IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO 190 OF 2020 (IKJ)

IN THE MATTER OF SECTION 93 OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF SKY SOLAR HOLDINGS, LTD.

IN CHAMBERS

Appearances:	Mr Barry Isaacs Q.C. instructed by Ms Gemma Lardner and Ms Victoria King, Ogier, on behalf of the Petitioner
	Mr Jonathon Milne, Mr Spencer Vickers and Ms Sean-Anna Thompson, Conyers, on behalf of the Company
Before:	**The Hon. Justice Kawaley**
Heard:	**25 September 2020**
Draft Judgment circulated:	**30 September 2020**
Judgment delivered:	**12 October 2020**

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Creditor's winding-up petition-disputed debt-whether petition should be struck-out on abuse of process grounds-cross-claim and 'reverse cross-claim'-relevance of pending proceedings in foreign forum pursuant to exclusive jurisdiction clause

REASONS FOR DECISION

Introductory

1. The Petitioner is a Delaware limited partnership and general partner of Hudson Solar (Cayman) LP, a Cayman Islands limited partnership. On August 26, 2020, the Petitioner presented a petition to wind-up the Company on the grounds that it was unable to pay its debts pursuant to sections 92(d) and 93 of the Companies Law (2020 Revision) (the "Petition").

2. The Petition alleges that the Petitioner was owed at least US$93,253,792 and is seeking a determination of the precise amount due through summary judgment proceedings commenced on May 26, 2020 (Supreme Court of the State of New York, County of New York, Cause No. 652002/2020 (the "New York Proceedings")), a smaller portion of that larger sum, demanded on February 18, 2020, US$7,141,444 was undisputed. Paragraph 14 of the Petition defines this sum as the "Undisputed Debt".

3. The Petition on its face accepts that all other amounts were disputed and the Company's liability to pay any further sums would be determined in the New York Proceedings, which it referred to as the "2020 Proceedings". It is averred:

> "*18. The Company is contesting the 2020 Proceedings but, in its evidence filed in the 2020 Proceedings filed in July 2020, the Company admitted its inability to pay the Undisputed Debt*."

4. Because standing to petition to wind-up a company is fundamentally dependant on a petitioner's ability to establish its standing as a creditor to whom an undisputed debt is owed, the debt relied upon for this purpose is a central averment in every creditor petition. The "Undisputed Debt" is, on a straightforward reading of the Petition, the debt upon which the Petition is based. Where a winding-up is sought on the insolvency ground, a creditor's petition must also clearly set out the basis on which it is alleged that the respondent is "unable to pay its debts". Is it unable to pay its debts generally, or is reliance based solely (or primarily) on the respondent's inability to pay the petition debt? In this regard, the Petition does make reference to the Company's general financial position on a balance sheet basis under the heading "*Cash Flow Position*". But it makes no general allegations of cash flow insolvency. The only positive averments in this regard relate to inability to pay the Undisputed Debt:

"*24. The Company is unable to pay the Undisputed Debt, and has admitted the same (see paragraph 18 above)…*

25. The Petitioner has no confidence that the Company has the means to pay the Undisputed Debt (or the Total Outstanding Debt).

26. On 17 August 2020 the Petitioner again requested payment of the Undisputed Debt from the Company, or evidence that the Company was able to do so. The Company did not provide any evidence of its ability to pay the Undisputed Debt…

27. In the premises the Company is insolvent and should be wound up in accordance with sections 92(d) and 93 of the Companies Law."

5. The Petition was the second set of proceedings commenced in the Cayman Islands in connection with the sums sought in the New York Proceedings. On July 22, 2020, the Petitioner issued an Originating Summons seeking freestanding injunctive relief pursuant to section 11A of the Grand Court Law (2015 Revision) (the "Section 11A Proceedings"). I granted an *ex parte* freezing order (including a receivership order) following a hearing on notice to the Company on July 30, 2020 (the "Freezing Order"), very narrowly, and directed that the Company should be able to seek to discharge the Freezing Order on short notice. Following an *inter partes* hearing on August 13, 2020[1], I discharged the Freezing Order. In my Reasons for Decision delivered on August 27, 2020, the day after the Petition was presented, I described what appeared to me to be the following uncontroversial facts:

"*1… The Plaintiff's pending application for summary judgment in the New York Proceeding is hotly contested. It is admitted that certain sums will become due and payable to the Plaintiff under a guarantee, but disputed whether any of the approximately $93 million the Plaintiff seeks is presently due and payable.*"

6. The focus of the Section 11A Proceedings was, of course, entirely different, but those proceedings sought what from the outset appeared to me to be overreaching relief which I ultimately determined was not properly available because there was no risk of impermissible dissipation of assets made out. But the fact that distinctly inapposite pre-judgment interim relief was sought in aid of the New York Proceedings implied that the

[1] *Hudson Solar Capital Infrastructure GP, LP-v-Sky Solar Holdings, Ltd.*, FSD 166/2020 (IKJ), Judgment dated August 27, 2020 (unreported).

more straightforward remedy of petitioning for winding-up was not available. This appeared to be because the existence of any presently due liability from the Company to the Petitioner would only crystallize with a judgment of the New York Court. If the Petitioner was indeed an undisputed creditor based on admissions made by the Company in evidence filed in New York (on July 14, 2020), just over a week before the Section 11A Proceedings were commenced (on July 22, 2020), it seemed odd that the winding-up jurisdiction was being resorted to as the second port of call.

7. The effect of the Freezing Order was to impede the Company from completing a go-private transaction in New York on or about August 28, 2020. The effect of the presentation of the Petition on August 26, 2020, which the Petitioner was keen to make the Company aware of before the Petition had been processed by the Court for formal service, was precisely the same. Unsurprisingly, the Company applied by Summons dated September 10, 2020 to set aside or strike-out the Petition in early course.

8. Not only did the Petitioner have a very recent track record of commencing proceedings which this Court had found to be misconceived (just over 2 weeks before the present proceedings were commenced), the important averment in the Petition to the effect that the Company's alleged inability to pay the Undisputed Debt had been admitted appeared on superficial analysis to be wholly unsupportable. Based on my pre-hearing reading of the papers, I formed the provisional view that the Petition would probably have to be struck-out. I accordingly declined to hear full oral submissions from the Company's counsel to afford the Petitioner's counsel the fullest possible opportunity to displace my provisional views.

9. The strike-out Summons was listed for a 1 day hearing. Mr Isaacs QC spent almost a full day addressing the Court on the Petitioner's behalf. The Petitioner's case was sculpted into a far more solid piece of legal architecture than had seemed possible at the outset. And so, at the end of an extended sitting day, I felt compelled to reserve judgment. Nevertheless, I am indebted to counsel for the wide range of authorities placed before the Court and for the relative conciseness and clarity of their written and oral submissions.

Governing legal principles

The relevance of pre-Petition litigation skirmishes

10. Near the beginning of the hearing, I suggested to Mr Milne that his case effectively entailed the assertion that the background to the present Petition proceedings was the most unusual in the world. This was because in the Company's Skeleton Argument it was submitted:

> "*4.1 Context is important. There is a long history of oppressive conduct by the Petitioner against the Company which cannot be ignored for the purposes of the Company's present strike-out application…*"

11. Complaint was made about five attempts to serve the Petition. It was further argued that the Petition was presented for an improper purpose and that the Petitioner had adequate alternative remedies which it should be left to pursue in the New York Proceedings.

