [DARA]

-All outstanding issues of disagreement being resolved by DK and CK. [CHETAN]

of course. [DARA]

-A written and signed deed/ understanding that I will not be party to any further liability from the companies you are taking over. [CHETAN]

This can form part of the agreement and would be normal. [DARA]

Agreed. [CHETAN]"

23. Despite their efforts, as I have said, no overall agreement was reached. In a letter from Dara dated 4 November 2021, he said, amongst other things, that Chetan had "*repeatedly refused and rebuffed suggestions of entering into mediation to resolve our business situation*", that Chetan was "*in a net negative position across our shared businesses*" and that "*the accounts between us needs to be balance*".

24. On 3 November 2021, Chetan resigned as a director of Capital. On 5 November 2021, through his solicitors, Debenhams Ottaway, he demanded repayment by Capital of his outstanding loan, in the sum of £612,000. That demand was rejected, and was repeated by Debenhams Ottaway in a second letter of demand dated 31 January 2023. In Capital's accounts to 30 April 2021, it was stated that no debt was due to its directors. Dara's evidence was that this reflected the assignment of Chetan's loan account; Chetan's was that the accounts were produced without his knowledge or consent.

25. Also on 31 January 2023, Chetan demanded payment by Penfold, in the sum of £237.070.80. Soon afterwards, on 16 March 2023, about a month after the petition was presented on 13 February, Dara's solicitors, Teacher Stern, sent a letter before action to Debenhams Ottaway in respect of Penfold's alleged claim against Chetan for breach of his duties as a director. By reference to that alleged claim (which in summary form had been raised previously, in Teacher Stern's letter of 14 October 2022) it was said that Chetan does not have standing to pursue a petition, and/or in any event, that no order ought to be made. At the hearing, through Mr Deacock, Dara undertook that in the event of the dismissal of the petition against Penfold, he would seek permission to commence a derivative action against Chetan in respect of the company's alleged claim.

26. As to the basis of that claim (which Dara described in his evidence as one which he considered to be "*genuine .... with a real prospect of success*"), it was said, in Teacher Stern's letter, that the sales of Flats 1 and 3 in 2021 were at an undervalue, because "*at that time the true value of Flat 1 was £902,805.00 and the true value of Flat 3 - £931,464.00*" which could be demonstrated by reference to the sale of Flat 2, in June 2019, for £950,000.

27. It was, in addition, said that "*around the time of the sales our client specifically informed your client in writing that he did not consent to the sale of the properties at the values your client subsequently caused them to be sold for. Our client requested that an alternative estate agent be appointed to market the properties, on the basis that he considered the advice as to valuation being provided by Knight Frank .... to be incorrect. Our client made it clear to your client in writing at the time if the proposed sales of undervalue proceeded he would claim back the loss caused to the company from your client personally.*"

28. Moreover, it was alleged that "*the sole individual with responsibility for advising* [Penfold] *and marketing the properties was Christian Lock-Necrews, a childhood friend of* [Chetan] *with whom he went to school. Contrary to* [Penfold's] *best interests, your client refused to comply with, or even seriously entertain* [Dara's] *requests*". Finally, it was said that there was no urgent need to sell, or to sell both properties, and that if the suggested values were not possible at the time, Chetan "*ought to have waited until the market recovered (as evidence will show it has) once pandemic-related restrictions were eased*". The loss alleged was therefore £505,000. In addition to the main claim in respect of the sales, the letter also raised allegations that Chetan had caused loss by failing to pay Two Work on time, by failing to file accounts on time, and by incurring unnecessary interest charges on a loan agreement which had been made necessary only as a result of repaying debts to Chetan. In those additional respects however, the claims were for sums amounting to about £50,000. It follows that without the claims in respect of the sales, the company's cross claims against Chetan are less than the debt owed to him (and in the event, little was said about them).

29. By the time of their sale, Flats 1 and 3 had been on the market for almost 4 years, since about June 2017, when project marketing began. Knight Frank had been instructed by Penfold in about (or certainly by) January 2020. An email from Chetan to Mr Lock-Necrows sent on 28 January 2020 at 09:57, read, "*As per our telephone conversation yesterday please take this as formal instruction of the salient points discussed: - We would like a full marketing effort to be carried out at both apartments three and one Penfold Place …. now we place trust in knight frank that you will deploy focus and push hard for Acceptable offers for the sale on both properties*." Knight Frank was to be paid remuneration calculated by reference to the sale price. Both the company and Knight Frank had an interest in sales at the highest possible price.

