Neutral Citation Number: [2024] EWHC 683 (Ch)

Case No: CR-2023-005013

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

IN THE MATTER OF WINDRUSH ALLIANCE UK COMMUNITY INTEREST COMPANY
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 22 March 2024

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE PARFITT

- -

Between :

TCPC MANAGEMENT LIMITED **Petitioner**

- and –

WINDRUSH ALLIANCE UK COMMUNITY INTEREST COMPANY **Respondent**

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- -

Aidan Casey KC (instructed by **Burgess Okoh Saunders Limited**) for the **Petitioner**
Ian Mayes KC and John-Paul Tettmar-Saleh (instructed by **Devonshires Solicitors LLP**) for the **Respondent**

Hearing dates: 9 and 12 February 2024

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10:30am on 22 March 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

Deputy Insolvency and Companies Court Judge Parfitt:

1. This is an application by Windrush Alliance UK Community Interest Company (the "Company") to strike out a winding up petition presented against it by TCPC Management Limited (the "Petitioner"). The basis of the application is that the petition debt is disputed and/or that the petition is an abuse of process.

Procedural background

2. The following procedural events have occurred prior to this hearing:

   (a) On 6 June 2023 the Petitioner served a statutory demand dated 5 June 2023 on the Company.

   (b) There was no application by the Company for an injunction to restrain presentation of a petition. The Company did not pay the debt claimed in the statutory demand.

   (c) On 11 September 2023 the Petitioner presented a winding up petition against the Company.

   (d) On 15 September 2023 the petition was served at the Company's registered office.

(e) The Company has obtained validation orders on three occasions, permitting it to make payments into or out of its bank accounts in the ordinary course of business. Validation orders were made by ICC Judge Prentis on 26 September 2023, and by ICC Judge Jones on 15 December 2023 and 12 January 2024. The validation order of 12 January 2024 is expressed to run until "final determination of the hearing listed for 9 February 2024 or further order in the meantime".

(f) On 12 October 2023 the Company filed a witness statement of Mr Billingham in opposition to the petition (his second witness statement, following an earlier statement in support of the application for a validation order). That witness statement set in motion the present strike-out application. There does not seem to have been a formal application made by application notice, but the parties have pragmatically proceeded as if there was. The filing of the witness statement resulted in directions being given by ICC Judge Mullen on 25 October 2023, which was the first return date for the petition. The directions provided for evidence to be filed and for the petition to be set down for a hearing.

(g) On 11 December 2023, the present hearing was listed in accordance with the directions order.

(h) The petition has not been advertised. If the strike-out application is unsuccessful, the Petitioner has indicated that it will seek an adjournment of the petition to allow advertisement to take place before a final hearing in the weekly winding up list.

The petition debt

3. The petition debt is a sum of £928,113.01. This is alleged to arise from an undated agreement apparently signed by the Company on 8 March 2023 and by the Petitioner on 9 March 2023 (the "Settlement Agreement"). By that agreement, the Company agreed to pay the Petitioner the sum of £900,000 in two instalments: the first within 45 days of signing the agreement, and the remainder on or before 31 May 2023. Interest was to run at a contractually specified rate of 4% over base on any unpaid sums.

4. The Company did not pay the sums set out in the Settlement Agreement, whether on time or at all.

5. The Company's counsel submitted, in answer to a judicial question, that although the Company is in a position to meet its other liabilities as they fall due (and, indeed, this is the basis on which it obtained its validation orders), the Company does not have sufficient resources to pay the petition debt. Although the Company claims that it is solvent, this depends on whether the petition debt is to be taken into account. If the petition is not struck out, it appears that the Company will be insolvent. It is liable to be wound up by this court unless it can reach some form of alternative consensual arrangement with the Petitioner and no supporting creditors seek to take carriage of the petition.

The test on this application

6. There is no dispute between the parties as to the primary legal test: the court has to determine whether the petition debt is bona fide disputed on substantial grounds. Both sides have cited the decision of Norris J in Angel Group Ltd v British Gas Trading Ltd [2013] BCC 265. At paragraph 22, the applicable principles were summarised as follows:

"22. The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:-

a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: Mann v Goldstein [1968] 1WLR 1091;

b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750);

c) A dispute will not be "substantial" if it has really no rational prospect of success: in Re A Company No.0012209 [1992] 1WLR 351 at 354B.

d) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: ibid. at 354F.

e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in Re A Company No.006685 [1997] BCC 830 at 832F.

> *f) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination (ibid. at 841C).*
>
> *g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid at 837B)."*

7. The focus of the present application is on whether the Company's objections to the petition debt are "substantial", or if (as the Petitioner contends) they amount to no more than a "cloud of objections".

8. Two particular points are important in the present case, which are reflected in the discussion of the evidence below:

    (a) The court is entitled to draw inferences from the failure of a party to call evidence which ought to be available to it. This is permissible, and indeed necessary, since the court's task is to weigh all the evidence before it and the absence of obvious evidence (without an adequate explanation) affects the weight of the evidence which is there.