12. Mr Isaacs QC submitted that the mere fact that the Petitioner had commenced two sets of proceedings (in New York and Cayman) before presenting the Petition, one of which was still pending, was an essentially irrelevant consideration. The winding-up jurisdiction ought to be available to any creditor petitioning on the basis of an undisputed debt. The Petition could only be struck-out if a collateral purpose could be shown to be the "only" purpose of the Petition and (as I accepted in the course of the hearing) the issue of alternative remedies was only relevant in the context of petitions seeking a winding-up order on just and equitable grounds.

13. I accept the Petitioner's counsel's submission that the pre-Petition litigation skirmishes, and any suggestion that the Petitioner ought to have litigated in a different manner (e.g. presenting the Petition as a first resort, not commencing the Section 11A Proceedings), are largely irrelevant in general terms. Indirect support for this conclusion may be found in the judgment of Kwan J (as she then was) in *Re City Top Engineering Ltd.* [2006] 3 HKC 455 at paragraphs [11]-[13]. The background to the petition in that case was a civil action in the midst of which statutory demands were served, a factor which was not considered to be abusive conduct.

14. More general judicial support for the proposition that this Court should be slow to second-guess litigants' tactical machinations may be found in the recent local case of *Marsh Management Services (Cayman) LLC-v-Nathaniel Clayton Price*, General No. 64 of 2020 (RMJ), Judgment dated September 22, 2020 (unreported). In that case, McMillan J (albeit in the context of rejecting an application for indemnity costs) opined as follows:

> "*32…Tactical and strategic decisions have to be made by parties in the course of legal proceedings. These are decisions for the parties themselves and in normal circumstances the Court's approval or disapproval of those decisions is quite frankly neither here nor there*."

15. I also indicated in the course of the hearing that I could not accept that the service irregularities complained of constituted a sufficient freestanding basis for striking-out on abuse of process grounds. The Petitioner's explanation that it considered it was important to notify the Company of the presentation of the Petition promptly before it was formally issued was sufficient to make the Company's complaints more technical than real. I hereby confirm that preliminary view.

16. Mr Isaacs QC's submissions on the restrictive nature of the collateral or improper purpose strike-out ground relied in part on my own judgment in *Re China CVS* [2019 (1) CILR 266] where I held:

> "*52 Mr. Imrie in oral argument went some way towards persuading me that this might well be a motive for the present petition: the desire to enter into a fresh joint venture even if there were no or no serious complaints of misconduct against the company's management. But I was unable to find at this stage that this was the only motive. The petitioner again identified the correct legal approach in its skeleton:*
>
> > *'72. Further, this is bound to be a fact sensitive issue which is impossible to decide without cross-examination. In order to be satisfied that a Petition should be struck out on the basis that the Petitioner was motivated by a collateral purpose, the Court must determine summarily:*
> >
> > *(a) what is the Petitioner's purpose(s) in presenting the Petition; and*
> >
> > *(b) that none of the Petitioner's purposes identified were legitimate.*" [Emphasis added]

17. Mr Milne could not dispute these guiding principles. While it is easy in the present case to conclude that one of the motives of the Petitioner is to stop the go-private transaction, in my judgment it is impossible to summarily determine that this is the sole motivation for the Petition. As I found in the Section 11A Proceedings, there is a serious question to be tried on the merits of the Petitioner's debt claims asserted in the New York Proceedings. If the Petitioner is arguably owed in excess of US$90 million, the proposition that, in effect, the Petitioner has no interest in recovering such substantial sums on its face beggars belief. While case law can be found which suggests a more robust approach to striking-out a

winding-up petition on collateral purposes ground may be permissible (e.g. *Re A Company* [1894] 2 Ch. 349), the modern consensus appears to me to be to prefer enlarging a petitioner's right of access to the Court (an important element of fundamental fair hearing rights) rather than restricting the winding-up jurisdiction of this Court. Mr Isaacs QC also aptly relied upon the Privy Council decision in *Ebbvale Ltd-v-Hosking* [2013] 2 BCLC 204 at 215 where Lord Wilson, explaining why a creditor's petition was not an abuse simply because the petitioner had some collateral motivations, held (at paragraph 33):

"*(d) But a winding-up order was also, objectively, likely to be of substantial advantage to him in his capacity as the petitioning creditor; and to secure such an advantage was the other of his purposes. It is not necessary that it should have been his principal purpose: see In re Millennium Advanced Technology Ltd [2004] EWHC 711 (Ch), [2004] 1 WLR 2177 at para 42 (Michael Briggs QC sitting as a deputy High Court judge).*"

18. Further, the Petitioner's counsel also relied on the fact that that the Cayman Islands Court of Appeal have disapproved of the approach of making interlocutory findings as to a collateral purpose, seemingly because the documentary evidence was not on its face conclusive: *Tianrui (International) Holding Company Limited-v-China Shanshui Cement Group Limited* [2019(1) CILR 481] at paragraph 41 (Martin JA). I accordingly summarily reject the Company's collateral purpose strike-out ground.

19. I also summarily reject the Company's alternative remedies argument to the extent that it was advanced as a freestanding strike-out ground. As I provisionally indicated in the course of the hearing, the need to consider the availability of alternative remedies arises in the context of a just and equitable winding-up petition. Assuming a creditor or contributory (a) has standing to petition and (b) makes out grounds for the making of a winding-up order, the Court has a broad discretion to consider whether it is "just and equitable" that a winding-up order should be made. It may not be just and equitable to wind-up what is often a solvent company if the petitioner has other more appropriate alternative remedies which it has failed to pursue.

20. On the other hand, an unpaid petitioning creditor who (a) establishes standing as a creditor, and (b) meets the applicable insolvency test is entitled to a winding-up order as of right (*ex debito justitiae*). Further and in any event, even in the just and equitable petition context, whether alternative remedies ought to have been pursued cannot be decided at the interlocutory stage as a strike-out ground. In *Re China CVS (Cayman Islands) Holding Corporation* [2019 (1) CILR 266], I accepted the following legal submissions:

> "*57. Mr Lowe QC submitted that the appropriateness of (discretionary) alternative remedies could not be determined at the interlocutory stage, save in very clear cases. It was argued in the Petitioner's Skeleton:*
>
> > *'64. Even in the case of the most common alternative remedy in the Cayman Islands (i.e. a fair offer by the Company to buy out the petitioner), the answer to both questions is inherently fact sensitive. Accordingly, it cannot be determined summarily that a Petition should fail on this ground save in very clear cases.29 As the CICA explained in Asia Pacific v Arc Capital [2015] (1) CILR 299, it is not always obvious that a shareholder is acting unreasonably even in refusing a buy-out offer. Even though this is a standard form of alternative remedy, it is dangerous to determine the issues summarily. The CICA expressly warned of the "potential danger of pre-judging the outcome of the trial'".*

21. The Company argued that the fact that the Guaranty under which the Petitioner claims has an exclusive jurisdiction clause could be taken into account at the strike-out stage. However, the authorities it relied upon in its Skeleton Argument, such as *Re Hits Africa Ltd,* FSD 96/2013, Judgment dated January 29, 2014 (Quin J) (unreported), supported a different proposition. Quin J (at paragraph 68) held that the exclusive jurisdiction clause was only relevant in considering, if a substantial dispute was found to exist in relation to the petition debt, how that dispute should be resolved.

