OUTER HOUSE, COURT OF SESSION

[2022] CSOH 97

P447/22

OPINION OF LORD CLARK

In the cause

KINGSTON PARK HOUSE LIMITED

Petitioner

for

an order under Section 221 of the Insolvency Act 1986 to wind-up

GRANTON COMMERCIAL INDUSTRIAL PROPERTIES LIMITED

Respondent

Petitioner: McBrearty KC; MacRoberts LLP
Respondent: McIlvride KC, Tosh; Turcan Connell

3 November 2022

Introduction

[1] The petitioner is a private limited company, incorporated and registered in England and Wales. The respondent is a private limited company, incorporated and registered in Jersey. In this application, the petitioner seeks an order for the winding-up of the respondent, on the basis that it is unable to pay its debts. That is opposed by the respondent, on two grounds. Firstly, that this court does not have jurisdiction to wind-up the respondent, and even if it does, it is more appropriate for the matter to be dealt with by the court in Jersey. Secondly, that the circumstances favour the exercise of the court's

discretion to refuse to grant an order to wind-up the respondent, principally because the debt is partly disputed and the respondent's present inability to pay any debt properly due to the petitioner has been caused by the actings of the petitioner. For convenience, the first issue will be referred to below as "Jurisdiction" and the second issue as "The merits".

[2] In light of the fact that winding-up is sought and thereby creates commercial exigencies, I gave my ruling orally and in summary form on 3 November 2022. The order for winding-up was granted. This Opinion now sets out my reasoning in full.

Background

[3] The respondent was incorporated on 15 April 2015. It went on to purchase heritable properties forming part of the Granton Harbour Estate in Granton, Scotland (the "development site") with a view to developing that land and selling it on at a profit. The plots on the development site are in effect the only substantive assets of the respondent. The court was advised that the respondent's only other asset is £205 held in a bank account. In order to finance the purchase of parts of the development site, the respondent borrowed sums from the petitioner. A total of £3,870,000 was borrowed under agreements dated 12 June 2019, 2 October 2019 and 16 January 2020. The original repayment date for those sums was 12 March 2020. The respondent did not repay the sums due on that date and intimated that it would require to sell the plots in the development site in order to do so. By way of supplemental agreements dated 26 March 2020 and 16 July 2020, the repayment date was extended and became 12 December 2020.

[4] The respondent was not able to sell the plots within the development site by 12 December 2020. In February 2021, the petitioner served the respondent with a demand for repayment of the sums due. Thereafter, the petitioner took steps to enforce the standard

securities granted in its favour by the respondent in respect of the various plots for which the loans had been given. Calling-up notices were served in respect of the standard securities on 18 March 2021.

[5] In June 2021, the petitioner agreed to provide the respondent with another opportunity to sell the properties within the development site. The petitioner states that it agreed to do so on the basis of a representation by the respondent that a prospective purchaser had been found and that negotiations were going well. It was agreed that the sums due to the petitioner by the respondent would be repayable in two tranches. First, the sum of £4,000,000 would be repayable on the earlier of: (i) the completion of a disposal of one defined part of the development site; and (ii) 31 July 2021. Thereafter, the balance outstanding would be payable on the earlier of: (i) the completion of the disposal of the second defined part; and (ii) 30 September 2021.

[6] The respondent provided the petitioner with a draft balance sheet as at 31 May 2021. That document disclosed that the respondent had fixed assets of £12,365,000. These fixed assets comprised plots of land which make up the development site. It also disclosed that the respondent had cash at bank and in hand of £1,305. The document identified two categories of creditors of the respondent. The first was the petitioner, whose claim was valued at £5,660,437. The second was sums due to other companies within the same group of companies as the respondent. Those unsecured debts are valued at £5,752,180.

[7] On 10 September 2021, the petitioner presented a petition to this court for the liquidation of the respondent. The parties subsequently reached a negotiated settlement of those liquidation proceedings in January 2022. As part of the settlement, the petitioner agreed to provide the respondent with another opportunity to sell the properties within the development site. Again, the petitioner states that it agreed to this based on a representation

by the respondent that a prospective purchaser had been found and that negotiations were going well. The terms of the agreement reached between the parties were set out in a letter of amendment, consent and waiver dated 7 February 2022, under which the parties agreed *inter alia* that the date for repayment of amounts owed would be extended to 29 April 2022.