    (b) Although the test presents a low threshold to a company facing a winding up petition, it will not normally be sufficient for a company to claim that it needs to investigate in the hope that something will turn up, rather than asserting a positive, substantial dispute. The Petitioner referred to the recent bankruptcy case of Re Kerkar [2021] EWHC 3255 in which ICC Judge Burton cited (at

paragraph 21) the memorable dictum of Megarry V-C in Lady Anne Tennant v Associated Newspapers Group Ltd [17979] FSR 298:

> *"A desire to investigate alleged obscurities and a hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism."*

9. As set out above in paragraph 1, the Company claims that the petition is an abuse of process *in addition to* the dispute over the petition debt. This aspect of the case was more apparent in the evidence filed by the Company than in the submissions made at the hearing. There are two forms of abuse of process here, as described by Rose J in Re Maud [2015] EWHC 1626 (Ch) at [29]:

> *"29. In the light of these authorities I conclude that the pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed will amount to an abuse in two situations. The first is where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors. It is also clear from those authorities, and as a matter of common sense, that the jurisdiction of the court to dismiss a petition based on an undisputed debt on the grounds of collateral purpose must be exercised sparingly. Bankruptcy*

proceedings cannot be allowed to become the forum for a detailed investigation into past and present relationships or an exploration of what the petitioner hopes to gain from the insolvency of the company or individual, in financial or personal terms and a consideration of whether those hopes are legitimate or not."

The parties

10. The Company is a private company limited by guarantee without a share capital. It was incorporated on 25 July 2009 as a community interest company, a "CIC". Its business is as a provider of social housing, with a focus on supported exempt accommodation ("SEA"). SEA is for people with greater needs, such as prison leavers, refugees and vulnerable people, who require care, support and supervisory services ("CSS") in addition to a place to live. To pay for CSS, the housing benefit payable for these individuals is exempt from normal maximum rent caps (hence the word "exempt" in the acronym SEA). The Company takes leases of properties, paying the rent and paying for (or providing) CSS using the housing benefit available to the individuals who live in the Company's properties.

11. The Company's evidence reveals that it is in the midst of a serious dispute. This has led to proceedings in the Chancery Division between the Company and (among others) a Mr Trevor Fothergill. Until June 2023, Mr Fothergill was the chief executive of the Company. He was responsible for its incorporation, and he had been a director since the outset. On 23 September 2023 Murray Rosen KC (sitting as a High Court Judge) handed down judgment in proceedings between the Company and Mr Fothergill following an expedited trial. The neutral citation number for that judgment is [2023] EWHC 2729 (Ch). As is apparent from the judgment, the essence of the dispute is that new directors were appointed in May 2023, who raised concerns about

Mr Fothergill's conduct of the Company's affairs. These concerns led to Mr Fothergill tendering his resignation as a director on 12 June 2023, and also to a self-referral by the Company to the Regulator for Social Housing (the "Regulator"). Mr Fothergill then attempted to revoke his resignation, and (as the Company describes it) sought to "intermeddle" in the affairs of the Company. One aspect of this intermeddling was an allegedly unauthorised payment made by the Company at Mr Fothergill's behest in June 2023 to the Petitioner, in the sum of £190,000. The intermeddling led to an application by the Company for injunctive relief against Mr Fothergill; injunctions were granted by Marcus Smith J on 23 June 2023 and continued by Rajah J on 28 June 2023. Ultimately, the dispute as to who were the proper directors of the Company was resolved in the expedited trial before Mr Rosen KC. In his judgment handed down on 23 September 2023, Mr Rosen KC concluded that Mr Fothergill had indeed resigned in June 2023, and the new directors were confirmed in office.

12. Although Mr Fothergill has resigned and there are new directors in office who were not appointed at the time of the Settlement Agreement (or before), there has not been a complete change of personnel. The Petitioner has drawn particular attention to the appointment of Derrick Williams, ("Mr Williams") who was a director between 11 December 2010 and 10 October 2023, and remains an employee, and Mr Sheku Kamara ("Mr Kamara") who was the finance director of the Company and was a de iure director between 1 March 2021 and 24 April 2023. Mr Kamara also remains an employee of the Company notwithstanding his resignation as a director. At the time of the Settlement Agreement, the Company's directors were Mr Fothergill, Mr Williams and Mr Kamara. Two of those individuals remain employed by the Company although they are no longer directors.

13. The Petitioner is a company owned and controlled by Mr Daniel Ayodele Jenyo ("Mr Jenyo"). He is also referred to in contemporaneous documents as "Ayo". Mr Jenyo owns or controls a number of other corporate vehicles; so far as relevant, these are discussed below.

The dispute over the petition debt

14. The petition debt is a liquidated sum due under the Settlement Agreement. The Petitioner's case is that the court does not need to look any further than the Settlement Agreement, and there can be no dispute in relation to a sum the Company recently agreed to pay. The Petitioner says that whatever lay behind the Settlement Agreement is irrelevant but, should the court look at it, the past history indicates that the petition debt is a legitimate and undisputed debt.