30. From time to time, Knight Frank provided advice and updates. For example, on 19 June 2020, Mr Lock-Necrows emailed Chetan and said, "*I can confirm the recommended asking prices for the remaining units at Penfold Place: Apartment 1 - £825,000 (reduced from £895,000) Apartment 3 - (Reduced from £950,000). As mentioned to you over the phone yesterday, the buyer who would offer a couple of weeks ago came back to me to confirm he is still willing to transact on apartment one at £745,000 and that this is his best and final offer on the apartment.*"

31. Chetan replied, "*Re the potential buyer whose offer has been place, I am sorry we cannot accept this offer as it is simply too low and a near loss on cost of development. As mentioned we are able to transact on flat 3 as low as £775,000 for a quick and clean sale but no lower*".

32. On 15 July 2020, Mr Daniel Sugarman, an associate at Knight Frank, emailed Chetan and confirmed Chetan's instruction that Flat 1 was to be marketed at £785,000, Flat 3 at £815,000. Dara was subsequently copied in to Chetan's email affirmation of that instruction, which enjoined Knight Frank to "*focus all negotiators to give priority to Penfold Place*". He made no objection, at any rate in writing.

33. On 11 September 2020, Mr Aidan McMahon, a negotiator at Knight Frank, emailed (albeit the printed document in the exhibit does not make clear to whom the email was sent) and said, "*I've had quite a few viewings in the last few weeks at Penfold Place and it's been the same sort of feedback (mainly negative see below)*" – he then referred to paintwork looking "*rough*", patios in poor condition, with "*mushrooms growing through*", and the entrance to the development having had "*homeless people sleeping outside, it's quite a mess, looks like someone has used it as a toilet also*".

34. On 29 September 2020, Mr Tom Nicole, a negotiator at Knight Frank, emailed Chetan and said that to "*quickly summarise the market below £3.5 million, we have found the pricing has become extremely sensitive. End users, who are currently active in the market, are holding fire if they don't feel financially comfortable and are awaiting to see regarding job security, coronavirus etc. … My opinion, would be to reduce the flats immediately to £650,000 and £675,000. I understand that this is a lower figure than you would of anticipated, but I feel a dramatic reduction is better than the death by a thousand cuts approach.*"

35. On 8 October 2020, Chetan emailed Mr Nicole (and also, others at Knight Frank, Ms Victoria Fenton, Mr Lock-Necrows and Ms Emma Fletcher-Brewer) in respect of offers from two prospective purchasers to buy Flat 1 for £662,000 or £660, and Flat 3 for £675000 (received following asking price reductions) and said "*Unfortunately, and with respect to your efforts, I cannot get an agreement for sale with all stakeholders at the offers received. … He company and stakeholders are expecting a price achieved of*

£675k for either of the apartments. I am sorry that this may not be favourable news; but I'm under scrutiny to all stakeholders and internal financial budgets".

36. Soon afterwards, on 15 October 2020, at 16:02, having been told by Ms Fletcher-Brewer, a partner at Knight Frank, of offers received in respect of the properties, Chetan replied by email "*Please accept this email as confirmation to proceed with both sales as highlighted below in agreed sales figures in RED*" (£670,000 for Flat 1, £675,000 for Flat 3). Ms Fletcher-Brewer had recommended acceptance: "*I genuinely believe that these issues will get worse* [this was a reference to the deteriorated physical condition of the properties] *coupled with the advice given by the Marylebone office (Apartment 1 £650,000 new advised asking price, Apartment 3 new advised asking price £675,000) and also current situation with lockdown, nearing Christmas, uncertainty in the market-these are pretty much the prices you requested. The overarching condition of these offices that they hear back today before 5.00 pm otherwise they will walk away, I'm afraid*".