[8] On 26 April 2022, the petitioner provided the respondent with a redemption statement stating that the total sum due as at 28 April 2022 in respect of loans, interest and costs was £7,146,289.78. That figure was in error to the extent that it included a duplicate fee note, in the sum of £28,854.86. The total amount shown on the redemption statement should have been £7,117,434.92. Interest continues to accrue on the loans at a daily rate of £3,287.67.

[9] The development site has not been sold. The respondent did not make payment of the £7,117,434.92 due to the petitioner by 29 April 2022. On 5 May 2022, the petitioner served a notice on the respondent demanding repayment of the full sums outstanding. The respondent has not made payment of the sums said to be due. It disputes that certain elements of the total sum are due. On 5 August 2022, the respondent offered to make payment to the petitioner of £6,238,000 in full and final settlement. The petitioner did not accept that offer.

Insolvency Act 1986

[10] It is not disputed that the respondent is an unregistered company, as defined in section 220 of the Insolvency Act 1986, because it is not registered in the United Kingdom. For present purposes, the relevant provisions of the 1986 Act are as follows:

> "221. Winding-up of unregistered companies.
> (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions about winding-up apply to an unregistered company with the exceptions and additions mentioned in the following subsections….

…
(3) For the purpose of determining a court's winding-up jurisdiction, an unregistered company is deemed—
(a) to be registered in England and Wales or Scotland, according as its principal place of business is situated in England and Wales or Scotland, or
(b) if it has a principal place of business situated in both countries, to be registered in both countries;
and the principal place of business situated in that part of Great Britain in which proceedings are being instituted is, for all purposes of the winding-up, deemed to be the registered office of the company.
…
(5) The circumstances in which an unregistered company may be wound up are as follows…
(b) if the company is unable to pay its debts…
…
224. Inability to pay debts: other cases.
(1) An unregistered company is deemed (for purposes of section 221) unable to pay its debts…
(d) if it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
…
426. Co-operation between courts exercising jurisdiction in relation to insolvency.
(1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part.
…"

Core requirements in relation to the exercise of jurisdiction

[11] In relation to the first issue, jurisdiction, it will assist to set out at this stage the three core requirements which senior counsel for each party agreed should be applied in this case. The relevant legal principles are summarised by Lloyd J in *Stocznia Gdanska SA* v *Latreefers Inc. (No 2)* 2001 BCC 174 (also referred to as *Re Latreefers Inc*). He quoted (at 179C-D) from the judgment of Sir Raymond Evershed MR in *Banque des Marchands de Moscou (Koupetschesky)* v *Kindersley* [1951] Ch 112, at 125-126:

> "As a matter of general principle, our courts would not assume, and Parliament should not be taken to have intended to confer, jurisdiction over matters which

> naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary."

Lloyd J continued (at 179E-F):

> 'The formulation of these principles has changed over time, and in particular the presence of assets in the jurisdiction is no longer regarded as essential…As a result of the decisions of Megarry J in *Re Compania Merabello San Nicholas SA* [1972] 3 All ER 44.8; [1973] Ch 75, Nourse J in *Re Eloc Electro-Optiek and Communicatie BV* [1982] Ch 43 and Peter Gibson J in *Re a Company (No. 00359 of 1987)* (1987) 3 BCC 160; [1988] Ch 210…the statement of the relevant principles has evolved to the point at which they were summarised, most recently, by Knox J in *Real Estate Development Co* [1991] BCLC 210 at p. 217, as consisting of three core requirements, as follows:
>
> > (1) There must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction.
> > (2) There must be a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order.
> > (3) One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction."

In the appeal against Lloyd J's decision, which was refused, the Court of Appeal followed that approach (at 194A-C).

[12] These three core requirements were adopted and applied in Scots law by Lord Hodge in *HSBC Bank plc* 2010 SLT 281.

