

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No.: FSD 197 of 2020

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF GREEN DRAGON GAS LIMITED

IN CHAMBERS



Appearances: Mr. Richard Gillis Q.C. instructed by Mr. Matthew Dors and Mr. Rupert Stanning of Collas Crill for GIC Private Limited, Petitioner

Mr. Tom Smith Q.C instructed by Mr. Sebastian Said and Mr. Daniel Hayward-Hughes of Appleby for Nordic Trustee AS, Majority Creditor

Mr. Mark Goodman of Campbells for Green Dragon Gas Limited, the Company

Before: The Honourable Mr. Justice Robin McMillan

Heard and Decided: 8 September 2021

Reasons for Judgment Delivered: 22 September 2021

HEADNOTE

Considerations in refusing adjournment of a winding up petition – The importance of distinguishing between a company and a related group of companies – The need for finality in legal proceedings.

REASONS FOR JUDGMENT

Introduction

1. On 7 April 2021 the Court delivered a Judgment in this matter following a hearing on 8 and 9 February 2021.
2. The Judgement which was a lengthy Judgment of 298 paragraphs and 119 pages specifically dealt with a preliminary issue in the proceedings, namely:

“whether there is a bona fide and substantial dispute as to the validity of the Petitioner’s purported guarantee, which should lead to a dismissal or adjournment of this Petition, so as to allow that dispute to be resolved in the appropriate type of proceedings, and forum.” (the “Preliminary Issue”).”

3. It would of course have been open to the parties to request that the Court address additional or other issues for the purpose of determining whether there was a *bona fide* and substantial dispute. However, at the material time the only issue identified for judicial determination was the issue set out in paragraph 2 above.
4. Ultimately the Court came to this conclusion at paragraph 298 of the Judgment:

“Conclusion

298. *Having reviewed and considered both the evidence and the submissions in this case and having due regard to the relevant principles of law and their application the Court finds that there is a bona fide substantial dispute as to the validity of the Petitioner’s Guarantee. Accordingly after duly weighing all of the circumstances the Court directs that the Petition dated 4 September 2020 should be dismissed.”*



5. Thereafter the Court indicated to the parties that a relatively short hearing would be convened for the purpose of finalising the terms of the consequent Order.
6. For reasons which have not been entirely shared with the Court this hearing was in fact postponed. However, it is important to state that it is this hearing which eventually took place on 8 September 2021, notwithstanding an initial administrative request from the attorneys representing the Petitioner that it should further be adjourned.
7. The Adjournment Application was in fact renewed by the Petitioner at the hearing itself.
8. Following the Court's decision on 8 September 2021 to refuse an adjournment, the Reasons are accordingly herein set out.

The Application for an Adjournment

9. The terms of the Application are found in a letter from the Petitioner's attorneys to the Court dated 30 August 2021. It is necessary to set out parts of the letter in some detail.
10. In part the letter states as follows:

"The application in this letter

This letter comprises an application by GIC Private Ltd. (GIC), the Petitioner, for an adjournment of the 8 September Hearing (the Application). The purpose of the 8 September Hearing was to deal with consequential orders following the Court's judgment of 7 April 2021 (Judgment) regarding the existence of a bona fide and substantial dispute as to the validity of GIC's guarantee from GDG (the Validity Issue) and consequent dismissal of the petition. In addition to the issues of costs and undertakings, it was probable that the Court would have been asked to address at the 8 September



Hearing the issues of (a) whether GIC requires permission to appeal and / or (b) whether such permission should be granted.

The reason for the Application is that on 24 August 2021 the directors of GDG (Directors) provided GIC with new information (under cover of correspondence expressed to be without prejudice but not accepted as such by GIC) as to the structure of debt within the corporate group of which GDG forms part. That information contradicts the debt structure information the Directors had previously given to the Court and GIC and which provided the basis of the Judgment, which might now need to be revisited.

If that new information is correct, it may well be that the Validity Issue is, and always was, largely academic. It was previously the expressed understanding of all parties and the Court that any net proceeds of sale would flow first up through GDG, such that the validity of the competing guarantees of Nordic Trustee A.S. (NT) and GIC at the GDG level would have been of critical importance. However, the new debt structure information recently provided (if correct) suggests that the first \$131m of net proceeds of sale would by-pass GDG and be paid in discharge of the newly disclosed inter-company loan from a company higher up the group (Greka Gas China Ltd, or GGC, which is also under the control of the Directors) where only NT has the benefit of a guarantee. Furthermore, the prospects of NT being adversely affected by GDG's granting of a guarantee to GIC would appear to have been only ever highly improbable in theory, and totally non-existent on the facts.

Unless and until the correctness, or otherwise, of this newly disclosed debt structure information is established, the Court cannot sensibly deal with the consequential orders. In conjunction with the bleak outlook recently provided by the Directors in their reports in respect of the realisation prospects, the question of permission to appeal may now be rendered largely academic. As for

the costs, if the petition proceeded on a false basis because of incorrect information provided by the Directors as regards the inter-company debt position, that might have a profound impact on the appropriate costs order.

Whether or not the new debt structure information is correct will also impact on whether the Judgment was given on an incorrect basis including on matters as fundamental as whether NT was (as claimed) the "Majority Creditor" of GDG."

11. The relief which is then sought is as follows:

"The relief sought

In the light of the foregoing, the Court is invited to adjourn the 8 September Hearing so that the Directors and NT can confirm their respective understandings of the current and historic debt structure of GGC, GDG and Greka Energy International BV (GBV). Once that has been done, the Court and the parties will then be better able to determine the implications of that further information on the Judgment and on the issues outstanding, and on the necessity for further enquiry.

Accordingly, GIC seeks an order in the following terms:

- 1. The 8 September Hearing be adjourned.*
- 2. Mr Borrelli and Mr Lundberg (or an appropriately authorised representative of NT) shall each file and serve by 15 September 2021 a duly sworn affirmation confirming:
 - a. their respective understanding of the current and historic debt structure of GGC, GDG and GBV (including any changes in that debt structure since GDG's incorporation);**



- b. *when and how that understanding has changed (if at all) since the appointment of Mr Borrelli and Mr Mansfield as Receivers of the shares issued by GGC to G3 Exploration Ltd.*
3. *Absent agreement as to further directions and the re-listing of the hearing referred to in paragraph 1 above, the parties shall file submissions as to appropriate directions within 14 days of receipt of both affidavits referred to in paragraph 2 above.*
4. *Costs reserved.*

GIC seeks the above orders as it cannot see how the consequential issues can properly be dealt with unless and until the relevant information regarding the debt structure (and the Directors' and NT's knowledge of that debt structure) is provided to the Court, and, if necessary, further enquiries are made that may be relevant to, inter alia, costs."

The Background

12. At this point it may be helpful to address by way of background the role of Green Dragon Gas Limited (*"the Company"*) (*"GDG"*) within the wider scheme of what is known as the G3E Group.
13. The Court has previously set out the corporate structure at paragraphs 5 – 9 of the Judgment:
- "5. GDG carries on business as part of a group of companies (" the G3E Group") that specialise in the exploration and development of coal bed methane gas in the People's Republic of China ("PRC"). G3 Exploration Limited ("G3E"), formally known as Green Dragon Gas Ltd is the Holding Company of the G3E Group and it is currently in official liquidation.*

6. *G3E is the ultimate holding company of the G3E Group. G3E's immediate subsidiary is Greka Gas China Ltd ("GGC").*
 7. *GGC's immediate subsidiary is GDG, the Company which is the subject of this Petition.*
 8. *G3E itself is now in Official Liquidation with Messrs Lawson and Kennedy of Alvarez and Marsal having been appointed as Joint Official Liquidators ("the JOLs").*
 9. *Messrs Borrelli and Mansfield of Borrelli Walsh ("the Receivers") have been appointed as Receivers pursuant to a Share Mortgage over the shares in GGC, securing the Majority Creditor's bond finance to G3E ("the NT Bonds"). The Receivers are now Directors of both GGC and GDG ("the Directors")"*
14. The Court adds at paragraph 13:
- "13. GDG's immediate subsidiary is a Dutch company, Greka Energy ("International") B.V. ("GBV"). GBV is the Group's main operating subsidiary, and a party to a number of production sharing contracts ("PSCs") with two Chinese State Owned Entities relating to the Group's exploration and development of coal bed methane in China. It is the PSCs which are the Group's most valuable assets."*
15. Accordingly it is in relation to this corporate structure that the Petitioner's attorneys have made the comments contained in their letter.
 16. What is clear at this juncture is that the comments go far beyond the original terms of reference which led this Court to the Judgment dated 7 April 2021.



17. A copy of a further letter from the Petitioner’s attorneys to the attorneys for GDG and dated 6 September 2021 contains a request for information. It states:

“We refer to the forthcoming hearing on 8 September 2021 and your email to the Court dated 1 September 2021.

We write to ask the Directors to confirm to the best of their knowledge the amount of any debt or other liability outstanding from GBV to GGC as at 9 July 2018, being the date of the GIC Guarantee, and (if different) on 1 September 2021.

In the light of your email to the Court dated 1 September 2021 please also identify where in the evidence currently before the Court that indebtedness was identified and quantified.”

18. Once again, it is noteworthy that the request although made to the Directors of GDG is in relation to debt arrangements between GBV and GGC. Perhaps not surprisingly no reply was received.

The Nature of an Adjournment

19. Insolvency proceedings are class actions designed to secure distribution of an insolvent’s assets *pari passu* between all its creditors. They are not merely a debt collection process. The primary purpose of the proceedings is to enable an independent person or persons to ascertain and preserve the debtor’s assets and to achieve that *pari passu* distribution.

20. This is a point made by Lewison LJ in the context of the law of bankruptcy at paragraph 16 in *Sekhon and another v. Edgington* [2015] 1 WLR 4435.

21. Then at paragraph 20 in bold type the learned Judge states:

“20. A decision whether or not to grant an adjournment is, of course, a discretionary case management decision and consequently, the judge's exercise of his discretion in this case cannot be impugned on appeal



except on the usual grounds for impeaching a judicial exercise of discretion.”

22. Equally importantly, Lewison LJ states at paragraph 22:

“22. Delay is inimical to all forms of litigation and especially so in a collective enforcement process such as insolvency. In my judgment, the judge was entitled to take into account the very late stage which the application was made. Even in ordinary civil litigation, late applications are frowned upon, as are applications for adjournments which delay the final resolution of the case.”

23. This Court would add that what is being sought here is not even a genuinely short adjournment leading to an outcome which is just, expeditious, economical and moreover timely.

24. Further evidence would be required, further directions would likely follow and a substantial further hearing at some indeterminate time in the future would ultimately ensue.

25. In *In the matter of G3 Exploration Limited (formerly Green Dragon Gas Ltd.)* Cause No. FSD 229 of 2019 (Unreported, McMillan J, 12 June 2020) this Court has adopted Lewison LJ’s comments at paragraph 26-27 of the Judgment.

26. This Court then adds at paragraph 28:

“28. In Re the General Rolling Stock Co., Ltd (1865) 34 Beav 313 Sir John Romilly MR describes the standing over of a creditor’s petition as an “indulgence”. Clearly it therefore arises as an exceptional event or circumstance.”

27. More normally of course a creditor would object to the standing over of its own petition rather than attempting to engineer it. In either instance the Court is entitled to exercise its discretion with a view to upholding the interests of justice and to deterring conduct which may at best be

described as opportunistic and potentially prejudicial to the fairness and finality of the legal process.

28. Having made these relevant preliminary comments the Court will review in more detail the legal submissions of the parties.

The Legal Submissions of the Petitioner

29. In the Skeleton Argument of the Petitioner dated 6 September 2021 the Petitioner summarises its position at paragraphs 4-7:

“Issue (1): The Consequentials Hearing should be adjourned.

(i) The Issue

4. *The Court will have already seen from the correspondence passing between the parties the basis upon which the Court is asked to adjourn the Consequentials Hearing. GIC’s letter application is at HB5-82 / 1-4. The order GIC asks the Court to make is at HB5-82/5. GDG’s response is at HB5-81 / 265-266. For the avoidance of doubt, the Court is not being invited to review the Judgment during the hearing on 8 September 2021. If the requested order is made, that will occur at a subsequent hearing after the requested information has been provided.*

5. *The essence of the point is this.*

(a) On 24 August 2021, the directors of GDG (the “Directors”), and Mr Borrelli in particular, provided GIC with new information, under cover of correspondence expressed to be without prejudice, as to the structure of the corporate debt within the G3E group, of which GDG forms a part.



