Neutral Citation Number: [2020] EWHC 2028 (Ch)

Case No: CR-2019-004304

IN THE HIGH COURT OF JUSTICE

THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF LONDON CAPITAL MARKETING LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Business Skype Remote Hearing
Date: 27/07/2020

Before :

I.C.C. JUDGE JONES

- -

Between :

LONDON CAPITAL & FINANCE PLC (IN ADMINISTRATION)

Petitioner

- and –

LONDON CAPITAL MARKETING LIMITED

Respondent

- -
- -

Mr Abraham (instructed by **Mishcon de Reya LLP**) for the **Petitioner**
Ms Staynings (instructed by **Bivonas Law LLP**) for the **Respondent**

Hearing dates: 13-14 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....CHJ 27/7/20.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) Introduction

1. On 1 July 2019 London Capital Finance Plc (In Administration) ("LCF") presented a Petition to wind up London Capital Marketing Limited ("LCM") on the ground that non-payment of a debt for unpaid loans totalling £918,000 would establish to the court's satisfaction that LCM was unable to pay its debts as they fall due. These are main proceedings and the papers are in order.

2. The petition exists within a very sensitive and concerning scenario for investors who purchased "mini-bonds" from LCF before its administration. There has been FCA intervention and there are ongoing investigations into what happened to the invested money, as well as criminal proceedings. LCM was connected with LCF. Mr Michael Thomson owned both companies until 2015 when LCM became a subsidiary of London Financial Group Ltd, which he also controlled. He was the sole director of LCM and one of four LCF directors. LCM was directly involved in the sale of LCF's financial products including the mini-bonds.

3. However, this hearing is only concerned with the claim that monies were lent to and a debt is owed by LCM. The matters before me do not address the issues arising from LCF's sale of mini-bonds or whether LCM or others wrongly received funds from LCF. The decision to be made is whether a winding up order should be made on the grounds of this petition. The issue before me is whether there is a genuine dispute to that claim on substantial grounds. If so, LCF does not have standing to present the petition and it should be struck out. If not, a winding up order will be made unless the debt is paid or an adjournment should be granted to enable payment within a reasonable time.

4. Both counsel have helpfully referred to authority explaining the disputed debt test to be applied. This is clearly established and need not be repeated. It is sufficient, therefore, to refer to the decisions of Mr Justice Hoffmann, as he then was in ***Re a Company (No. 0012209 of 1991)*** [1992] 1 WLR 351 at 354 and of Mr Justice Norris in ***Angel Group v British Gas Trading Ltd*** [2012] EWHC 2702, [2013] B.C.C. 265 at [22] and to add that the issue should not be turned into a mini-trial.

B) The Evidence in Support and the Reduced Claim

5. The evidence in support of the petition is in standard verification form and it is convenient to turn to the evidence in reply to record that to prove the debt, LCF relied upon two schedules retrieved from its records detailing payments made by LCF to LCM in the sum of £918,462.50 for the period from 7 April 2017 to 28 November 2018. No written agreement has been found and the payments have been treated as loans repayable upon demand. LCF made demand by letter from their solicitors, Mishcon de Reya, dated 24 June 2019. There was no acknowledgment or payment before the petition was presented.

6. LCM's case was set out in a letter from its solicitors, Bivonas Law, 12 August 2019. The amount received by LCM is not in dispute. Indeed, payments totalling

£917,342.50 have been identified from LCM bank statements obtained after evidence in opposition had been served. However, the 12 August 2019 letter stated (amongst other matters):

> *"Mr Thomson instructs us that prior to or on 23 October 2018 the Petitioner lent the Company £500,000.00 which was lent on for the purposes of a bridging loan of £453,411.18 (after deduction of management charges). The funds were not required so were returned to the Petitioner's account shortly afterwards. Accordingly, the Company became entitled to its management fee and the alleged debt in the Petition is overstated by £500,000.00."*

7. LCF now accepts that repayment. This leaves LCF to claim that the sum of £46,588.82 remains outstanding together with the balance of the debt (£918,000 - £500,000). As to the balance, LCF has accepted for the purposes of this hearing that there is a genuine and substantial dispute that some of the payments were for contracted services provided by LCM to LCF. That acceptance is based upon an entitlement under clauses 2, 5 and 6 of an agreement made 4 July 2016 between LCF and LCM known as "the LCF Agreement".

