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No: CR-2024-004551

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INSOLVENCY AND COMPANIES LIST

IN THE MATTER OF ALPHA SCHOOLS (HOLDINGS) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 11 November 2024

Before:

Deputy ICC Judge Baister

- -

Between:

ALPHA SCHOOLS (HOLDINGS) LIMITED	**Applicant**
- and -	
SIGNAL ALPHA III FUND LP	**Respondent**

- -
- -

Mr Andreas Gledhill KC (instructed by **Hill Dickinson LLP**) for the **Applicant**
Mr Daniel Lewis (instructed by **McDermott Will & Emery UK LLP**) for the **Respondent**

Hearing dates: 28 & 29 October 2024

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Approved Judgment

This judgment was handed down at 10.30 am on 11 November 2024 by circulation by email to the parties' representatives and by release to the National Archives

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Deputy ICC Judge Baister:

Introduction

1. Alpha School (Holdings) Limited is the parent of a group of companies which operate 19 private schools. Its CEO is a former preparatory school headmaster, Mr Ali Khan. By late 2023 Alpha was seeking new finance with a view to acquiring more schools and because, in spite of owning significant assets, its cashflow was poor, and its relationship with its bankers, Barclays Bank, had come under strain. Barclays wanted to reduce the company's overdraft facility as a result of the intention of the Labour Party, if it got into government, as it now has, to impose VAT on private school fees and the uncertainty that would create in the private education sector. Alpha recognised that it needed to refinance and embarked on the process of doing so.

2. Signal Alpha III Fund LP is a limited liability partnership controlled by Signal Capital Partners Limited, a private asset management company which specialises in the kind of financing which Alpha needed. Both entities are referred to together in the evidence as "Signal," as they were in the course of submissions, and I shall follow suit, although it was Alpha III which was to be the vehicle for the loan in issue here. Signal usually only considers financing of £50 million or more. Alpha was looking for less than half of that. I shall explain later why Signal was interested in refinancing Alpha in spite of its policy as to the size of the deal it was usually prepared to consider.

3. In January 2024 (Mr Metze, a partner in Signal, says "[o]n or around 11 January 2024") Mr James Gray of ARE Capital Advisors Limited introduced Alpha, via another intermediary, Tite Street Capital, to Signal. Discussions followed. Tite Street participated in many or all of those discussions. Mr Khan says that was because Tite Street was to be a junior lender. As such it was, he says, "a due diligence partner of [Signal]." He also refers in his evidence to the two being in a joint venture, although Mr Metze emphasises that Signal and Tite Street are separate entities. Signal relies on that separation, making the point that things said by Tite Street should not be attributed to it. I take that point, but it does appear from the documents and attendance at meetings that the two entities worked hand in hand so as to make it hard at this summary stage to differentiate between who exactly said what on behalf of whom.

4. Initial terms were set out in a non-binding terms sheet of 31 January 2024.

5. The usual investigations into Alpha ("due diligence") began. According to Mr Khan it was Signal and Tite Street who appointed Azets to assist with financial due diligence (this was on or around 21 February 2024). In fact Azets' letter of engagement was addressed to Alpha, which I think was the true client. Azets produced a number of what were called Red Flags Reports, the first draft of which is dated 7 March 2024. According to Mr Khan the aim at that time was to complete the deal by the end of March. In an email of 25 February 2024 Mr Khan told Mr Guido Lang of Tite Street that it had to complete in March. That did not happen, as a result of which "We [Alpha]…cooled our interest in a deal involving [Signal] and continued [*sic*] our discussions with another lender…Fintex Partners Limited." Negotiations with Signal ceased. (I pause here to record that Mr Metze confirms that Signal knew that Alpha was talking to another lender in March 2024, although he understood that that was about a bridging loan.) Fintex was only able to refinance to the tune of £16 million,

which was less than Alpha wanted but was sufficient, Mr Khan says, to take out Barclays and provide essential cashflow.

6. In April 2024 Signal made contact again with Mr Khan. Having learned that Alpha had not completed refinancing with Fintex, it offered to do so in the sum of £18 million and to do so by the completion date apparently envisaged for the Fintex deal, 10 May 2024. A further attraction was that Signal was not insisting on Mr Khan's giving a personal guarantee, which was a requirement of the Fintex deal. Negotiations between Alpha and Signal resumed, and the parties signed a term sheet on 24 April 2024. Financial due diligence resumed, resulting in a further Red Flag Report dated 10 May 2024 and later yet another dated 29 May 2024 (the 10 May deadline had been lost on the way).

7. On or around 24 April 2024 solicitors were engaged to conduct "legal due diligence," the purpose of which was to establish Alpha's good title to its portfolio of school properties. That work was originally to be done by Macfarlanes LLP, but McDermott Will & Emery UK LLP were engaged instead because they were said to be able to do the work more quickly. On 4 May 2024 McDermott Will & Emery produced a document, a "Conditions Precedent Checklist," which colour coded property titles as to those about which they were satisfied, others they regarded as being in "agreed form" and matters that were outstanding. On 29 April 2024 an exchange between McDermott Will & Emery and Alpha's solicitors, Cooper Burnett LLP, canvassed the possibility of taking out indemnity insurance in respect of outstanding matters regarding properties where title might not be confirmed by the then completion deadline.

8. In the meantime the parties had agreed broad terms for the refinancing which were set out in the term sheet of 24 April 2024. The terms envisaged Signal's providing finance of £20.6 million or thereabouts (the figure is in square brackets) and a closing date of 10 May 2024 (also in square brackets). It also gave deal exclusivity to Signal for six weeks. Other provisions that are important for present purposes are the following:

> Exit multiple
>
> Eight
>
> Deal expenses
>
> The Company agrees to pay all costs and expenses (including legal fees incurred by the Lender (including the administrative parties representing the Lender being the Facility Agent and Security Trustee) and any other finance parties in connection with the Senior Secured Financing, including but not limited to legal, tax, due diligence, and structuring expenses, irrespective of the closing of the finance.
>
> Typical LMA provisions relating to amendment and enforcement and preservation costs shall be included.
>
> Break Fees

> In case the Borrower does not complete the Financing with the Lender, the Borrower is obliged to pay a fee of GBP 350,000.