37. Also on 15 October 2020, at 16:23, Dara emailed Chetan, and said:

> "*On a point to note, I have not agreed to the sales, other than in principle based on an agreement between us which has not been drawn up yet.*
>
> *I will not agreed to theses sale until we have an agreement in place. At a minimum a shareholders agreement, coupled to u repayment plan of the debt owed to me.*
>
> *Please do not give the go ahead to anything unilaterally, it will cost us more money moving forward.*
>
> *I have not agreed in word or in deed.*
>
> *I will need a shareholders agreement at a basic minimum, that will ensure that funds cannot be dispersed before an agreement, which cover your payments to me is agreed and secure.*
>
> *I hope you will take this in the good grace that it is sent in*."

38. At 16:43, Dara wrote again, "*On a final point, any abortive work or fee that may come due because of your unilateral decision making will be charge to you in person, not the project, or any of the companies, please bear that in mind. I will have no choice but to instruct lawyers against your actions if you do not work collaboratively. So unless I have a written assurance in place will be actively seeking to stop the process of these sales, with the associated costs being directed squarely at you*".

39. In reply, on 16 October 2020, at 09:57, Chetan said that he had "*signed off these two remaining sales offers, just as I have with the previous 5 apartments sold. ... I can see you will attempt to stall sales of this project as some form of leverage to your campaign of co-agreement between us in other related company matters ... In my opinion, you are a potential threat in jeopardising the prospects of* [Penfold] *receiving sales income and the ability to distribute funds to Heritable, family members and other creditors. To that affect, I will be expecting that any written agreement that you and I are proposing and commit to, will include your commitment and legal-undertaking to sell the remaining apartments and the funds proceeds to be distributed in the hierarchy of creditors that we have broadly spoken about*".

40. In reply, at 16:08, Dara wrote to Chetan, that he would be "*writing to Joe Sole, to ensure that no exchange will be allowed until such time as we have a detailed agreement subtle between us*". Joe Sole was a solicitor, of EMW LLP. In the event, the sales were completed on 1 February and 1 April 2021, and Dara took no further or formal step to prevent them.

41. The reference to "*Heritable*", was to Heritable Development Finance, which had given a loan to Penfold, by an agreement dated (about) 3 May 2016, to assist with the purchase of the property at 1 Penfold Place. The maximum amount of the loan made available was about £2.7 million. From at least August 2020, the correspondence showed that Heritable had been pressing for information about repayment, the term having expired. For example, on 5 August 2020, Mr Paul Reynoldson at Heritable, emailed Chetan, and said, "*I have been reminded that the revised expiry date for the Penfold place loan has passed so I would appreciate it if you could let me know how the refinance discussions are progressing? We currently have approx. 4 months interest cover left within the facility availability*". He wrote again, asking Chetan for further updates, including in respect of the proposed and agreed sales of Flats 1 and 3

on 17 September 2020, 23 September 2020, 29 September 2020, 14 and 28 January 2021, 23 February 2021 and 3 March 2021.

42. The exchange of contracts for the sales of Flats 1 and 3, and the sales concluded in February and April 2021, took place at much the same time (as explained above) as Dara and Chetan were negotiating, or trying to negotiate, an overall agreement, and in the context of that negotiation.

43. In December 2021, Two Work issued proceedings against Penfold, of which Chetan was not aware and of which he was not made aware by Dara. It obtained default judgement against Penfold in the sum of £564,288.97 on 19 January 2022 which it enforced by way of a third-party debt order (in respect of the sum standing to the credit of Penfold's bank account) made final on 1 June 2022. It has therefore had the benefit of that payment, which it received within 2 years before the presentation of the petition against Penfold.

44. On 1 September 2022, Debenhams Ottaway wrote to Dara and said that Chetan had been "*extremely shocked, concerned and amazed to learn that*" sums had been removed from the company's bank account for the benefit of Two Work, but without his knowledge or agreement. In that letter, Debenhams Ottaway raised the prospect of a preference claim under s.239 of the Insolvency Act 1986 ("**the IA 1986**"), and threatened to commence winding up proceedings. On 30 September 2022, they wrote to Teacher Stern and invited Dara to agree that Penfold should go into creditors voluntary liquidation and that a mutually agreed insolvency practitioner be appointed, failing which, again, a winding up petition was threatened.