15. The Company's submissions focus on the following points:

    (a) The relationship between the Company and the Petitioner which gave rise to the Settlement Agreement was fraudulent and/or unlawful.

    (b) The Settlement Agreement was not binding.

    (c) The Petitioner has failed to particularise the petition debt.

16. I will address each of these objections in turn.

The relationship between the Petitioner and the Company

17. The petition debt arises from an unpaid amount payable by the Company under the Settlement Agreement. To understand the Settlement Agreement, and the Company's

opposition to the petition, it is necessary to trace the parties' relationship which led to the Settlement Agreement.

18. Mr Jenyo is named as a party in a set of "Heads of Terms" with the Company as the other party. On 23 January 2021 Mr Jenyo sent Mr Fothergill a copy of the Heads of Terms by email, stating that "it would be great to sign this by Wednesday, so we can progress with clarity. After the heads of terms are signed I will send to my solicitor for drafting the final agreement."

19. The Heads of Terms indicate the broad areas of responsibility between the Company and Mr Jenyo. Broadly, as described in Mr Jenyo's evidence, it appears that Mr Jenyo was to help find properties and tenants to bring into the Company's portfolio, and he would provide the CSS in relation to those tenants. In exchange, there would be a split of the "surplus" after all costs.

20. Mr Jenyo states in his evidence that he was named as the party to the Heads of Terms because he had not, at that stage, decided which of his three corporate vehicles was going to be used. One of the vehicles was the Petitioner; another was a similarly-named company called TCPC Limited, and a third was DNA Consortium Limited. Mr Jenyo is somewhat unclear in his evidence about when and how the Petitioner began providing the services described in the Heads of Terms; it appears that matters proceeded on an informal basis for some time.

21. During 2022, the Company and the Petitioner negotiated a more formal agreement in a document referred to in the evidence as the Service Level Agreement or "SLA". A draft document was first provided by Mr Jenyo to Mr Kamara and Mr Fothergill of the Company on 9 February 2022. There was a substantial period thereafter when no progress seems to have been made. From September 2022 to November 2022 there

were a series of email exchanges over the terms of the SLA which show that the Company's lawyers were involved in the drafting process, and it seems that the document reflected a standard form prepared by those lawyers which was used by the Company for other service providers besides the Petitioner. Mr Casey stressed this as an important point. The Petitioner has sought disclosure of the agreements with other service providers, but its requests have not been responded to.

22. Negotiations between the Petitioner and the Company continued until the countersigned SLA was sent by Mr Jenyo to Mr Kamara on 5 December 2022. Mr Kamara signed the SLA on behalf of the Company.

23. The SLA describes the services which the Petitioner was to provide, and the way in which it was to provide them. The SLA expressly provides that the Petitioner will hold itself out as the Company when providing services. As to the payment for the services, the SLA contemplates a joint bank account being set up for the Petitioner and the Company, into which the housing benefit payable in respect of the tenants of the properties falling within the SLA would be paid. From this joint bank account, 3.25% was to be paid to the Company, and 96.75% was to be paid to the Petitioner. The Petitioner was required to use the monies to pay the rent on the properties, and all other costs involved in relation to the provision of the SEA (including the costs of CSS). The commercial effect was that if there was anything left over after paying these costs, the Petitioner would keep the balance as a profit.

24. It appears that the SLA was not followed through to the letter. In particular, there does not seem to have been a joint bank account created.

25. The SLA is expressed to take effect from 1 March 2022 although it was not signed until the end of the year.

26. Within a matter of weeks of the signing of the SLA, the Petitioner was seeking to recover from the Company what Mr Jenyo described as "significant amounts" in respect of historic underpayments. Starting in January 2023, a negotiation took place between the Petitioner and the Company in relation to this shortfall. These negotiations primarily featured Mr Jenyo on the Petitioner's side, and Mr Kamara and Mr Fothergill for the Company. The Petitioner draws attention to the involvement of Mr Kamara because he continues to be employed by the Company and has provided a witness statement in relation to these proceedings. That witness statement is very short. It does not deal with the Settlement Agreement at all, nor the SLA. Mr Kamara's witness statement only addresses points of detail in certain paragraphs in an earlier witness statement of Mr Jenyo in these proceedings. The Company's case is that the Settlement Agreement was fraudulent, the product of an unlawful arrangement orchestrated by Mr Jenyo and the now-departed Mr Fothergill. The involvement of Mr Kamara, and his failure to deal in his evidence with his knowledge of the circumstances leading to the Settlement Agreement (and, indeed, the SLA), seems to me to be relevant to the assessment of the Company's case. The Petitioner submits that the surrounding circumstances disprove that Mr Fothergill was on a fraudulent frolic of his own. It is submitted that the allegation of collusion between Mr Jenyo and Mr Fothergill does not stack up. I agree that it is surprising that Mr Kamara, the Company's finance director at the time of the Settlement Agreement and the person who signed the SLA on behalf of the Company, does not comment on the circumstances which led to the Company and the Petitioner entering into these agreements. The email exchanges exhibited to Mr Jenyo's witness evidence in these proceedings indicate that Mr Kamara was deeply involved in the negotiation of the

Settlement Agreement. His failure to say that there was anything wrong with it suggests that he does not think there is anything wrong with it.