8. The material clauses of the LCF Agreement may be summarised as follows:

   i) Clause 2.1 provides that LCM is appointed an exclusive third party distribution agent of LCF's products (meaning, in summary, the mini-bonds and any other bonds or financial products for which LCF provides advisory or investment management services) in the United Kingdom with the opportunity to provide product development services.

   ii) The services are further described and clause 2.2 provides that LCM shall use reasonable endeavours to distribute the products to potential investors in the United Kingdom through its IFA sales and distribution network and to provide such other advice and assistance as requested by LCF from time to time.

   iii) Clause 5 provides that LCM will be entitled to the following fees, set out in Schedule 2, for those services as follows:

   > *"(a) In relation to assets invested from LCM Investors into any of the LC&F Products, LC&F shall pay or procure to be paid to LCM amounts in cash sterling equal to twelve per cent (12%) of the gross amount of assets invested from LCM Investors into any of the LC&F Products from time to time ("Initial Fee");*
   >
   > *(b) such other fee arrangements as may be agreed from time to time in writing between the Parties".*

   iv) Clause 6 provides for LCM to be entitled to be reimbursed expenses on a monthly basis for:

   > *"6.1 ... all reasonable costs and expenses properly incurred by LCM in connection with client meetings and roadshows or otherwise for the LC&F Products attended by any LC&F representative, provided road show and expenses and travel costs have been approved in advance by LC&F (and comply with a travel policy to be agreed from time to time by the Parties)*
   >
   > *6.2 All reasonably accrued expenses payable to LCM will be paid in GBP and, in any case where they are calculated or incurred by reference to a currency other than GBP, fees*

and expenses will be converted into GBP on the date of payment to LCM using the relevant spot exchange rate set forth in the Financial Times on the date of payment.

6.3 All reasonably accrued expenses due under this Clause 6 will be paid within thirty (30) business days after LCM has issued an invoice for their payment. LC&F shall pay an interest rate in accordance with the rate described herein on any fund outstanding and due according to this Agreement.

9. The payments accepted are:

i) Payments labelled in the bank statements as "*Invoice LCM"*. The stated reason for their acceptance is that while the LCF administrators have not identified any invoices from LCM to LCF, as required by cl. 6.3, they are prepared to accept that such an invoice may exist for the purposes of this hearing. That is because entries in the bank statements have invoice references.

ii) Payments labelled "COMMS" because they could have been made pursuant to the terms of the LCF Agreement, in particular, clause 2.1.

10. That leaves a petition debt of £408,468.82 ("the Reduced Sum"). It is LCF's case that these sums are intercompany loans which have been demanded and remain unpaid.

C) Evidence in Answer

11. LCM's evidence in opposition is provided by Mr Thomson. The evidence starts with three witness statements made 13 August and 11 and 25 September 2020. His first witness statement is brief and effectively adopts the defence identified in the letter dated 12 August 2019. The key grounds of dispute are that the £500,000 was repaid *"less charges"* and the balance of £418,000 is *"not a loan but payments … for services provided and management charges"*. He explains that whilst he has provided *"some copy agreements"* relating to those payments, he needs *"to access the Company's documentation and bank statements to demonstrate the Petition is misconceived"*.

12. The four copy agreements referred to are: the LCF Agreement; a consultancy agreement made between LCM and Root Cause Consultancy Limited dated 5 January 2017; a product development and distribution agreement made between Opis Capital Limited, LCM and LCF dated 17 September 2017; and a master agency agreement made between LCM and McCormick Consultancy dated 6 February 2017. Only the LCF Agreement has featured within the context of establishing a dispute.

13. In his second witness statement Mr Thomson explains that LCM *"would feed all investments through to LCF and LCF would issue the mini-bond to the investor via the Company"*. Under the LCF Agreement: LCM would receive a fee of 12% of any investment in an LCF product introduced to LCF by the Company in accordance with the LCF Agreement; and any expenses incurred by LCM in connection with marketing and promoting LCF's products would be reimbursed by LCF.

14. Mr Thomson also explains the difficulties LCM has had in dealing with this claim. They stem from the FCA's intervention on 10 December 2018 when company material relating to both LCF and LCM was seized from LCF's registered office, which was also LCM' s trading office. He has only returned to those offices on a few occasions since the appointment of LCF's administrators on 30 January 2019.

15. In addition, on 4 March 2019 the Serious Fraud Office arrested him at his home and seized his laptop and other material. He does not know whether any of the items seized by the SFO contain information relating to the Company. Mr Thomson states that he has asked the SFO for the return of the laptop and for LCM's bank statements. They were not available for this second witness statement and nor had Lloyds Bank provided the bank statements. His solicitors asked LCF's solicitors to provide all LCM's documents in their possession. In answer, Mishcon de Reya stated on 12 August 2019 and 28 August 2019 that LCF does not hold the books and records of LCM.

16. Mr Thomson argues that as a result of the investigations and actions of third parties such as the FCA and SFO, he has been unable to have access to the books and records of LCM and as result no adverse inference should be made from any lack of documentary evidence produced by him in support of LCM's position. He states in his second witness statement that the difficulties mean Mr Thomson's is *"unable to verify the accuracy of the information contained in [the] schedules [relied upon by LCF as … [he] no longer [has] access to [LCM's] records or accounts"*.

