Neutral Citation Number: : [2021] EWHC 2470 (Ch)

Case No: CR-2020-003888

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

IN THE MATTER OF SWAN CAMPDEN HILL LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
London EC4A 1 NL

Date: 09/09/2021

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

FENTON WHELAN LIMITED	**Petitioner**
- and -	
SWAN CAMPDEN HILL LIMITED	**Respondent**

- -
- -

Rowena Page (instructed by **Stevens & Bolton LLP**) for the **Petitioner**
John Briggs (instructed by **Forsters LLP**) for the **Respondent**

Hearing date: 30 June 2021

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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.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton :

1. This is the hearing of a winding-up petition presented at court by Fenton Whelan Ltd against Swan Campden Hill Ltd (the "Company") on 8 October 2020.

2. The petition states at paragraph (j) that a winding-up order is sought on the grounds set out in section 124(1) and section 122(1)(f) of the Insolvency Act 1986 (the "Act"). Section 124 sets out who is entitled to apply for a winding-up order and provides that such application shall be by petition which may be presented by various parties, including a creditor. Section 122(1) sets out the circumstances in which a company may be wound up by the court, including, at sub-paragraph (f) that the company is unable to pay its debts.

3. The petition refers at paragraph (l) to a statutory demand served on the Company on 18 August 2020 in respect of the Company's failure to pay invoices from 1 October 2018 to 1 February 2019.

4. The Corporate Insolvency and Governance Act 2020 received Royal assent on 25 June 2020. When first introduced, it precluded a creditor from presenting a winding-up petition between 27 April 2020 to 30 September 2021 unless the creditor had reasonable grounds to believe that the Covid 19 coronavirus had not had a financial effect on the debtor company, or that the company was unable to pay its debts regardless of the financial effect of the virus. Its terms also prevent statutory demands served between 1 March 2020 and 30 September 2021 from being relied upon for the purposes of a winding-up petition presented on or after 27 April 2020. It was not therefore open to the Petitioner to rely upon the statutory demand served on 18 August 2020 as it falls within the period of statutory restriction. Nevertheless, in December 2020, the parties submitted a consent order to the court which recited that the parties had agreed, pursuant to paragraph 8.1(a) of the Temporary Insolvency Practice Direction, that the coronavirus test set out in the Practice Direction had been met and that consequently, on the evidence, it is likely that the court will be able to make an order under section 122(1)(f) of the Act. The court order vacated the Preliminary Hearing, gave directions for the filing of further evidence in relation to the grounds on which the Company opposed the petition and for a hearing to be listed before an ICC judge. This is that hearing.

5. Whilst the amount of the debt claimed by the Petitioner is not set out in the petition, following service of the statutory demand and the reference in the petition to outstanding invoices, it appears to be accepted that the debt in question relates to 5 invoices totalling £50,000 plus VAT dated between 1 October 2018 and 1 February 2019. For convenience I shall refer to this as the "Petition Debt".

6. Ms Page confirmed that in light of the CIGA provisions to which I have already referred, the Petitioner seeks a winding-up order on the basis that the Company is unable to pay its debts as evidenced by its failure to pay the Petition Debt. Mr Briggs submits that the Petition Debt is genuinely disputed on substantial grounds and/or is subject to a genuine and serious cross claim.

Relevant legal principles

7. The legal principles are well known and have been summarised in the skeleton arguments. Whilst each emphasised what they considered to be pertinent issues by reference to separate authorities, the key principles do not appear to be in dispute. The rule of practice, long rehearsed in this court, is that the court will dismiss a petition when it is satisfied that the debt on which the petition is based is bone fide disputed on substantial grounds.

8. Even in cases where the petition debt is not disputed, as established by the Court of Appeal in *Re Bayoil SA* [1999] 1WLR 147, the court has a discretion and may decline to order winding up where there is a genuine and serious cross-claim that the respondent has been unable to litigate that equals or exceeds the amount of the petition debt.

9. Ms Page highlights that although a failure to litigate a cross-claim is not necessarily fatal, in deciding whether a cross-claim is genuine and serious, the court is entitled to take into account all the relevant circumstances, including the fact that a company has not attempted to litigate it. In *Dennis Rye Ltd v Bolsover District Council [2010] BCC 248*, Mummery LJ stated:

> "A company is not prevented from raising a cross-claim in winding-up proceedings simply because it could have raised or litigated the claim before the presentation of the petition or it has delayed in bringing proceedings on the cross-claim. The failure to litigate the cross-claim is not necessarily fatal to a genuine and serious cross-claim defeating a winding-up petition. However, in deciding whether it is satisfied that the cross-claim is genuine and serious, the court is entitled to take into account all the relevant circumstances, such as the fact that a company has not even attempted to litigate the cross-claim, or that there are reasons why it has not done so."

10. Mr Briggs referred me to *LDX International Group LLP v Misra Ventures Ltd* [2018] EWHC 275 Ch in which David Stone, sitting as a Deputy High Court Judge brought together the key uncontroversial propositions that can be drawn from the leading authorities concerning a company's opposition to the making of a winding-up order. Mr Briggs relied upon the summary as authority for two principal propositions. First, when considering whether to make a winding-up order in the face of opposition, it is not practical or appropriate for the court to conduct a long and elaborate hearing, examining in minute detail, the case made on each side. In *Re Bayoil*, cited in *LDX International Group LLP*, Ward LJ said:

> "a winding-up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim or the cross-claim, that seems to me to require that the court should proceed cautiously".

11. Secondly, Mr Briggs submitted that the court must take a realistic view of whether the Company is likely to establish a genuine and substantial dispute and/or cross claim. I accept his submission, noting also the third proposition set out in *LDX*, that:

> "It is incumbent on the recipient of the statutory demand to demonstrate, with evidence, that the cross-claim is genuine and serious: *Orion Media,* at paragraph 31. Bare assertions will not suffice: there is a minimum evidential threshold: *Re a Company,* at paragraph 33."