There are other terms to which I shall come later.

9. In spite of the 10 May 2024 target completion date, by July 2024 still the deal had not been completed. Alpha was by then under considerable pressure and was anxious to proceed with its proposed acquisitions too. According to Mr Khan, Barclays expressed to him the view that Signal was "not serious" about refinancing Alpha. As a result Alpha abandoned Signal, opting instead to refinance with Fintex, with which, as we have seen, it had also been having discussions. The Alpha/Signal deal appears to have been, or regarded as, aborted on 2 July 2024, the date Mr Khan gives in paragraph 17 of his first witness statement. Mr Khan did not tell Signal that he had refinanced with Fintex. Signal only found that out as a result of a Land Registry enquiry and Companies House entry evidencing registration of a charge over assets of Alpha dated 24 June 2024.

10. Signal invoiced Alpha on 3 July 2024 for £1,113,194 for professional fees and transaction expenses, "[p]ayment to be made by Friday 5th July 2024." (Signal accepts that the correct amount is in fact £1,104,533 as Mr Waterson explains in his witness statement, but little hangs on that at this stage). On 9 July 2024 Signal served a statutory demand. There were discussions which resulted in Signal's undertaking not to present a petition without giving seven days notice, but such notice was given.

The applications and the evidence

11. On 30 July 2024 Alpha applied to restrain Signal from presenting a winding up petition.

12. In support of its application Alpha relies on three witness statements made by Mr Khan and one from Mr Gray. Signal adduces evidence in the form of witness statements from Mr Frederik Metze, a partner in Signal, and Mr Timothy Waterson, a solicitor and Signal's senior legal adviser. There is some justification in Mr Lewis's complaint about the length of Mr Khan's evidence, which at times lacks discipline in the way it presents Alpha's case. Mr Metze and Mr Waterson's witness statements are relatively brief. They do not engage with many of the points made by Mr Khan in his witness statements. The reason for that is the concession made and recorded in paragraph 23.

The law

13. The law on an application such as this has been set out in a number of authorities. Mr Lewis cites the well known judgment of Norris J in *Angel Group v British Gas Trading Ltd* [2013] BCC 265 and helpfully lists the main points arising from it; Mr Gledhill cites Hildyard J's equally well known decision in *Coilcolor Limited v Camtrex Limited* [2015] EWHC 3202 (Ch). The propositions in those cases are now so well known that I think it is unnecessary to set them out here. It is enough to say that the court will grant relief where the debt relied on in the petition, or to be relied on to petition, is disputed by the company *bona fide* on substantial grounds and/or where the company has a genuine and substantial cross-claim sufficient to extinguish the petition debt. It is not, of course, sufficient merely to assert a dispute or the

existence of a cross-claim: a mere "cloud of objections" (the expression used by Chadwick J in *Re a Company (No 6685 of 1996)* [1997] BCC 830) is not to be equated with substance. Any cross-claim relied on must also be substantiated rather than simply asserted (*Re Bayoil SA* [1999] 1 WLR 147). But, as Mr Gledhill points out, for the purposes of determining whether a debt is disputed,

> "the threshold […] is not a high one […] and may be reached even if, on an application for summary judgment, the defence could be regarded as 'shadowy'" (*Tallington Lakes Ltd v South Kesteven DC* [2012] EWCA Civ 443 (*per* Etherton L.J);

And in *Coilcolor* Hildyard J said:

> "[T]he court can usually be expected to give the company the benefit of the doubt and not do anything to encourage the use of the Companies Court as an alternative to ordinary court processes, even if the case is one of sufficient strength in the perception of the petitioner that it would be proper to resort to an application for summary judgment under CPR Part 24."

14. I mention here a recent decision of ICC Judge Burton on a passage from which Mr Gledhill relies, *Re A Company* [2024] EWHC 2656 (Ch). Under the heading "Is there a genuine and serious cross-claim?" she said:

> "35. Mr Patterson [counsel for the respondent] urges me to dismiss the application on the basis that it lacks the necessary degree of substance. He refers to the principles set out in *Orion Media* [*Marketing Limited v Media Brook Limited* [2002] 1 BCLC 184], summarised in David Stone's judgment in *LDX* [*International Group LLP v Misra Ventures Limited* [2018] EWHC 275 (Ch)] that bare assertions will not suffice and the minimum evidential threshold must be met, as referred to in *Re A Company* [[2016] EWHC 3811 (Ch)]. Mr Patterson acknowledges that there is no requirement for an asserted cross-claim to be set out in a pleading as part of an application for an injunction to restrain presentation of a winding-up petition. However, he submits that as Hildyard J concluded in *CoilColour* that once the applicant has persuaded the court that it has a serious cross-claim, that claim should be adjudicated in the context of an ordinary action, it follows that for a cross-claim to be serious, it should be capable of being set out in a pleading: the court "must be able to see the parameters of the claim.
>
> 36. In my judgment, the Respondent's reliance upon the absence of sufficient detail before this court to enable the Applicant formally to plead its asserted cross-claim puts an unnecessary and hitherto unrequired gloss on the relevant test. Clearly, to be serious, a cross-claim must be capable, at some stage, of being pleaded. But I consider that there is scope for this court to determine an asserted cross-claim to be genuine

> and serious even in circumstances where all of the information one would usually require for it to be properly pleaded, is not before this court."

In fact I was shown draft points of Alpha's proposed claim, prepared recently and under some pressure and signed by Mr Gledhill and junior counsel. They were produced in response to a criticism of Mr Lewis of Alpha's legal advisers that an allegation of fraud appearing in paragraph 23 of an earlier skeleton argument ought not to have been made. Mr Lewis dis not object to the pleading being shown to me.