17. Mr Thomson was only able to comment upon the claim and the schedules in his second witness statement to this extent:

    i) The sum £500,000 *"was made up of a bridging loan for a third party in the sum of £453,411.18 and a management charge owed to the Company of £46,588.82"*. The bridging loan was ultimately not required and so was paid back into LCF's account within a week.

    ii) The payments to LCM described in the schedules as being:

        a) "either 'COMMS', 'INVOICE' or 'INV' and include either a reference number or a name are very likely to be commission payments owed to the Company by LCF for introducing investors to them pursuant to Schedule 2 paragraph 1(a) of the LCF Agreement."

        b) "The payments from LCF to the Company described as 'LCM MANAGEMENT CHARGE' are payments to the Company for carrying out their contracted role pursuant to paragraph 2 of the LCF Agreement."

        c) "Other payments to the Company from LCF are very likely to be expenses incurred by the Company to market and promote LCF's products which are reimbursable to the Company by LCF pursuant to paragraph 6 of the LCF Agreement.

        The expenses included:
        i. accountancy fees incurred by the Company, an example of which appears to have been paid by LCF to the Company on 20 July 2018, marked 'LCM OLIVER & CLIVE INV'.
        ii. Payments to Root Cause, Opis and McCormick Consultancy who were consultants engaged by the Company to try to develop a network of IF As who would promote LCF' s financial products
        iii. Costs incurred arranging and hosting promotional events for IFAs."

18. Mr Thomson also notes in his second witness statement that in the Borrower Schedules at Appendix III of both the Joint Administrators' Reports dated 25 March 2019 and 27 August 2019 the Company is not named as being one of the borrowers from LCF. In addition, LCF's filed accounts for the year ended 30 April 2017 record within Note 16 that the sum of £98,400 was paid to the Company by LCF and that there was no balance outstanding. This is matched by LCM's turnover in its accounts.

19. Mr Thomson in his third witness statement, drafted after receipt of LCM's bank statements from LCF, explains that all of LCM's books and records were held at LCF's registered office and therefore the administrators should have them. He does not have remote access to LCM's records or to its online bank accounts. He also notes that he *"did not run the accounting books or the bank accounts for [LCM]. [He] employed people to undertake this role"*.

20. He refers to various of the bank statements to support the dispute that *"there were no loans from LCF to the Company"*. Now he has the benefit of the bank statements, he deals with the Payment Schedules as follows:

> *"a. ……*
>
> *b. The Bank Statements appear to confirm that payments described as 'COMMS' are commission payments to [LCM] for the introduction of investors to LCF. With the majority of these payments into [LCM], the Bank Statements show a corresponding payment to an Independent Financial Adviser for a slightly lower amount. This is likely to be the commission owed by LCM to the IFA for introducing the investor.*
>
> *c) The majority of payments from LCF to [LCM] described as 'MANAGEMENT CHARGE' appear to be payments from LCF to cover the cost of third parties who were creating and developing new investor market for LCF products. The Bank Statements show payments out to consultants that largely tall with the payments marked 'MANAGEMENT CHARGE'.* It is to be noted that this differs from the second witness statement and in his fourth witness statement Mr Thomson states this to be the accurate explanation.
>
> *c) A number of the payments described on the Payment Schedules as 'PAYMENT' or 'RCC-INV' can be seen on the bank Statements to have a corresponding onward payment by [LCM]* to Root Cause *… a consultant engaged by [LCM] to develop and market LCF products.*
>
> *d) Two payments of £25,000 from LCF on 27 April 2018 marked on the Payment Schedule as 'LCM PAYMENT' are* likely to be payments to [LCM] for carrying out its contracted role *pursuant to paragraph 2 of the LCF Agreement."*

D) Evidence in Reply

21. Mr Hardman's evidence in reply concludes after detailed evidence that Mr Thomson's evidence does not support LCM's position that the Petition Debt represented payments from LCF to LCM for services provided and management charges. He states (amongst other matters) that:

    i) Mr Thomson has provided no evidence that LCM's business ever existed. The Bank Statements support the position that LCM did not have an operational business. The only funds received by LCM were provided by LCF.

Contemporaneous email correspondence indicates that LCM's business was never fully established.

ii) The Bank Statements show that LCM made payments to individuals and entities connected with LCF and LCM, and to other third parties, at a time when it did not have an operational business.

iii) The Bank Statements also reveal a number of highly suspicious payments out to individuals and entities connected with LCM and LCF, for which LCM and Mr Thomson have failed to advance any satisfactory explanation.

iv) There are no VAT invoices from LCM to LCF in respect of any fees or expenses purportedly payable under any of the four agreements on which LCM rely. LCM and Mr Thomson have consistently refused to obtain and provide copies of LCM's bank statements and other relevant records, despite having the means to obtain the same and, crucially, despite Mr Thomson's assertion that LCM requires those documents to substantiate its position that the payments from LCF to LCM were for *'services provided and management charges'*.

E) Evidence in Rejoinder

22. In a 4th witness statement made 25 September 2019 Mr Thomson states that the majority of the evidence LCF claims to lack would have been available from LCF's Global Management Platform had the fees for continued access been paid. He asserts that much of that information will still be available in LCF's banking Excel spreadsheets, which are in LCF's possession. As to trading, he states:

> *"Although there was a period during which the Company was undertaking research and development, developing networks, and test marketing; contrary to the assertion in paragraph 64.2 of the Witness Statement, it is denied that the Company's business was never fully established. It can be seen from the financial statements on Companies House and previously exhibited as MA T3 that the Company paid tax. In any event, the relevance of this assertion to the issue of whether the Company owes LCF an unpaid debt is not understood."*

23. He also raises issue with the suggestion of Mr Hardman that it is implausible that payments in round numbers from LCF to LCM related to commission payments. He observes that investors typically invested in lump sums and gives as examples: a commission payment of £1,200 is 12% of an investment of £10,000, £2,400 is 12% of £20,000 and £3,600 is 12% of £30,000.