12. Ms Page relies upon the Court of Appeal's judgment in *Ashworth v Newnote Ltd* [2007] BPIR 1012 as authority for the proposition that when considering a party's opposition to a winding-up petition, it is open to the court to reject evidence because of its inherent implausibility or because it is contradicted by or not supported by the documents. In reaching its conclusion, the Court relied upon paragraph 12 of Patten J's judgment in *Portsmouth v Alldays Franchising Ltd and others* [2005] EWHC 1006 (Ch):

> "[12] So far as the evidence is concerned the mere fact that a party in proceedings not involving oral evidence or cross-examination asserts that certain things did or did not occur, is not sufficient in itself to raise a triable issue. That evidence inevitably has to be considered against the background of all the other admissible evidence and material in order to judge whether it is an allegation of any substance. Once the court considers that the evidence is reliable in that sense, and not some attempt to obfuscate the real issues by raising a series of hopeless allegations then it does, of course, become necessary to consider what the legal consequences of it are."

13. In her skeleton argument and oral submissions, Ms Page referred to the Company's decision, as time advanced, to raise points in opposition to the petition which were initially not mooted in any of the correspondence which preceded service of the statutory demand, nor in the first witness statement of the Company's solicitor, Andrew James Head dated 23 October 2020,

14. in opposition of the petition. She submitted that this gave rise to "the archetypal case in which a company seeks to raise a cloud of objections to stave off a winding-up petition". I take this to be a reference to the observations of Oliver LJ in *Re Claybridge Shipping Company SA*, regarding an unwilling debtor raising in his affidavit, a cloud of objections in order to claim that a dispute of fact exists which cannot be determined without cross-examination so that the petition cannot be allowed to proceed. As noted by Chadwick J in *Re a Company No. 006685 of 1996* [1997] B.C.C. 830, referring in turn to Staughton LJ in *Re Taylor's Industrial Flooring Ltd* "anything that the law could do to discourage such behaviour should be done".

Background

15. The Petition Debt arises from a development manager appointment contract dated 31 August 2017 between the Petitioner and the Company (the "DMA"). Pursuant to the DMA, the Petitioner agreed to provide development manager services for the renovation and refurbishment of a property at 1 Camden Hill London, (the "Property").

16. In his first witness statement dated 20 November 2020, the Company's sole director, Mr Jumean, describes his understanding of the background to the DMA. He states that the Property was owned for more than 18 years by Swan Developments Limited, a

company registered in Gibraltar ("SDL"). In or around 2008, planning permission was granted by the Royal Borough of Kensington and Chelsea Council for a new double basement and other improvements to the Property. In 2016, Mr Jumean decided SDL should sell the Property but states that upon instructing marketing agents, he was persuaded by them to meet the Petitioner's directors who, he was told, had some attractive ideas for improving the Property.

17. They soon met and Mr Jumean states that one of the Petitioner's directors, Mr Sharma, claimed that the original planning permission would not maximise the value of the Property. He continues:

> "Mr Sharma also claimed that the Petitioner had good connections within RBKC and that with the help of their recommended architect (who he said was very highly regarded by RBKC) they could achieve improved planning permission and thereby maximise the value of the Property. I believed Mr Sharma when he said that the Petitioner could deliver improved planning permission and I (and, by extension, the Company) placed trust and confidence in the Petitioner.
>
> At this stage, there was no intention on my part to develop the Property. All I was interested in was improving the planning permission before selling the Property.
>
> Accordingly, the original agreement made in January 2017 between the Petitioner and the Company was on the basis that they would work only to revise the Original Planning Permission.
>
> However, sometime after the original agreement was entered into, Mr Sharma told me that the revised planning application was very likely to be approved shortly and the negotiating position with RBKC would be improved even further if the RBKC planning team could satisfy itself that work had already started on the project. If the works were to start, this required the Company to instruct the Petitioner to carry out additional development services."

18. It is against this background, that according to Mr Jumean's evidence, the DMA was entered into.

19. Clause 2 of the DMA provides for the Petitioner to be paid a fee of £540,000 in accordance with a schedule included at Appendix 2 to the DMA.

20. Clause 2.3 of the DMA provides for the Petitioner, as Development Manager, to submit an invoice for each instalment of the fee plus VAT as set out in Appendix 2, fully itemising any expenses and disbursements and including such other details or supporting documents that are reasonably necessary to check the invoice. Clause 2.4 provides for the due date for payment of any part of the fee to be the date of receipt of a valid VAT invoice in respect of the relevant instalment and for the final payment date to be 21 days after the due date.

21. Clauses 2.5 and 2.6 provide:

> "2.5 Unless the Client has served a notice under clause 2.6, the Client shall pay to the Development Manager the sum stated in the invoice submitted by the Development Manager pursuant to clause 2.4) ("the notified sum") on or before the final date for payment.
>
> 2.6 Not less than 5 days before the final date for payment ("the prescribed period"), the Client may give to the Development Manager notice that the Client intends to pay less than the sum notified in the Development Manager's invoice ("a pay less notice"). Any pay less notice shall specify…
>
> (a) the sum that the Client considers to be due on the date the pay less notice is served; and;
>
> (b) the basis on which that sum is calculated."

22. Mr Jumean's witness statement draws the court's attention, inter alia, to the following clauses of the DMA:

> Clause 1.4 "The Development Manager shall perform the Services in relation to the Project regularly and diligently and in accordance with the terms and conditions of this Appointment;
>
> Clause 1.12: "The Development Manager warrants to the [Company] that in performing the Services it has exercised and will continue to exercise the standard of reasonable skill and care to be expected of a development manager who is experienced in providing services similar to the Services in relation to projects of a size and complexity equivalent to the Project"; and
>
> Clause 1.17: "The Development Manager shall maintain a full and complete record of the Project costs on an open book basis."

23. He also refers to Clause 20, pursuant to which the Petitioner was to provide the following services:

> "20.1 Advise on the selection of the Contractor and the Consultants (Appendix 1, paragraph 2.6); and
>
> 20.2 In conjunction with the Client's legal advisers, negotiate the terms of the appointments of the Consultants and the terms of the Building Contracts ensuring that all appointments of the Consultants were in accordance with the requirements of the Company and any person providing funding in connection with the Project (Appendix 1, paragraphs 2.7 and 2.8)."