15. I remind myself that a judge hearing an application such as this "should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity is not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law" (*per* Neuberger J in *Re Richbell Strategic Holdings Ltd* [1997] 2 BCLC 429). I also remind myself that, this being a summary process, I should not conduct a mini trial, nor should I disbelieve a witness's written evidence unless it is plainly incredible or at odds with relevant documentary evidence.

16. Finally, I take note of a proposition that came to mind in the course of the submissions I heard and which I thought might be relevant. Mr Gledhill agreed to send me a note of the relevant case, which he has since done (copying Mr Lewis). The proposition can be found in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) (although I think it is the case mentioned in that judgment that I had in mind). In *Easyair* Lewison J, as he then was, said that one of a number of factors the court should have in mind in reaching its conclusion was

> "not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550."

He went on to say,

> "Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63."

Lewison J was, I accept, dealing with an application for summary judgment, but what he says is, in my view, apt to an application such as the one before me. Mr Gledhill alluded in the course of his submissions to the potential importance of Signal's internal communications both generally and specifically in relation to matters such as intention and dishonesty in what was said on behalf of the parties. I pointed out that Alpha could have applied for disclosure but had not done so. I think my point was a bad one: limited disclosure of a category of documents may well help on an

application of this kind, but it is unlikely to be sufficient in a case such as this, which would require standard disclosure of the kind ordered in claim form proceedings as opposed to limited disclosure of the kind I was envisaging. That is, of course, a point that may ultimately work in favour of Signal too.

17. I shall refer to other matters of law later as necessary, but now turn to the application of those legal principles to the issues in this case. Those issues fall into two broad categories: Alpha's primary case, which is that it has a cross-claim in misrepresentation entitling it to damages sufficient to extinguish Signal's debt; and an attack on individual elements of Signal's debt, which relies on contractual and other points, including Alpha's right to have solicitors' costs assessed. Alpha also relies on Signal's conduct, which Mr Gledhill describes as "high-pressure bully tactics in an attempt to get Alpha to cave in and pay, and stifle scrutiny of its own conduct." All these allegations are vigorously resisted.

Misrepresentation

18. Alpha's case rests primarily on its contention that Signal made a number of misrepresentations to induce it to refinance with it. Alpha relies on, among other things, the following (which I take from Mr Gledhill's skeleton argument):

> (a) Mr Metze gave multiple assurances to Mr Khan that Signal "would be able to close the deal by 10 May 2024," and Mr Waterson similarly represented that it "would do whatever was necessary to ensure a completion date of 10 May."
>
> (b) Mr Metze told Mr Khan at a Teams meeting on 15 April 2024 that the proposed deal had got "the 'thumbs up' from Amit" (that is Amit Jain, the or a founding partner of Signal) which meant that investment committee approval was assured.
>
> (c) Mr Metze told Mr Khan at a similar meeting on 16 April 2024 April 2024 that financial due diligence had been effectively "done", and that legal due diligence would be "light touch" or "pragmatic."
>
> (d) Mr Ferguson-Davie, the managing director of Tite Street's investment team, emailed Mr Khan, also on 17 April 2024 (copying Mr Metze), representing that due diligence could be complete by 8 May 2024, if it started on 17 April 2024, i.e. within three weeks.
>
> (e) Mr Waterson said at a meeting on 24 April 2024 that in order to achieve that, Signal would be prepared to use indemnity insurance to cover any property title issues in order to meet the 10 May 2024 deadline.
>
> (f) Mr Metze told Mr Khan that he would not be required to give a personal guarantee if he proceeded with Signal's proposed deal.

(g) Signal represented in the Term Sheet that the multiple used to calculate its investment return would be eight, no higher.

(a) to (e) were of importance to Alpha, given the pressure on it to refinance in the light of its strained relationship with Barclays. The importance of (f) and (g) is self-evident.

19. In the course of his oral submissions Mr Gledhill undertook a detailed forensic analysis of the witness statements and documents to support the foregoing points and to make others to similar effect. I do not propose to set out all of them here, but I mention the following to give some additional colour.

(a) At an early stage, on 2 February 2024, Mr Ferguson-Davie of Tite Street said in an email to Mr Khan that "we are keen to move forward at pace" (i.e. at speed).

(b) On the same date in the course of a Teams meeting attended by Mr Khan, Mr Gray, Mr Metze, Mr Lang (Tite Street's chief investment officer), Mr Ferguson-Davie and Mr Nicolas Stolz (Tite Street's vice-president) there was discussion about the structure of the deal, which included the possibility of using a Topco for reasons of speed and title indemnity insurance for the same reason. Mr Khan says, "I recall that I was reassured as early as on this call, by both Mr Lang and Mr Metze, that [legal due diligence] would be 'pragmatic' and would not slow things down." That was said in response to Mr Khan's concern at the length of time investigation of 19 odd titles might take. Mr Khan raised the same worry on 25 February in an email to Mr Lang, stressing, under a heading "Worries," that "it [the deal] must complete in March."

(c) By 18 March 2024 the possibility of refinancing with Fintex was live. Mr Khan wrote a note comparing the advantages of going with Fintex and those of sticking with Signal. Among the matters in favour of Signal were "More money," "No PG," "Pragmatic" (a reflection of his understanding of what Mr Lang and Mr Metze had said), "Will they get LDD done by 10th," (presumably 10 May) followed by a note that seems to reflect the change from Macfarlanes to McDermott Will & Emory, "who said they can do [legal due diligence] in two weeks."

(d) In an email of 15 May 2024 Mr Khan refers to the distress he was experiencing as a result of the completion timetable slipping and the potential adverse financial consequences for Alpha.

(e) The 10 May completion date appears in the term sheet, albeit in square brackets, implying it was a target, but one that might move.