24. In a fifth witness statement Mr Thomson exhibits an email sent to them from a tirm of solicitors called Keogh Caisley, who I understand acted for Spencer Golding. Attached to the email from Keogh Caisley was a document entitled 'Client Account Payment Detail'. This document shows that on 28 November 2018, the sum of £453,411.18 was transferred from Keogh Caisley's client account to LCF on behalf of Mr Spencer Golding.

F) Adjournment by consent

25. Although nothing has resulted, I should record that on, I believe, the Wednesday before this hearing the court received in box work a draft consent order signed by the parties seeking the vacation of this hearing and the re-fixing of the petition for the first available date on or after 1 August 2020. As a matter of practice this should not occur without reasons being provided. They were requested and the reason provided to the court was that a **section 127 Insolvency Act 1986** application to enable funds to be paid for lawyers to act at the hearing was not ready and, as a result, the Company needed the adjournment to avoid being unrepresented.

26. My response as pending final hearing judge, based upon the overriding objective, was that the application for an adjournment would have to be made at the hearing of the Petition on Monday. My reasons for requiring this application to be argued were: (i) If the company does not have funds for representation, potentially the court should decide that it can still be represented by its director(s); and (ii) the hearing has been set for 2 days, this is a last minute request and arguably contrary to the overriding objective taking into consideration the interests of other court users and the court's resources. No adjournment was requested.

G) Submissions

27. Mr Abraham on behalf of LCF ran three arguments in relation to the Reduced Sum:

    i) the Reduced Sum relates to intercompany loans as they appear to be payments that cannot be explained by virtue of the LCF Agreement or any other agreement in the same way as the payments labelled "*COMMS"* and "Invoice LCM".

    ii) Alternatively, to the extent the Court is of the view that the Reduced Sum was paid in accordance with the terms of the LCF Agreement, a debt is still due to LCF as a result of overpayments made by LCF to LCM; and/or

    iii) Irrespective of (1) and (2), a debt is still due to LCF in respect of the unpaid portion of the £500,000 loan repaid on 23 October 2018.

28. LCF's approach can be summarised with reference to the skeleton argument of Mr Abraham as follows:

> *"There is scant documentary evidence backing up assertions in the evidence that seek to justify the fact that the payments made relate to services provided and were not loans. When pressed by LCF for the provision of further documentary evidence LCM's reasons for a lack of evidence (in particular the involvement of the SFO) do not stand up to scrutiny. If anything, they show an unwillingness on the part of LCM to access and review its documents for fear that it may undermine the basis on which it asserts there is a dispute in respect of the Outstanding Debt.*

> *The "disputes" raised by LCM in respect of the Outstanding Debt and its refusal to pay the debt are merely "a 'cloud of objections' contrived to justify factual inquiry" and avoid a winding up order being made.*
>
> *The Court is invited to find that the lack of documentary evidence is not as a result of Mr Thomson's inability to obtain the documents but rather a reluctance to obtain them due to what they may show and/or because no such documents exist."*

29. LCM's position is that the reduced Sum is disputed in good faith on substantial grounds. Ms Staynings sets out the following submission in her skeleton argument:

> *"The Petition characterises the debt as "loans provided to the Company by the Petitioner". No documentary evidence has been exhibited by the Petitioner to support that there was ever any loan agreement in respect of these sums (or that they were ever treated as loans by LCF). In contrast, there is significant documentary evidence supporting that the payments were made for services provided by the Company to LCF, as well as evidence in the form of witness statements from Mr Thomson …*
>
> *The Petitioners' case appears to hinge on the fact that Mr Thomson has not provided detailed evidence to support why <u>every single</u> individual payment from LCF to the Company was made. This is, however, wholly unsurprising: There are numerous payments dating back several years; Mr Thomson was not responsible for the day-to-day accounting and record keeping of the Company: It is not even clear that the Company and LCF ever raised formal invoices as between themselves, or what the arrangement was between them for reimbursing the Company's expenses and paying its commission fees; Much of the disclosure in a Part 7 claim would relate to records of LCF, as the counterparty to the agreement (which are entirely within the control of the Administrators and not Mr Thomson). Among other matters, and without limitation, it is reasonable to expect that there would be disclosure of relevant contemporaneous emails, records of all persons who invested in LCF (and how they were introduced), and full banking and accounting records and information relating to LCF; The Administrators have refused to give full disclosure in these proceedings …; Even at the pleading stage in a Part 7 claim, the Company would not be expected to particularise its defence by setting out a detailed account in respect of every single one of the numerous payments (as opposed to its defence that the payments were justified by services provided by LCM). To the extent relevant, it is unnecessary in any event for the Company to particularise its defence in the same level of detail as would be expected in defending a Part 7 Claim …; and Mr Thomson no longer has access to his personal laptop or to records which were held at the Company's trading office (which is also LCF's registered office): Nor does he have access to LCF's Global Management Platform, which the Administrators have apparently chosen not to continue paying for …".*

30. Counsel have also made detailed submissions in respect of each aspect of the Reduced Debt. I will address those submissions within context when making my decision to the extent I consider it necessary to do so.