22. In summary, the pre-Petition litigation skirmishes between the parties are only relevant insofar as they shed light on whether or not the Petitioner is a creditor in an undisputed amount. That is the central standing question upon which the present strike-out application turns. It is nonetheless sometimes possible to glean a sense of how a party views the merits of their commercial position from how they pursue or defend a claim. In my judgment, greater weight can be attached to the way in which the case before the Court is conducted than how a party has litigated other causes of action here and especially abroad. Each case has its own commercial context and procedural logic.

The relevant standing test applicable to a disputed debt petition

23. It is remarkable how much case law has been generated in relation to a legal test which has essentially been settled for many years. More recent local and other authority essentially builds on English "old chestnuts" such as *Mann-v-Goldstein* [1968] 1 W.L.R 1091 (Ungoed-Thomas J) and *Re a Company (No 1573 of 1983)* (1983) 1 B.C.C. 98937 (Harman J). In brief, where the petition debt is disputed in good faith and on substantial grounds, the practice is to dismiss or strike-out the petition. Mr Milne for the Company relied upon the following statement of principle which is binding on this Court. In *Parmalat Capital Finance Limited-v-Food Holdings Limited and Dairy Holdings Limited* [2008 CILR 202] , Lord Hoffman opined as follows:

> "9. *The next question is whether the debt is disputed. If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute: see, for example, Brinds Ltd v Offshore Oil NL (1986) 2 BCC 98,916. But the Board does not find it necessary to examine the limits of the discretion because they consider that there is no substantial dispute.*"

24. Mr Isaacs QC pointed out that the same case (at paragraph 8) also indicates that the Court's determination that a creditor has standing to petition is not a determination of such creditor's rights against the company, which will only be determined in the winding-up itself. The key principles have been recently considered by this Court in decisions which provide helpful guidance on how the abstract legal test is practically applied. In *Re Primus Investments Fund, LP and Mayer Investments Fund L.P.*, FSD Nos 76 and 77 of 2020 (RJP), Judgment dated June 16, 2020 (unreported), Parker J (after citing the passage in Parmalat reproduced above) held as follows:

> "*52. The law as expressed in Parmalat was subsequently considered in the Cayman Islands Court of Appeal in relation to how the Court should approach the matter of a disputed debt.*

53. *In Re GFN [2009] CILR 650 Vos J. A referred to the judgment of Oliver LJ in Re Claybridge Shipping [1997] 1 BCLC 572 in which he held that:*

> *'But the court must… remain flexible in its approach… it ought not, in my judgment, to be an inflexible rule that Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground,* ***and it is only too easy for an unwilling debtor to raise a cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings… I think that [the rule] ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case… The court must, I think, reserve to itself the right to determine disputes - even perhaps in some cases substantial disputes - where this can be done without undue inconvenience and where the position of the company… is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether".*** *(my emphasis)*

54. *Vos J.A summarised the law as follows at § 94 of GFN (CICA):*

> *(a) A person with a good arguable case that a debt is due and owing to him from the company may present a petition to wind up as a creditor under the Companies Law.*
>
> *(b) The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a bona fide and substantial dispute as to the existence of the debt upon which the petition is based.*
>
> *(c) In an appropriate case, however, the winding up court can refuse to dismiss or stay the petition and can determine the question of the disputed debt in the petition itself.*
>
> *(d) Appropriate cases include those where the court doubts that the debt is actually disputed bona fide on substantial grounds, or where the creditor if he established his debt would otherwise lose his remedy altogether or where other injustice might result.*

(e) *Where the winding up court decides to hear a petition based on a disputed debt it will only make a winding up order on the grounds that the company is unable to pay its debts or that it is just and equitable to wind up, having determined that the petitioner is, on a balance of probabilities, a creditor of the company.*

55. *In Re Duet Real Estate [2011] CIGC J0607-1 the Cayman Islands Court did just this. Duet sought a declaration that there was a genuine and substantial dispute about the existence of certain debts alleged to be owing to the petitioner, and sought to restrain the petitioner from presenting a winding up petition until such time as the dispute about the existence of the debts was resolved by arbitration. In that case the transaction documents, other than the security documents, were governed by English law. Having considered the evidence presented, Jones J determined that there was no bona fide dispute of substance and that the arguments made by Duet in that regard were 'nothing more than a disingenuous delaying tactic' and 'there [was] no evidence from which to infer that there is a genuine and substantial dispute'. He refused to grant the declaration and injunction sought.*

56. *Each case will turn on its specific facts. A bona fide dispute on substantial grounds means a real dispute on which the respondent company has a real prospect of success (as opposed to a fanciful or insubstantial prospect of success): see Re A Company (No. 001946 of 1991) [1991] ex parte Fin Soft BCLC 737 at [740]; and Argentum Lex Wealth Management Ltd v Giannotti [2011] EWCA Civ 1341 at [17]. In the latter case, the Court of Appeal commented that the concept of a bona fide dispute on substantial grounds is similar to the test for obtaining permission to appeal viz. that there should be a realistic prospect of success: per Longmore LJ at §17.*

57. *Whilst the winding up procedure is not suitable to resolve questions of disputed fact, as there is no investigation akin to a trial with discovery of documents and cross examination, the Court should be alive to 'smokescreens' or contrived arguments presented late in the day.*

58. *As this Court said in Altair:*

> *'I also bear in mind that an unwilling debtor may raise factual matters which cannot be easily determined without cross examination in order to assert a defence and in such circumstances the court should be astute to assess whether the defence put forward is genuine and of substance'- see*

Re A Company 6685 [1997] BCC 830 at § 832 and 835 per Chadwick J as he then was, at §44."

25. The *Altair* judgment mentioned in the *Primus* matter was delivered on March 16, 2020. The case was adjourned to await a related Hong Kong decision after which Parker J concluded that "*there were genuine disputes based upon substantial grounds raised by the Company*": *Re Altair Asia Investments Limited*, FSD No 200 of 2019 (RJP), Judgment dated July 28, 2020 (unreported). Parker J's second Judgment is most valuable for the following lucid distillation of the legal principles governing petitions based on debts which are disputed which I gratefully adopt:

> "*53. The court set out the relevant law in its judgment of 16 March 2020 (at paragraphs 41-44) and it is unnecessary to repeat it.*
>
> *54. The rule of practice concerning a creditor's disputed debt is long established and well-known. The court will usually dismiss the petition and leave the creditor to establish his claim in an action if the debt is bona fide disputed on substantial grounds. The court however retains the discretion to make a winding up order even though there is a dispute on substantial grounds. There is therefore a threshold question to determine.*
>
> *55. The burden is on the company to establish the substance of any dispute that is raised. In this case the Hong Kong judgment is impugned but the fact that there is an appeal pending does not itself demonstrate that there is a bona fide dispute as to the debt.*
>
> *56. The court is also astute to identify cases where an unwilling debtor raises technical objections late in the day and puts forward many issues of law and fact on affidavit (and claims that cross-examination is required to resolve disputes of fact) so that the petition should not be heard at all. Or cases where matters are deliberately made opaque or overcomplicated by unwilling debtors.*
>
> *57. In an appropriate case the court can refuse to dismiss or stay the petition and can determine the question of a disputed debt in the petition itself.*