24. Mr Jumean states that he gave the Petitioner almost total control over the development project and that as he was living in the UAE, and had no way of viewing progress on the ground, he relied very heavily on the Petitioner's directors:

> "The Company relied on the Petitioner's guidance in the selection of construction professionals and in connection with the negotiation of their contracts. On this basis, W11 Construction Limited ("W11") was selected as the Building Contractor, Form London Limited was selected as the structural engineer, Blade Consulting as the Quantity Surveyor ("Blade"), Montagu Evans LLP as the planning consultant and Pilbrow & Partners LLP as the architect. The appointments of Blade and W11 took place in early September 2017 and these appointments did not involve any tendering process. Mr Sharma advised me that because the improved planning permission was in the process of being sought, it was best to engage contractors that the Petitioner had previously worked with, so there was no requirement to go through a tendering process with multiple contractors which would serve to delay matters and which was unnecessary in the circumstances. I had no reason at that stage to question the advice given or Mr Sharma's expertise in this regard."

25. It does not appear to be in dispute that in February 2018 it was orally agreed that the instalment payments, usually of approximately £16,000 would be reduced to £10,000 plus VAT. It appears that from around that time, the Property was being marketed for sale.

26. The amended payment arrangements were agreed shortly after Mr Jumean's personal accountant, Mr Zebb, informed him that he had received an email purportedly from a former employee of the contractors, W11. The email was sent under the name "Adam West" and alleged that W11 was "a corrupt firm" engaged in overcharging. Mr West provided a redacted email purporting to show that W11 would overcharge for the Campden Hill project by £2.4m spread over two years, that nobody would notice the over-charge and that the Petitioner would agree to this. It said:

> "This is for the build of 45 Road for James at FW"

The latter reference appears to be to one of the Petitioner's directors. It continues:

> "We shall also look after Jon at Blade, Andy at Form and Sanjay/Bagee. I have sent you the costs from Andy that need to be added to our schedule".

27. The email prompted a meeting at the Petitioner's office on 22 January 2018 with Mr Jumean and the directors of Blade and W11 (the "January 2018 Meeting"). Mr Jumean states:

> "I asked expressly if money had been passing between the three companies in connection with the project at 1 Campden Hill and the Property. This was immediately denied by every party. Mr Sharma said that such accusations were outrageous and even offered a forensic audit/investigation take place in order to

> demonstrate this. While I found the episode concerning, I trusted that I was being told the truth.
>
> However, a few weeks later, there had been more communications with "Adam West" and he seemed prepared to meet me to show me the evidence he had to substantiate his claims. On 7 February 2018, I wrote to Mr Sharma and Mr Van Den Heule explaining this development and said that:
>
> > "Until we get to the bottom of this Kindly [sic] instruct W11 not to run up any costs at all. Depending on the information given to us by this guy we reserve the right to conduct an external audit of W11s books."

28. In his witness statement of 6 November 2020, Mr Sharma describes attempts he made to obtain payment from the Company of the Petitioner's outstanding invoices. He states that during a telephone conversation in or around November 2018, Mr Jumean agreed that the Company would settle the Petition Debt once the sale of the Property, negotiations for which were in progress at the time, had completed or in any case, at the end of the year if the sale was delayed.

29. Mr Sharma exhibits an email to Mr Jumean dated 15 February 2019 in which he referred to W11's claim for payment of outstanding amounts. His email also referred to Mr Jumean's agreement to settle the Petitioner's outstanding invoices if the sale were to be delayed, and he requested payment in order that the Petitioner could continue representing the Company. Mr Jumean denies that he gave any assurance that the invoices would be paid.

30. Mr Jumean responded by email dated 18 February 2019 which he copied to Jon Collins at Blade and also to the Company's solicitors. He said the following:

> "With regard to settlement of invoices, before we move forward would you kindly clarify the following? You have appointed all consultants, contractors and advisors on this project and you have negotiated all their fees on my behalf. Furthermore you have been representing me vis-à-vis all consultants and contractors from the outset of this agreement and it is now proposed that you negotiate on my behalf as you did in the past with "W11."

31. He asked the Petitioner, in addition, to confirm four key points – each of which I shall set out, followed before the next point, with the reply provided by the Petitioner later the same day. When replying, the Petitioner stated that they had been pressing W11 and all the other consultants as much as they could on the Company's behalf and that the Company's solicitors, Forsters, should be able to attest to the vigour with which the Petitioner had been defending the Company's interests. The questions and answers were as follow:

> > "Have you or James or FW received or agreed to receive any form of consideration, payment, fees, credit notes etc from W11 or its owners or any other consultant or contractor or advisor or any third party acting on [the Property]?"

> REPLY: 'FW have received fees from W11 for referrals. We have an ongoing global rebate with Blade Consulting'.
>
> "Do you or FW have any agreement with any contractor or consultant or advisor appointed on 1CH to receive any form of consideration?"
>
> REPLY: 'We have an agreement with Blade across all projects on which we cooperate. We have an agreement with Rokstone for referrals (we pay them). There is no agreement with any other party.'
>
> "When we settled drawdowns directly to FW does FW deduct any fees whatsoever from the payments to the third parties or does it pay 100% of the amounts received?"
>
> REPLY: 'No deductions, we pay 100%.'
>
> "Has FW received any fees from any third party providing any service to 1CH other than those paid directly to FW by me?"
>
> REPLY: 'Only those stated above'

32. On 20 February 2019, a meeting took place between the parties. The following day, 21 February 2019, Mr Sharma sent an email to Mr Jumean summarising his understanding of what was discussed at the meeting. In relation to the Property, Mr Sharma said:

> "4. We discussed your displeasure at what you stated in the meeting you already knew—that we had in the past accepted fees from W11 and Blade. We discussed whether this had in any way impacted our performance on your behalf on 1 Campden Hill. I believe you accepted this is not the case."