20. Alpha maintains that the representations Mr Khan says were made were "falsified by subsequent events," and were made fraudulently in the *Derry v Peek* sense (i.e. they were made by persons who either knew they were untrue or did not believe them to be true, alternatively they made them recklessly or carelessly as to whether they were true or not. The result, Mr Gledhill says, is that Alpha is entitled to rescind the term sheet and has done so by advancing its misrepresentation case (now set out in the draft pleading to which I have referred). Alpha is entitled to damages which, Mr Gledhill contends, will be at least equal to the amount of any liability to Signal in debt, even if, for any reason, the term sheet is held not to have been validly rescinded. That claim for damages will qualify for equitable set-off, and thus, constitutes a defence to liability; alternatively it will necessarily equal the amount of Signal's claim, giving Alpha a defence of circuity of action (*Aktieselskabet Ocean v B. Harding & Sons Ltd* [1928] 2 K.B. 371).

21. In the alternative to its claim in fraudulent misrepresentation, Alpha is able, Mr Gledhill says, to set up a cross-claim for negligent misrepresentation under s 2(1) Misrepresentation Act 1967 on the basis that the relevant representations were made without "reasonable ground" (which will be for Signal to prove), in which case Alpha will be entitled to damages quantified on the same basis as they would be for fraudulent misrepresentation.

22. The foregoing propositions are again taken from Mr Gledhill's skeleton argument. They are made good by reference to passages from *Chitty on Contracts* and *Misrepresentation, Mistake and Non-Disclosure* (John Cartwright, 6th edn). I do not propose to set them out here as they are uncontroversial and not generally challenged (subject to points Mr Lewis takes as to the nature of certain things said and in paragraphs 11 and 46 of his skeleton argument: that carelessness is not sufficient, and a representation of opinion or as to the future is not sufficient).

23. Mr Lewis's submissions otherwise approach the misrepresentation issue from a different perspective. For the purpose of this summary application only his starting point is that the allegations of misrepresentation stand (hence the limited evidence from Mr Metze and Mr Waterson). His attack on Alpha's case comes essentially in two parts: the reason why the deal collapsed, which was not his client's fault but of Alpha's making; and, he submits, the application of the law to the matters and the evidence relied on by Alpha do not give rise to an actionable claim.

24. Mr Lewis took me in some detail through the Red Flag Reports prepared by Azets by way of financial due diligence. Much of the detail does not matter: the point Mr Lewis makes is that it was Alpha's failure to make available on time or at all the information required to complete the process that caused the delay. The obvious strength of that submission can be made simply by noting Azets' summary of ticks and crosses against the various categories of information needed: some were ticked, some bore a cross, yet other categories carried both symbols, indicating that some information had been given but other information was still needed. Mr Metze says, "The overview section to the First Azets Report contained a number of red crosses suggesting that an aspect of the due diligence checklist was either not at all complete or was only partially complete. This applied to 10 of 17 (i.e., c. 59%) of the items in scope." Some of those ticks were still outstanding in the third Azets report. Mr Metze makes other points, notably about deficient creditor information, pointing out that "it is absolutely not the case, as suggested at [14] and [15] of Khan 1, that 'all financial due diligence

had been completed already' by the time the parties came to negotiate the Term Sheet in mid-April."

25. Two late developments in the course of the negotiations between the parties derailed the smooth progress of the deal. On 17 May 2024 Mr Khan's sister issued proceedings claiming a 50% interest in Alpha; and on 20 May 2024 HMRC presented a winding up petition against Alpha. These developments were not conducive to a swift completion and, it seems, prompted Signal to seek better terms consistent with what it perceived to be an increased lending risk. As Mr Lewis puts it in his skeleton argument, "various late disclosures as to the [Alpha's] financial position and being subject to litigation provided good reason to ensure that [Alpha] was sufficiently financed so as to meet its immediate liabilities as well as to revisit the allocation of risk under the senior facility agreement."

26. Mr Lewis submits that the representations relied on by Alpha can all be categorised as "sales talk," part of Signal's attempting to win, or win back, Alpha's business. "Sales talk," or "mere puff" as it used to be called, that is "so obviously laudatory" that that it can be dismissed and/or is "…vague and incapable of verification" cannot be actionable (see D O'Sullivan, S Elliott, & R Zakrzewski, *The Law of Rescission* (3rd edn) paragraph 4.45).

27. He rightly submits that the question as to what was meant by the representations relied on is objective, such that whether any, and if so which, representations were made has to be "judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee" (see *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] 2 All ER (Comm) 833 [30] (*per* Mance LJ)).

28. He also submits that, in the case of an express statement, "the court has to consider what a reasonable person would have understood from the words used in the context in which they were used" (see *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep 264 [50] (*per* Toulson J)).

29. He further contends that only a representation of present fact can form the basis of a claim in misrepresentation. A promise, a statement about the future, or a statement of opinion, will not suffice (see J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (6th edn) [3-19]; [3-44]):

> "When it is said that a statement, to be actionable, must be one of fact, it means that the statement must be of present fact: not 'future fact,' that is, not a statement of what will happen in the future, nor a statement of what the speaker will do in the future. A statement of what will happen in the future is a representation of the speaker's <u>present</u> belief about <u>future</u> events. A statement of intention is a representation of the speaker's <u>present</u> plan for his <u>future</u> conduct" [Mr Lewis's emphasis].

30. In reaching my conclusions on the misrepresentation issue I too start from the position that what Mr Khan claims was said by or on behalf of Signal was said. Quite apart from Mr Lewis's concession, Mr Khan's written evidence and the documents are

peppered with indications that speedy refinancing was critical for Alpha given the pressure from Barclays, the cashflow problems besetting it and its ambition to increase its portfolio of schools. Signal was well aware of that. Against that backdrop, any indication that due diligence would be "light touch" or "pragmatic" takes on a particular significance, the implication being that it could be conducted much more quickly than the usual due diligence that might be expected in a deal of this nature.

31. In this case I attach importance not only to what was said but also to the context in which it was said. The importance of the latter can be seen from two of the propositions on which Mr Lewis himself relies: first that any representation made has to be "judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee;" and secondly the need to consider what a reasonable person would have understood from the words used in the context in which they were used" (see paragraphs 27 and 28 above).