58. *Such cases include those where the court doubts that the debt is disputed bona fide on substantial grounds, or where the creditor if he established his debt, would otherwise lose his remedy altogether, or where other injustice might result.*"

26. Further assistance is provided by the decision of Richards J in *Re Adenium Energy Capital, Ltd.* FSD 54/2020, Judgment dated July 27, 2020 (unreported), which cited the second *Primus* Judgment in relation to the governing legal principles with approval. The context was one in which the company at the hearing of the petition (which was supported by another creditor) opposed the making of a winding-up order on the grounds that (a) the debt was disputed and (b) the dispute was governed by an arbitration clause. Richards J granted a winding-up order based on the following critical findings as to whether or not the petition debt was disputed on substantial grounds. This cogent evidential analysis helpfully illustrates what appears to be a clear example of a "smoke screen" dispute:

"*71. In this case there has already been an arbitration process spanning some two years and multiple appeals. The fact of the debt was resolved by the Award and confirmed on appeals. The Company now seeks a second arbitration by raising an issue which its own Counsel candidly stated to this Court, should have been raised at the time of the first arbitration. Moreover given the res judicata principles, it is an issue which on even a cursory review of documentation appears to be a hopeless endeavor. From the material before the Court, the reasonable and inescapable inference is not that it was not raised at arbitration due to the ineptitude of Counsel but because the Company well knew that the names were used interchangeably and that the reference in the MOU prepared in English to Bareeq Capital was a reference to the company with the statutory name in Arabic of Al Bareeq for Investments and Project Development. Even if this is wrong, it was plainly an issue which ought to and should have been raised at that time.*

72. Is this Court precluded in the exercise of its discretion by virtue of the fact of the arbitration clause, from rejecting what appears to be no more than a tactical maneuver on the part of the Company designed to delay making payment of the debt?

73. I do not think that paying due regard to the agreement of the parties means that the Court should lend itself to countenance what appears to be no more than a ruse by the Company. This is particularly so, given that in this case the

arbitration process has already been undertaken to completion. The Petitioner in this case is not endeavoring to bypass the agreed arbitration procedure. The route of arbitration appears to have already been exhausted under the applicable Rules. The ability to engage a second arbitration process to completion appears on balance to be doubtful. Further, it appears that a tribunal and or court on any second arbitration would have to consider and apply res judicata principles. I consider that the foregoing constitutes good and exceptional reasons why the parties should not be held to their agreement in this case.

74. *In my view, the raising of the issue of standing now by the Company as a basis for the grounding of an assertion that there is a bona fide dispute on substantial grounds as to the debt owed has all the hall marks of a contrivance. Having reviewed the evidential material provided and considered all the submissions made by both parties, being mindful of the low threshold on these matters, I would conclude on balance that there is no bona fide dispute on substantial grounds as to the debt owed. In so doing I respectfully adopt the words of the learned Judge in the cited case of* ***Primus****. The raising of this issue now and the filing of a request for a second arbitration is no more than a smoke screen.*"

The legal principles governing cross-claims

27. Mr Isaacs QC accepted that presentation of a petition could be restrained on the grounds that it was an abuse of process because it was bound to fail: *Coilcolour Limited-v-Camtrex Limited* [2015] EWHC 3202 (Ch) at paragraph 31. This case considered restraining the presentation of a petition, but the same principles apply by analogy to an application to strike-out a petition after it has been presented. How this broad principle applies in relation to cross-claims was explained by Hildyard J as follows:

"33. *The Court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. Re Pan Interiors [2005] EWHC 3241 (Ch) at [34] – [37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied. Even if not qualifying as a set-off, a genuine and substantial cross-claim exceeding the would-be petitioner's claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter).*

> *That is also because, if the cross-claim is established, the would-be petitioner will have no sufficient interest either in itself having a winding up ordered, or to invoke the class remedy which such an order represents.*"

The strike-out test

28. The Company is inviting the Court to strike-out the Petition before it is heard on its merits, not to dismiss the Petition on the grounds that a winding-up order should not be made. Mr Isaacs QC commended the following test to the Court which I adopt. In *Re a Company ((No 003079 of 1990)* [1991] BCLC 235 at 237, Ferris J held:

> "*In my judgment the test which I should apply is the test which appears from Stonegate Securities Ltd v Gregory and Mann v Goldstein [1968] 2 All ER 769, [1968] 1 WLR 1091. That is to say if I can now see that the petitions, if and when they come on for substantive hearing, are bound to be dismissed because the locus standi of the petitioners is disputed, then it would be appropriate to strike out the petitions and not leave them on file with a view to them coming back before the court at some future time, when the result will inevitably be the one that I have indicated. Of course if I am not satisfied that that is inevitably the result then the test is not satisfied and I ought not to strike out.*"

29. This test was raised because the Petitioner's counsel somewhat surprisingly (having regard to the case advanced by the Petition and the initial evidence in support) sought to persuade the Court that even if the smaller Petition debt of some US$7.1 million was found to be disputed, the Court should find that at least US$93 million was undisputedly due. It is well-recognised that the Court should not exercise the exceptional strike-out jurisdiction based on a complaint which can be cured through an amendment.

The Petitioner's right to advance a "reverse cross-claim"

30. I was initially inclined to accept without qualification Mr Isaacs QC's submission that, if the Court is entitled to take into account a cross-claim asserted by the Company, the global commercial relationship including any reverse cross-claims the Petitioner may assert must also be taken into account: *Montgomery-v-Wanda Modes Ltd.* [2002] 1 BCLC 289 (Park J at paragraphs [38]-[39], approved by Mr William Trower QC sitting as a Deputy Judge (as he then was) in *The Commissioners of Her Majesty's Revenue and Customs-v-Andrew*

Harris [2001] EWHC 3094 (Ch) at paragraph [21]. On reflection, however, this principle is more likely to be easily engaged in jurisdictions in which the governing insolvency law statute incorporates a balance sheet insolvency test.

31. The Cayman Islands corporate insolvency test was explained by Parker J in *Re Primus Investments Fund, LP and Mayer Investments Fund L.P.*, FSD Nos 76 and 77 of 2020 (RJP), Judgment dated June 16, 2020 (unreported) as follows:

> "*45. As is well known, in the Cayman Islands the concept of insolvency reflected in section 93 (c) is that of 'cash flow' insolvency, that is to say the inability to pay debts as they fall due: Re Weavering [2016 (2) CILR 514] at [38].*
>
> *46. The test of inability to pay debts was considered on appeal in that case which put a gloss on Clifford J's definition of cash flow insolvency based on a company's present inability to pay debts as they fall due.*
>
> *47. Martin J.A held that:*
>
> > *'In my view, the cash flow test in the Cayman Islands is not confined to consideration of debts that are* ***immediately*** *due and payable it permits consideration also of debts that will become due* ***in the reasonably near future****". (my emphasis)*
>
> *48. The Petitioner claims, in respect of each Debtor, that "The Partnership is insolvent because it has failed to make repayment of a demand duly served on it by the Petitioner, following the occurrence of an Event of Default under the Finance Documents, and the subsequent acceleration of the Facility pursuant to the Finance Documents. The Partnership has therefore failed to pay its debts."*

32. A petitioner who initially relies upon a liquidated debt may well be met with the response that a cross-claim which the respondent can assert is greater than the petition debt. A petitioner in England and Wales under section 123(2) of the Insolvency Act 1986 can establish inability to pay debts based on a balance sheet insolvency test ("*if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities*"). Such a

petitioner need only show that an unspecified minimum debt is clearly owing and that, having regard to the broader commercial position including the petitioner's contingent 'reverse cross-claims', the company is plainly insolvent.