27. The main thrust of the Company's challenge, however, was a legal one. It was alleged the SLA (and the Settlement Agreement, which crystallised historic liabilities in relation to the arrangement) represented an unlawful profit-sharing arrangement which involved a breach of the rules for CICs.

28. The Company's submissions relied on the following steps.

29. In accordance with Regulation 7 of the Community Interest Company Regulations 2005 (SI 2005/1788), article 3(1) of the Company's articles of association provided (inter alia) that it "*shall not transfer any of its assets other than for full consideration*". The Company was an "*asset-locked body*" that was constitutionally incapable of transferring its assets gratuitously or at an undervalue.

30. The Company was a "Registered Provider" of social housing, registered with the Regulator. As a Registered Provider, the Company was required to comply with the Regulator's Governance and Financial Viability Standard (the "Standard"). Paragraph 2.6 of that Standard provides that

> *"Registered providers shall ensure that any arrangements they enter into do not inappropriately advance the interests of third parties, or are arrangements which the regulator could reasonably assume were for such purposes."*

31. Although profit-making bodies can now be Registered Providers, only non-profit making Registered Providers are entitled to receive SEA. This conclusion is a result of paragraph 4(10)(b) of Sch 3 to the Housing Benefit Regulations and Council Tax Benefit (Consequential Provisions) Regulations 2006, which defines exempt

accommodation as including accommodation provided by a "housing association" where it, or a person acting on its behalf, also provides care, support or supervision. "Housing association" is a term defined by Regulation 2(1) of the Housing Benefit Regulations 2006 by reference to section 1(1) of the Housing Associations Act 1985 as (so far as relevant) a company which "does not trade for profit".

32. The Company itself would therefore be unable to make a profit in its supply of SEA or CSS under the applicable regulations. It is permissible, however, for a non-profit making body to engage a third party to supply CSS, and for the third party to make a profit on that supply. This has been established in Regina (S) v Social Security Commissioner [2009] EWHC 2221 (Admin) and in the Upper Tribunal decision of Charles J in Wirral Borough Council v Furlong and others [2013] UKUT 0291 (AAC), where the possibility was described as "obvious" in the "real world" (at paragraph [36]).

33. From these building blocks, the Company makes two main points about the SLA (and the Settlement Agreement, which is said to be infected by it). First, it is said that there are restrictions on what the Company can do with its money, arising under the Company's articles, reflecting its obligations as an asset-locked body which cannot make payments otherwise than for proper value. Second, there are restrictions arising from the Standard imposed by the Regulator that prevent third parties' interests being "inappropriately advanced".

34. As to the value obtained by the Company, the Company says that it has seen insufficient evidence that the Petitioner provided services worth what the Company agreed to pay under the SLA and the Settlement Agreement.

35. A serious problem with this argument is that it is close to the Micawberism decried by Megarry V-C. The Petitioner has presented a petition based on a debt arising under a contract; it is for the Company to impugn the debt, and the burden lies on the Company to establish that there is a bona fide dispute. During the hearing I was taken to the emails between the Company and the Petitioner which led to the Settlement Agreement. At no stage in these negotiations did the Company allege that the Petitioner had failed to provide proper value.

36. A further aspect of the Company's complaint about undervalue is that the Petitioner was to be paid a fixed percentage of the SEA revenue, so that its profits would depend on what was criticised in the evidence as a "fixed rate that amounts to a transfer of Company assets at an undervalue". I do not think this is an apposite description of the arrangements between the Petitioner and the Company. Under the SLA, the Petitioner was to receive the bulk of the SEA revenue, but was also required to provide almost all the relevant services and pay all the relevant costs (including passing rent to landlords). The Petitioner was taking a commercial risk and, if that risk paid off, it would make a profit. The profit was not fixed by any means, but would depend on the cost to the Petitioner of supplying the necessary services and making the payments it undertook to make. I do not consider that this arrangement would amount to a transfer of Company assets at an undervalue unless the Company were able to particularise a substantial absence of value (e.g. that the Petitioner was not providing services at all). The Company has not done this.

37. A further problem with this complaint about transferring asserts at an undervalue is that the restriction comes from the Company's articles. This is therefore within the scope of section 39 of the Companies Act 2006, which provides that the validity of an

act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution. The Company's constitution includes its articles. Although a breach of the constitution may cause the Company difficulties with the Regulator, and may give further grounds for the developing dispute with Mr Fothergill, it does not in itself invalidate the SLA or the Settlement Agreement and therefore has no impact on the petition debt. A separate complaint by the Company that the arrangements with the Petitioner amounted to a breach of the Company's memorandum of association encounters the same difficulty.