Submissions for the petitioner

Issue 1: Jurisdiction

[13] The court has jurisdiction to wind-up the respondent under section 221(3)(a) of the 1986 Act. The respondent's only purpose is to deal with the plots which it owns, as part of the development site. Its principal place of business was therefore in Scotland and it is deemed to be registered in Scotland: *HSBC Bank plc,* Lord Hodge, at [10]. The respondent's position, that the petitioner is an English registered company with no averred connection

with Scotland and is not a person subject to the jurisdiction of this court, was incorrect. This court could properly exercise jurisdiction over the petitioner: *HSBC Bank plc,* Lord Hodge at [13]-[14]. The three core requirements set out by Lord Hodge were met. The first was not disputed by the respondent. For the second core requirement, the provisional liquidators, and later the liquidators, will be able to market and sell the plots over which the petitioner has a standard security, thereby allowing the debt due to the petitioner to be paid. There was no need to demonstrate that it is of greater benefit to it to seek a winding-up order rather than enforcing the standard securities. The winding-up order avoids the need for the petitioner to enforce the standard securities and to enter into possession of the properties.

[14] As to the third core requirement, it was accepted that the petitioner does not have a business presence in Scotland. Nevertheless, the petitioner was not merely presenting this petition, but also submitted to the jurisdiction of this court. In any event, the petitioner is an English company. Section 426(1) of the 1986 Act made clear that insolvency orders in one part of the UK are to be reciprocally enforced in other parts of the UK. Any order made by this court would therefore be capable of being enforced in England, where the petitioner is registered. Further, the petitioner holds heritable securities over the company's property in Scotland and any dispute in respect of those would be governed by the Scottish courts. For these reasons, jurisdiction was established.

Issue 2: The merits

[15] The respondent was unable to pay its debts. The total amount due is £7,117,434.92. Interest has continued to accrue on that sum since 28 April 2022. Even if there were to be merit in the respondent's arguments regarding the sum due, it remained the case that there is a very substantial undisputed sum due. It was acknowledged by the respondent that it

would have to sell the plots or refinance in order to be able to repay the sum due. There was no imminent sale or refinance in the offing.

[16] The respondent contends that the rate of interest is exorbitant and is an unenforceable penalty. But the interest is a matter of agreement, between the petitioner and the respondent as commercial entities, on an arms-length basis. The agreed rate is not payable only on breach of contract and accordingly it is enforceable: see *EFT Commercial Ltd* v *Security Change Ltd (No.1)* 1992 SC 414 and *Makdessi* v *Cavendish Square Holdings BV* [2016] AC 1172. The respondent contends that certain professional fees are not due, but that was again covered by the agreement. The respondent had no basis for raising a substantial dispute on *bona fide* grounds about the sums due by it to the petitioner: see *Angel Group Ltd* v *British Gas Trading Ltd* [2013] BCC 265, at [22]; *Re Swan Campden Hill Ltd* [2021] EWHC 2470 (Ch).

[17] The information contained in the two affidavits lodged on behalf of the respondent did not disclose any relevant basis upon which the court should refuse the orders sought by the petitioner. Even if it were correct that the pandemic affected previous ability to pay, it had no effect after February 2022. The suggestion that liquidation will make it more difficult to obtain a sale or refinancing of the plots than if they were to be included as part of a sale or refinance of the overall development site affords no basis for the court to refuse the orders sought. The respondent is unable to pay its debts, against a background of having attempted to refinance or sell on a number of occasions and having failed to do so.

Submissions for the respondent

Issue 1: Jurisdiction

[18] The three core requirements set out by Lord Hodge in *HSBC Bank plc* concern the aim to discover a sufficient connection with this jurisdiction. That is as true in relation to the potential beneficiaries as it is in relation to the company which it is sought to wind-up: *Re Real Estate Development Co*, at 217H. The second and third core requirements were not satisfied. There was no reasonable possibility of benefit to the petitioner if a winding-up order is made. The petitioner is a creditor with first ranking standard securities over all of the respondent's assets. The petitioner may exercise its rights as secured creditor to enforce those securities and to realise those assets without the need for a winding-up order to be granted. Indeed, the petitioner had already taken steps to do so, with calling-up notices served on 18 March 2021. The reasons given by the petitioner in its pleadings were not properly explained or vouched.

[19] The proposition that the petitioner does not require to show that a winding-up order will generate a greater benefit for the petitioner than a sale in exercise of its rights under the standard securities was wrong as a matter of both recognised principle and authority. It is a fundamental principle that the court will not wind-up a company if there is no likelihood that any advantage will be achieved by the petitioner by the grant of a winding-up order. The benefit to the petitioner must flow naturally from the winding-up. It must arise if, but only if, a winding-up order is made. If it does not, the court may say that the petitioner is seeking a collateral personal advantage. That is contrary to the very essence of liquidation law, which is a collective process not designed to benefit only one creditor: *Re Eloc Electro-Optieck*, 47C-D; Prof AR Keay, *McPherson & Keay's Law of Company Liquidation* (5th ed, 2021), paragraph 2-048, fn 383, citing *Re Compania Merabello San Nicholas SA*.