33. Under Cayman Islands law, creditors typically seek to establish cash flow insolvency by reference to an inability (or refusal) to pay a liquidated sum which is presently due or "*due in the reasonably foreseeable future*". It seems to me that it will typically be easier to establish inferred cash flow insolvency from an inability to pay a liquidated presently due debt. It will likely be less straightforward to establish standing and insolvency based on unliquidated reverse cross-claims although it is easy to envisage circumstances where such claims could potentially be taken into account using what might be described as a 'modified balance sheet solvency test'.

34. The Petitioner submitted that the Petition (in addition to relying on the "Undisputed Debt") also averred that $93 million was presently due and, alternatively, that leave to amend should be granted to permit the Petition to be "clarified". This was a hopeless contention. The Petitioner also (in the further alternative) invited the Court to take into account its total claims against the Company in response to the Company's cross-claim, which I consider to be a far more fluid and less formal forensic undertaking. In the present case, the Company both disputes the Petition debt and relies upon the cross-claim it has filed in the New York Proceedings.

35. The Petition did expressly aver that reliance was placed on the fact that the larger sum the entitlement to which would be established in the New York Proceedings was actually owing, but no coherent case was pleaded as to how this essentially contingent claim should be taken into account.

The approach to the evidence

36. Clearly, in the context of an application to strike-out a winding up-petition on lack of standing grounds, the Court is required to ascertain whether it can summarily decide whether there is or is not a substantial dispute about the petitioner's debt. It is helpful to remember that in *Montgomery-v-Wanda Modes Ltd.* [2002] 1 BCLC 289 Park J also opined as follows:

> "*I wish to add one other point of legal principle which is in my view clearly established by the authorities. The point is familiar in cases where the company's ground of opposition to the petition is that it disputes the debt relied on by the petitioner. In the present case WML admits the debt but says that it has a cross-claim in a greater amount. However, I believe that the principle which I am about*

to state is equally applicable in either context. The principle is that, if the ground of opposition by the company raises substantial questions of fact or law (or both) which are genuinely disputed by it, the petition should be dismissed: a court hearing on a winding-up petition is not the appropriate forum to determine such questions. Rather they should be litigated in the normal forum for resolving them. What that forum is will vary according to the nature of the dispute."

37. The Company's cause was assisted in the present case by the fact the formal contractual relationship between the parties and their respective affiliates had, superimposed on top of the ordinary borrower/lender/guarantor framework, an 'on again off again' commercial courtship with a potential partnership in prospect. In addition, the Company had filed a legal brief, evidence and a Complaint of its own in the New York Proceedings which it was not easy for this Court to summarily dismiss as frivolous.

Findings: is the Petition Debt disputed in good faith on substantial grounds?

The Petition Debt

38. The Petition is clearly based on the failure to pay the Undisputed Sum of US$7,141,444, which it is alleged was notified as due on February 18, 2020 and demanded on August 17, 2020. The Company's insolvency is wholly or substantially based on the Company's admitted inability to pay this sum. These findings are supported by the following portions of the Petition:

"*19. The total amount owing to the Petitioner under the terms of the Note Purchase Agreement and Guaranty is to be determined by the 2020 Proceedings. The Petitioner seeks a determination …of at least US$93,253,792 (the 'Debt Claim').*

20. The Company is disputing the validity of the 2019 Acceleration Notice and the 2020 Acceleration Notice in the 2020 Proceedings and, consequently, the entitlement of the Petitioner to claim interest at the default rate under the terms of the Note Purchase Agreement and Guaranty. Even if the 2019 Acceleration Notice and the 2020 Acceleration Notice were invalid, the Company has not suggested…in either the 2019 Proceedings or 2020 Proceedings that the Undisputed Debt is not due and payable.

24. The Company is unable to pay the Undisputed Debt, and has admitted the same…" [Emphasis added]

39. The Petitioner's pleaded case is that it is seeking a determination of the total sum due to it from the Company (presently calculated as at least US$93,253,792) in the New York Proceedings where that determination will be made. The Petition is only based on the Undisputed Debt and the Company's inability to pay this specific sum. It is averred that the Company has made no profits over the last 6 years (save for 2016) and that its net asset position has declined over the same period. Supporting figures are set out under the heading "Cash Flow Position" but it is not averred that the Company is actually cash flow insolvent in a general sense. The sole allegation of insolvency is the averment that the Company is unable to pay the Undisputed Debt.

40. The crucial averments of the Petition are expressly supported by the First Affidavit of Neil Auerbach, the Petitioner's Managing Partner. Most pertinently, he deposes:

"*29…The Petitioner is confident that it will prevail in the US Proceedings, but presents this Petition on the basis of the Company's failure to pay the lesser sum of the Undisputed Debt rather than seeking immediate payment of the accelerated amounts.*"

41. However, a subtle and unexplained change of course occurs in Mr Auerbach's Second Affidavit:

"*23. Although the petition debt is limited to the 'Undisputed Debt' of $7,144,444, the Petitioner contends that there is no substantial dispute in respect of the full amount demanded under the Guaranty.*"

42. The Petition and the supporting Affidavit implicitly admit that all sums claimed other than the Undisputed Debt are, for Cayman Islands winding-up law purposes, disputed and appropriate for determination by the New York Court. The Petitioner's reply evidence confirms that the Petition is based solely on the Undisputed Debt, but adds the inconsistent (from a Cayman Islands law perspective) assertion that there is no substantial dispute about the larger sum either. From a local law perspective, there is no inconsistency between seeking summary judgment on the basis that there is no triable issue and accepting that,

from a winding-up law perspective, there is a substantial dispute. The position under New York law, in actual or perception terms, may perhaps be somewhat different.

43. The rationale for restricting the petition to the Undisputed Debt claim was that the sums claimed were standard scheduled sums (falling due between June 21, 2019 and January 16, 2020), and were not affected by the Acceleration Notices, the validity of which was challenged by the Company in the New York Proceedings (First Auerbach, paragraph 29); Second Auerbach, paragraphs 14, 24). On its face, the unexplained change of course lacks credulity and solidity; it seems intended to be more symbolic than substantive in its effect on the present proceedings.