38. As to the concerns about the Standard, and the "improper advancement" of a third party's interests, it does not seem to me that this can affect the obligations of the Petitioner and the Company between themselves. It is true that the Company has been subject to criticism by the Regulator. The Company self-referred to the Regulator in June 2023 when the new board members took office. The outcome was a notice (the "Notice") published on 13 September 2023. The Notice states that the Regulator does not publish regulatory judgments for small registered providers (such as the Company); instead it publishes regulatory notices where it has evidence that a small registered provider is not meeting the regulatory standards.

39. The Notice contained multiple regulatory findings against the Company, one of which was that:

> *"There is a lack of assurance that Windrush has not inappropriately advanced the interests of third parties in its lease deals, connected party transactions and payments to both internal and external individuals."*

40. The Notice goes on to record that:

> *"There is a lack of assurance that Windrush, before taking on new liabilities in the form of long and short-term leases, has understood and been able to manage the risks and impact on its business. This is demonstrated most starkly in a novel operating model used in many of its leased properties where service level agreements signed by Windrush, effectively cede control of many regulatory and legal obligations to third parties, including being able to represent themselves as Windrush."*

41. These findings support the concern expressed by the Company, in general terms, about the arrangements with the Petitioner, although the arrangements with the Petitioner are not singled out by the Regulator for comment. It is noteworthy that the Regulator refers to multiple service level agreements, which supports the Petitioner's observation that the SLA was in the Company's standard form, reflecting arrangements it had put in place for other similar service providers.

42. Troubling as these concerns may be for a regulated entity such as the Company, the Company has been unable to point to a legal consequence which affects the ability of the Petitioner to recover the debt due under the Settlement Agreement. In his oral submissions, Mr Casey KC criticised the absence of a coherent legal theory explaining how these regulatory concerns led to an ability to avoid the obligations arising under the Settlement Agreement. He pointed out, and I accept, that there is no specific provision in the regulatory regime for invalidating arrangements which cross the line, rendering enforcement unlawful or illegal. He noted that there had been no intervention by the Regulator in this case, despite the Decision, so that the Regulator was allowing the Company to continue in operation. He also drew attention to substantial payments made by the Company to the Petitioner in August 2023, under

the Company's new management. The aggregate payments were more than £600,000. Mr Mayes KC stated that these payments reflected ongoing liabilities, rather than the historic petition debt, but was unable to distinguish the character of this payment from the supposedly illegal debt the Company now refuses to pay. The Petitioner's point, which in my judgment has considerable force, is that if there was a bona fide belief in the unlawfulness of the arrangements with the Petitioner, the Company would not have paid the additional sums.

43. Addressing these points, Mr Mayes KC explained that the Company was faced with a fraud. He submitted that the Company had a "bona fide suspicion on reasonable grounds" that there was a fraud. The Company's argument is that it suspects the arrangements with the Petitioner were deliberately designed to enable breaches of the regulatory regime, allowing undue profits to be made from the supply of SEA. Mr Mayes KC submitted that the Regulator did not consider that the SLA was a standard form – at least in the sense of being in line with what was expected of a Registered Provider, as opposed to being an arrangement commonly used by the Company.

44. There is limited support for this case theory in the underlying evidence. In March and April 2021 an email discussion took place primarily between Mr Kamara on behalf of the Company and Mr Jenyo. Mr Kamara asked Mr Jenyo for details in relation to some new housing units, including what Mr Kamara described as the "profit sharing ratio". Mr Jenyo responded; he set the "profit ratio" at 80:20 in the Petitioner's favour. Mr Kamara asked for a breakdown; Mr Jenyo explained how the calculation had been undertaken, with profit calculated after deducting payments to landlords and the costs of providing CSS. In reply to his own message, on 10 April 2021 Mr Jenyo wrote "We should change 'profit' to 'surplus' ☺". The message ended with a

winking emoji. Mr Mayes KC drew this emoji to the court's attention, inviting an inference that Mr Jenyo recognised there was something worth winking about – something hidden, or understood only by the parties to the email. Whether such an inference could fairly be drawn would require a trial; but for the purposes of a hearing such as the present, it seems to me that Mr Jenyo's language and emoji indicates on a prima facie basis that there was nervousness about the use of the word "profit" in this context.

45. Notwithstanding the change in language suggested by Mr Jenyo, both Mr Fothergill and Mr Kamara referred in subsequent emails to Mr Jenyo's "profit share" or "share of profits": Mr Kamara on 7 May 2021 and Mr Fothergill on 28 October 2021. On 22 February 2022 Mr Kamara sent Mr Jenyo an email in which he recorded that Mr Jenyo had agreed to forgo his "profit sharing" to assist the Company. Mr Kamara's witness statement in the present proceedings, filed on behalf of the Company, makes no comment on any of these matters. His silence on these communications which involved him and, in some cases, which originated from him, is a noteworthy gap in the evidence. The Company's case is built on inferences from these documents; but it has not provided the court with Mr Kamara's explanation of the documents. That explanation would assist with determining whether there was a substantial basis for the inferences; its absence diminishes the impression of the substance of the Company's case.