33. Mr Jumean replied later the same day stating, inter alia:

> "I disagree strongly with any suggestion in paragraph 4 above that I "already knew" that FW had taken fees from W11 and Blade. The first time I became aware of this was from your email of 18 Feb 2019. In the meeting I complemented you on your "clever" reply to my questions about fees in my email of 18th Feb 2019, stating "you must have known we already knew something". This of course does not mean that at any time during the contract I was aware that you had received fees from any third party working on CH. I first became suspicious of FWs double dealing as a result of my conversations with Daniel Jacoel about Brick Street sometime in the beginning of February 2019.
>
> I also disagree strongly with any statement that I accepted that the fees did not impact your performance. I would never have agreed to allow you to appoint W11 as the main contractor without any tender if you had told me at the time of appointment

> that you received fees from W11. I would never have allowed you to negotiate any financial settlement between me and W11 if you had not expressly stated that you do not get paid by them. I would never have allowed you to appoint Blade as the QS if I had known that Blade was paying you any fees. Furthermore I would never have allowed you the authority to unilaterally instruct Blade if I had known you had a "rebate" system in place with them. All of these in my view constitute bribery and a very serious breach of trust.
>
> In our meeting I stated to you that in my view FWs acceptance of fees from W11 and Blade is the textbook definition of bribery and that I have met with my lawyers and prepared a vigorous legal action against FW for among other things, breach of contract, fraudulent misrepresentation, bribery, and breach of trust, I explained that I reserve my right to take such legal action against FW. However if the events of the next few days and weeks result in a situation that makes it commercially prudent for me not to peruse this action, I may, at my discretion, choose not to pursue it. [sic]"

34. Mr Sharma replied on 6 March 2019. As this email is referred to in the Company's grounds of opposition, I shall turn now to consider those terms. Before doing so, I note that throughout September 2017 to September 2018, the sums due in respect of invoices presented by the Petitioner, including the reduced payments as agreed from February 2018, were paid.

35. It is not in dispute that none of the invoices which comprise the Petition Debt were the subject of a pay-less notice pursuant to clause 2.6 of the DMA. Payments stopped in October 2018 and have not resumed since then.

Procedural history and the Company's grounds of opposition

36. The Company initially opposed the petition on grounds set out in Mr Head's witness statement dated 23 October 2020. He states that the fact that the Petition Debt is disputed is demonstrated in correspondence and conversations between Mr Jumean and Mr Sharma. He refers, by way of example, to the email from Mr Sharma dated 6 March 2019, the subject heading of which was "1 Campden Hill Fee Dispute".

37. Mr Head states that in that email, Mr Sharma recognised that the Company had unresolved complaints against the Petitioner and indicated a desire to resolve the dispute without recourse to litigation. He extracted the following paragraph from Mr Sharma's email of 9 March 2019:

> "In your email of 21 February 2019, you referred to the potential of legal action against FW for breach of contract, fraudulent misrepresentation, bribery and breach of trust. Without any proper particulars as to what is alleged, FW are of course unable to respond. However, as I have previously stated, FW strongly reject that it has in any way acted improperly and if it is necessary to do so, FW will vigorously defend any claim. In such

> circumstances, formal legal proceedings are unlikely to be in the interest of either party and as I communicated in our recent meeting, we remain committed to carrying out our services on the project and similarly committed to exploring with you a way to resolve the current issues between us".

38. Mr Head states that this and the reply from the Company in which Mr Jumean acknowledged that relations between the parties were strained but expressed a desire that they resolve matters amicably, illustrates that the Petition Debt was in dispute from at least March 2019. He states that as it has not been resolved since then, the Petition Debt remains disputed. He further states that the Petitioner's knowledge that the Petition Debt was disputed:

> "is no doubt the reason that the Petitioner delayed presenting the winding-up petition in respect of alleged non-payment of invoices between 1 October 2018 to 1 February 2019".

39. On 6 November 2020, Mr Sharma made a witness statement responding to Mr Head's witness statement. He stated that in or around February 2019, the Company decided to cease development works and market the Property for sale whilst continuing to progress the planning and design work to maximise the value of the Property, and that it was against this background that the instalment payments were reduced to £10,000 plus VAT.

40. Mr Sharma states that around March 2019, the sale of the Property fell through. On 17 February 2020, he sent a further email asking for the Company to settle the invoices "as has been agreed". Requests for payment were made periodically thereafter during face to face meetings, telephone calls and emails. He states:

> "By August 2020, the Petitioner had neither received payment of the Outstanding Invoices from the Respondent nor any reason advanced by the Respondent for its failure to pay the Outstanding Invoices. Consequently, the Petitioner served the statutory demand dated 6 August 2020 (the "Statutory Demand") on the Respondent in respect of the Outstanding Invoices.
>
> I hoped that after receipt of the Statutory Demand, the Respondent would at least get in touch with me in order to make payment of the Outstanding Invoices or failing that, provide an explanation as to why the Respondent had not paid them.
>
> However, no such payment or explanation was received. The Petitioner therefore filed the Petition with the Court on 8 October 2020. "

41. In relation to the payments from W11 and Blade, he referred to his letter of 6 March 2019 and said:

> "the accusations regarding receipt of third party fees were not denied on the basis that the Petitioner did in some cases receive payments from third parties, this was not forbidden under the

> terms of the DM Agreement and in ordinary course in our industry."

42. He sought to explain that his reference to there being a dispute between the parties regarding fees was simply a reference to the Company's failure to pay their invoices and that despite his letter of 6 March 2019, to the date of his witness statement, the Company had not provided any specific details supporting its allegations of bribery, fraud or misrepresentation as set out in Mr Jumean's letter of 21 February 2019.

43. Following a non-attendance pre-trial review on 8 November 2020, both parties filed further evidence, albeit not, as directed, limited to the question of whether the CIGA test had been met. The Petitioner's evidence is set out in the third witness statement of Mr Sharma. He highlights that the Company has not particularised its alleged claims for misrepresentation, bribery and breach of trust and said that as a result, the Petitioner was 'in the dark' regarding the nature of the dispute alleged by Mr Jumean to exist between the parties. The remainder of his witness statement refers to (i) the balance of the Petitioner's fee provided for by the DMA having become due and payable following a transfer of the Property; and (ii) fees which he asserts are due under a separate interior design agreement relating to the Property. I shall describe the fees claimed at (i) and (ii) as the "Additional Fees". The Petitioner urges the court to take the Company's failure to pay these fees into account when exercising its discretion.

44. Mr Jumean's witness statement of the same date expands upon the grounds of opposition referred to in Mr Head's witness statement. It is from this witness statement that I extracted, for the purposes of setting out the background to the petition, his recollection of the Petitioner persuading him to apply for improved planning permission and his reference to the email received from "Adam West". He states that it has always been clear to the Petitioner that the Company has a potential cross-claim regarding the referral fees and rebate agreement. He concludes his statement under a heading "Grounds for Disputing Debt and/or Cross-Claim" saying that the main basis on which the Company disputes the Petition Debt is due to his serious concerns over whether the Petitioner's planning services were being carried out with reasonable skill and care, or at all in the period after the construction work was paused. He does not consider that the Petitioner made proper efforts to obtain the planning permission that it said could be achieved.