44. It remains to consider the alleged admission by the Company that it was unable to pay the scheduled payments comprising the Undisputed Debt. The Affidavit of Wu Hao in Support of the Defendants' Opposition to Motion for Summary Judgment in Lieu of Complaint averred as follows:

> "*28. Starting in June 2019, Sky was unable to make the required payments because of Hudson's hostile and wrongful takeovers of ECI and RCI-2 and the subsidiary Uruguay project companies. One of the purposes of Hudson's note purchases under the ARNPA was to assist in funding the construction of the Uruguay solar projects (ECI and RCI-2). The note purchases funding the Uruguay projects were to be serviced, generally, from the distributable free cash flow generated from those projects. As a result of Hudson's wrongful takeover of ECI, RCI-2, and the associated Uruguay solar projects, the senior lender on the Uruguay projects refused to release the cash necessary to make the required payments under the ARNPA. On June 8, 2019, Sky informed Hudson that Sky would continue to make scheduled payments as long as it was able, but any future failure to make payments under the ARNPA would be a direct consequence of Hudson's improper and premature enforcement actions…This is exactly what ended up happening.*"

45. An assertion that the Petitioner has wrongfully made it impossible to meet contractual obligations from the intended payment source cannot in my judgment be sensibly construed as an admission of insolvency for the purposes of section 93(c) of the Companies Law. Nor does it raise a dispute about the existence of the relevant debt. Of course, the Company's evidence in the New York Proceedings was filed before the Undisputed Debt had been characterised as such.

46. However, the Petition and the evidence in support do make out what appears to be an arguable case of failure to pay the Undisputed Debt, being a debt which represents monies which are due notwithstanding the validity of the Petitioner's impugned Acceleration Notices. Mr Isaacs QC referred extensively to the Amended and Restated Note Purchase Agreement dated July 15, 2016 ("ARNPA"), which the Company was not party to, and to the September 18, 2015 Guaranty which the Company was party to. As one would expect, these documents left no room to escape liability for defaults on the grounds of waiver. Moreover, various apparent admissions had been made by or on behalf of the Company or the primary borrowers about being in default in 2018 and 2019, which suggest the challenges to the Acceleration Notices may well be optimistic.

47. Reference was also made to a Pledge Agreement also dated July 15, 2016 under which Sky Capital America Inc. (an indirect subsidiary of the Company) pledged its 100 % ownership interest in Lumens Holdings I, Inc. ("Lumens") as security for the monies borrowed by Lumens under the ARNPA. Section 9.4(b) provided that 10 days' notice would be reasonable notice, and Mr Auerbach's evidence was that 45 days' notice was given of the auction which the Company complained was hastily conducted. This contractual provision is not dispositive of the validity of the Company's complaint, which focused on the substantive commercial outcome of the auction rather the formalities surrounding the way it took place.

48. As far as the evidential case on insolvency is concerned, the evidence relied upon in support of admitted inability to pay the Undisputed Debt is on its face extremely tenuous. However it is entirely straightforward to infer commercial insolvency from failing to pay a presently due and undisputed debt.

The Company's dispute

49. The Company's evidence in opposition to the Summary Judgment Motion in the New York Proceedings filed on July 14, 2020 helpfully sets the scene in terms of the background to the present dispute as viewed from the Company's perspective. Mr Wu painted the following picture at paragraphs 31 to 41 of his Affidavit. The Petitioner has since late 2018 been promoting a "*tactical 'loan to own' strategy*". Reliance is placed on, *inter alia*, the following events:

(a) in 2018 the parties were discussing the possibility of the Petitioner converting some of its Notes into equity and on December 24, 2018 the Petitioner proposed a statutory merger under Cayman Islands law. Two days later the

Petitioner served notice of default in respect of a matter that had been waived for years;

(b) Statutory Demands were served in the Cayman Islands, the British Virgin Islands and Hong Kong in the first two months of 2019. After eight threatening letters or notices, an acquisition proposal was canvassed on January 29, 2019, followed by another notice of a "manufactured default";

(c) The Petitioner filed a Motion for Summary Judgment in the New York Court in February 2019. Nearly 11 months of settlement negotiations ended in January 2020 when the Petitioner insisted on a go-private transaction;

(d) an acquisition proposal from the Petitioner on February 20, 2020 was still being considered by the Company when the demand under the Guaranty was reissued on March 4, 2020.

50. The idea that one element of the Petitioner's total claim in the New York Proceedings could not be disputed first seems to have emerged in Ogier's August 17, 2020 letter, forming part of the Petitioner's typically feisty riposte to the discharge on August 13, 2020 of the Freezing Order made in the Section 11A Proceedings. After making other open 'settlement' proposals on behalf of the Petitioner, the following statements were made in terms which foreshadowed a winding-up petition:

> "*Finally, we note that on any outcome of the proceedings, there is no bona fide or substantial dispute that your client is liable for the outstanding principal and interest per our client's Demand on the Guaranty dated 4 March 2020. As of 18 February 2020 the outstanding principal and interest stood at $7,141,444 and now stands at $11,351,077 (**Debt**). Payment of the Debt would be without prejudice to our client's ongoing claim in the US Proceedings save that our client expressly acknowledges that such payment will correspondingly reduce any ultimate quantum that may be awarded in the US Proceedings.*
>
> *Our client has serious concerns about your client's ability to pay the Debt at all, particularly given your own client's various statements that appear to acknowledge cash-flow insolvency, including but not limited to:*

- *the statement in its audited financial statements that it needs to execute a financing plan or sell operating assets to be able to continue as a going concern; and*

- *Mr Wu's sworn statement in the US Proceedings that from June 2019 your client was unable to make the required payments.*"

42. Three days earlier, on the same date that the Freezing Order was discharged, the Company (and its affiliates) had filed its own Complaint against the Petitioner and its affiliates in the New York Court. That is on any view a cross-claim because the validity of the contractual documents is acknowledged and the following causes of action are asserted:

(a) an application for a declaration that, inter alia, the technical defaults asserted by the Petitioner are "*not actionable*" (paragraph 71);

(b) damages to be assessed for breach of contract (paragraph 76);

(c) damages to be assessed for breach of the implied covenant of good faith and fair dealing through, *inter alia*, exercising its rights under the Guaranty "*in a manner designed to execute its improper loan-to-own strategy*" (paragraph 78); and

(d) damages to be assessed at trial for selling Lumens at auction on August 3, 2020 "*for only $10.5 million-substantially less than its market value of between $18 million and $25 million*", in violation of Section 9-610 of the NYUCC (paragraphs 85-87).

51. So although the Company does not seem to dispute that, *prima facie*, the amounts said to be contractually due are in fact due, it is asserted that because of what may loosely be described as abuse of contractual lender rights, the Petitioner is liable to the Company in damages for improperly enforcing its contractual rights. The cross-claim is significant because it potentially allows the Company to sidestep the Petitioner's apparently compelling arguments that defaults have clearly occurred. It is also impossible to confidently summarily assess the merits of the Petitioner's arguments (plausible on their face) that the Company's complaints about manufactured defaults, etc., have only been raised of late and were not raised contemporaneously. Because of the typical inequality of

power between even sophisticated borrowers and lenders, a borrower may pursue negotiation rather than the costly and legally challenging route of accusing the lender to which it is beholden of improper conduct. The substance of the Company's present disputes is not pivotally undermined by the following statement, in its SEC Form 20F filing, upon which the Petitioner relied: "*We have suspended the interest payment since June 2019 as a result of ongoing settlement discussions with Hudson.*"

52. The Company did not rely merely on this cross-claim. Mr Milne referred the Court to The Memorandum of Law filed on July 14, 2020 in support of the Company's opposition to the Summary Judgment application in the New York Proceedings. Section D asserted that "*Hudson's Acceleration is Unconscionable*". This submission does not on its face undermine the Petitioner's claim in respect of the Undisputed Debt as it is a liability which does not appear to be dependent on either of the impugned Acceleration Notices (2019 and 2020). However, the at first blush improbable deployment of an equitable argument in a commercial lending context prompted me to recall in the course of the hearing a case where the Privy Council declined to permit enforcement of commercial security on the grounds that the lender had, in a quite different factual context to the present case, acted inequitably: *Cukurova AS –v-Alfa Telecom Turkey Limited* [2013] UKPC 20. In that case, the mortgagee insisted on enforcing its security over the appellant's shares having refused to accept the tendered payment of the entire secured debt.