H) Decision

H1) Overview

31. The starting point is that LCF has established that the Reduced Sum was paid to LCM and has not been repaid. I accept Mr Abraham's submission that, notwithstanding various parts of Mr Hardman's evidence referred to at paragraph 21 above, it is no part of LCF's case on this petition and LCF does not need to establish that the payments involved misfeasance. LCF's claim can be advanced on the basis that the money was lent, it being implied that the loan would be repaid upon demand. As Mr Abraham submitted, if LCM wishes to dispute it is a loan on the basis that the payments involved misfeasance, so be it. However, for the purpose of considering whether there is a genuine and substantial dispute, I will also bear in mind the absence of written documentation evidencing a loan, as Ms Staynings observed during her submissions.

32. On the face of the evidence in opposition, LCM has raised an issue of dispute, namely that LCM was contractually entitled to the Reduced Sum. However, Mr Abraham is correct to submit that LCF is entitled under the umbrella of the disputed debt test to challenge the contention that this is a genuine and substantial dispute. He has sought to achieve that task by demonstrating that LCM's explanation for the payments cannot be correct even as a matter of dispute. In doing that he is right to rely upon the absence of documentation in the context of the administrators having failed to identify any relevant documents.

33. On the other hand, the administrators have explained that there are several million documents, which will include electronic communications and they will not have been able to consider them all for the purposes of the petition. In addition, Mr Thompon has explained that LCM's books and records were kept at LCF's registered office and it is important to bear in mind within the context of the disputed debt test that difficulties will also have arisen for Mr Thompon and, therefore, LCM as a result of the civil and criminal investigations including the seizure of his personal laptop.

34. The lack of access to LCM's books and records described in the evidence gives rise to Ms Steynings's submission that allowance should be made for the absence of documentation when addressing the grounds of dispute. However, allowance can only be given to the extent that it is relevant to the specific dispute. It is not enough simply to state that disclosure is required. There must be cause and purpose for that disclosure. Mr Thomson was the sole director. He had sole management responsibility for LCM and normally should be expected either to be able to identify the relevant documents said to exist (specifically or by category) and where/how they were kept or to explain his lack of such knowledge. For example, by identifying the employee(s) who would know and why that is the case.

35. This point can be illustrated by the reliance during submissions upon the absence of board meeting minutes, whether for LCM or LCF. It will not normally be enough simply to contend a need for disclosure of those minutes. As a director he should know and be able to identify in his witness statement the board decisions for which documentary evidence is missing. Insofar as that is not the case, his evidence should explain why. Mr Abraham is right to draw attention to Mr Thomson's role with both companies and to the expectation that he would be able to provide such information.

36. I am far more hesitant to accept Mr Abraham's reliance upon LCM not having provided evidence from anyone other than Mr Thomson. For example, from employees or from third parties who received payments from LCM. Whilst the impact

of such a submission will depend upon specific context, it is a route which is likely to travel outside the boundaries of the genuine and substantial dispute test.

H2) The Unpaid Balance of £500,000

37. The first dispute challenged by Mr Abraham's oral submissions concerns the unpaid balance of the £500,000 received by LCM on or about 23 October 2018. The 12 August 2019 letter from LCM's solicitors states it was:

> *"lent on for the purposes of a bridging loan of £453,411.18 (after deduction of management charges). The funds were not required so were returned to the Petitioner's account shortly afterwards. Accordingly, the Company became entitled to its management fee and the alleged debt in the Petition is overstated by £500,000.00".*

38. The natural reading of this statement is that the management charges/fee relate to the agreement ("the Golding Agreement") between LCM and the borrower, Mr Spencer Golding, trading as "Home Farm Equestrian Centre", the money having been *"lent on"*.

39. Neither party has referred to specific terms of the Golding Agreement to explain the deduction. However, two points arise to support that natural construction. First, clause 9.1 entitled LCM to retain a sum in the region of £50,000 from the £500,000 drawn down, as well as the Golding Agreement providing that LCM was entitled to be reimbursed by Mr Golding for all costs and expenses it incurred in connection with (in summary) the finance documents and investigations required by the Golding Agreement.

40. Whilst those provisions do not explain the precise sum deducted from the £500,000, the second point is that a borrower of funds intended to be lent to a third party for the purposes of the borrower's business would not be able to claim a "management fee" from the lender. There is no suggestion in the evidence that this loan concerned LCF's business or the services rendered by LCM under the LCF Agreement. The Golding Agreement was concerned with a facility to finance Mr Golding's intended purchase of land and had nothing to do with an LCF product.