45. It was in that context that for the first time, the alleged sale at undervalue was referred to in correspondence or writing, formal or otherwise, albeit most cursorily, in Teacher Stern's letter of 14 October 2022, which was sent in response to Debenhams Ottaway's letter of 30 September 2022. However, in any sort of detail, it was not explained until the letter before action dated 16 March 2023, after the petition was presented. That is despite the fact of the negotiation being conducted throughout 2021, which entailed both sharp and bitter disagreement, and the detailed consideration, in correspondence, of numerous aspects of the parties' venture.

46. On 10 October 2022, at much the same time as Teacher Stern first referred to the alleged claim, Two Work obtained a second default judgment against Penfold in the sum of £330,375.29, subsequently secured by an interim third-party debt order granted on 24 October 2022 in respect of the sum held to the credit of Penfold's bank account at HSBC. Again, both judgment and order were obtained without Chetan's knowledge.

47. In Penfold's accounts to 30 October 2020 (apparently approved by Dara - but not Chetan - on 22 November 2022) the debt previously recorded as due to Chetan was removed, according to Dara, because the accounts were "*adjusted to account for the losses* [Chetan] *wrought on the company, and Chet has never disputed this*".

48. In fact, Chetan had previously made his position explicit. For example, on 21 July 2022, Debenhams Ottaway wrote to Teacher Stern, and said, amongst other things, "*Please note however, that if you have instructed the accountants to remove or in any way reduce our client's Director's Loan Account, until the same as reinstated in full, our client will not be in a position to agree the accounts as they will therefore not be correct*". On 3 August 2022, Dara emailed Debenhams Ottaway and said, "*from what I can gather, Chet is now seeking to clarify in the 2020 draft accounts, is that his DCA has been left in place and intact. It has. There has been relatively little activity in the accounts during the 2020. I have been responsible enough to ensure that the accounts have been prepared correctly and reflect a true and proper representation of the accounts during the period*." Nonetheless, when the accounts were approved by Dara, the debt had been removed. The same accounts showed a net balance sheet deficit of £1,046,436.

49. After the hearing, there having been a discussion concerning Penfold's circumstances, and of the October 2022 interim third party debt order, Mr Deacock wrote (on my invitation) to offer the following undertakings: "*Dara Khera undertakes to the Court that he will with reasonable expedition issue and thereafter pursue the proposed derivative claim on behalf of Palladian Penfold Limited against the Applicant arising out of the sale of Flats 1 and 3 Penfold Place NW1 6RJ ("the derivative claim") and will not without the agreement of the Petitioner cause Palladian Penfold Limited to pay any sums owed to Two Work Limited or Palladian Capital Limited pending determination of the derivative claim*", and "*Two Work Limited undertakes to the Court that it will procure the discharge of its Third Party Debt order dated 24th October 2022*

and will not enforce its Judgment debt dated 10th October 2022 or any other debt owed to it by Palladian Penfold Limited pending determination of the derivative claim or further order of this Court".

The Law

50. There was no real dispute between the parties regarding the principles, and there is no need to rehearse them lengthily. They were, for example, summarised in Re LDX International Group LLP [2018] EWHC 275 (Ch) at [22], and insofar as relevant they are:

    50.1. if there is a genuine and serious cross-claim – that is, one which is of substance – which exceeds the petitioner's debt, the company will ordinarily be allowed to establish its cross claim in civil proceedings; the companies court is not the right court in which to engage in a detailed examination of claim and counterclaim;

    50.2. it is incumbent on the debtor company to demonstrate, with evidence, that the cross-claim is genuine and serious; bare assertions will not suffice - there is a minimum evidential threshold;

    50.3. if there is any doubt about the claim or cross-claim, then the court should proceed cautiously; this is because a winding up order is a draconian order, which, if wrongly made, gives a company little commercial prospect of reviving itself;

    50.4. a company is not prevented from raising a cross-claim simply because it could have raised or litigated the claim earlier, or because it has delayed in bringing proceedings on the cross-claim; however, the court is entitled to take any delay into account in its assessment of whether the cross-claim is genuine and serious.