32. The main features of the context in which the things complained about were said are:

> (a) The acute pressure on Alpha to refinance caused by the need to replace Barclays and Alpha's cashflow problems. Those factors had been present for many months by the time of the events with which we are dealing. There was also the need for finance to enable further acquisitions, though that is unlikely to have been as acute: the acquisitions may have been desirable, but there is no basis on which they can be said to have been necessary. Mr Gray says "Alpha needed to complete its refinancing urgently. Signal knew that […]."
>
> (b) The apparent attraction of the deal for Signal is also important as context. Mr Gray describes the threefold commercial incentive for Signal: he refers first to the "outsize returns that the transaction offered" in the form of "a targeted minimum return of doubling its investment (a two times equity multiple) and potentially…an Internal Rate of Return (IRR) of 20%-30%;" secondly, the deal could have been what Mr Gledhill describes as a strategic bridgehead to the private schools sector, meaning that Signal would be, in Mr Gray's words, "well placed to provide further capital expansion;" and thirdly, there was the possibility of Alpha's own expansion leading to a need for further financing which "could place the total lend much closer to, or even above, the £50m threshold." Mr Gray's third point is, I accept, speculation, but it is worth noting here that a finance deal of £20 million or thereabouts was below what usually attracted Signal: it generally only financed deals worth £50 million or more. And, of course, Signal was competing with Fintex.

In that context the representations relied on assume a potential importance that goes way beyond anything that might be dismissed as "sales talk" or "puff.

33. I attach importance to the number of times things were said about both timing and due diligence – by both Mr Khan and representatives of Signal. I have not set out all that was said, but what was said was said in different terms on several occasions. Saying what was said not once but on several occasions potentially elevates its importance. There may be said to be a point at which what might be called "sales talk" becomes something more. A throwaway remark may be dismissed as too vague or plainly not intended to be a representation; but it is different when it becomes a theme of the exchanges between the parties and is plainly of importance to someone who is giving weight to and relying on what is said. Those matters also go to judging the representations objectively according to the effect of what was said may be expected to have been on a reasonable representee in the position and with the known characteristics of Alpha/Mr Khan.

34. The object of the financial due diligence undertaken was, according to Mr Khan, said to be limited to identifying "'show stoppers', specifically financial information which would mean that Signal could not lend," so, as we have seen, it was to be "light touch," "pragmatic."

35. Mr Khan says what he understood a "show stopper" to be, and I too have no difficulty in understanding what it meant. But what exactly is meant by "light touch" or "pragmatic" is hard to say at the best of times, let alone in the context I have given. If one posits a sliding scale of due diligence with "light touch" at one end, "normal" due diligence (whatever that may be) in the middle and, say, "heavy handed" due diligence at the other end of the scale, there is plainly scope for argument as to where, on such a scale, the due diligence being done in this case falls. It may be that the kind of information Azets was asking to satisfy Signal was excessive, or at least inconsistent with a light touch or pragmatic approach. The same might apply to the legal due diligence, the more so in the light of the professed intention to do it in two to three weeks or thereabouts and what Mr Waterson said about the possibility of dealing with any shortcomings in the process by insuring.

36. What was said about the due diligence process is important in itself, but it also feeds into the reality of the time scale for closing the refinancing. I accept that 10 May 2024 appears in the term sheet in square brackets, an indication that it was an aim rather than a hard and fast promise to complete by then, but it is there; and I have already said enough to emphasise its importance to Mr Khan and Alpha. I attach importance to what was said about due diligence too. In doing so I give particular weight to a document headed "Alpha Schools Loan – Indicative Due Diligence Process and Timeline" to which I have not so far referred. It is exhibited to Mr Khan's second witness statement. I accept the significance of the word "indicative," but I cannot disregard the fact that it does indicate prospective completion by 15 May 2024. Even allowing for some lost time in the due diligence process which Mr Gledhill factored into his submissions (there was a hiatus in the process at one stage), completion should have taken place by the end of May. I appreciate that problems with due diligence could have pushed the timetable even further into the future, but that simply leads me back to the considerations I have raised above in connection with due diligence.

37. I also attach importance to the evidence about the involvement of Mr Jain. The last two lines in the timeline refer to final approval by Signal's credit committee, with funding to follow three days thereafter. Mr Jain's approval was, it seems, vital to the

success of the refinancing. He was at the Teams meeting of 15 April 2024. Before the main meeting Mr Khan spoke to Mr Metze on the telephone, and Mr Metze told him that if Mr Jain was on board "then you have investment committee approval." The Teams meeting itself appears to have gone well, because at a meeting the next day (16 April 2024) Mr Khan recalls Mr Metze being happy because the deal had been given "the 'thumbs up' from Amit." That supports Mr Khan's claim that he was told on the same date that due diligence had been effectively done by then, with all that that implied.

38. I accept Mr Lewis's submission that only a representation of present fact can form the basis for a claim in misrepresentation and that a promise or a statement about the future or a statement of opinion will not suffice. The problem is that, whilst that criticism can be made of some of the statements relied on, it does not apply to all (for example, that due diligence had been "done," and the present effect, albeit with bearing on the future, of the significance of Mr Jain's approval). Sorting which statements fall foul of Mr Lewis's justified submission is, in my view, an exercise that can only be carried out against the background of the entire relevant context. Many statements will fall to be considered not simply by reference to the words used but the situation in which they were used, how they were said and other matters that can only be explored at trial.

39. The complications in the form of the legal proceedings brought about by Mr Khan's sister's litigation and of HMRC's petition were, arguably, not fatal to the deal. They appear to have resulted in the requirement, not previously envisaged, of Mr Khan's giving a "bad boy guarantee" and an increase in Signal's exit multiple from eight to nine. Those matters understandably changed the nature of the deal but do not appear to have caused it to collapse. The collapse of the deal could as easily have been overzealousness as to what Signal was demanding by way of due diligence. That too is not something that can be resolved on an application of this kind: it can only be resolved when the parties have put all their cards on the table for a trial. It is possible that expert evidence from someone who can attest to the nature of due diligence consistent with the terms "light touch" or "pragmatic" on the basis of experience of refinancing transactions of this kind would be necessary to resolve the problem. This is not the court in which to carry out such an exercise.