53. Issue was also joined with the Undisputed Debt in the following way in the First Affirmation of Mr Wu sworn in these proceedings. It was pivotally averred as follows:

> "*21. There is a genuine and substantial dispute as to the 'Undisputed Debt'. Specifically, the 'Undisputed Debt' is one of the alleged defaults that Hudson relies upon in the 2020 proceedings…and, inter alia, is the basis for Hudson's purported acceleration under the ARNPA and its other improper enforcement and self-help actions. The 2020 Proceedings will determine whether the failure to pay the 'Undisputed Debt' is a default under the ARNPA…*
>
> *30. Based on US legal advice (privilege in which is not waived), I understand that the New York Court may ultimately determine that there has been no default under the ARNPA related to the 'Undisputed Debt'…because Hudson caused the very circumstances which led to non-payment. Indeed, the Company's opposition to the 2020 proceedings and the 2020 Sky Action against Hudson ask the New York Supreme Court to find that there has been no default under the ARNPA.*"

54. The February 18, 2020 letter from Kasowitz Benson Torres LLP to, *inter alia*, the Company asserted that the failure to pay the sums now characterised as the "Undisputed Debt" "*constitutes an Additional Event of Default*", even if the 2019 Acceleration Notice was invalid. This did form the basis of the March 4, 2020 Acceleration Notice. Clearly, the question of whether or not the failure to pay the Undisputed Debt is an Event of Default is a matter as to which issue has been joined in the New York Proceedings, both in relation to (a) the Petitioner's Summary Judgment Motion and (b) the Company's own Complaint. However, on the face of the evidence before me, there appears to be no legal assertion being made that the amounts in question are not legally due. There is a fundamental distinction between a lender being prohibited from exercising enforcement rights in relation to a default which it has caused and the lender not being entitled to recover at all interest payments which are otherwise due. The history of the dealings between the parties (with the Petitioner seemingly engaged in a sustained campaign to invest in the Company's Group alongside enforcing its undoubted contractual rights) is unusual and nuanced. Very narrowly, and bearing in mind that the Company has the onus of proof, I find that is not possible to fairly conclude that the disputes raised in the New York Proceedings by the Company in relation to the Undisputed Debt by way of opposition to the summary Judgment Motion or under its cross-claim are substantial. The issues raised by the Company are substantial as regards the Petitioner's broader case which appears to be based on its right to take enforcement action pursuant to Events of Default.

55. Having regard to the nature of the disputes between the parties which all arise out of the same commercial relationship and contractual documents, it is difficult to see how the "full claim" the Petitioner asserts in New York has any material impact on the analysis even if it is taken into account as a reverse cross-claim. In these proceedings, the Petitioner has effectively admitted that the 'reverse cross-claim' is disputed and will be determined in the New York Proceedings. The motivation for commencing the present proceedings was, in part, impatience about delays in the New York Proceedings due to Covid-19. According to the Second Auerbach Affidavit:

> "*37…Proceedings seeking summary judgment were commenced because the Petitioner contended (and continues to contend) that there is no substantial dispute as to the Company's liability. The proceeding is an accelerated summary judgment proceeding, available where there is 'no triable issue of fact'. However due to delays in those proceedings (in part as a result of the global pandemic) and spurious defences raised by the Company, the Petitioner is no longer willing (nor the Petitioner believes, should it be*

obliged) to await resolution of the US proceedings in order to secure payment of its debt… The Petitioner was concerned that the longer it waited to secure payment, the less likely that the Company would be in a position to pay the debt."

56. In my judgment, there is no clear basis for me to conclude that a substantial sum will be awarded to the Petitioner "*in the reasonably near future*" (*Re Weavering* [2016 (2) CILR 514] at [47]) so that the larger claim can be taken into account for the purposes of establishing commercial or cash flow insolvency. Even less clear is how such a contingent liability can be relied upon as constituting an unliquidated petition debt. The position would be different if summary judgment had already been granted in New York on liability, but only damages remained to be assessed.

57. For the avoidance of doubt, I reject any suggestion that there is a complete alignment between a claim which is eligible for summary judgment and an undisputed debt. Assuming New York law to be the same as Cayman Islands law, genuine and substantial <u>legal</u> disputes are frequently resolved at the summary judgment stage if they can be determined without regard to highly contentious facts. It is only substantial <u>factual</u> disputes which ordinarily will require a full trial. To establish that the Undisputed Debt (or the larger US$93 million) is disputed, the Company merely has to demonstrate that the legal and/or factual merits of the Petitioner's claim require formal adjudication, either in the context of a summary judgment application or at a full trial. Mr Auerbach's Second Affidavit, incidentally, suggests that the New York law position on when summary judgment can be denied may well be broadly the same. More significantly, for evidential purposes, his evidence betrays an understandable anxiety on the Petitioner's part that factual disputes it considers to be "*spurious*" may end up being fully tried. Be that as it may, the function of summary judgment applications must be borne in mind. As Smellie CJ held in *Arnage and others-v-Walkers (a firm),* FSD 105/2014 (ASCJ), Judgment dated July 23, 2019(unreported):

"*20. The Plaintiffs' case for summary judgment on liability, is predicated on the absence of a reasonable defence. This is the test to be applied to the assessment of pleadings and the evidence as to liability, without the need for a trial of facts which may properly be disputed…*"

58. The Petitioner also invited the Court to take into account the scheduled payments which continue to accrue and stood at US$11,351,077 as at August 14, 2020 (First Auerbach, paragraph 34). This uplift to the Undisputed Debt has limited evidential significance because in terms of indebtedness it is subject to the same cross-claim and its impact on the inability to pay debts analysis is minimal for the following reasons. While the Company's legal and/or equitable cross-claims do not appear to be any stronger than arguable on the material before me, Mr Milne advanced what I considered to be a far more powerful point in oral argument. The argument was set out in the Company's Skeleton Argument quite compactly as follows:

> "*42.8. As a result of the auction cited above, the Petitioner received the sum of US$10.5 million on 3 August 2020. The Petitioner (wrongly) failed to bring this US$10.5 million payment to the Court's attention in the over 500 pages of evidence and exhibits it has filed in support of the Petition and only referred to these in reply to Wu 1. There is no explanation as to why this amount does not extinguish the "Undisputed Debt*".