51. Other relevant matters were set out in Re a Company No.006685 of 1996 [1997] BCC 830:

    51.1. there is no rule of practice that a petition will be struck out merely because a debt is disputed; the true rule is that it is not the practice of the companies

court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition upon the company is to put upon the company pressure to pay (rather than pressure to litigate) which is quite different in nature from the effect of an ordinary action;

51.2. the court will be alert to the risk that an unwilling debtor is raising a cloud of objections in order to claim that a dispute exists which cannot be determined without cross-examination;

51.3. the court will therefore be willing to consider the evidence in detail even if, in so doing, it may be engaged in much the same exercise as a court determining a summary judgment application.

52. In determining whether a debt is disputed, or whether there exists a genuine and substantial cross-claim which exceeds the petition debt, the court is entitled (as it would be in determining a summary judgment application) to reject evidence which is inherently implausible or which is not supported by documentary evidence: Re Time GB Group Limited [2023] EWHC 1887 (Ch) at [59].

53. To essentially the same effect, Mr Deacock cited the summary given by Norris J in Angel Group Ltd v British Gas Trading Ltd [2012] BCC 265, at [22].

54. Further, as to delay in bringing or litigating a cross-claim, it is important to consider when the cross-claim was first raised and in particular whether it was first raised after the service of the winding up petition or the service of statutory or other type of demand prior to the issue of the petition, including consideration of why the company says it has not been able to litigate the claim to date: Re K Wearables Ltd [2023] EWHC 410 (Ch) at [3]. The company is not however precluded from relying on the cross-claim by virtue of the fact that it could have litigated but has not done so: Montgomery v Wanda Modes Ltd [2003] BPIR 457 at [33].

The Petition against Capital

55. The issue in respect of the petition against Capital was whether or not there is a genuine and substantial dispute in respect of the debt relied upon by Chetan, in respect of his

loan account. In my judgment, for the following reasons, there is no dispute of any real substance, and it follows that I shall make the winding up order sought.

56. It was not in issue that the debt relied upon by Chetan was immediately due to him, but for:

    56.1. the allegation that it was assigned by him to Dara, orally, at a time (unspecified) and in circumstances (equally unspecified) in about 2020/2021; alternatively,

    56.2. the allegation that, were an overall account of Chetan and Dara's mutual dealings in respect of their joint enterprise to be conducted, Chetan would be in a position of net deficit.

57. The first of these allegations was the focus of Mr Deacock's submissions. I reject it for the following reasons.

58. Fundamentally, the parties have for some time been engaged in a prolonged and complicated negotiation intended to settle all financial aspects of their common business affairs, including in relation to Capital. Plainly, that negotiation has not resulted in agreement. In those circumstances, it is inherently unlikely that one element of that broader negotiation (of no obvious benefit to Chetan, and in particular, concerning a very substantial debt owed to him) was finally agreed, independently of all others, and regardless of whether or not any ultimate agreement was otherwise possible; essentially, it would be inconsistent to conclude that whilst there was no agreement between the parties as to their overall financial positions, yet nonetheless, the loan to Chetan had been assigned, when the loan was itself inherently an aspect of the parties' overall positions.

59. That unlikelihood is amply reflected in the documents. Thus, the email exchange of 17 and 18 February 2021, included a request, amongst others, from Dara, that the loan be assigned. Chetan's response, that this had been "*agreed ... verbally*" was manifestly subject to what followed at the end of that email, where he discussed the broader negotiation, and explicitly disputed that he should be expected to invest more ("*to pay invoices which are related to those companies for which I will have zero recourse*") in

respect of "*companies which I will not see a penny returned … and only you stand to recoup or benefit from*". As Chetan said, "*my thinking is not aligned with yours*". This email, significantly relied on by Dara, was in fact inconsistent with his case, and undermined it. It showed that Chetan, whilst in principle, as one element of an agreement, might have been willing to assign his loan, he would not do so without agreement of other elements.

60. That obvious conditionality (and the parties' attempts to agree single issues as part of a whole compromise, but conditional upon the whole) was made equally, if not more, clear by the email exchanges which culminated in the document referred to above at paragraph 22. First, in that document, Dara himself said that "*the entire deal is conditional on a full and final settlement of all elements*". Second, Dara asked (prospectively, suggesting that no final agreement had been reached, even in his own mind) whether Chetan would agree to assign his loan ("*Y/N*") to which Chetan replied that in principle he would be willing, but subject to "*all outstanding issues of disagreement being resolved*", and the agreement being recorded in a signed document, which Dara described, in his response, as something that would be "*normal*" (and with which he did not express disagreement).

61. In the circumstances, the documentary evidence contradicts and undermines Dara's evidence and Capital's opposition.

62. Finally, such as it was, Dara's positive evidence of the alleged assignment was vague and unconvincing. He did not explain or describe when or how, or using what form of words, the assignment was said to have been agreed. It was not, as I have observed, in writing, or reflected in the documents.

63. In conclusion therefore, there was no real or substantial dispute about the debt claimed and relied upon by Chetan, and I shall make a winding order against Capital. The second aspect of Capital's opposition (referred to at paragraph 56.2 above) I also reject, and deal with below, at paragraph 78, in connection with the petition against Penfold.

The Petition against Penfold

64. For the following reasons, and in the following circumstances, I shall also make the order sought against Penfold.

65. It was common ground that Penfold is very significantly insolvent. Other than some cash at bank, and the freehold interest in the property at 1 Penfold Place, it has no assets, other than the claim raised against Chetan. However, even if that claim were to succeed to its greatest asserted extent, the company would still be insolvent. Although the petition was opposed by Capital (its most significant creditor, owed c. £1.5 million, and presently controlled by Dara) I have decided to make a winding-up order against Capital, which will soon therefore be under the control of an independent liquidator, and at liberty to take whatever steps it might think fit to recover its debt from Penfold. Furthermore, Dara's undertaking to seek permission to commence a derivative action was given before I decided the case against Capital; given that Capital is to be wound up (on the basis that it owes £612,162.19 to Chetan) Dara's interest in pursuing a claim for the benefit of Penfold's creditors (and in particular, Capital) is correspondingly diminished: benefit to Capital would be benefit to Chetan.

66. Penfold is thoroughly deadlocked; it is presently disabled from any action; as such, it did not oppose the petition. Moreover, it does not trade, and it is not expected to trade in the future; its purpose was to develop and sell the property at Penfold Place, and it has now achieved that purpose.

67. The petition was opposed by Two Work, which is controlled by Dara. However, despite the undertaking given at and in the aftermath of the hearing (as a result of discussions during the hearing) I do not consider that its interests wholly represent those of the creditor class. In particular, it benefitted, to the apparent disadvantage of other creditors, from the default judgment for £564,288.97 and the third party debt order which it obtained and executed in December 2021/January 2022 (at Dara's instance, without the knowledge or consent of Chetan, and yet at a time when they were negotiating or attempting to negotiate an overall agreement); that is a circumstance which a liquidator would very likely wish to investigate, and which Two Work and Dara would doubtless wish to leave undisturbed. Further, notwithstanding the undertaking, Two Work still has the benefit of a second default judgment, also obtained without Chetan's involvement; that too is a circumstance which invites investigation, which would sensibly be carried out by an independent liquidator.

68. Dara's opposition to the petition, *qua* contributory, must be assessed first, by reference to his ownership and control of Two Work (with which therefore he shares a common

interest, unrepresentative of the creditor class, for the reasons given) and second, by reference to the company's insolvency, and the fact that he therefore has no tangible interest in the outcome of a liquidation, which cannot, in his personal capacity, be of any benefit to him, both of which facts diminish any weight that might otherwise be attached to his views.

69. I accept that the claim asserted by Dara on behalf of the company, against Chetan, is capable of comprehensible description in terms recognisable in law, and I accept that the court cannot resolve genuine and substantial disputes. However, as the authorities make clear, the court is not wholly incapable of assessing such assertions critically, by reference to the parties' conduct, the contemporaneous documentation, and more generally, by reference to all the circumstances, insofar as they are not in dispute. In the event, for the following reasons, I do not accept that the claim raised is one of real substance, genuinely asserted, and for an amount more than the admitted debt owed to Chetan; it has all the hallmarks of an argument belatedly constructed to avoid an otherwise inevitable outcome. Notably, on an application for permission to continue a derivative claim under s.263 of the Companies Act 2006, the court must take into account matters which go well beyond merely the merits of the claim itself – it must take into account for example the good faith of the applicant member, and the importance that a person acting in accordance with s.172 (the duty to promote the success of the company) would attach to continuing the claim. In all the circumstances of this case, there would be very significant obstacles to a grant of permission - obstacles which would not of course be faced by a liquidator.