> "Additionally, (or alternatively) the Petitioner (through Mr Sharma) knowingly misrepresented the likelihood of success in order to persuade me to commence the development of the Property with the Petitioner. … I believe Mr Sharma misled me knowing that by the time I discovered the difficulties with securing the improved planning permission, it would be too late to pull out of the development of the Property …"

45. He alleges that if the Petitioner had advised the Company correctly as to the likelihood of success in obtaining improved planning permission, the Company would not have invested approximately £3.3 million developing the Property and that the Company has yet to uncover the full extent or amount of payments he believes were received by the Petitioner from third parties.

46. He says that he has been advised that one potential cause of action relates to what he regards as a "secret profit" and opines that such a claim would be very likely to exceed the value of the Petition Debt. Finally "in the alternative or in addition" he states that he understands that claims lie against the Petitioner for "damages for breach of contract, breach of fiduciary duties, tort and unjust enrichment" on the basis that the Petitioner's conduct caused the Company to engage Blade and W11 without tender giving rise to inflated costs of the development. He refers to the figure of £2.4m raised by "Adam West" and concludes that the Company has a cross claim based on substantial grounds.

47. Much of Mr Jumean's second witness statement dated 29 January 2021 concerns the Additional Fees. He refers back to his earlier WS and states:

> "I consider there to be a number of cross-claims that the Company may bring against the Petitioner in connection with:
>
> The services which were (or were supposed to be) provided by the Petitioner to the Company; and
>
> The undisclosed monies I understand the Petitioner received in connection with the Property.
>
> … even if the sums claimed under the Additional Invoices were due and payable (which they are not) the value of the Company's cross-claims are likely to exceed the Petitioner's claims. In addition, the Company has reserved its position with respect to its potential claims against FWD."

48. He then refers to a letter dated 2 December 2020 from the Company's solicitors to the Petitioner's solicitors, requesting specific details of the payments received by the Petitioner as well as any payments which the Petitioner's directors accepted personally in connection with the Property. Further requests for the information were made, but as at 20 November 2020, the Petitioner had not provided the requested details.

49. From this description it can be seen that the Company's grounds of opposition have expanded since Mr Head's first witness statement. It is helpful to bring them together. Mr Briggs did not expressly state which he considered to comprise disputes to the sum claimed and which comprise cross-claims:

    i) The Company's concerns that the Petitioner was not carrying out the planning services with the requisite due skill and care, or at all after construction work was paused;

    ii) The Petitioner's misrepresentations regarding the Company's prospects of achieving improved planning permission which induced the Company to enter into the DMA and resulted in the Property being sold for less than in its original state even after the Company spent £3.3 million seeking to revise the planning permission and developing the site;

    iii) The Petitioner's acceptance of referral fees which put it in a position where, in breach of the fiduciary duties the Petitioner owed to the Company, its interests

conflicted with those of the Company and exposed the Company potentially also to overcharging.

50. Mr Briggs supplemented these points with some general observations. Since serving a statutory demand on the Company, the Petitioner has sought to claim the balance of fees which it claims to be due to it under the DMA: £376,000. In June 2021, the Petitioner's solicitors sent a letter to the Company's solicitors expressly stating that it was being sent in accordance with the Pre-Action Protocol for Construction and Engineering Disputes. The sum claimed includes the Petition Debt. This is a case, he says, in which having included the Petition Debt in the Protocol correspondence, the Petitioner must have recognised that it is subject to a dispute. He highlights that there have been four rounds of evidence from the Petitioner and three from the Company and submits that "the obvious inference from all this evidence and the fact that the debt which is substantially disputed, was known to be disputed when the petition was presented" is that the petition should be dismissed.

51. Mr Briggs confirmed that it was not the Company's intention to pursue claims for the tort of bribery. He said that whilst the terms used by My Jumean reflected his horror and distaste upon being informed that the Petitioner had received payments from W11 and Blade, as a non-lawyer, he had not used the terms in their strict legal sense.

Grounds of dispute

Petitioner failed to carry out planning services with due skill and care

52. According to Mr Jumean's witness statement, the Company's primary ground for disputing the Petition Debt lies in its serious concerns that in breach of the DMA, the Petitioner's planning services were not being carried out with reasonable skill and care.

53. Mr Briggs did not contest Ms Page's submission that:

i) the DMA is a "construction contract" within the meaning of, and subject to the Housing Grants, Construction and Regeneration Act 1996 (the "1996 Act");

ii) the operation of the scheme provided for by the 1996 Act requires a construction contract to (i) provide an adequate mechanism for determining what payments become due under the contract and when; and (ii) require one of the parties or a specified third party to provide a 'payment notice' specifying the sum due not later than five days after a payment becomes due. The Act provides that if the payer intends to pay less than the amount stated in the payment notice, it must issue a 'pay less' notice prior to the final date for payment;

iii) if a construction contract complies with the requirements of the 1996 Act, its statutory provisions are of no operational effect. If, and to the extent that a contract does not comply with the requirements, the statutory provisions step in an fill the gap or override any conflicting contractual provisions;

iv) Section 111 of the 1996 Act provides that where a paying party wishes to pay less than the amount claimed in the payment notice, it must serve an effective notice of its intention to withhold payment by the relevant deadline. If it fails to do so, it cannot subsequently dispute the debt. This was confirmed by the

> Court of Appeal in *Rupert Morgan Building Services Ltd v Jervis* [2004] 1 WLR 1867 where Jacob LJ noted that the scheme was intended to prevent main contractors abusing their bargaining position against sub-contractors who were not in a position to mount an effective protest. He highlighted, however, that the scheme would not preclude the main contractor or client from subsequently showing that he has overpaid on an interim certificate: "the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings."

54. In *R&S Fire and Security Services Ltd v Fire Defence plc* [2013] EWHC, Newey J recognised, in the context of winding-up proceedings, that having not served a pay-less notice, as required by section 111 of the 1996 Act it was not open to the respondent company to dispute that the amount claimed in the payment notice was properly due and payable. In my judgment the same principle applies here: having failed to serve a pay-less notice within the prescribed period, it is no longer open to the Company to dispute that the Petition Debt is due and payable.

55. However, as noted by Newey J, and conceded by counsel in the case before him, the 1996 Act does not preclude a party from raising a cross-claim which, if genuine, substantial and in an amount in excess of the petition debt will, save in special circumstances, preclude the court from making a winding-up order.

The Company's cross-claims

Misrepresentation regarding the Company's prospects of being granted improved planning permission

56. This claim was not touched upon in Mr Head's witness statement. It first arose in Mr Jumean's witness statement in November 2020 when he claimed that Mr Sharma knowingly misled him, aware that by the time Mr Jumean discovered that improved planning permission would not be granted, it would be too late for the Company to pull out of the development contract.

57. To be actionable, such a serious allegation, amounting to fraud, would need to be fully and clearly particularised. It is not. That remains the case despite the Petitioner explaining as early as March 2019 that it was unable to respond to such allegations without full particulars. Mr Sharma repeated in his witness statement of 20 November 2020 that he was hampered in responding to Mr Jumean's allegations, having received no details of the allegations.

58. Both parties referred to commentary on misrepresentation in Chitty on Contract (33rd Edition). At paragraph 7-007 the authors state:

> "The traditional rule is that a misrepresentation must be a false statement of fact, past or present, as distinct from a statement of opinion, a statement of intention or a mere commendatory statement. However the distinction between a statement of fact on the one hand and a statement of opinion or intention on the other, is not clear cut."

59. The Petitioner's statement regarding the Company's likelihood of obtaining planning permission was, in my judgment, quite clearly not one of fact; it was a statement of opinion regarding the possibility of achieving a certain outcome if a certain course of action were to be pursued. Mr Jumean's evidence refers to a representation of what *could* be achieved, not what he was told *would* be achieved were he (as he did) to engage the Petitioner's services. There was no statement of past or present fact. A third party would determine whether planning permission should be granted. That decision would be taken in the future and the Petitioner was in no position to guarantee that it would go in the Company's favour. It follows that even on the Company's own evidence of what "*could"* be achieved, it recognises that there was no false assertion of fact in this case which could give rise to an actionable misrepresentation.

60. Mr Briggs referred me to paragraph 7-009 of *Chitty on Contract* which summarises that if it can be proved that a person who expressed an opinion did not hold it, or could not, as a reasonable man having his knowledge of the facts, honestly have held it, the statement may be regarded as one of fact.

61. The only evidence tendered by the Company to support an assertion that the Petitioner could not honestly have held such an opinion is Mr Jumean's statement that he had been consistently told by the Petitioner that improved planning permission was "coming soon" but that he later saw correspondence from the planning authority that it "had made it clear that the applications for improved planning permission were unlikely to be accepted". That correspondence is notably not before the court.

62. The email correspondence passing between the parties suggests that in 2020 the Petitioner still considered that if it had not been told to stop work before submitting revised applications, the planning work may have led to a positive result. Mr Briggs submitted that faced with such serious allegations, one would expect the Petitioner to have produced email correspondence from the planning consultants, Montague Evans, confirming that this was the case.

63. Whilst it would have been open to the Petitioner to have provided such evidence, in my judgment, it was not obliged to do so. The burden of proving that the Company has a genuine and serious cross-claim in respect of the Petitioner's alleged misrepresentation regarding its prospects of securing improved planning permission for the Property, lies with the Company.

64. The Company has failed to meet that evidential burden. In *LDX* the respondent company had served a detailed letter of claim. The judgment records that:

> "LDX has retained KPMG to undertake an audit; instructed law firm Fieldfisher LLP to investigate and produce reports; instructed Bond Solicitors to conduct investigations; and retained a digital specialist firm to conduct forensic examination of LDX's electronic data system."

65. The court in that case was presented with three lever arch files of evidence and taken to three examples of what counsel for the respondent described as concrete examples of alleged breaches on the part of the petitioner which established loss exceeding the value of the petition debt. Whilst one of the examples was not quantified, the other two

were. The court in *LDX* was satisfied that the respondent had established that its cross-claim set out in its letter of claim was of substance – genuine and serious.

66. The comparison with the case before me is stark. There is no evidence to support Mr Jumean's bare assertion that the Petitioner could not honestly have believed when contracting with the Company, that improved planning permission could be granted. I am not persuaded that the Company has a genuine and serious counterclaim based upon misrepresentation regarding its prospects of being granted improved planning permission.

Acceptance of referral fees

67. Mr Jumean's evidence is that if he had known that the Petitioner had received payments from W11 and Blade, he would not have permitted either firm to be engaged without a full tendering process. He was so affronted by the arrangement that he described it as fraud or breach of trust. Mr Briggs submits that this was "either on the mark or near the mark" and that the arrangements in question give rise to a question for investigation at trial, as to whether and how the arrangements operated to the Company's detriment.

68. Mr Briggs' skeleton argument referred to: the Petitioner receiving "improper payments"; W11 and Blade being "appointed without a tendering process in breach of their fiduciary duty" to the Company; and to a payment received from Blade of £34,499.41 being regarded as a "secret profit" "recoverable by way of restitution where the principal can elect whether to recover the secret profit or damages for fraud". However at no stage prior to his oral submissions has the Company developed its contention that the Petitioner owed it fiduciary duties nor explained how or why such duties arise.

69. Before me, Mr Briggs said that whilst the parties' relationship was one of contract, that does not preclude there being a fiduciary relationship. It depends on the type of contract. Where one party is entrusted to act on behalf of another, its client, that raises fiduciary obligations. He gave, by way of example, the role of a bank which the law has long held owes fiduciary duties over and above its contractual obligations to its customers.

70. The Petitioner knew that the Company's sole director was abroad and had left the Petitioner with almost total control of the project. That gave rise, he said, to a relationship that was dependent on proper disclosure and candour on the Petitioner's part. He referred to:

    i) clause 1.12 of the DMA (duty to exercise reasonable skill and care);

    ii) paragraph 2.6 of Appendix 1 to the DMA (Petitioner tasked with advising on the selection of contractors and consultants); and

    iii) paragraph 2.9 of the same appendix (Petitioner, in conjunction with the Company's legal advisers tasked with negotiating the terms of building contracts for the project).

These, he said, are fiduciary terms, imposing on the Petitioner a duty to act in the best interests of its client and to ensure that it did not act in a way that gives rise to a conflict of interest or duty.

71. Mr Briggs submits that contrary to the express terms of the contract, there is no evidence that the Company's legal advisers played any part in the appointment of W11 and Blade. As a result, there must have been a variation of the agreement between the parties which it would be appropriate to investigate at trial. The court should not, therefore, place too much reliance on the black letter provisions of the DMA when, he submits, it is clear that those terms were not scrupulously followed.

72. Thus, it is the Company's case that accepting payments from contractors and consultants, whose services the Petitioner recommended, put the Petitioner into a position where their interests conflicted with those of the Company. This was all the more starkly the case, when W11 and Blade were engaged without tender. The Company complains that the Petitioner has still not disclosed full details of how much it received from contractors and consultants engaged on the project, when and for what. Mr Briggs highlights that all the relevant information is held by the Petitioner and submits that if the dispute between the parties were to be properly aired at trial, such evidence would be available to the trial judge.

73. A fiduciary relationship arises where X agrees that Y will act on its behalf or for its benefit in circumstances that give rise to a relationship of trust and confidence. Some relationships such as between partners; solicitor and client; trustee and beneficiary; or principal and agent give rise to a strong, but rebuttable presumption that X owes fiduciary duties to Y.

74. The DMA expressly provides that the arrangement between the parties will not constitute a partnership or joint venture, and that the Petitioner would not act either expressly or impliedly as the Company's agent nor hold itself out as such. The Petitioner's role under the DMA extended to advising on the selection of the contractor and consultants and to negotiating the terms of their appointment. The Petitioner was expressly prevented from entering into contracts on the Company's behalf, the value of which exceeded £50,000. Its authority to negotiate the terms for the appointment of contractors or consultants was shared, and to be exercised in conjunction with the Company's legal advisers.

75. The decision regarding which contractors and consultants should be employed on the Campden Hill project ultimately lay with the Company. It would have been open to the Company, as a commercial party entering into a legal contract with another commercial party, to seek to impose obligations on either or both of the Petitioner and its legal advisers to scrutinise the work of the other, expressly to preclude either from recommending the appointment of any parties from whom they might receive payments (whether in relation to this or other projects) or to impose express obligations of disclosure, or to act in good faith or to create a relationship of trust. It did not do so.

76. As suggested by Mr Briggs, the courts have found special circumstances to justify the imposition of a fiduciary relationship between specific parties such as a bank and its customers. I was not taken to any authorities to demonstrate a willingness on the part of the court to imply fiduciary duties into an arrangement between a client and its project manager. In the circumstances of the case before me, which differ significantly

from those involving a bank and its customer (where the co-mingling of customer monies with those of the bank has been considered, in some cases, to merit such an intrusion into the parties' contractual arrangements) I see no justification for the court to do so. Mr Jumean's absence from the country and decision to rely almost entirely on the Petitioner might have justified him seeking to include in the contract express duties of confidence and disclosure, but in my judgment, they fall a long way short of giving rise to grounds upon which the court should imply such terms into the contract. It was entered into by two commercial parties and was entirely silent on the issue.

77. It follows that I consider that Mr Jumean's dissatisfaction with the basis upon which the Company contracted, lies at his own door. His displeasure upon learning that payments were received by the Petitioner from W11 and Blade, does not give rise to a genuine and serious cross-claim.

Overcharging

78. The only evidence provided by Mr Jumean to support his allegation that the Company may have been overcharging, is correspondence from "Adam West" which first came to its attention in February 2018.

79. The Petitioner has sought to discredit the information given by Mr West. It believes that the correspondence was from a disgruntled former employee of W11 with another name, who has been convicted of a string of fraud-related offences resulting in a series of custodial sentences. The Petitioner brought this information to the Company's attention.

80. The email prompted the January 2018 Meeting at which, Mr Jumean said: "I expressly asked if money had been passing between the three companies in connection with the project". As I have already noted, the allegation was denied and according to Mr Jumean's evidence, Mr Sharma offered a forensic audit/investigation.

81. The Company now relies upon the Petitioner's reply to the questions asked in Mr Jumean's email, sent a year later, on 18 February 2019 to say that the Petitioner's response at the January 2018 Meeting was less than candid.

82. This seems to me potentially to conflate two separate concerns about the Petitioner's conduct. The West correspondence alleged overcharging and diversion of the monies so received, to one of the Petitioner's director's personal developments. Ms Page submits that it was this allegation that was deemed to be offensive and strenuously denied at the January 2018 Meeting by Mr Sharma. The question posed in the February 2019 email was widely framed and asked whether any consideration, payment, fees etc were received or agreed between the Petitioner and any contractor or consultant working on the Property. This different question, received a direct response disclosing that there were referral and rebate arrangements between the Petitioner, W11 and Blade which, according to Mr Sharma, are commonplace in the construction industry.

83. Despite Mr Jumean's concerns since he was first notified of the alleged overcharging by the Petitioner, he continued to pay the Petitioner for another year. His concerns were not raised in response to the Petitioner's demands for payment until Mr Jumean's witness statement in November 2020. In that witness statement he states that his concerns regarding this "whistle-blower" have not been resolved and that his

investigation into his concerns that the Petitioner may have advised the Company to pay inflated costs "is ongoing".

84. No evidence has been put before the court of the ongoing steps which Mr Jumean states he has taken to investigate Mr West's allegations. The Company has similarly not provided any evidence of the outcome of such investigation which corroborate or verify Mr Jumean's concerns. It would have been open to the Company to instruct an independent quantity surveyor to perform a full audit of the works undertaken by each party against the amounts claimed. None appears to have been commissioned and as the Property has been sold, it may now be too late to pursue such an inquiry. Mr Jumean states:

> "when I asked Mr Sharma about getting an external audit done of the books of W11, he told me that this was not possible and that the obligation on the Petitioner to '*maintain a full and complete record of the Project costs on an open book basis*' (as per clause 1.17 of the DM Agreement) simply meant that the Petitioner would provide me with the costs of the contractors and subcontractors and the Company would just have to accept them. I am now advised that an external audit is much more extensive than Mr Sharma had led me to believe. At the time, however, I did not pursue the matter further, as I did not want to get involved in a dispute with the Petitioner or W11 when I was attempting to sell the Property."

85. From this I discern that however extensive Mr Jumean considered were his rights to review the project costs, he elected not to exercise those rights before the Property was sold.

86. In the absence of a recording, it is impossible to know precisely what words Mr Jumean used to frame the question he posed of the Petitioner and other contractors at the January 2018 Meeting. I accept Mr Briggs' submission that unless the court finds evidence in a witness statement to be inherently implausible or contradicted or not supported by the documents, it is not open to the court to resolve issues of fact simply by weighing witness statements against each other.

87. However the counterclaim relies not on what was said at the meeting but on the alleged overcharging. Taking into account that: (i) there is no evidence before the court from Mr West bearing a statement of truth; (ii) an independent audit of the project and review of the payments demanded by the Petitioner of the Company has not been conducted; and (iii) despite investigating the allegations made by Mr West for over three years, the Company has failed to provide the court with any evidence of the alleged overcharging, I find that Mr Jumean's concerns that the Petitioner overcharged the Company, as presented to the court, are nothing more than that: concerns or apprehensions.

88. An email from an unknown third party, making very serious allegations, without any other supporting documents or evidence does not, in my judgment, oblige the court to treat, nor justify the court treating Mr Jumean's apparent continuing suspicions or disquiet regarding alleged overcharging, as giving rise to a genuine and serious cross claim.

Counterclaim for negligent planning services?

89. The Company's evidence in opposition to the Petition expressly refers to the Petitioner's five invoices being *disputed* on the basis that:

> "there were serious concerns over whether the Petitioner's planning services were being carried out with reasonable skill, care or at all in the period after construction work was paused. This was (and is) the main basis on which the Company disputes that the sums claimed are owed".

90. I have found that the Company's failure to serve a pay-less notice prevents it from relying on such a dispute in opposition to the petition. There was no reference in the evidence before the court of the Company claiming that it relies, instead, upon a cross-claim based on the Company's alleged negligent planning services. Ms Page submits that if such a cross-claim had been advanced before the hearing, it would have been addressed.

91. Mr Briggs did not specify whether the claim was raised by way of dispute or cross-claim. He referred generally to the Company's frustration that improved planning permission was not granted, to Mr Jumean's statement that it was clear by early February 2018 that the Petitioner's strategy of starting redevelopment works to enhance the Company's prospects of obtaining improved planning permission was not working and the correspondence he has apparently seen in which the local authority made it clear that the applications were unlikely to be accepted. He submits that any such claim for damages would far exceed the value of the Petition Debt and the court cannot simply sweep it away.

92. Towards the end of his witness statement, Mr Jumean sets out a series of beliefs that:

i) if improved planning permission had been granted, the Property would have sold for much more than £43 million;

ii) if the Property had been sold in its original state with the original planning permission it would have sold for more than was ultimately achieved (he exhibits valuation reports from Allsops in January 2013 at £54 million and Hamptons International in December 2014 at £55 million);

iii) it is a result of the Petitioner's actions that the Property was unavoidably sold without improved planning permission and with no documentation or warranties from any of the contractors; and

iv) if the Petitioner had given correct advice regarding the likelihood of achieving improved planning permission, the Company would not have spent approximately £3.3 million redeveloping the Property.

93. Even if it were acceptable for the Company, at the last moment, and in oral submissions to introduce a new, alleged cross-claim, each of these allegations, as presented to the court, amount to no more than unsubstantiated statements of belief. They fail to meet the minimum evidential threshold to demonstrate that the cross-claim is genuine and serious.

Delay in pursuing the counter claim

94. The Petitioner asserts that this is an archetypal case in which a debtor seeks to raise a cloud of objections to stave off a winding-up petition. In doing so it relies on the Company's delay in raising and then pursuing and developing with any degree of particularity, any of the cross-claims on which it seeks to rely.

95. Mr Briggs responded by urging the court to look at the case in context. Mr Jumean was abroad and was left dissatisfied with a property, the development of which had not been completed. He spent over £3 million on the project. Whilst he was aware that the Petitioner sought to recover £50,000 from the Company, rather than incurring costs litigating his claims, he decided to "cut his losses and run". Mr Briggs said that until recently, the parties were in "a Mexican stand-off". However the Petitioner has lately claimed £313,000 in respect of the balance of the fees which it contends is due to it. That, Mr Briggs said, changes the colour of things and simply walking away is no longer an option. It should be clear to the court that the Company's delay in pursuing or articulating its counterclaim does not reflect it lacking substance or not being genuine.

96. Whatever the reason for the delay, I have concluded that the Company has failed to meet the evidential burden of demonstrating that any one of the cross-claims is genuine and substantial or that alone or together they give rise to an amount that equals or exceeds the Petition Debt.

97. Both parties referred to the Petitioner's demand for the Additional Fees. Mr Briggs' skeleton argument set out grounds upon which the Company disputes that it is liable to pay the Additional Fees. The Petitioner urged the court to take into account the Company's failure to pay them in the exercise of its discretion. Those fees are not before this court. I do not consider that the Petitioner's decision to include the Petition Debt in its Pre-Action protocol letter amounts to an acknowledgement that the debt is disputed. It is a sum that remains due and owing to the Petitioner. If the Company is wound up, it will be for its liquidator to decide whether to accept or reject that part of the Petitioner's proof of debt which relates to the Additional Fees. There remains then, simply the question of whether the court should exercise its discretion in favour of making a winding-up order.

Exercise of discretion and conclusion

98. Having found that the Petition Debt is not genuinely disputed on serious grounds nor, on the evidence before the court, that it is the subject of a genuine or serious cross-claim, there are no grounds before the court to persuade me to exercise my discretion against the Petitioner. In the event that the Company persists in its failure to pay the Petition Debt, it will be liable to be wound up.

99. The petition has not yet been advertised and as noted at the beginning of this judgment, the petition fails to set out details of the Petition Debt. On handing down this judgment, remotely by email, I shall invite the Petitioner to file a draft order providing for the petition to be ame

100. nded to include full details of the Petition Debt, for the amended petition to be re-served and evidence of service to be filed at court, for notice of the petition to be given, and

adjourning the petition to be heard in the general winding-up list on the first available date after 28 days.