40. Alpha says the representations made were fraudulent misrepresentations. It is a serious allegation. Mr Lewis criticises Mr Khan for gratuitously imputing dishonesty to Signal without cogent evidence to support the inference he invites. He also points to authority as to the stringent requirements for pleading fraud (*Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 and *Portland Stone Firms Limited & others v Barclays Bank & others* [2018] EWHC 2341 (QB)). I accept the force of those submissions and that both cases cited also involved the consideration of pleaded issues at an interlocutory stage so bear on this case; but they did so in a context that presupposed a full trial at some stage in the future. That is not what this jurisdiction is about: even the final hearing of a contested winding up petition involves a summary disposal. This application is necessarily also of a summary kind. The scope of the court's inquiry is, then, limited and always will be in the winding up jurisdiction.

41. In my judgment Alpha has made out a case of fraudulent misrepresentation to a sufficient degree of substance that raises it, by some margin, above being capable of

dismissed as no more than a cloud of objections. There is sufficient material on the basis of which an inference of dishonest or fraudulent conduct might ultimately be drawn, although I make clear that in saying that this court stops short of making any finding, as it must. The facts and matters on which Alpha relies may not prevail in the end but they are manifestly of a kind that can only be disposed of at trial, following disclosure, after cross-examination and, perhaps, after hearing expert evidence.

42. If the foregoing can be said of fraudulent misrepresentation it must apply equally to Alpha's alternative misrepresentation claim. I take on board Mr Lewis's point about the difficulty in reconciling a claim based on dishonesty and one relying on negligence, but that point too should, in my view, be dealt with in any claim form proceedings that may be brought and in which both sides set out their stalls in pleaded detail.

43. My view on the issue of misrepresentation is reinforced by ICC Judge Burton's approach in the *Re A Company* case mentioned above. I would say that the case advanced by the applicant here appears to me to be stronger than the case relied on before her.

44. Mr Khan complains that it was represented to him that Signal would not require a personal guarantee from him to support the facility and that that was a factor in his decision to opt for Signal rather than Fintex. In spite of that, in June 2024 Signal asked him to give a "bad boy" guarantee. Here I am with Mr Lewis. Circumstances had changed by then as a result of the HMRC petition and the action by Mr Khan's sister coming to light. The guarantee sought was limited in scope, wholly different in effect from a conventional personal guarantee. I reject this aspect of Alpha's case. The same may be said about the increase in the exit multiple from eight to nine.

45. That does not, however, detract from my overall conclusion on the representation issue, which, taken in the round, alone, in my view, entitles Alpha to the relief it seeks.

<u>The debt</u>

46. Signal's statutory demand relies on the terms sheet as the basis of the debt claimed. It refers to the term sheet in its statutory demand as "the Agreement." It is an ambitious definition. In my view there are serious issues as to whether the terms sheet has any contractual (as opposed to evidential) status. I say that because it is hedged around with qualifications: its terms are said to be "indicative only and subject to finalization" and "intended for discussion purposes only." Mr Lewis says in his skeleton argument that "the final lending terms were subject to contract." Mr Gledhill does not argue that the term sheet as a whole has no contractual force, so I leave that point (about which I may be wrong) to one side and concentrate on the arguments he does advance.

47. Signal claims a lender's fee of £350,000 said in the terms sheet to be due "[i]n case the Borrower does not complete." The borrower did not complete, so on the face of it the claim is straightforward. However, the terms sheet also says that only certain provisions were agreed to be legally binding. The provision enabling Signal to seek a lender's fee was not in that category. Mr Gledhill submits that, under ordinary principles of construction, if a document states that only certain parts of it are binding,

the natural conclusion is that the others are not; it is not possible to imply a term to contrary effect, because to do so would contradict an express term (see *Chitty*, paragraph 17-019).

48. Mr Waterson challenges this proposition in his witness statement by reference to correspondence, in the course of which Signal asserted through its solicitors that reference to a break fee would be redundant if it were not legally binding. He goes on to say:

> "40. A break fee such as that in the Term Sheet is commonplace in many term sheets, and particularly those in the special situations space. The intention behind such a fee is that it gives the prospective lender comfort that it is not wasting its time and resources in negotiating a deal that might never come to pass. With regard to the amount, this is typically calculated as a percentage of the relevant loan amount. In this case, the loan amount was originally going to be £20.6 million, so the break fee was c. 1.7% of the loan value. This is a lower percentage than I often see, with certain transactions often commanding a break fee of up to 5%. In the present transaction, Mr Khan did in fact negotiate the level of the break fee, as I understand Mr Metze addresses in his witness statement."

In effect, his appeal is to common sense, commercial practice and the fact of Alpha's agreement to the amount by signing the terms sheet.

49. Mr Lewis adopts Mr Waterson's approach. He puts it like this in his skeleton argument:

> "Since the break fee is only payable if "the Borrower does not complete the Financing with the Lender" the general proviso as to "definitive agreements" being entered into subsequently cannot apply – the Break Fee assumes such agreements are not entered into. As a matter of construction and logic, the Break Fee - specifically provided to arise in certain circumstances - cannot be said to be ousted by the general wording at the conclusion of the contract in respect of legally binding provisions. The Break Fee was also separately negotiated by the Applicant."

50. I have some sympathy with Signal on this point but cannot say that I am so confident about it as to be able to determine the point summarily. Mr Gledhill's point is plainly capable of argument and may again have to be examined in the context of all the surrounding facts. For that reason (and because other issues require a trial) it is better dealt with in claim form proceedings. My decision on the misrepresentation issue also means that Alpha has an arguable case on the basis of which it may establish a liability on the part of Signal sufficient to extinguish any entitlement to the fee.