70. As I have said, the first time that the alleged sales at undervalue were referred to in correspondence or writing, formal or otherwise, was briefly, in Teacher Stern's letter of 14 October 2022, which came very shortly after the concealed default judgment of 10 October 2022, and importantly, in direct response to Debenhams Ottaway's letters of September 2022, which sought agreement to a voluntary liquidation, and which raised the prospect of recovery against Two Work under s.239 of the IA 1986. In any sort of detail, the allegations were not explained until the letter before action dated 16 March 2023, after the petition was presented. That is despite the fact of the negotiation being conducted throughout 2021, which entailed, as I have said, both sharp and bitter

disagreement, and the detailed consideration in correspondence of numerous aspects of the parties' venture, some of which I have set out above.

71. Dara is experienced in the business of property development. In the circumstances of this dispute, it is very unlikely indeed that if he genuinely believed in its existence (and indeed, if it genuinely existed) he would not have raised and relied upon - or even briefly mentioned - the possibility of a claim against Chetan worth over £0.5 million, until October 2022.

72. In fact, the contemporaneous emails from Dara to Chetan in October 2020 in respect of the sales (again, at a time when their commercial relationship had effectively broken down) do not reflect or show a belief or even suspicion that the sales were at an undervalue, or that they ought to be delayed in order to sell at a higher price, in a more advantageous market, at a subsequent time. On the contrary, the objection Dara raised at the time was *not* that the sales were at an undervalue – it was that there ought not to be a sale until such time as there was a final, negotiated agreement regarding the closure of their venture, and regarding payment of sums which Dara claimed to be due to him; his interest was in securing that agreement. Otherwise however, he explicitly agreed the sales "*in principle*" – an agreement inconsistent with the claim now made. The correspondence reflects Dara's concern, not that the properties would be sold at the agreed prices, but that the proceeds would be removed or paid to Chetan (or at his direction) - a concern perhaps ironic, given the effect of the third-party debt order in favour of Two Work subsequently executed in June 2022. Furthermore, despite being a director of Penfold, and despite having several months in which to do so, he took no step between October 2020 and February/April 2021 to prevent the sales, and made no further written objection to their terms.

73. The correspondence enclosed with the letter before action did not therefore support the statement in that letter, that "*our client specifically informed your client in writing that he did not consent to the sale of the properties* ***at the values your client subsequently caused them to be sold***" or that "*our client made it clear to your client in writing at the time that if* ***the proposed sales at undervalue*** *proceeded he would claim back the loss …*" (the emphasis is mine).

74. Relatedly, on 3 August 2022 - almost two years after the alleged breach - Dara wrote that Chetan's loan account in Penfold's accounts to 30 October 2020 would remain unaltered (he having been "*responsible enough to ensure that the accounts* [had] *been prepared correctly and reflect*[ed] *a true and proper representation of the*" company's affairs). That email undermines his statement that the balance in favour of Chetan was removed "*to account for the losses* [Chetan] *wrought on the Company*" in 2019/2020 - and in any event suggests that no such "*losses*" were even contemplated by Dara as having been caused and suffered, until late 2022 (at some point before he unilaterally approved the accounts on or about 22 November 2022). It was not suggested that anything happened between August and November 2022 to explain how a genuine claim not previously known about or contemplated would suddenly have become apparent; neither was there any explanation given of Dara's concealed, unilateral decision to cause the removal of Chetan's loan account from the company's accounts. Far more likely, is that these acts were in response to Chetan's threat to seek a winding up order.