41. Ms Steynings to counter those difficulties refers to the differently worded, second witness statement of Mr Thomson.

> *"The sum of £500,000 that is shown to have been transferred from LCF's account number 41552360 to the Company on 23 October 2018 was made up of a bridging loan for a third party in the sum of £453,411.18 and a management charge owed to the Company of £46,588.82. The bridging loan was ultimately not required and so was paid back into the LCF's account within a week".*

42. The difference in wording is stark. This is a different "dispute" specifically asserting that the monies retained were management charges owed to LCM by LCF. The problem is that Mr Thomson makes no reference to and does not seek to explain this significant change in wording. As a matter of general approach, it is not usually sufficient to establish a genuine dispute by first asserting "a" and then asserting "b" instead without providing an explanation for this change of course.

43. Specifically in this case, Mr Thomson does not attempt to explain why the bridging loan was for £453,411.18 and/or why a management charge of £46,588.82 was owed. He does not do so despite the fact that his evidence is based upon his knowledge that this charge was the cause of the deduction. The case cries out for a statement explaining why that charge existed. He does not even explain why he is not providing an explanation from personal recollection.

44. Furthermore, further information would have been required to explain the management fee even if the £453,411.18 had not been *"lent on"*. It is not sufficient to satisfy even the relatively low hurdle of the disputed debt test, merely to state that a sum of nearly £50,000 was paid as management charges as part of the £500,000.

45. This is not a case of day to day, ordinary book entries for a running account between LCM and LCFs for relatively low sums with which he would not have been concerned. These are large sums paid in the context of the Golding Agreement. Mr Thomson is the sole director. No-one else can be identified from his evidence as being concerned with the Golding Agreement transaction. He does not say it had nothing to do with him, despite being the sole director. He does not say someone else was responsible for these arrangements. Yet, despite his inevitable involvement and knowledge, all he is prepared to tell the court from personal knowledge is that the sum retained is attributed to a management charge owed to LCM. This is not an instance when he identifies documentation (specifically or by class) which he needs to refer to but is unavailable.

46. I am satisfied for all those reasons that there is no genuine and substantial dispute to the claim that the balance of the £500,000 remaining unpaid is a debt due and owing. It on its own establishes LCF's standing as a creditor and an inability to pay debts as they fell due.

H3) "LCF Payments" - £50,000 on 27 April 2019

47. Mr Abraham's submissions next turn to payments described in LCM's bank statements as "London Capital & F Payment". There are eight totalling £71,880 which LCF claims are unpaid loans. They are to be differentiated in terms of grounds of dispute because Mr Thomson distinguishes two payments of £25,000 made on 27 April 2019. For those payment he relies upon clause 2 of the LCF Agreement (see paragraph 20 at "(d)" and paragraph 8 above). He relies (see above) upon its clause 6 for the others (see paragraph 17(ii) at (c) and paragraph 8 above).

48. It is convenient to deal first with those two payments. However, before doing so I should mention that Mr Thomson only identified clause 2 in his third witness statement and did not mention it in his second is not to be treated as a difficulty for LCM's case. The third witness statement was made after the production of bank statements which had not been available when the second witness statement was made. It is not surprising that the evidence might change in the light of a review of this further documentation. As he stated in his fourth witness statement, he *"was able to provide a more accurate assessment as to what the payments from LCF to [LCM] related"*.

49. If clause 2 of the LCF Agreement had applied, the fees for the services provided by LCM would have been paid in accordance with clause 5 and Schedule 2 (see paragraph 8 above). Schedule 2 offered alternative possibilities: (i) the payment of 12% commission in relation to assets invested in LCF financial products by investors introduced by LCM; or (ii) payment under *"such other fee arrangements as may be agreed from time to time in writing between the Parties"*.

50. The first basis for LCF's challenge is that the payments cannot be commission payments under Schedule 2, paragraph 1(a) of the LCF agreement because commission payments: (i) are described in the bank statements as "Comms"; (ii) are in sums commensurate with a 12.0% commission; and (iii) will be followed by payments out to a third party of the major part of the payment. Mr Abraham took the court to the evidence establishing those characteristics. Mr Thomson's third witness statement expressly accepts (i) and (iii). Mr Abraham also established that the two payments of £25,000 fail to meet any of those criteria.

51. That leaves the possibility that these two payments are charges under Schedule 2, paragraph 1(b). Ms Staynings submitted there was every possibility that other fee arrangements would have been agreed after the date of the LCF Agreement. She supported that submission by referring to a document entitled "LCM Commissions Briefing" to be found in the, as she described it, limited disclosure provided by LCF. This identifies fees to be paid by LCM to its network of IFA agents and includes the statement: *"LCM sales have 2-commission rates processing LCF product applications in the CM GMP system. All sales are invoiced at 12% unless reinvestment applications which are invoiced at 2%. LCM agents' commissions are paid from the fees (up to a max. 8.75%) from LCF"*. She submitted, there must have been a separate agreement in respect of reinvestment applications and, if so, there could be other agreements. This, she submitted, demonstrated the need for disclosure during Part 7 Claim Form proceedings.