51. Legal fees make up the bulk of Signal's claim. They amount to £700,000 plus disbursements. The significant level of the legal fees does not of itself, of course,

mean that they were not incurred, but they are high. Mr Gray says in his witness statement:

> "42 I cannot begin to understand the legal fees being claimed here. I did a similar size of deal recently in March 2024 (£24.75m loan amount and 20 assets), with four sets of lawyers for three parties, including a US law firm for one party. The total legal bill for all parties was in the region of £350k, and this included the lender approaching the borrower midway through the transaction to request approval to reflect an increase in legal fees. Since the increase could be attributed to a certain aspect of the deal that had become more complicated, this was approved and the parties moved forwards. This is how such a matter should have been dealt with, and clearly it would have come to a head much earlier had it been so."
>
> 43. It is also worth noting, that the total fees incurred on Alpha's deal with Fintex (for both sets of lawyers) came to approximately £350k."

52. Mr Waterson takes a different view, saying (in paragraph 63 of his witness statement) that he disagrees with Mr Khan's claim that they are extortionately high: "In my years of experience, the fees charged for a deal of this nature would typically be in the region of £600k to £1 million." That is a general statement: it does not address legal fees specifically, which make up the lion's share of what is claimed.

53. Neither Mr Gray nor Mr Waterson purport to give expert evidence; their evidence is evidence of fact based on their experience. They may be right or they may be wrong. Given that the solicitors' bill itself is devoid of detail, I cannot begin to guess what an appropriate or proper fee might be, or even a minimum on the basis of which I could say that £x must be due and could form the basis of a petition. A clause of the kind relied on by Signal must, in my judgment, imply a term that any fees claimed be reasonable.

54. Quite apart from that, as Mr Gledhill submits, ss 70 and 71 Solicitors Act 1974 provide for the right of a party chargeable with a bill, and a third party so chargeable, to apply for an assessment of the bill. There is also provision in s 70(1) that no action should be commenced until assessment has been completed, and sub-section (2) provides for any action already commenced to be stayed pending completion. Assessment is plainly available to Alpha. Alpha has gone so far as to undertake, through Mr Gledhill, to apply for assessment, should that step be necessary. It would be wrong, in my view, to allow a petition (with all the possible consequences for Alpha) to be presented, only for it to be stayed while the bulk of Signal's debt was subject to a process to which Alpha is entitled to have recourse. In any event, it is always unsatisfactory to have two sets of proceedings on foot at the same time dealing with the same subject matter.

55. The Solicitors Act does not apply to foreign lawyers. Part of Signal's debt relates to foreign lawyers' fees and other fees which are not subject to assessment or any similar process. Such fees must, however, be subject to an implied term as to their reasonableness. There is no evidence on the basis of which I can say whether or not

they are reasonable. That seems to me to mean that their quantum can only be ascertained at trial with, I suppose, the benefit of evidence as to their having been incurred, a breakdown as to how they have been calculated and, arguably, expert evidence. For that reason they are not susceptible of summary determination so cannot stand for the purpose of presenting a winding up petition.

56. The idea that Signal can claim the costs of winding up proceedings, presumably including their costs of resisting this application, is plainly absurd. Leaving to one side the issue as to whether such costs can be said to be costs of "enforcement," (the word used in the term sheet), because winding up is not enforcement, and that it is hard to see that serving a statutory demand as a precursor to winding up should not be similarly classified, the costs of this application, like those of any petition to wind up, are a matter for the court. Any suggestion to the contrary would fall foul of the fundamental proposition that one cannot contract to oust the jurisdiction of the court. I will say no more until the question of costs is argued.

57. Mr Lewis gamely argues that a petition could be presented for a sum exceeding £750 and invites the court to allow Signal to do so for some unspecified sum said to be incapable of dispute. He relies on a passage from *Angel v British Gas* in which Norris J rejected a submission that an injunction had to be granted where determining the exact sum that might be due to the creditor would require a line by line examination of invoices on which the debt was based. Norris J said:

> "29. I do not accept this submission. On this application the question is whether or not there is an indisputable debt owed by Angel to BG sufficient to support a winding-up petition. There may be uncertainty about the precise sum: but the court at this stage is not concerned to determine what could be proved in a winding up. It is concerned to see that the petitioner is indisputably a creditor in a sum exceeding the statutory minimum and so entitled to present a winding-up petition. It will be for the parties to agree or make their own respective judgements about what cannot be disputed and what can properly be disputed (and the court will be alert to identify every case where the winding-up process is being used to exert pressure to pay a debt that is bona fide disputed on substantial grounds rather than to litigate it). In Re A Company No.2340 of 2001 April 26, 2001, Unreported, Blackburne J. held:
>
> 'At the end of the day the question is whether or not there is a debt owed by [the Debtor] to [the Creditor] over and above £750, sufficient therefore in amount to support a winding up petition, which is not bona fide disputed on substantial grounds. In my judgment, there clearly is. Even making allowance for the various points which [Counsel] has raised, on any view further substantial sums are owing. In my judgment therefore, it cannot be said that if [the Creditor] were now to present a petition to wind up [the Debtor] it would be an abuse of process. True it is that there is a dispute as to the precise amount of the sum to which [the Creditor] is entitled but, on the evidence I have seen, I am satisfied that there is no genuine

> dispute … as to the existence of an indebtedness on the part of [the Debtor] to [the Creditor] amply sufficient in amount to support a winding up petition. I propose therefore to dismiss this application'."

58. The problem in this case is that I have no basis on which I feel I can ascertain a minimum petitonable sum that is not capable of dispute or, at the very least, better dealt with in ordinary proceedings, which are plainly the proper way of resolving this dispute. I am not prepared to guess what such a sum might be.

59. I turn next to the question of Alpha's solvency. Signal has put that in issue, and although Mr Gledhill took me to evidence of Alpha's balance sheet solvency, there is good reason to suspect that it may not be (or may not have been) cash flow solvent: it owes (or owed) substantial sums to HMRC (there is no evidence of their having been paid), and the financial documents I have seen make reference to "stretched creditors" ("stretched," it seems, being a euphemism for "not paid on time"). In his submissions Mr Lewis took the point that Mr Khan's evidence on solvency was inadequate, and he invited me to note that Mr Gledhill had failed to address the question of solvency in his opening submissions. (The balance sheet point was made in reply.) Mr Gledhill submitted that the issue of solvency does not arise in circumstances in which the prospective petitioner has failed to establish standing to petition. I accept that submission.