75. In any event, in addition, the claim itself was contradicted by the contemporaneous documents. Plainly, Knight Frank advised and recommended that the properties be sold for the sums offered, and the allegation made in Dara's letter before action, that "*the sole individual*" instructed at Knight Frank was Mr Lock-Necrows, Chetan's "*childhood friend*", was not true: numerous others, including a partner, were involved. Further, Knight Frank had actively marketed the flats (but without success) for a considerable period (of several years), and Chetan had pressed them to get the best possible prices, even refusing to accept the offers made around 8 October 2020. I accept that Knight Frank might themselves have wished for a sale to receive their remuneration, but nonetheless, an allegation in those circumstances that the flats were each worth about £250,000 more than the prices in fact achieved is simply fanciful, and it was notable that Dara produced no expert evidence to support that allegation. In that context, his evidence that the prices ought to have been more alike to that achieved in respect of Flat 2 (which was sold for £950,000 in June 2019) was of no real substance; that was a sale at a different time (before the Pandemic, and before the physical deterioration of the properties referred to by Knight Frank) and there was no evidence that it represented a sensible comparator.

76. The sole remaining, and perhaps only conceivable complaint, was that Chetan acted in breach of duty because he ought to have caused the company not to sell, but instead to delay sale to a later time. However, that allegation could not succeed because Dara, the company's only other director, explicitly agreed to the sales at that time, in 2020, subject only to the negotiation of an agreement regarding their positions overall; he made no mention at all of a suggested delay to achieve higher prices. That is not inherently surprising given that the properties had been marketed for several years, and that the future and continuing effects of the Pandemic would at that time have been difficult to predict. In any event, the alleged claim would require proof that Chetan acted in breach of duty, not merely that another director might, acting commercially, have acted differently, or that - with all the advantages of hindsight - some other course of action might have been more advantageous. The correspondence with Heritable is enough to show that there was external pressure to sell, and the claim that Chetan ought to have delayed the sales would require evidence of loss, which there was not.

77. Accordingly, by reference to Dara's putative asserted derivative claim, I decline to dismiss the petition.

78. In addition to that asserted claim, albeit that little was made of the argument at the hearing or in written submissions, Dara raised in his evidence the point (which he had also raised in correspondence during the period of his negotiation with Chetan) that were there to be an account taken of the parties' positions overall in respect of their joint enterprise, Chetan would be a net debtor of sorts (although to whom, was not obvious). Whilst perhaps possible to conceive of various bases upon which some such argument might be constructed, the evidence (which comprised nothing more than the bare assertion) and in consequence, the argument, came nowhere close to establishing that the particular debt otherwise owed by Penfold was neither due nor immediately payable.

79. Finally, Mr Hocking made the argument that in any event, regardless of the substantiality of the asserted derivative action - in other words, even if the asserted claim were genuine and substantial - the court should make a winding up order in this case, in the exercise of its exceptional jurisdiction to do so, in support of which he cited Re GBI Investments Ltd [2010] EWHC 37, at [81]-[85], a decision of Warren J. In support, he relied on the circumstances that I have described above – essentially, the

company's insolvency (and that all that remains is for its affairs to be wound up, whether formally or informally, a point on which the parties agreed); that it is deadlocked, and has been for a considerable time, but that Chetan's freedom to petition as a contributory is curtailed by the fact of its insolvency; the advantages of an independent office holder being appointed to investigate and act in respect of such a company, in respect of which both sides have raised numerous complaints (including against Chetan himself, which themselves could be investigated by a liquidator); Two Work's (and thus Dara's) egregious conduct in respect of the concealed execution of the third party debt order; and the fact that if no order is made on this petition, but instead, on a subsequent petition, the relevant period for the purposes of an application under s.239 of the IA 1986 would or might not be sufficient to capture the earlier payment to Two Work.

80. In the event, there is no need to make an order on that basis (which, depending on whether or not the company's asserted claim would amount to an equitable set-off - a point on which there was no detailed argument - would be an order made at the instance of a petitioner without standing) and I will not do so, although I do agree that by reference to the circumstances overall, liquidation is a plainly sensible and appropriate outcome, and not one which I am reluctant to order. This is not a case in which Chetan is, as an outsider, seeking to put pressure on a trading company to pay a disputed debt: it is plain to me that for proper reasons he genuinely wishes for a liquidation (and explicitly offered that outcome, as an agreed voluntary liquidation, in correspondence). To the extent that I am exercising a discretion, I do so in favour of winding-up.

81. In the circumstances, for the reasons given, I shall therefore order that both Capital and Penfold be wound up compulsorily on the petitions presented against them by Chetan.

Dated 1 May 2024