46. The Company also sought support for its fraud allegation in the transcript of a Zoom or Teams meeting which took place on 7 January 2021 attended by Mr Fothergill and Mr Jenyo. The transcript reads as follows:

Trevor Fothergill: *"…you know, um, there is going to be um other, in development, and you know, and I'm obviously speaking off the record, there is going to be opportunity company I do you know what I'm saying… I don't want to say too much"*

Ayo Jenyo: *"I get exactly what you, I get exactly what you're saying"*

Trevor Fothergill: *"Do you know what I mean? I want to have another company that's set up, so if we have a few acres that are spare I don't know"*

[both laughing]

Ayo Jenyo: *"You're forgetting, you're forgetting I'm Nigerian so I, you know where you haven't gone, I'm going there in my mind."*

Trevor Fothergill: *Yeah, because it's about legacy and Windrush Housing Association is great and I've been honest with you, Ayo, if you want to know what my goal is, if I be honest with you, I want to move away from Windrush and I want to concentrate on development, that's where I really want to be. Development housing solutions and module development, not just in this country, you know, in Africa. But you need a really good financial backing to do that, and that's where I want to be, I would say within the next 5 years if not shorter, but I want to get Windrush very strong, be a CEO, but being honest with you, my real passion is in developing- providing housing solutions, and that's what I want to grow out, that's where the real action is.*

Ayo Jenyo: *Trevor, my laptop is about to die and the light's just gone, can I just call you on the phone? Give me 2 minutes.*

47. The Company's witness evidence on this application quoted the transcript, but stopped after Mr Jenyo's comment that he was Nigerian. The witness statement suggested that this exchange illustrated the "motives and intentions" of Mr Jenyo and Mr Fothergill "when entering the parties into a contractual relationship". Reading the transcript in its full form, as the Petitioner suggested in correspondence, it does not seem to me that any adverse inferences can fairly be drawn from the transcript. It is hard to understand exactly what the parties were talking about, but it seems to have had something to do with what Mr Fothergill hoped for his future beyond the Company. There can be no credible suggestion from this transcript of a fraudulent, unspoken conspiracy to extract profits at the expense of the Company.

48. The evidence for the allegation of fraud, then, depends on the use of the term "profit share", and on Mr Jenyo's winking emoji. The reason a profit share would be a fraud, on the Company's case, is that the Company was not supposed to be making a profit at all. As a non-profit making asset-locked entity it had nothing to share.

49. It is true that under section 37 of the Companies Act 2006 a company limited by guarantee cannot give a person a right to participate in the company's divisible profits otherwise than as a member, but it does not seem to me that such an arrangement was what was being discussed. The Company's objection to the SLA and the Settlement Agreement has nothing to do an improper distribution of the *Company's* profits; it is not suggested that the Company made any profits or was seeking to distribute its own profits to the Petitioner by these arrangements, notwithstanding the terminology used.

50. The Company's real objection is that the Petitioner obtained too much from the deal; that it was making improperly large profits, conflicting with the Company's regulatory obligations. The problem with this objection is that the mere use of the

term "profit share", and Mr Jenyo's winking emoji do not indicate anything improper about the arrangements; the Petitioner (as the Company concedes) is entitled to make a profit from providing CSS on the Company's behalf. The evidence does not indicate that improperly large profits were being extracted in breach of the Company's regulatory obligations, still less that the arrangements between the Company and the Petitioner were a conspiracy designed to evade the regulatory restrictions for SEA. In the absence of credible evidence, it does not seem to me that there is a substantial basis for the Company's allegation of fraud.

51. Without a credible evidential foundation for its fraud case, the Company's attempt to evade the liability under the Settlement Agreement on the basis of fraud or illegality is left without legal foundation. Drawing these matters together, it does not seem to me that there is a bona fide substantial argument that the debt arising under the Settlement Agreement is unenforceable on these grounds.

The Settlement Agreement was not binding

52. As set out above, the Company has been litigating against Mr Fothergill and has obtained injunctive relief. On 28 June 2023 Rajah J made an order against Mr Fothergill on the Company's application which, at paragraph 5(ii) required Mr Fothergill to file an affidavit:

> "*…setting out all his dealings with the [Company's] customers, tenants, suppliers, service providers, employees, directors and consultants from 12 June 2023 to the date and time of the affidavit, including a complete schedule of contractual arrangements purported to be reached by Mr Fothergill with any such persons or entities on behalf of the [Company] in that period*.

Insofar as the Affidavit or the Documents concern the debt purportedly due to [the Petitioner], which is the subject of the statutory demand… or the contract or settlement agreement referred to in that statutory demand, the Affidavit or Document is to be provided within 36 hours of service."

53. The following day, on 29 June 2023 Mr Fothergill sent an email to the solicitor for the Company in which he said (among other things):

> *"…Regarding the statutory demand. In my last conversation with Rob, he instructed me not to get involved as he was resolving this matter directly to [the Petitioner]. I can confirm that there was no fixed agreement that was made with [the Petitioner] prior to my departure."*

54. The Company invited me to treat this email as indicating that the SLA and the Settlement Agreement were not "fixed agreements" in Mr Fothergill's terminology, and that he did therefore regard them as binding.