[20] In any event, there were no persons interested in the distribution of the company's assets over whom the court can exercise jurisdiction. The presentation of a winding-up petition is not a sufficient qualification for submitting to jurisdiction. If it was sufficient, the third core requirement would be satisfied in every case. It would not be a requirement at all: *Re Real Estate Development Co*, 217H-I; *Re Latreefers Inc*, 182B-C. The fact that the petitioner is incorporated in England and Wales was not sufficient. The fact that the petitioner has real rights in property situated in Scotland under the standard securities which render the petitioner subject to the jurisdiction of the court in terms of the Civil Jurisdiction and Judgments Act 1982, schedule 8, paragraph 5(1)(a) in respect of proceedings relating to those standard securities was also irrelevant. That did not give the petitioner any presence or other substantial connection to Scotland. The effect of schedule 8, paragraph 5(1)(a) in the 1982 Act is an *in rem* and not *in personam* jurisdiction. The provision renders certain types of proceedings subject to the jurisdiction of the Scottish courts. It does not render the petitioner subject to the jurisdiction of the Scottish courts. In any event, no such proceedings have been raised.

[21] Even if those core requirements were satisfied, the court must consider whether any other jurisdiction is more appropriate for the winding-up of the company. In that analysis, the starting point is whether there is any compelling reason why jurisdiction in respect of the winding-up of a company incorporated in Jersey does not actually and properly lie within the competence of the courts of Jersey: *Re a Company* (No 00359 of 1987)) *sub nom International Westminster Bank plc* v *Okeanos Maritime Corp* 1988 Ch. 210, 226H; *Re a company* (No 003102 of 1991) *ex p Nyckeln Finance Co Ltd* [1991] BCLC 539, 541D; *Re Buccament Bay Ltd* [2015] 1 BCLC 646, 654 at [20]-[21]. There was no suggestion that there is not a perfectly satisfactory winding-up process available in the Jersey courts. There are well-

recognised means by which the Scottish courts can lend assistance in foreign insolvencies: e.g. Insolvency Act 1986, s426. It was more appropriate for any winding-up of the respondent to be carried out in Jersey.

Issue 2: The merits

[22] The court is never bound to grant a winding-up order upon proof of a ground for winding-up and retains an unfettered discretion: *Re Southard & Co Ltd* [1979] 1 WLR 1198, 1203. The amount of the debt founded upon by the petitioner is disputed in good faith and on substantial grounds. Firstly, the respondent disputes liability for the various professional fees detailed in the fourth column of the redemption statement. Secondly, the petitioner is not entitled to interest at the rates claimed. A contractual provision that seeks to charge interest at a floating rate designed to produce a fixed sum is not a provision for payment of interest at all. In the circumstances, the interest claimed is either an unenforceable penalty or, at least, the rate of interest applied would fall to be modified by the court: Debt Securities Act 1856, s 5; *Wirral Borough Council* v *Currys Group plc* 1998 SLT 463; *Cavendish Square Holding BV* v *Makdessi,* at [252].

[23] The effect of these disputes was that the respondent has been unable to progress steps to refinance the various plots it owns on the development site in order to satisfy any amount that is properly due to the petitioner. Any refinancing is necessarily conditional upon the petitioner discharging the first ranking standard securities it presently holds over the respondent's plots in order that first ranking securities can be granted in favour of the new funder. The amount of any new funds to be advanced will be dependent upon the sums required to repay the debt which is properly due to the petitioner and thus obtain the discharge of the petitioner's securities. The respondent's efforts to refinance were well

advanced, but they have been thwarted by the petitioner's insistence on payment of sums which are not properly due to it and the presentation of this petition. In the exercise of its discretion, the court should refuse to grant a winding-up order. That was particularly so in circumstances where the petitioner will retain sufficient security for the alleged debt pending the determination of the amounts which are in fact properly due. The residual development value of the plots owned by the respondent and over which the petitioner holds standard securities is reasonably estimated at £14,098,280 and, thus substantially in excess of the debt founded upon by the petitioner.