59. The First Wu Affirmation complained that the auction of Lumens entailed the Petitioner enforcing security on the premise that a default in dispute in the New York Proceedings had in fact occurred. It exhibited a letter from Kirkland & Ellis LLP dated July 27, 2020 to Kasowitz Benson Torres which complained, *inter alia* (at page 2):

> "*And now, despite the fact that the briefing is ongoing and that the Court has not had the opportunity to review Sky's detailed submission in opposition to Hudson's summary judgment motion (let alone rule on the merits) Hudson plans to proceed with a hurried auction of Lumens on August 3, 2020, before the Court has even adjudicated whether the technical defaults that purportedly justify the auction, are actually actionable.*"

60. Assuming in the Petitioner's favour that Kirkland & Ellis' additional "*scorched-earth campaign*" jibe was misconceived, the purpose of the auction can only have been to recover sums which were contractually due, even if the Acceleration Notices were invalid, the primary issue in the New York Proceedings. Again, assuming the Petitioner was entitled to exercise its contractual security rights leaving the Company to pursue its cross-claim in

damages, the most obvious consequence of realizing just over US$10 million would be that the Undisputed Debt would have been substantially, if not fully, discharged, even taking accrued liabilities into account. If the monies were recovered under the ARNPA and applied to discharge amounts due under the Notes, the corresponding liability to the Petitioner under the Guaranty must also have been discharged. It is admitted in the 2nd Auerbach Affidavit (paragraph 40) that the auction was based on one of the Events in Default under the ARNPA. No explanation is proffered as to why the relevant recovery would not have impacted on the accounting position between the parties and extinguished (or at least substantially reduced) the Undisputed Debt. The receipt of the Lumens auction proceeds in and of itself provides the basis for a substantial dispute in relation to the Petition debt, far more solidly than the Company's more elaborate and difficult to evaluate cross-claim which (to the extent that the Company needed to rely upon it at all) is not substantial in terms of its impact on the Undisputed Debt.

61. It may well have been because of the force of this point, that Mr Isaacs QC felt compelled to advance the more difficult and improbable alternative submission that the Court could find in the alternative that the Petitioner's claim to the US$93 million which had initially been accepted (by way of pleading and evidence) was a dispute which should properly be adjudicated in the New York Proceedings was, more clearly, itself an undisputed debt. This alternative submission, despite the conviction and skill with which it was advanced by Mr Isaacs QC, must be resoundingly rejected.

Conclusion: the Petition debt is genuinely disputed on substantial grounds

62. For the above reasons, I find that the Company has established that the Undisputed Debt upon which the Petition is based is disputed *bona fide* on substantial grounds. This is not because of the legal arguments advanced in the New York Proceedings, but rather on the basis that it is genuinely arguable that the proceeds of the Lumens auction would have extinguished all or most of the Undisputed Sum. I also find that, if the Petition was to be amended and instead based on the larger amount of US$93 million which is the subject of the New York Proceedings, that the Petition would be bound to be dismissed having regard to the Company's substantial cross-claim in the New York Proceedings. On a strict analysis, the position appears to be that the existence of the Petition Debt and the larger sum claimed is not disputed, but that the Company asserts by way of defence and cross-claim that the Petitioner is not entitled to enforce its claim in the legal and factual circumstances of the case.

Findings: should the discretion to strike-out be exercised?

63. The Petitioner's counsel accepted that the Court was entitled to strike-out the Petition if I found that the Petitioner would be unable to cure a lack of standing found to exist at the interlocutory stage by the time the Petition was heard. The only hypothesis explicitly advanced for the Petitioner curing a lack of standing based on the Undisputed Debt was an essentially fanciful suggestion. Namely, that the Court should grant leave to amend the Petition to assert that the Petitioner's entitlement to a larger sum of approximately US$93 million (which the Petition presently pleads is disputed and should be determined in the New York Proceedings) is in fact undisputedly due.

64. The jurisdiction to grant leave to amend is broad and flexible. But certain admissions against interest once made cannot credibly be withdrawn. Having already found herein that this larger debt is itself *bona fide* disputed on substantial grounds, there is no rational basis upon which I could properly grant leave to amend rather than to strike-out. I find that the Petition herein is an abuse of process because it is based on a disputed debt and should be struck-out accordingly. The prejudice to the Company of refusing to grant the relief sought is self-evident. It is a listed company. It is being prevented from completing a go-private transaction which the Petitioner conceded in the Section 11A Proceedings it had no right to obstruct.

65. The Petitioner (a) has at least some security, (b) has to a not insignificant extent (and quite obviously) pursued these proceedings for purposes unconnected with the interests of unsecured creditors as a whole, and (c) has contracted to resolve disputes relating to the Guaranty in New York. There is admittedly the risk that delay will result in the Company's ability to pay a debt established in the future becoming impaired. But it is also possible that if the go-private transaction proceeds and the Company is freed from the costs attributable to its public listing, that its fortunes may improve.

66. There is no basis (based on the material presently before the Court) for finding that striking-out the Petition (or dismissing it at the hearing) will deprive the Petitioner of any remedy altogether. Based on the material presently before me, I have found that the liability to meet the scheduled payments is not disputed on substantial grounds in the New York Proceedings. The only substantial dispute the Company has established relates to the Undisputed Debt and the arguable contention that this particular debt has been wholly or substantially discharged through the auction proceeds of the pledged Lumens shares. Further, I find no basis for concluding that this is the sort of case where, if the Petition is

advertised, other creditors will appear and seek to take over the present unsustainable Petition. Moreover, the Company's insolvency is not so obvious that the Court could properly exercise its discretion to grant a winding-up order notwithstanding the fact that the Petition debt is disputed. The insolvency case advanced is based on a failure to pay the sums claimed by the Petitioner alone.

67. Finally, the Petitioner's debt claims depend on contractual documents which are governed by New York law and which contain exclusive New York jurisdiction clauses. It is inconceivable that at the hearing of the Petition it could properly be decided that the Petitioner's standing as a creditor in respect of its disputed claims should be determined in the present winding-up proceedings rather than in the contractually agreed forum. The position is, however, clearer as regards the Petitioner's overall claim which is impacted by the substantial cross-claim than it is in relation to the Petition debt. The Undisputed Debt has only been identified as a liquidated sum payable in any event in the context of the present proceedings and the correspondence immediately preceding their commencement. Having found that the entitlement to the scheduled payments has not been shown to be disputed on substantial grounds in the New York Proceedings, I could perhaps less intrusively determine whether or not the debt isowing in the present proceedings. There is no reason to believe that any such inquiry would be resolved in the Petitioner's favour. In all the circumstances, bearing in mind the fact that the Company has not thus far had any need to challenge the Undisputed Debt in the New York Proceedings, and taking into account the way in which this particular Petition has been prosecuted overall, I am satisfied that it would not be appropriate for me to determine the existence of the present Petition debt within these proceedings. The Petition should properly be struck-out at this stage.

Conclusion

68. For the above reasons, the Company is entitled to an Order striking-out the Petition under GCR Order 18 rule 19 and/or the inherent jurisdiction on the grounds that it is based on a disputed debt and its presentation and/or further prosecution is and/or would be an abuse of the process of this Court. Unless any party applies by letter to the Court within 21 days of the date of delivery of this Ruling, the Petitioner shall pay the Company's costs in relation the Petition to be taxed if not agreed on the standard basis.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT