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Case No: CR-2021-MAN-000122

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

IN THE MATTER OF VST ENTERPRISES LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Manchester Civil Justice Centre
Date handed down: 14 April 2021

Before His Honour Judge Stephen Davies sitting as a High Court Judge
Between :

INTERACTIVE DIGITAL SYSTEMS LIMITED	**Applicant**
- and -	
VST ENTERPRISES LIMITED	**Respondent**

Louis Doyle, QC (instructed by **Howes Percival LLP, Solicitors, Leicester**) for the **Applicant**
Anja Lansbergen-Mills (instructed by **Hill Dickinson LLP, Solicitors, Manchester**) for the **Respondent**
Robert Mundy (instructed by **Knights plc, Solicitors, Nottingham**), for the **Petitioners in CR-2020-004299**

Hearing date: 8 April 2021
Date draft judgment circulated: 12 April 2021

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 2:15 p.m. on 14 April 2021.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and summary of decision

1. This is my judgment following the hearing of an administration application issued on 2 March 2021 ("**the application**") in respect of VST Enterprises Limited ("**the Company**" or "**VST**") by Interactive Digital Systems Limited ("**the Applicant**"), as a creditor of the Company within the meaning of para.12(1)(c) of Schedule B1 to the Insolvency Act 1986.

2. The application came on initially before HHJ Halliwell on 10 March 2021, when it was adjourned to 8 April 2021 with directions for the filing of further evidence. In addition to the evidence filed in accordance with that order there has been a flurry of further evidence filed in the days preceding the hearing, to which no opposition was taken by each party.

3. I heard extremely able and persuasive submissions from Mr Doyle, QC, counsel for the Applicant, from Ms Lansbergen-Mills, counsel for the Company, and from Mr Mundy, counsel for the Petitioners in the petition for the winding-up of the Company on just and equitable grounds in case number CR-2020-004299 presented in January 2021 ("**the J&E Petition**"), who supported the application. Given the time of day and the detail and importance to the parties of the matters argued, I reserved judgment.

4. The real battleground between the parties was on the issues of: (a) whether the Applicant has proved that the Company is balance-sheet insolvent; and if so (b) whether the court should exercise its discretion to make or refuse to make an administration order. Having considered the evidence and the submissions I am satisfied that, whilst the Applicant has established balance-sheet insolvency, it is not an appropriate case for the exercise of the discretion to make an administration order. My reasons follow.

B. Parties

5. The Company was incorporated on 13 November 2012, but did not trade until 2015. There are 107 shareholders. Most are private individuals or companies; however the vast majority of the shares are held by the Company's parent company, Davis Co Holdings Limited ("**Holdings**" or "**Davis Co**"), which is owned by the Company's CEO, Mr Louis-James Davis. The Company described itself in 2015 as a start-up, its purpose being the commercial exploitation of an image (Vcode) which can be scanned using a smartphone application and linked to a platform from which transactions can be processed and information communicated.

6. The Applicant was engaged by the Company in around 2018 to undertake the design and programming of the software and technology infrastructure for the VCode platform. Unfortunately the relationship between the Applicant and the Company has not been a smooth one, with allegations by the Applicant of non-payment of monies due by the Company and of unauthorised use of its software, and with allegations by the Company of various breaches by the Applicant. A threat by the Applicant to issue a winding-up petition

was averted in 2019 and further disputes were compromised by a Settlement Agreement entered into on 22 November 2020 ("**the Settlement Agreement**"), the terms of which raise issues of some importance in this case.

7. The eight Petitioners acquired shares in the Company between May 2017 and August 2018. Between them they acquired 112 shares, thus less than 0.1% of the Company's allocated share capital, although between them they paid over £200,000. The main reasons for their seeking a just and equitable winding-up order are said to be "the insolvency of VST, impropriety on the part of VST and its directors, a break-down of confidence in VST and its directors, and that, in the circumstances, it is necessary for a liquidator to be appointed to investigate the activities of VST and the conduct of its directors". The J&E Petition is opposed and an application by the Company to strike out the petition is listed in May 2021.

C. Relevant legal principles

8. There is little dispute as to the relevant legal principles, as opposed to their application to the particular facts, many of which are disputed. I adopt with gratitude the summaries in the skeleton arguments.

9. By Sch. B1, para.11 the Court may make an administration order in relation to a company only if satisfied that:

(a) the company is or is likely to become unable to pay its debts; and

(b) the administration order is reasonably likely to achieve the purpose of administration (by para.111(1) meaning an objective specified in para.3).

10. As regards (a), the term "unable to pay its debts" is, by para.111(1), attributed the meaning given by s.123 of the 1986 Act; that is, either cash-flow insolvent within the meaning of s.123(1)(e) or balance-sheet insolvent within the meaning of s.123(2) of the 1986 Act. The burden of proof in demonstrating a company's inability to pay debts (or the likely inability to pay debts) rests on the applicant, on a balance of probabilities: Highberry Ltd v. Colt Telecom Group plc (No.2) [2002] EWHC 2815 (Ch).

11. For the purpose of ascertaining balance-sheet insolvency within the meaning of s.123(2), contingent and prospective liabilities are not to be taken at full face value, but rather fall to be discounted for contingencies and deferment. The section requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish. It is very far from an exact test, and the burden of proof is on the party asserting balance-sheet insolvency (BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others [2013] UKSC 28 at §§37-42) ("**Eurosail**").

12. As regards (b), it is well established that "reasonably likely" does not require the court to be satisfied as to the achievement of the purpose of administration on a balance of probabilities; rather, the test is less exacting in that it suffices that there is a real prospect that the administration's objective will be achieved: Hammonds v. Pro-Fit USA Ltd [2007] EWHC 1998 (Ch), [2008] 2 BCLC 159 at [24] (Warren J).

13. Paragraph 12(1)(c) of Sch. B1 allows for an administration application to be made by "one or more creditors of the company". Paragraph 12(4) provides that the reference to creditor "includes a contingent creditor and a prospective creditor". It was held by Buckley J in Stonegate Securities Ltd v. Gregory [1980] 1 Ch 576 at 579 that a contingent creditor is "a creditor in respect of a debt which only becomes due on an event which may or may not occur" (in contrast to a prospective creditor where the contingency is one that will, as opposed to may, happen in the future).

14. If the court is satisfied that: (a) the applicant for an administration order does have standing, here that it is a contingent creditor of the company; and (b) the company is or is likely to become unable to pay its debts; and (c) that the administration order is reasonably likely to achieve the purpose of administration, then it has a discretion as to whether or not to make an administration order. As Sir Geoffrey Vos C (David Richards LJ and Asplin J agreeing) said in Rowntree Ventures Ltd v. Oak Property Partners Ltd [2017] EWCA 1944 (Civ) at [24]:

> "It is necessary first in my judgment to understand that the discretion provided to the court in para.13 of Sch.B1 is of a wide and general nature. It is not constrained in any way. Any appellate court considering a particular exercise of such a discretion must ensure that nothing it says operates so as to cut down the width of the statutory discretion that parliament has given to the court. The effect of this proposition is that a multitude of factors may properly be taken into account in deciding in any particular case whether it is appropriate to make an administration order when the two statutory pre-conditions have been held to be fulfilled. Nothing that I say today should be taken as limiting the factors that can properly be considered. The circumstances are likely to be infinitely variable. The interests of secured creditors, preferential creditors, unsecured creditors and the company itself will change from case to case."

15. 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: see the analysis by Rose J in Maud v (1) Aabar Block Sarl (2) Edgeworth Capital (Luxembourg) Sarl [2015] EWHC 1626 (Ch) at §29.

D. Standing

16. It is common ground that the Applicant has standing in that it is a contingent creditor of the Company by reason of the terms of the Settlement Agreement. However, it is necessary to say something more about the terms of the Settlement Agreement because Ms Lansbergen-Mills submits that it is a point of some importance that if the Applicant is successful in persuading the court to make an administration order then it will lose any prospect of ever being paid the sum under the Settlement Agreement in respect of which it is a contingent creditor.

17. The relevant recitals to and terms of the Settlement Agreement are as follows:

"**BACKGROUND**

(A) …

(B) VST and Davis Co have confirmed that:

(a) the Fund Raise (as below defined) is being conducted by and for VST;

(b) the funds for the Fund Raise will be paid to and/or held for VST;

(c) at the date of this agreement the Fund Raise is approximately 90% complete and is expected to complete imminently; and

(d) VST will be able to effect payment the [sic] balance Settlement Sum under clause 3.1(c) below, upon receipt of the first £1m of the Fund Raise."

"**Agreed terms**

1. Definitions and interpretation

Fund Raise

The completion and receipt of funds of a new substantial fund raise [sic] by VST of at least £7m by way of debt or equity."

2. Effect of this agreement

Interactive acknowledges that upon execution of this Settlement Agreement it shall have no right to present a winding up petition against either VST or Davis Co in relation to the debt it and/or the claims is [sic] states it is due to it under the [prior agreements] and pursuant to the Dispute[1], its sole right shall be for enforcement of the Settlement Agreement (emphasis added).

"**3. Payment**

3.1. VST shall pay or cause to be paid to IDS the total sum of £430,000 ('the Settlement Sum') divided into instalments … as follows:

[1] The "Dispute" is a defined in recital (A)(d) as being a dispute about ownership of certain IP rights addressed in other sections of the Settlement Agreement and is not thus directly relevant to this case.

(a) the amount of £12,500 inc VAT to be paid no later than one working day of the date of this agreement;

(b) the further amount of £12,500 inc VAT to be paid on or before 27 November 2020; and

(c) the further amount of £337,500 + VAT to be paid no more than 7 calendar days following receipt by VST of cleared funds of the first £1m from the Fund Raise."

18. It is common ground that payments (a) and (b) were made but that payment (c) has not been made. It is not alleged by the Applicant that the Company has in fact received the first £1M from the Fund Raise and, since there was no payment longstop date in the agreement, the Company cannot contend that the contingency upon which its right to the third payment is based has yet arisen. If the Company never successfully obtains the first £1M from the Fund Raise, then the Applicant will never have any right to be paid the third payment under the Settlement Agreement. Although not legally impossible, it is commercially almost inconceivable that the Company could achieve the Fund Raise whilst in administration. Indeed the proposed administrators do not suggest that they could achieve the objective of rescuing the company as a going concern. It follows that Ms Lansbergen-Mills is right in her submission that for the Applicant to obtain an administration order would be the equivalent of its killing the only goose which could lay the golden egg of the third payment.

19. There is some suggestion by the Applicant in its evidence that the Company was guilty of misrepresentation in confirming that as at the date of this agreement the Fund Raise was approximately 90% complete and was expected to complete imminently. However, it has no evidence to this effect and there is no provision in the Settlement Agreement which entitles it to request information from the Company. Moreover, by reason of clause 14.2 it would be necessary for the Applicant to establish that the Company was guilty of fraudulent misrepresentation for it to be able to succeed in such a claim. It might also be possible for the Applicant to argue that there was to be implied some obligation on the Company to use reasonable endeavours to conclude the Fund Raise within a reasonable time and that the Company has breached such obligation, but there is no suggestion in its evidence to that effect nor any evidential basis for any such suggestion.

20. I shall return to clause 2 when I come to address the issue of discretion.

E. Insolvency

21. The Applicant relies upon the most recent filed accounts of the Company which are abbreviated unaudited accounts for the period 28 February 2019 to 31 October 2019. As Mr Doyle submits, these demonstrate balance sheet insolvency on any reasonable view and Ms Lansbergen-Mills realistically did not submit to the contrary. In particular, as he submitted, they disclose:

(a) A net balance-sheet deficit of (£2,311,028), following a deficit of (£636,090) as at 28 February 2019.

(b) Fixed assets of £3,016,610. Of which the vast majority is made up of unidentified intangible assets put at £3,002,307. It appears however from Mr Davis's second witness statement that these are intellectual property rights which are not included in the most recent balance sheet on the basis that they are subject to R&D tax credits and, accordingly, are not capitalised as an asset, and there is in any event no background information to support the valuation ascribed in the 31 October 2019 balance sheet.

(c) Current assets of only £195,877, of which debtors are apparently £194,411, compared with creditors falling due within one year of £4,950,371, producing a deficit on total assets less current liabilities of £1,737,893.

(d) A negative profit and loss reserve figure of (£3,424,618), which is not further explained because the directors have elected not to include a copy of the profit and loss account within the financial statements, but which would appear to represent a deficit of £1,749,680 carried forwards from the previous period and a deficit of £1,674,938 arising in the current period.

22. Moreover, on 13 May 2019 the Company granted an all-monies debenture over its assets in favour of Holdings who, it is stated in the notes to the accounts, provides support with working capital requirements. The notes also state that the Company has elected not to disclose transactions between itself and Holdings, so that it is not known either what proportion of the figure for creditors of £4,950,371 is represented by lending from Holdings or when and how that lending was provided. However, the unaudited financial statements for Holdings for the year ended 28 February 2020, more recently disclosed, indicates that the amount owed by group undertakings amounted to £4,476,619, which provides a fairly good indicator.

23. Ms Lansbergen-Mills placed most reliance upon the balance sheet as at 28 February 2021 which Mr Davis recently introduced into evidence, giving the explanation that the delay was due to the Company's accountant having been delayed in providing it earlier because of the death of his elderly father. Mr Doyle was suspicious both of the lack of a more detailed explanation and the fact that the format of the balance was both very different from the format of the previous balance sheets but also deficient in a number of respects, most significantly (as observed by Mr Mundy) the fact that the balance sheet did not balance.

24. However, as she acknowledged, even this balance sheet was not by itself sufficient to demonstrate balance sheet solvency, since although it disclosed total assets less current liabilities of £2,473,508.85, when one added in all liabilities, including the amount contingently due to the Applicant and total amounts due to Holdings of £5,137,014, there was a deficit of total net assets of £3,458,005.15.

25. Mr Doyle submitted that even this was suspicious, since the figure for debtors of £2,593,544.59 was significantly higher than the equivalent figure of £194,411 in the 31 October 2019 statements without any explanation or breakdown being provided.

26. However, Ms Lansbergen-Mills submitted that when regard is had to the terms of an undated letter from Holdings to the Company, written for the purposes of this hearing, it could be seen that on an application of the correct approach, as mandated by Eurosail, the Company could not be shown to be balance sheet insolvent. This letter stated that at the present time the Company owed Holdings £5,137,014, that it fully supported the Company and its ability to raise sufficient funds to make the business a success and repay all creditors and, on that basis, that "in order to demonstrate our support and belief in VST's business model, we will restructure our debt position and defer our debt to be paid only on a successful fund raise in excess of £1million and/or should VST enter any insolvency event".

27. Whilst Mr Doyle made the fair point that this letter was not contractually binding and thus could just as easily be left unimplemented should it suit the purposes of the Company and Holdings to do so, his further point, which seems to me to be unanswerable, is that the deferment would cease to have effect if and when there was a successful fund raise in excess of £1million. What that means is that in that eventuality not only would the Company become liable to pay the Applicant the third payment, but also it would become liable to pay Holdings the full amount outstanding. It is plain and obvious that in such a circumstance the Company would not be able to discharge both liabilities, let alone all liabilities, from its assets.

28. From a commercial perspective, the evidence shows that the Company can only make a success of exploiting its VCode product if it is able to obtain substantial external funding in the region of the £7M which it confirmed it was close to achieving through the Fund Raise. There is no suggestion that Holdings or Mr Davis could provide such level of additional funding in addition to the amount in excess of £5 million already apparently invested. Whilst I accept that it is unlikely that Holdings would pull the plug in such a case, whether or not it would do so in any individual case must depend on the circumstances prevailing when such external funding was provided and, in particular, how much was provided and subject to what conditions. What, for example, if only £1 million was provided, and this was not enough to satisfy both the Applicant's right to the third payment and other pressing creditors as well as allow the Company to fund the exploitation of its product, and there was no prospect of obtaining any more external funding? There is every likelihood that the Company would exercise its right to demand repayment at such point, especially if that meant that it could exercise its security rights.

29. Mr Doyle's simple proposition, which I accept, is that when the court is asked to make a judgment on the evidence which is before it as to the Company's assets, making proper allowance for prospective and contingent liabilities, it is plain and obvious that the Company cannot reasonably be expected to meet those liabilities and, it follows, it is deemed insolvent on a balance-sheet basis even though it may currently be able to pay its debts as they fall due.

30. As necessary, I would also accept the submission of Mr Doyle that the failure by the Company to provide satisfactory documentary evidence to support its case in relation to insolvency buttresses this conclusion. If, as is the Company's case, it is a well-run business with a strong product, a strong prospect of raising sufficient funding successfully to exploit

that product, and a strong business plan, one would expect to see documentary evidence to this effect. Instead, the Company has failed to provide any financial forecasts or full financial information including profit and loss accounts, whether prepared by an accountant or by its own internal financial resource. It has failed to provide any details of the surprisingly large figure for creditors in the most recent balance sheet. It has failed to provide any details of the liabilities to Holdings or other debtors. It has failed to provide bank statements, only providing a bank balance statement as at two recent dates. Whilst the evidence from the most recent balance sheet showed that the cash at bank was only £47,968.69 at that point, the current evidence is that £500,000 was paid in on 6 April 2021 by a company which is also a shareholder and whose director is the subject of complaint by the Petitioners as to his being complicit in misrepresentations made to them. It is suggested that this recent injection of funds is an attempt to make the Company's financial position appear better than it in fact is, rather than - as Mr Buckley asserts - a genuine business receipt. Whilst I am not in a position to make any findings as to the truth or otherwise of those allegations, I am not satisfied that this evidence is sufficient in itself to show that the Company may reasonably be expected in the mid to long term to be able to trade successfully without access to substantial external funding.

31. I also note that the Company has failed to provide any details as to any existing or future contracts or as to any existing or future fundraising opportunities. Although Mr Davis suggests that the fundraising opportunities are controlled by Non-Disclosure Agreements ("**NDAs**"), he does not produce these NDAs, redacted as necessary, or provide redacted details of these opportunities, other than some limited evidence by way of a letter written by Hill Dickinson.

32. In the circumstances I am satisfied that the threshold jurisdictional condition of demonstrating insolvency is made out on the balance-sheet basis. I do not however consider that it is also made out on the cash-flow basis. Mr Doyle said in his skeleton that the Applicant did not rely on cash-flow insolvency because it did not need to do so. Whilst he would be entitled to repeat the submissions made above as to the lack of information and the concerns as to the Company's financial position, nonetheless the fact is that the Company has been able to keep going since 2015 with no evidence of an inability to pay its creditors as they fall due. Whilst it may be suspected by the Applicant and the Petitioners that the Company has used the funds injected by the private investors to keep itself afloat, whilst buying time by not paying the Applicant what it considers is properly due to it, that is not sufficient in my view to demonstrate cash-flow insolvency.

F. Achieving the purpose of administration

33. Ms Lansbergen-Mills did not contest that this jurisdictional condition was satisfied, realistically in the light of the low evidential hurdle and the statement by the proposed administrators supported by a detailed letter from the proposed administrators. Whilst they do not suggest rescue as a going concern is reasonably likely, I accept that achieving a better outcome than winding-up is reasonably likely, given the greater opportunities reasonably available to the administrator to realise value from its assets.

G. Discretion

34. The Applicant's position, supported by the Petitioners, is that where the jurisdictional conditions for making an administration order are met, and where there are - they submit - very significant concerns about the conduct of the Company, specifically in relation to: (a) misrepresentations made to external investors such as the Petitioners in order to induced them to acquire shares at a substantial premium and in relation to its failure to transform the Company from a start-up into a successful business; (b) inter-connected dealings as between the Company on the one hand and Holdings and other connected parties and companies on the other; and (c) its failure to perform its promises to procure purchasers for their shares, the Court should exercise its discretion to make the order, to protect prospective investors and to allow the Company's affairs to be investigated as quickly as possible by independent insolvency professionals.

35. The Company's position is that it would be wrong to exercise the discretion where the Applicant is a contingent creditor who will receive nothing from the administration anyway, and where to make an administration order at a time when the Company is still actively seeking external funding will inevitably result in the closure of a business which does have a valuable product and business opportunity, in circumstances where the majority of the shareholders support the Company's management and plans. The Company contends that the allegations about the Company's conduct can only properly be resolved under the J&E Petition and that it would be wrong for the court to rely upon those untested allegations as a ground to justify making an administration order on this application. It submits that the Applicant's conduct in pursuing this application against its own commercial interests is only explicable on the basis that its real objective is to place pressure on the Company to agree to pay the monies due under the third payment in advance of receipt of the £1M funding trigger agreed, and that this represents an abuse of the process.

36. Mr Doyle and My Mundy spent some considerable time in their written and oral submissions in taking me to the evidence as to the misrepresentations made by the Company in the course of corresponding with would be investors and existing shareholders such as the Petitioners. It is neither necessary nor appropriate for me to refer to them in any detail. It suffices to say that the material does include a number of forecasts as to the future, in terms of projected business opportunities and contracts being progressed by the Company, and in terms of its financial performance, which have not yet materialised in the 6 years since the Company began actively soliciting external investment as a start-up. It also includes a number of references to the Company having had valuations which supported its forecasts. The essential complaint is that there is no hard documentary evidence to prove either than the Company ever in fact obtained these valuations or had ever progressed to serious negotiations, let alone crystallised contracts, with any of the blue-chip businesses and institutions to which it referred.

37. It is fair to say that they put together a powerful case. The material does indeed include content of this nature and it is plain that the projections and forecasts have not materialised and that no actual documentary evidence has been provided. It is clearly the case that the

accounting information which has been provided does not explain the basis of the transactions between the Company and Holdings and other associated companies and person whereby the Company now has a very substantial apparent indebtedness to those companies and persons. However, it is also clearly the case that these allegations, which were dealt with at a fairly high level in Mr Halliday's witness statement in support of the application, are not accepted by the Company in its evidence in reply. The J&E Petition and supporting evidence was only exhibited to Mr Halliday's witness statement in response, dated only 8 days before the hearing with the Easter weekend intervening, in which he accepted that he was not in a position to give first-hand knowledge of the truth or accuracy of what was said.

38. In the circumstances, I accept Ms Lansbergen-Mills' submission that it would be unfair to draw firm adverse inferences against the Company, when exercising the discretion whether or not to make an administration order, in relation to the specific matters alleged in the J&E Petition. It does appear to me that these are matters which are really for determination in the J&E Petition. I accept that the matters raised are serious allegations, which appear to be supported to some extent at least by the documentary evidence. I also accept that the fact of these allegations is a relevant consideration in the exercise of the discretion, as is the obvious need for these allegations to be investigated and determined, if appropriate by an insolvency professional in an insolvency procedure. However, this is not a public interest winding-up petition and I am not, for example, being asked to appoint a provisional liquidator on the basis of a detailed investigation by an independent qualified professional in respect of which the Company has been given a fair opportunity to put in a detailed rebuttal. I do not, therefore, consider that these factors have the weight which Mr Doyle and Mr Mundy invite me to place upon them.

39. I do however consider that this is not a case where the Applicant has no genuine interest in the Company going into administration and that this application is not solely an illegitimate device to exert pressure on the Company to force it to renegotiate the Settlement Agreement. Whilst it is true, as I have said, that if the Company goes into administration the prospect of ever being paid the third payment becomes vanishingly remote, I am prepared to accept that if the Company went into administration the Applicant would be at least entitled to investigate the submission of a claim based on misrepresentation or breach and to support an investigation by the administrators as to any grounds for recovery of Company assets against Holdings or - perhaps more profitably - persons or companies associated with it. I do not, therefore, consider that the principles summarised in Maud are engaged here.

40. However, I must return to clause 2 of the Settlement Agreement and consider whether this application is being brought contrary to its terms which, as will be recalled, provide that the Applicant's "sole right shall be for enforcement of the Settlement Agreement". The question is whether or not this application for an administration order constitutes enforcement of the Settlement Agreement. The case has not been advanced on the basis that this amounts in itself to a contractual bar on bringing the claim or that it of itself makes the application an abuse, but on the basis that it is a powerful factor against the exercise of the discretion to make an administration order.

41. It is common ground that well-established principles of contract construction apply to this exercise. In my judgment when properly applied they result in the conclusion that this application does offend against clause 2. My reasons are as follows:

(a) Clause 3.1 requires the Company to make 3 payments, only the third of which is subject to a contingency.

(b) If the Company had failed to pay any of those payments, including the third if the contingency had materialised, it cannot seriously be suggested in my judgment that issuing an administration application or presenting a winding-up petition based on that non-payment would not amount to enforcement of the Settlement Agreement. Whilst it is a class remedy, as opposed to an individual claim for the specific sum, and whilst many applicants or petitioners in such a position may not expect to see much, if anything, from the process, nonetheless they are still exercising a lawful right to enforce the obligation to pay.

(c) It would follow in my view that once the contingency had arisen then an administration application presented on that basis would amount to enforcement. As would, in my view, an administration application presented on the basis of an alleged breach of an implied term giving rise to a claim for damages - the example given earlier of an alleged breach of an alleged implied terms to use reasonable endeavours to bring the Fund Raise to a conclusion.