52. Those submissions were linked to her observations that email correspondence exhibited by LCF demonstrated that a number of employees were concerned with the process of recording and paying sums due to LCM. She submitted that whether they were employed by LCF or LCM, Mr Simpson would not have been responsible for their work and could not be expected to have knowledge of those day to day transactions. In addition, the important point that flows is that those employees processed the payments. There is nothing to suppose that they were not approved for payment for services rendered and nothing to identify them as loans.

53. These are good submissions but need to be considered in the circumstances of Mr Simpson being the only director of LCM and not suggesting in his evidence that there was anyone else to whom the task of agreeing fee arrangements was delegated. There was a debate during submissions as to whether it was relevant that the employees referred to by Ms Steynings were all employed by LCF and, therefore, their knowledge and actions were LCF's. However, not only would that raise questions as to whether LCM truly operated as a legal personality (an issue identified by Mr Hardman but which I have ignored for the purposes of this judgment) but it does not address the real point. The point is that LCM purports to raise a genuine and substantial dispute upon the basis of the knowledge of Mr Simpson and he should know what fee arrangement he agreed. He does not suggest delegation of the

responsibility for making agreement(s) with LCF. He does not provide any such evidence.

54. I accept that Mr Simpson may not remember details but he does not provide any information other than that than that the two payments of £25,000 *"are likely to be payments to [LCM] for carrying out its contracted role pursuant to paragraph 2 of the LCF Agreement"*. He does not even identify any document(s) which might identify or assist him to explain the fee arrangement agreed. It is not enough for the purposes of a genuine and substantial dispute to rely upon evidence that the payments are *"likely to"* fall within that category without more.

55. The payments are for a sum totalling £50,000. Whilst, although I do not necessarily accept this, Mr Thomson may not remember those two payments, one would expect him to be able to explain why a fee justifying payment of those amounts might have been agreed. That is so not only because he controlled the recipient but also because he was a director of LCF. Despite this, he says nothing informative. Nor is it sufficient for this to be left as a matter to be investigated from records no longer in his possession or control without even suggesting what those records might be. He does not say, for example, that agreements under clause 2(b) were made between "x" for LCM and "y" for LCF and were recorded in the following format.

56. The genuine and substantial dispute test is a relatively low hurdle but Mr Thomson's evidence is inadequate. The £50,000 is a debt due and owing. It establishes LCF's standing as a creditor and LCM's inability to pay debts as they fell due.

H4) The Other "LCF Payments"

57. The other payments are said to be expenses incurred by the Company to market and promote LCF's products which are reimbursable pursuant to paragraph 6 of the LCF Agreement. Mr Thomson provides examples of the types of expense to which this clause might relate, such as accountancy fees, payments to consultants and the cost and expense of promotional events. These six payments are all small, ranging between £1,200 and £5,000. They total £21.800.

58. Mr Abraham draws attention to the following reasons why this evidence should not be accepted: clause 6 requires reimbursement on a monthly basis and these payments are not monthly; there is no evidence that invoices were raised and none have been found by LCF; and the description in the bank account of "LCF Payment" is consistent with a loan.

59. However, this is a dispute which descends into too much detail for the disputed debt test. Not only is the specific reimbursement clause identified but Mr Simpson, as a director with knowledge, describes the type of payments being reimbursed. He does not refer to the specific payments but bearing in mind their relatively low values, it is reasonable to accept that this would be a level of detail which he could not be expected to have knowledge of without assistance from LCM's ledgers and original documentation. I do not consider the test requires him to obtain evidence from third parties to justify his evidence. I accept there is a genuine and substantial dispute for these six payments.

H5) Payments labelled "*LCF Management Charge"*

60. There are five payments labelled "Management Charges" in LCM's bank statements. Three were for £25,000 received on 7 April 2017 and another received the same day was £15,000. The fifth was a payment of £30,000 received into the account on 5 December 2017.

61. As set out at paragraph 20 above, Mr Simpson in his fourth witness statement has confirmed that his third witness statement correctly attributes the *"majority"* of those payments as sums required to cover to cover *"the cost of third parties who were creating and developing new investor market for LCF products"*. Paragraph 45 above equally applies (subject to the necessary changes) to this alteration in evidence between the second and third witness statements. In support of that evidence Mr Simpson explained that the bank statements show payments out to consultants that largely tally with the payments received from LCF.

62. There is a potential difficulty with that evidence because it appears to confuse the concept of management fees with reimbursement of expenses for payments to third parties under clause 6 of the LCF Agreement. There is also the feature that the bank statements recording the payments to the third parties only refer to invoices from the third parties relevant to payment in the case of one of the £25,000 payments and the £5,000 payment to Wealden Consultant on 7 April 2017. The absence of invoice details on the bank statement for the other payments is also to be contrasted with other payments to third parties attributed to reimbursement under clause 6 of the LCF Agreement as "Comms".