Decision and reasons

Issue 1: Jurisdiction

[24] As noted, the three core requirements set out above were adopted by Lord Hodge in *HSBC Bank plc.* Lord Hodge also took the approach, with which I respectfully concur, that these requirements concern discretion in relation to the exercise of jurisdiction rather than being a pre-condition for the existence of jurisdiction itself.

[25] It is undisputed by the respondent that the first core requirement is satisfied here, which is undoubtedly correct given that the only substantive assets of the respondent are situated in Scotland. The only commercial acts of the respondent concern financing, developing and selling plots on the development site at Granton, and are thus in respect of heritable property that is subject to the law of Scotland. According to an affidavit lodged by the respondent, the respondent's agents, who act on behalf of the respondent in dealing with asset management services and supervising the development proposals, had an office at Granton. There is no evidence of any business or trading having taken place in another jurisdiction. The respondent's principal place of business is in Scotland.

[26] As to the second core requirement, in my view it is clear that winding-up is not a last resort for a secured creditor. The petitioner is not required to demonstrate that winding-up will be of greater benefit than enforcement of the standard securities. The short point is that the test is whether there is a reasonable possibility of benefit to the petitioner by winding-up, rather than it having no real purpose (for example, granting of the order being in vain or for some collateral purpose). I am satisfied that there is a reasonable possibility of benefit, simply because the winding-up procedure can give rise to satisfaction of the petitioner's claim (insofar as that is not disputed by the liquidator). Winding-up therefore serves a purpose.

[27] But even if a comparison is made between the right to seek winding-up and the right to enforce the standard security, further benefits from winding-up accrue to the petitioner beyond those arising from serving the calling-up notice. These include that the petitioner need not take the steps required to sell the property that is subject to the standard securities and that matters will instead be handled by an independent insolvency practitioner who will be subject to statutory duties. I do not accept the submission for the respondent that in *HSBC Bank plc* Lord Hodge applied the comparative approach. Lord Hodge concluded (at [14]) that the petitioners, who held a security over the development site, were likely to benefit from the grant of a winding-up order if the provisional liquidators and later the liquidators were able to complete the developments and thereby obtain a better price for the assets than otherwise could be obtained. While that identified the benefit, Lord Hodge at no time suggested that winding-up was a last resort and required to be of greater benefit to the petitioner than enforcing the security. That is not the position in cases purely involving domestic parties and there is no reason to conclude that it should apply where the respondent is foreign. It is also the case that granting a winding-up order in this jurisdiction

will give a greater benefit than it being granted in Jersey, when all of the assets are located here.

[28] Turning to the third core requirement, it is that "one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise *a* jurisdiction" (emphasis added). That will occur where the person is subject to the jurisdiction or has submitted to it. In this case, it is only the petitioner as an interested person who is claimed to fall into that category. In *Re Latreefers Inc*, Lloyd J made the following useful observations (182B-C):

> "The third requirement is in some ways puzzling, not as regards the principle, but in practice. The petitioning creditor will always have invoked the jurisdiction and therefore be subject to it in some sense. The fact that the petitioning creditor is foreign, and non-resident, is not a sufficient bar, but the fact that he has presented a petition cannot be a sufficient qualification in itself. It seems to me, in the present case, that the petitioning creditor, albeit foreign and having no business presence in England, should be regarded as having submitted to the court's jurisdiction and thus as being a person over whom the court can exercise jurisdiction. The creditor has the benefit of an English judgment debt, which involved submission to the jurisdiction, and it is still the plaintiff in the ongoing Commercial Court proceedings, so the submission to the jurisdiction is continuing."

[29] Accordingly, the fact that this court's jurisdiction over the petitioner is invoked by the petition having been brought does not of itself suffice. Lloyd J's point that the third requirement is "puzzling" in practice is well-made, because it is not clear precisely why the jurisdiction of the court is needed when the petitioner is already subject to it. It was suggested to me that the purpose of the third core requirement may be that the court has a means, or perhaps a further means, of control over the petitioner in respect of these proceedings. However, control arises in any event from the petitioner having invoked the jurisdiction of this court by bringing the petition. It is also unclear how, in *Latreefers Inc,* being the plaintiff in other court actions would have allowed such control in respect of the petition procedure. Moreover, from the language of the third core requirement it is clear

that if there is jurisdiction over other creditors, rather the petitioner, that can suffice. What seems to be the more plausible interpretation of the principle behind the third core requirement is that there should be a connection between the petitioner, or other persons having an interest in the distribution of assets, and this jurisdiction. So, if the court can exercise "a jurisdiction" over a person interested in the distribution of the assets that will suffice.

[30] In *HSBC Bank plc* Lord Hodge concluded that as the petitioners had offices in Scotland, the test was met. Thus, a petitioner does not need to have invoked the jurisdiction in some other proceedings before the court, or be a defender in such proceedings. This illustrates that the test is met when the court will be able to exercise a jurisdiction in the event that any litigation is brought against the petitioner or a court order is to be enforced against the petitioner. *Re Latreefers Inc* illustrates a different means of having submitted to the court's jurisdiction, which was the applicant's involvement in prior court proceedings for the debt and continuing engagement in extant court proceedings. This is an example of the court being able to exercise a jurisdiction when proceedings, other than the winding-up, have actually been raised or successfully completed by the person, invoking the court's jurisdiction. Those specific examples do not apply here. However, they show means by which the third core requirement can be met.

[31] In the present case, the petitioners have no branch or office in Scotland. No other court proceedings (apart from the petitioners having previously, in September 2021, brought a winding-up petition) have taken place or are continuing. There is also no submission to jurisdiction in the form of prorogating the jurisdiction of the Scottish courts by contract. Indeed, the restated or supplementary agreements give exclusive jurisdiction to the courts in England, although the clause is stated to be only for the benefit of the petitioner and the

petitioner is also allowed to sue in any other court with jurisdiction. So, the points founded upon by the petitioner for the court being able to exercise a jurisdiction over it differ from the examples in the previous authorities. The points are the existence of the standard securities and the application of section 426(1) of the Insolvency Act 1986.

[32] Dealing firstly with the standard securities point, as noted, the fact that the respondent's assets are in Scotland satisfies the first core requirement of a sufficient connection. The petitioner's standard securities in respect of those assets means that the petitioner has a right *in rem* in respect of the property covered by them (Conveyancing and Feudal Reform (Scotland) Act 1970, section 11(1)). The respondent continues to have the real right of ownership, but the petitioner has what might be described as a subordinate real right. In any proceedings which have as their object rights *in rem* in immovable property this court has exclusive jurisdiction (paragraph 5 (1)(a) of Schedule 8 of the Civil Jurisdiction and Judgments Act 1982). As noted by Lord Rodger in *Burnett's Trustee* v *Grainger* 2004 SC (HL) 19, 2004 SLT 513, (at [87]), quoting from a textbook on Roman Law, an action *in rem* asserts a relationship between a person and a thing and an action *in personam* is about a relationship between persons, but "there cannot be a dispute between a person and a thing, and therefore even in an action *in rem* there must be a defendant".

[33] This right *in rem* is a right on the part of the petitioner and it is covered by a range of statutory provisions that could result in the petitioner bringing or defending an action in relation to the standard securities. Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 sets out a number of rights and duties on the part of the creditor and the debtor or proprietor of the property. The petitioner has not invoked the jurisdiction of this court in relation to the standard securities. However, by holding such security the petitioner remains open to being a defender in an action raised in this court. I conclude that the

petitioner made itself subject to, or submitted to, the jurisdiction of the court on matters concerning the standard securities. Of itself, that would satisfy the third core requirement.

[34] There is, however, a stronger basis for it being satisfied. I accept the submission on behalf of the petitioner that the requirement is met as a result of the terms of section 426(1) of the 1986 Act. While it might be argued that the section in effect mirrors, and adds little, to the point that the petitioner has invoked the court's jurisdiction on winding-up, in fact it allows this court to exercise its jurisdiction over the petitioner "in relation to insolvency law" and hence has a wider remit. The test for the third core requirement, on my interpretation of it, is met. In any event, even if the third core requirement is restricted to having control, or greater control, over the petitioner in the petition proceedings, this section has that effect. It is true that, if section 426(1) results in the third core requirement being met, the consequence is that persons domiciled in other parts of the UK who bring a petition for winding-up in Scotland will always be able to satisfy that requirement. But that is the import of its terms: an order made by this court in the exercise of jurisdiction in relation to insolvency law must be enforced in England as if it were made by a court exercising the corresponding jurisdiction there. Such persons are therefore, in effect, subject to the jurisdiction of this court in relation to insolvency law.

[35] Accordingly, I conclude that by having standard securities over heritable property in Scotland and separately as a consequence of section 426(1) of the 1986 Act the petitioner is subject to, or has submitted to, the exercise of a jurisdiction by this court.

[36] This court must, of course, also consider whether any other jurisdiction is more appropriate for the winding-up of the company. As explained, all of the principal and substantive assets of the respondent are in Scotland and the key feature of any liquidation process is to take over those assets. The respondent's development of the property has been

in Scotland and the standard securities are here. There is therefore an advantage in the winding-up proceedings being here and no advantage in simply leaving the process to the courts in Jersey. Those courts could of course request the Scottish courts to assist in that regard and that appears to be a highly likely outcome if the winding-up process went ahead in Jersey. But in the whole circumstances, including that the three core requirements are satisfied, I do not see it as more appropriate for that route to be followed.

[37] In summary, the three core requirements are met and I see no substantial difference between this case and *HSBC Bank plc.* Lord Hodge correctly observed that in the interests of comity and having regard to practicality, the courts must exercise restraint before granting orders for the winding-up of foreign companies. But in that case, as here, the only substantial business assets were in Scotland. Lord Hodge also held that as the company's only business was to develop property in Scotland, its principal place of business was in Scotland. That applies also in the present case, as the respondent's business activities take place in Scotland. Lord Hodge also held that as the petitioners had offices within this jurisdiction the court could exercise a jurisdiction over them. In the present case, the petitioner has no seat in Scotland, but this court can in my opinion exercise a jurisdiction over the petitioner as a result of the standard securities and, separately and in any event, section 426(1) of the 1986 Act. This court entirely respects the jurisdiction of the courts in Jersey and will not exercise an exorbitant jurisdiction contrary to international comity, but I am satisfied that in the circumstances this court has jurisdiction to wind-up the respondent and that it would be more appropriate to do so in this jurisdiction.

Issue 2: The merits

[38] Turning to deal with the merits, there is, on any view, a significant unpaid debt (some £3.87m) due by the respondent to the petitioner, which has subsisted for some time. The respondent agreed to the terms of the various restatements or supplementary contracts that extended the period for payment and the sums which would fall due in those circumstances. It is clear that in order for a sum to be a penalty, it must fall due as a result of a breach of contract: *EFT Commercial Ltd* v *Security Change Ltd (No. 1).* Senior counsel for the respondent argued that the additional sums, described as interest, were included in the varied contracts as a consequence of the respondent's previous breach of contract. There is a clear difference between a sum agreed to be payable under the varied contracts, as interest on the loan, and a sum payable for breach of contract. The sums in this case were not a penalty for a breach. In fact, these were simply the agreed terms upon which the loan would proceed further and the sums now claimed built up wholly as a result of the respondent not being able to repay or find a buyer or other financier. If there is a proper basis for disputing the sums claimed by the petitioner (over and above the substantial undisputed sums) then the liquidator will be fully able to do so. So far as the professional fees are concerned, these are also covered by the varied contracts. In any event, they do not amount to a substantial element of the debt claimed to be due. Again, the liquidator can dispute them, if so advised.

[39] Affidavits were lodged on behalf of the parties and I have considered their contents. However, I find nothing of any material substance within them which could cause me to reach different conclusions on either jurisdiction or the merits. In the respondent's affidavits, there is reference to the Covid-19 pandemic having for some time affected the ability of the respondent to obtain refinancing, but things have of course moved on and

senior counsel for the respondent placed no real reliance on that matter. In one affidavit it is said that the inability of the respondent to have an undisputed ascertained amount to repay, combined with the presentation of the winding-up petition, have made refinancing of the respondent's sites impossible. That is not explained in any proper detail, but in any event the petitioner has the right to claim for repayment based upon the restatement or supplemental agreements and to present this winding-up petition.

[40] In the whole circumstances, I am satisfied that this court has jurisdiction, the respondent is unable to pay its debt to the petitioner and that in the exercise of my discretion winding-up should be granted.

Conclusion and disposal

[41] For the reasons given, the winding-up order is made.