(d) However, in my judgment to issue an administration application on the basis that, even though the third payment was not due, nonetheless the Company was insolvent (and the purpose of administration condition was also satisfied), cannot amount to enforcement of the Settlement Agreement. In my judgment there is a small but significant difference between the two situations, which does not depend upon the particular factual circumstances as they exist at the time of the administration application, but upon the fundamental difference in law because seeking to enforce a present obligation, which can of course be done, and seeking to enforce a contingent obligation, which cannot be done precisely because it is still contingent. The same reasoning would apply if the Applicant had issued an administration application before the date the second payment had become due.

(e) On this analysis I accept that it is not relevant that because of the nature of the contingency it is virtually inconceivable that the liability to make the third payment could ever arise if the Company went into administration. That is because this is a commercial inconceivability, rather than a legal impossibility, and that it is at least conceivable that an administration application resulting in the company continuing as a going concern might achieve that outcome - if for example the Company was transferred to a purchaser which was able to procure the necessary fund raise.

(f) Nonetheless, what is conclusive in my judgment is that seeking to put a company into administration, by reference to a liability or breach which is not said to have arisen under the Settlement Agreement as at the time of the application or hearing, cannot amount to enforcement of that agreement.

42. In my judgment this factor alone, when put into the balance with the other relevant considerations, justifies the conclusion that it would not be a proper exercise of the discretion to make an administration application. However, there are further factors which not only support that conclusion but would, in my judgment, justify the same decision even if I had not reached the same conclusion in relation to clause 2.

43. In summary, in my judgment it would not be right to make an administration order based on the third payment as a contingent liability in circumstances where:

(a) The third payment will never realistically in this case ever fall due once the administration order is made.

(b) The Applicant is unlikely, based on current evidence, to receive any substantial payment in the administration through proving a claim for misrepresentation or breach and being paid through the return of monies to the Company from Holdings, or persons or companies connected with it, when one considers realistically: (i) the amounts involved; (ii) the other likely creditor claims (including misrepresentation claims from other private investors); and (iii) the time and cost of pursuing claims for the return of monies as well as the likelihood of an actual recovery. Whilst I appreciate that this is no more than speculation at this stage, what is clear is that the Applicant has not put a coherent researched strategy for recovery on this basis before the court, so that it cannot fairly be described as anything more than speculative.

(c) The Company is still actively pursuing the fund raise. Whilst I accept that the evidence is less than detailed, the evidence of Mr Davis is supported, at least as regards the continuing discussions with a prospective investor, by the letter from Hill Dickinson. Moreover: (a) as I have said, there is no evidence that the Company is unable to pay its debts in the short to medium term, such as to justify a conclusion that it will be forced into insolvency before it could realistically convert any opportunity into an agreement; (b) the application is not supported by any other creditors; and (c) the existing management appears to be supported by the majority in number and value of the shareholders excluding Holdings, as is revealed by the letter written on 16 September 2020 following the Company general meeting held the previous day so that, even allowing for the position of the Petitioners and the apparent support from another private investor, this is not a case where it is clear that there is little no support from external investors. It may be that the Company is unlikely to obtain the funds it seeks, and I understand the Applicant's scepticism given the history. However in the absence of hard evidence of the financial position of the Company significantly worsening it does not seem to me to be proper to allow the Applicant to put itself in a different position from that which is willingly entered into in November 2020 when it concluded the Settlement Agreement and agreed to wait for its money and to take the risk that the funds would not necessarily materialise in weeks.

(d) The serious allegations made against the Company in the J&E Petition ought to be properly investigated in that forum. Whilst I appreciate that the Company is contending that the Petition should be struck out as an abuse, I am not in a position to investigate that.

Further, whilst I also appreciate that a J&E Petition will be a far slower process to bring to a conclusion than will be this administration application, that rather tends to support the argument that it would be wrong to short-circuit that process by relying on these allegations, which have not been independently investigated or tested, to justify placing the Company into administration when otherwise factors militate against that course. Finally, whilst sometimes the need for urgent investigation by an independent insolvency professional and/or the need to protect further investors would assume importance, here there is no real evidence that the former is of real urgency (since on Mr Doyle's analysis funds have already been effectively transferred to Holdings and/or to persons or companies connected with it and there are no more funds in the Company) and there is no evidence of the Company presently actively seeking investment from gullible small investors by making plainly misleading representations.

44. Thus, for all of these reasons, the application fails.