63. However, the more important point is that Mr Simpson has identified no agreement between LCM and LCF relating to those Management Charge payments either in general terms or with specific reference to the individual payments. He, as sole director of LCM, would have been the person to reach such an agreement and would be able to provide the usual particulars of the agreement if one existed (i.e. when, where and between whom it was made and potentially the gist of the words used). Alternatively he would have been able to provide evidence that whilst there was no express agreement, the payments were made at the request of LCM (whether by invoice or otherwise and whether identifying the third party and/or describing the third party's work in detail or otherwise), that request having been accepted by LCF. There is no such evidence.

64. It is significant in this context that the sums are substantial and that four were made on the same day. As LCM's director he must have known the circumstances of the payments. To assist his recollection he has the bank statements to remind him of the identity of the third parties and of all the details mentioned above. Yet, all he informs the court is that they *"<u>appear to be</u> payments from LCF to cover the cost of third parties who were creating and developing new investor market for LCF product"* (my underlining).

65. This lack of information even applies when the third party payments following receipt of the 7 April 2017 payments include, on the same day, two payments to himself totalling £30,000. There is no explanation as to why he would be a third party creating

and developing a new investor market for LCF, a company of which he was also a director, with the result that he was owed £30,000 by LCM.

66. There is no suggestion within his evidence in respect of those payments or of any of the other management charges that there are documents which exist to explain them. Mr Thomson does not assert, for example, that left with LCF were contracts between LCM and those third parties or with LCF to which the payments relate or communications describing the specific work carried out or invoices for payment. This is not a disclosure issue and, even it was, there is nothing to explain why Mr Thomson could not include within his witness statement evidence of the work he carried out for which he was paid and of his contractual entitlement to payment.

67. Subject to one issue, in all those circumstances this is not a genuine and substantial dispute. The issue is the possible exception of the 7 April 2017 payments totalling £30,000 for which the bank statements identify specific invoices. It might be possible that these payments should be attributed to reimbursements of costs and expenses under clause 6. However, Mr Thomson states otherwise. He specifically changed his evidence in his third witness statement to do so and has confirmed in his fourth statement that he was right to do so. As a result, there is no evidence from him to justify a case that these were clause 6 payments. There is also the feature that the problem concerning the description of "Management Charge" for the payments made to LCM by LCF would remain (see paragraph 62 above, first sentence).

68. I conclude that the genuine and substantial dispute test has not been met. The payments labelled "LCF Management Charges" from LCF are loans which remain unpaid establishing insolvency for the purposes of ***section 122(f) of the Insolvency Act 1986***.

H6) "F/FLOW LONDON CAPI MANAGEMENT CHARGE"

69. On 20 April 2018 LCM received £170,000 from LCF which was described in the bank statement as "F/FLOW LONDON CAPI MANAGEMENT CHARGE". Mr Thomson does not address this descriptor on its own. He does not explain what "F/Flow London Capi" refers to. He does not refer to the fact or explain why this was followed some 7 days later by the 27 April 2018 "London Capital & F Payment[s]". There are no subsequent, significant payments to third parties until 26 June 2018 when £160,000 is transferred in 7 payments to 5 different accounts named "Foreign PYT". Mr Thomson does not deal with this in his evidence.

70. Mr Simpson either treats this sum as an expense under clause 2 of the LCF Agreement (as in H4 above) or as management charges covered by his third witness statement (as in H5 above). However, there is simply no information to justify this separately described payment. It is a significant sum. One he must have been aware of as a director of LCM. There is no suggestion in his evidence that he had designated matters relevant to this significant payment or to any documentation which, if found, might explain something. This is inadequate. A genuine and substantial dispute does not exist.

H7 Overpayments

71. The final payments relied in Mr Abraham's oral submissions are samples of other smaller overpayments. The first on 5 December 2017 is based upon the difference between the sum received by LCM and the sum paid as commission to a third party. It is submitted that the LCF payment amounted to £30,000 but the payment by LCM to the third party was only £25,000. This would mean, on Mr Thomson's case, that there has been an overpayment by £5,000.

72. LCF may be correct but this is micro-litigation unsuitable for a\ challenge to the existence of a disputed debt. There may be all sorts of reasons known to those keeping the books and records for the apparent discrepancies. It is not a matter which should be attributed to the knowledge of Mr Thomson. It is appreciated that LCM could still deal with it but in practice LCM faces the difficulties of the removal of books and records.

73. The second, relies upon a connection between the "F/Flow London Capi" payment and the 26 June 2018 foreign payments. However, no connection has been established and this falls away as a result of the "F/Flow London Capi" payment decision.

I Decision

74. The decisions I have reached lead to the conclusion that LCF is a creditor of the Company for at least the sum of £386,588.82 and the Company is unable to pay its debts as they fall due. A winding up order will be made unless an adjournment can be justified on the basis that payment of the undisputed debt can be achieved within a reasonable time and it is in the interests of the creditors as a whole. No such request is made and the usual compulsory order is made including (for the avoidance of doubt) dismissal of the extant validation application.

Order Accordingly