55. Given the extensive contemporaneous documentation filed in connection with this application, this was a surprising invitation. The contemporaneous emails show Mr Fothergill being deeply involved in the negotiation and the signing of both the SLA and the Settlement Agreement. Mr Kamara signed the SLA on the Company's behalf, but Mr Fothergill had been involved in the negotiations throughout 2022. Mr Fothergill himself signed the Settlement Agreement.

56. Mr Mayes KC submitted that there was enough here to raise a triable issue on whether the Settlement Agreement was binding. He submitted that Mr Fothergill ought to be asked in cross-examination about what he meant in his email. He submitted that the email undermined the Settlement Agreement.

57. As Mr Casey KC pointed out, this argument hangs on a misunderstanding of what Mr Fothergill was required to do by the 28 June 2023 order. He was not required to give a full account of the dealings which led to the SLA and the Settlement Agreement. The injunction was obtained in the context of a dispute as to Mr Fothergill's intermeddling in the Company's affairs after his resignation. Paragraph 5(ii) of the order required Mr Fothergill to give a full account of what he had done between the date of his resignation on 12 June 2023 and the date of his affidavit a matter of weeks later. Mr Fothergill's response that there was no fixed agreement with the Petitioner obviously related only to this period.

58. The suggestion that Mr Fothergill's email raises a triable issue as to whether the Settlement Agreement is binding is hopeless. It is based on a misunderstanding of the purpose of the email. There is no substantial dispute over whether the Settlement Agreement is a "fixed agreement".

59. I have considered whether the Company's pursuit of this weak point should be taken into account in weighing its other objections to the petition. This is an area where the court is alert to the tactical deployment of a "cloud of objections" as it has been described since the decision of Oliver LJ in 1981 in Re Claybridge Shipping Company SA [1997] 1 BCLC 572. There is generally limited court time available to deal with applications of this sort, and it is necessary to deal with them in a summary fashion. A company which takes bad points in opposition to a petition will risk attention being diverted from its good points. Having run that risk, a company may receive limited sympathy on appeal in complaining that a particular factor has not being given as much weight as it could have been. There is certainly a danger of a

company's overall approach being characterised as a cloud of objections if this is the course it chooses to take.

60. However, in the present case it seems to me that I can put this weak point to one side when considering the other arguments raised by the Company. This is possible because I have had the advantage of preparing a reasoned judgment and can weigh each argument separately. In fairness to the Company, I need not and will not treat this weaker point as undermining the force of the other arguments it raises. I assess each argument on its merits, rather than approaching the arguments as a single potential cloud.

The failure of the Petitioner to particularise the debt

61. The Company complains that the Petitioner has not particularised the debt.

62. On its face, this is an immaterial objection. The Petitioner has properly particularised the debt in the petition, which sets out the Settlement Agreement giving rise to the debt and the liquidated sum claimed. This is as far as the Petitioner needs go to enable the Company to understand the petition debt.

63. What the Company wants, though, is for the Petitioner to provide an account of the dealings which led to the Settlement Agreement. The Company points to the following paragraphs in the Regulator's Notice, which refer to the absence of proper financial record-keeping by the Company:

> *"The current board and management team are working to address these issues but, due to historic failings, do not have reliable data or information on which to run the business…*

> *"There is a lack of assurance on the financial stability of Windrush. The financial information we have been given presents a picture of an organisation without the basic information needed to adequately manage the finances of a registered provider. The management accounts of Windrush seen to date are unreliable and Windrush has recognised they do not present a true picture of the organisation's finances. There are a number of ongoing contractual disputes with a range of external bodies and Windrush does not have the data or information to understand the extent of its liabilities or monies owed to it. For this reason, we are concerned about the ongoing solvency of the organisation and its long-term future."*

64. Faced with this weakness of its own data, the Company has sought an explanation from the Petitioner about three things:

    (a) How the Settlement Agreement comprises liabilities which pre-date the SLA taking effect on 1 March 2022;

    (b) How the Settlement Agreement included liabilities from before 2022 which had been written off; and

    (c) Whether the CSS were provided by the Petitioner at all material times, rather than Mr Jenyo personally or one of his other companies.

65. Each of these points might have force if there were no Settlement Agreement, and the Petitioner was simply presenting a petition based on the current balance it claimed to be owed pursuant to a contract for services with the Company. A petition which failed to address the sort of points raised by the Company would be defective and, in all likelihood, would give rise to a bona fide dispute on substantial grounds.

66. The Settlement Agreement takes away the force of these objections. Whatever the parties' respective obligations prior to the Settlement Agreement, they agreed to compromise them in that agreement. Clause 5 of the Settlement Agreement provides that:

> *"This agreement is in full and final settlement of, and each party hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it, its Related Parties or any of them ever had, may have or hereafter can, shall or may have against the other party or any of its Related Parties arising out of or connected with the Dispute (the* ***Released Claims****)."*

67. The "Dispute" is defined in the recitals to the Settlement Agreement as follows:

> *"A dispute has arisen between the parties relating to monies owed by [the Company] to [the Petitioner] under an Agreement (Agreement) dated 1 March 2022 between [the Company] and [the Petitioner] (****Dispute****)"*

68. The Settlement Agreement forms a comprehensive, freestanding settlement of a real dispute between the Company and the Petitioner. It contains no further obligations on the Petitioner to provide an explanation for its entitlements, or the services it provided. The Company has no contractual right under the Settlement Agreement to the information it now seeks as particulars of the Petitioner's debt. In my judgment, it is not entitled to such particulars, and the failure to provide the requested particulars does not mean that there is a substantial dispute in relation to this petition debt.

69. The court has had the advantage of seeing the exchanges of correspondence which led to the Settlement Agreement. These exchanges indicate that the Settlement Agreement was the result of a commercial negotiation in which various options were presented and the Petitioner offered to compromise its opening demands in response to negotiation by the Company. The time for the Company to have sought particulars of the debt which is now comprised in the Settlement Agreement was during the negotiation of the Settlement Agreement. It is understandable that the Company's new management wishes to see the workings again, as they were not involved at the time of the negotiation and appear to have taken over a company whose records are in disarray. Although their position is understandable, the new management are not the subject of this winding up petition. The petition was presented against the Company, and the Company has had its chance to investigate these matters.

70. Accordingly, I reject the Company's objection based on a failure to particularise the petition debt.

Abuse of process

71. As set out above, the Company's evidence describes its opposition to the petition on the basis that the petition debt is bona fide disputed on substantial grounds and/or that the petition is an abuse of process. Although not much pressed in oral argument, the Company seeks to set the petition aside on the basis of abuse of process alone.

72. The form of abuse of process alleged is that the Petitioner is using the petition to pressurise the Company in the context of its dispute with Mr Fothergill, to "hamper the Company's new directors".

73. Various links are drawn in this evidence between Mr Jenyo and Mr Fothergill. The most significant is that Mr Jenyo was involved in drafting a letter dated 16 June 2023 by which Mr Fothergill sought to withdraw his resignation four days earlier. The Company identifies this as the first move in the dispute between the Company and Mr Fothergill, and Mr Jenyo made it. Mr Fothergill also made a disputed payment to the Petitioner during his 'intermeddling' phase post-resignation.

74. It does not seem to me that much weight should be given to these manoeuvres. Mr Jenyo had a long history with Mr Fothergill, who was the founder of the Company. It is not surprising that Mr Jenyo chose to side with Mr Fothergill and may have supported his attempts to return or remain in office. Those attempts were swiftly halted by injunctive relief and an expedited trial. Mr Fothergill's exit has been confirmed, but the Petitioner has continued the petition.

75. The timing of the presentation of the petition is also criticised as indicating an abuse of process. The Company notes that the petition was presented as the final preparations were underway for the trial before Murray Rosen KC in late September 2023. Mr Billingham alleges as follows in his second witness statement at paragraph 37:

> "*I believe it is highly likely that this was calculated to either entirely de-rail the Company's preparation for the hearing, cause it to be adjourned or to encourage the Company and Mr Hoilme to discontinue the proceedings, effectively ceding control of the Company to Mr Fothergill, and thereby putting the Petitioner in a place whereby it would almost certainly have been able to take control of the business via the control Mr Jenyo exercised over Mr Fothergill.*"

76. Any suspicion of abuse of process arising from the presentation of the petition at a key juncture in the dispute between the Company and Mr Fothergill has now passed. The petition has been proceeded with notwithstanding Mr Fothergill's confirmed exit. Even if it were ever the case, it cannot be said that the petition is being used as a tactic anymore.

77. As a final point on abuse of process, various criticisms are made of actions taken by Mr Jenyo on the Company's behalf or in its name, the most significant of which appear to be various lease agreements between the Company and a company owned by Mr Jenyo called TC Support Limited which were entered into on 1 March 2022. The implication is that Mr Jenyo is trying to prevent the Company from scrutinising his involvement in the Company's affairs by placing it into liquidation. I am not in a position to determine whether these matters have any bearing on Mr Jenyo's motivation. I do not consider they are sufficiently clear cut to justify a finding that the petition is an abuse of process, having regard to the approach in Re Maud (quoted above). I also take into account that compulsory liquidation is not a way to prevent scrutiny of one's involvement in a company's affairs; the liquidator has a duty to investigate the company's affairs and it is to be expected that Mr Jenyo's conduct will be examined.

78. Overall, I am satisfied that this is not a petition presented by a creditor which does not genuinely seek a winding up order, or seeks an order other than for the benefit of creditors generally. I therefore reject abuse of process as a freestanding ground of opposition to the petition.

Disposition

79. Having dismissed the objections raised by the Company, I will allow proceedings on this petition to continue.

80. I invite the parties to agree a form of order following the handing down of this judgment.