Abuse

60. As we have seen, Signal acted with extraordinary speed after discovering that Alpha had refinanced with Fintex. The invoice for the amounts it claims was sent almost immediately and said to be payable in five days. That is an unusually short time in which to expect payment of a significant sum. It was not an agreed period and is out of line with normal expectation (28 or 30 days would be more usual, I think, but one does from time to time see invoices that are payable immediately).

61. There is no indication that the solicitors' bill or any other fee was due for payment when Signal invoiced. The five day period is even odder when, as Mr Gledhill points out, no detail was given of the expenses claimed, for example of the work done by the solicitors. Signal did not even send a copy of the solicitors' bill with the invoice. Information was requested but was not immediately forthcoming, although the bills are now in evidence.

62. The statutory demand was served within days of the five day period elapsing.

63. Mr Gledhill relies on those matters as what he calls "marks of abuse." There is some justification in that description, although, were the matters so far mentioned all that could be relied on, I am not sure they could be called "abusive" as opposed to merely "aggressive."

64. One thing that plainly can be described as abusive, however, is the letter of 25 July 2024 which McDermott Will & Emery sent to Fintex telling Fintex that they had been "forced" (*sic*) to serve statutory demands and had given notice to Alpha's legal representatives that they intended to present a winding up petition on or shortly after 1 August. They went on to say that Signal had suffered loss and damage as a result of

"various [unspecified] unlawful acts perpetrated against [Signal]." They invited a call from Fintex "to discuss the issues noted herein," saying, "Whilst our client does not (presently) make any allegations against you, you will appreciate that our client must (and does) reserve its rights insofar as you are concerned in connection with the matters set out in this letter." The explanation for sending the letter is this: "As the lender under the Fintex Financing, *and in the interests of cooperation* [my emphasis], our client considers it prudent to put you on notice of the issues set out above."

65. I described this letter during the hearing as "disgraceful," and I do not draw back from that description. It would have been wrong for a lay client to write in those terms; for a solicitor to do so was, in my view improper. The explanation that it was written in the interests of cooperation is disingenuous. What cooperation? Signal and Fintex were competitors.

66. The purpose of writing this letter could only have been (a) to put improper pressure on Alpha to pay up without further inquiry, either in the form of direct pressure (the letter says "Alpha Schools have been informed that we are contacting you directly") or by way of indirect pressure exercised on Alpha by Fintex; or (b) to interfere with the business relationship between Alpha and Fintex with a view to damaging Alpha.

67. This was abusive conduct. Although it cannot constitute premature advertisement of the presentation of a petition (as to which see *Re Bill Hennessey Associates Ltd* [1992] BCC 386), because no petition had been presented at the time, it is analogous conduct, and as such is to be deprecated and met with an appropriate sanction.

68. It was also, it seem to me, an extraordinarily unwise thing to do. If Fintex had pulled the plug on Alpha, Alpha would, in all likelihood, have been forced into liquidation or administration, leaving Signal out of pocket for what might have been years before seeing a dividend. Apart from the fact that most insolvency administrations take some time, Signal would almost certainly have faced, in due course, the same problems it is facing in this court: for no liquidator or administrator properly directing him- or herself could have admitted Signal's claim to proof on the basis of the scant information I have seen, which could well have meant rejecting the proof and an appeal by Signal against that decision.

69. There is a further instance of abusive behaviour. McDermott Will & Emery's letter refers to the service of statutory demands not only on Alpha but on two other companies in the Alpha group, AS Midco Limited and ASOpco Limited. Although McDermott Will & Emery conceded, when writing to Fintex, that their client only intended to present a petition against Alpha itself "[a]t this stage," there was and is no basis I can ascertain on which any company other than Alpha could be liable for the debt claimed by Signal. The convoluted reasoning resorted to as justification for trying to claim against two other companies in the Alpha group rests, as I understand it, on the definition of borrower in the terms sheet as "Alpha Schools (Holdings) Ltd ('the Company'), sister companies and/or subsidiaries." It is beyond imagining that any solicitor could have reasonably believed that that definition was so plain as to give rise to a liability that was not susceptible of argument in a summary jurisdiction. That leads inexorably to the conclusion that the deployment of statutory demands against AS Midco and ASOpco was part of a pattern of abusive conduct. The fact that Signal's solicitors said there was no present intention to petition these companies does

not mitigate, it makes things worse: they must or ought to have known that there was absolutely no basis on which they could petition, so any threat to do so was improper.

70. Try as he could, Mr Lewis was unable to offer any credible challenge to the allegations of abuse.

71. Granting or refusing to grant an injunction involves the exercise of a discretion. Signal's abusive conduct supports the exercise of that discretion in favour of Alpha. But it goes further: it also fortifies my decision on misrepresentation, leading me to wonder whether a company that is prepared to act with the level of aggression Signal has demonstrated might also be unwisely zealous when it comes to pitching for business or negotiating a finance deal.

Result

72. Hoffmann J's *dictum* to the effect that resort to winding up can be a "high risk strategy" is well known (see *In Re a Company (No 0012209 of 1991)* [1992] 1 WLR 351). His warning applies equally, in my view, to the intention to do so evinced by service of a statutory demand. Signal's strategy in this case was not just high risk but foolhardy. This is not a case in which the court needs to give the company the benefit of the doubt with a view to discouraging the use of the Companies Court as an alternative to ordinary court processes but, as Mr Gledhill puts it, a paradigm disputed debt case. I shall grant Alpha the relief it seeks.

73. I end by thanking counsel for their helpful written and patient oral submissions. I should add that, in my view, Mr Lewis said everything that could be said on behalf of his client: the fact that his submissions have not prevailed is attributable, in my view, to fundamental defects in Signal's case which no amount of forensic ingenuity could overcome.