- (b) *By way of reminder of the structure of the G3E group, the Court is invited to look at the corporate structure chart at [HB2 – 27 / 3]. It shows (towards the left of the page) where GGC, GDG and GBV sit within the group.*
- (c) *The new information provided by Mr Borrelli contradicts the debt structure information the Directors had previously given to the Court and GIC and which provided the basis of the Judgment which might now need to be revisited.*
- (d) *It was previously the expressed understanding of all the parties and the Court that any net proceeds of sale would flow first up through GDG such that the validity of the competing guarantees of NT and GIC at the GDG level would have been of critical importance. Indeed, it was on that basis that NT described itself as the “Majority Creditor”.*
- (e) *However, the new debt structure information recently provided (if correct) suggests that very significant sale proceeds would by-pass GDG and be paid in discharge of the newly disclosed inter-company loan from a company higher up the group, namely GGC. Only NT holds a guarantee from GGC such that only NT would benefit from the sale proceeds paid direct to GGC.*
- (f) *The consequence of the new information (if correct) is stark. It may well be that there was never any real competition between NT and GIC at the GDG level. That is because NT would receive prior payment of its*



bond at the GGC level, and because it would only be if there were any surplus proceeds that any money would flow up to GDG.

- (g) The new information (if correct) is of importance to the question of GDG's solvency. As the Court will recall, and as discussed further below, one of the key issues considered in the Judgment was whether GDG was insolvent (or near insolvent) at the time the GIC Guarantee was given such that creditors' rights were engaged – the so called Sequana issue. In that context, NT placed much reliance on GDG's potential liability under the uncalled NT guarantee from GDG. However, if the new information is correct, NT may never have been a significant creditor of GDG at risk of prejudice from the GIC guarantee because its bond claims against the G3E group would be satisfied first at the GGC level in consequence of its guarantee from GGC and the fact that the sale proceeds would by-pass GDG and flow straight to GGC under the newly disclosed inter-group indebtedness. That is also of critical importance to one of the other key issues in the Judgment, namely whether the GIC Guarantee was issued in breach of fiduciary duties.*
- (h) If the new information is correct, it may well be that the dispute regarding whether or not there is a bona fide and substantial dispute regarding the validity of GIC's guarantee from GDG ("Validity Issue") is, and always was, largely academic.*

- 6. In its response email to the Court dated 2 September 2021 Campbells, acting on behalf of the Directors, seeks to suggest that: (i) the "new information" is not new*

information; and (ii) it is irrelevant to any of the issues to be determined at the Consequential Hearing. Both points are obviously wrong.

(ii) *The impact of the new information*

7. *As regards the first, the new information clearly falsifies the information the Directors and NT previously put before the Court on the hearing of the petition and in the related G3E proceedings, as well as the information and assurances provided by the Directors throughout their appointment. GIC has sought to identify some examples below, notwithstanding significant time pressure due to paternity and medical leave of the principal fee earners of Collas Crill (GIC's counsel):"*

30. At this juncture the Court comments that the allegation of clear falsification of information previously put before the Court is unwarranted. In any event, this Court has been concerned with the prospective winding up of GDG and not as such with *"the structure of corporate debt."* If NT is a creditor, it is a creditor. Whether it is a *"significant creditor"* is not a matter of law or fact with which this Court has been materially concerned.

31. At paragraph 7(a) and 7(b) the Skeleton Argument continues:

"(a) Mr Lundberg's first affirmation (dated 3 December 2019) in the G3E proceedings (FSD 229 of 2019) exhibited at page 8 of FL-1 a structure chart of the G3E group, showing intercompany debt owed by GDG to G3E. This same structure chart was also exhibited to Mr Lundberg's first affirmation (dated 9 September 2020) filed on behalf of NT in these proceedings at page 1 of Exhibit FL-1 [HB2-31 / 1]. There is, critically, no indication of any debt owed by GBV to GGC but only from GDG to G3E.

(b) Mr Borrelli's first affirmation in the G3E proceedings (dated 5 December 2019) stated at [50]: "[the GIC Guarantee] is significant in that, should the GIC Guarantee be valid, GIC

will be entitled to share alongside the Bondholders in any proceeds generated from any of the sale of the Group's assets". That statement is inconsistent with the new information provided: if that information is correct, GIC would only be entitled to share (if indeed the Bondholders / NT had a residual interest) only once the Bondholders / NT had recovered a very significant sum via GGC."

32. However, as counsel for the Company has pointed out, the chart to which reference is made is contained with a document dated 22 January 2020 headed "*Draft for Discussion Purposes*". Obviously, it was a draft document based on information available at that time. In any event, at paragraph 61 of the draft document, there is reference to "*significant amounts of intercompany transactions between GBV and the associated companies controlled by Mr. Grewal.*"
33. In the circumstances, express reference to falsification appears to this Court to be entirely inappropriate.
34. Indeed, the Court notes that in the schedule to paragraph 61 there is reference to intercompany transactions of GBV with the associated companies controlled by Mr. Grewal and a figure of RMB 97,363,737 seemingly payable to GGC is actually set out.
35. The Petitioner goes on to state at paragraph 9(a) of the Skeleton Argument that if this "*new information*" is correct NT's interests would not have been diluted by the Guarantee but would have been protected by the prior recovery NT received at the GGC level in consequence of the "*newly disclosed*" GBV/GGC indebtedness. Frankly, this has no bearing on the narrow preliminary issue which the Court was specifically asked to resolve.
36. The Petitioner raises at paragraph 9(b) whether GDC was cash flow insolvent if NT was to call its guarantee, because NT would make prior recoveries at the GGC level. Once again, the Court has no reason to revisit these issues, nor in the premises any means to resolve disputes of this alleged



factual nature. That would be much better accommodated by a trial hearing, to the extent that the information may be relevant at all.

37. The third point made at paragraph 9(c) is that NT is not the Majority Creditor but in all likelihood only a contingent minority creditor. The Court reminds itself that apart from the semantic character of the point the Court's present responsibility lies in relation to GDG and not in relation to the G3E Group at large.

38. The Skeleton Argument submits that the Court has jurisdiction to review its own judgment:

"12. Courts clearly have jurisdiction to review their own judgments even when (as in this case) they have been handed down. The law in this area (including the so-called "Barrell" jurisdiction) was reviewed by the Supreme Court in Re L and B [2013] UKSC 8 [PAB-5]. In brief:

(a) The Court has jurisdiction to review its own judgment at any time before the relevant order is drawn up and perfected [16].

(b) The exercise of the jurisdiction is not dependent on the existence of exceptional circumstances. Rather it should be exercised in accordance with the overriding objective to deal with cases justly [27].

(c) One of the circumstances in which it has been recognised that it may be right to re-open a judgment is where new facts have been discovered after judgment [24] and [27]."

39. The Petitioner addresses the alleged "without prejudice" status of the information at paragraph 15(a):

"The statement of fact regarding the GGC/GBV debt structure does not attract privilege even if contained in without prejudice correspondence. It is an assertion of a factual truth regarding

a matter singularly within the knowledge of the Directors and Receivers. It was not made by way of a negotiating statement, and the fact that it was said in the context of a without prejudice negotiation is irrelevant to its truth. As Lord Griffith's held in Rush & Tompkins v Greater London Council [1989] A.C. 1280 at 1300 E, "There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the cause is admissible even if made in the course of negotiations for a settlement" [PAB-8]. Lord Griffiths then referred to Waldridge v Kennison (1794) 1 Esp. 142 [PAB-9] which he regarded as an exceptional case and which should not be allowed to whittle down parties' ability to speak freely when seeking compr[om]ise. He then went on, "If the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence". The Directors' statement of fact regarding the GGC/GBV debt structure was not an "admission of facts made for the purpose of the compromise". It was an "independent fact" in no way connected with the merits of the cause. Regardless of the merits of the cause, the state of the GGC/GBV debt is what it is. Accordingly, the statement is admissible."

40. At one moment the Petitioner asserts that the information is merely the admission of an independent fact in no way connected with the merits of the cause. At another moment the Petitioner seeks to use the same information if it is ruled admissible for a variety of purposes directly connected with the merits of the cause as it sees them. In the opinion of the Court, this approach would be illogical and unconscionable. The Court declines to admit the evidence, or to consider admission the evidence, at this stage and on this basis.
41. Alternatively, if and to the extent that GDG has already provided the information or some of it in open form the Petitioner was already free to use it in whatever way it wished or not to use it as the case may be.



42. The Petitioner disputed that GDG was likely to become insolvent. Indeed it appeared to assert that even though at the time of the Petition being filed GDG was insolvent subsequently it ceased to be arguably so or probably so. As to what those respective time periods are, the Court declines to speculate. However, if it is being alleged that currently GDG is not insolvent, then of course that would have some implications for whether the Company should be wound up in any event. The rigours of a trial are surely necessary to test these speculative and perhaps inconsistent hypotheses in relation to the Petitioner's underlying debt claim.
43. The Court moreover does not intend to address all of the arguments raised by the Petitioner, given that many of them and possibly most of them have little or nothing to do with the actual discretion to grant an adjournment.
44. In oral submissions, Mr. Gillies Q.C. emphasised that at the GDG level the Majority Creditor would be paid in full. He added that the GIC Guarantee accordingly was not prejudicial to the Majority Creditor.
45. Complaint was also made that the significance of this was not brought to the attention of the Court. The real question, however, is whether such an arrangement has any bearing whatsoever on the preliminary issue previously identified.
46. In other words, is it correct to look only at the affairs of GDG for the purpose of the hearing which has been concluded and the Judgment which has been handed down, or one must look more broadly as invited at the affairs of the G3E Group?
47. The Court has great practical and legal difficulty in acceding to the broader commercial approach urged upon it in terms of what is relevant. Indeed Mr Gillies' arguments come very close to asking the Court to ignore the concept of corporate identity itself.

The Legal Submission of the Majority Creditor



48. The Majority Creditor’s Skeleton Argument dated 3 September 2021 begins at paragraph 1 with a salutary reminder that the Court directed the hearing to take place as a relatively short oral hearing for settling the terms of the Order.
49. As for the admissibility point, the Majority Creditor states at paragraphs 23-25:
- “23. In an e-mail to the parties on 26 August 2021 [HB5/80/259], the Petitioner said: “GIC was informed on the 24 August by the Directors that GBV owes GGC USD131m and owes nothing to GDG. This is contrary to previous information provided by the Directors. It is also relevant both to the issues of costs and the undertakings.”*
- 24. The Court will recall that on 30 August 2021, the Petitioner then made an application for an adjournment by letter [HB5/80/ 262], in which it again referred to the same information and expanded on the alleged impact on the issues before the Court at this hearing on settling the order, as well as the proceedings as a whole.*
- 25. In the Majority Creditor’s submission, the appropriate way to deal with any points made on the basis of this information, is to disregard both the evidential material relied upon, and the submissions improperly built upon that material, because:*
- (1) The information was provided in the context of ‘without prejudice’ communications;*
- (2) Those communications were between GIC and the Directors at a time when they were engaged in attempts to settle the disputes between GIC and the Company;*
50. The Court has no difficulty in accepting the force of these submissions and having heard the Petitioner’s self-contradictory reasoning offered for admitting fresh evidence, the Court is satisfied that any such initiative however it may be described is entirely without merit.



51. The Majority Creditor continues at paragraph 26 to develop a point which the Court has previously emphasised namely, the original decision of the Court is in no way affected by these peripheral contentions.

52. Paragraph 26 states:

“26. In any event, even if the information in question is truly “new” (which is not accepted), it is clearly entirely irrelevant to the issues which were decided by the Court (against GIC) in the Judgment and so equally irrelevant to the way in which the Court should now decide the consequential issue of costs.

(1) GIC’s assertions as to the alleged effect of the information on the simple issues before the Court of settling the Order are entirely misconceived, suggesting the hearing of the preliminary issue “may have proceeded on a false basis”, and that there might be a “profound impact” on the appropriate costs order [HB5/81/2]. Neither point is correct since, whilst it may be that the information to which GIC refers has commercial implications as to priority of payment among creditors at different levels in the structure, that issue is obviously not, contrary to the Petitioner’s allegation, the “basis of the Judgment” [HB5/81/2].

(2) Instead, as the Court knows, the Judgment was based on an assessment of evidence and law relating to the purported granting of the guarantee in favour of the Petitioner, and whether there was a substantial dispute as to its legal validity. None of that is in any way affected by the points now sought to be made by the Petitioner.

(3) Indeed, when the Petitioner says “the prospects of NT being adversely affected by the granting of a guarantee to GIC would appear to have been only ever highly improbable...” [HB5/81/2], the Petitioner fails to recognise that the question

before the Court on the preliminary issue was whether there was a bona fide dispute as a matter of law as to the validity of the guarantee.

(4) The legally relevant question was not whether there was any adverse effect on NT, but whether there was an adverse effect on GDG, as part of the question of whether Mr Grewal breached his fiduciary duties to the Company, together with GIC's knowledge or reason to believe there was such a breach. The Petitioner does not even seek to suggest that the information it now relies on would have impacted on that question."

53. This final submission is especially important because throughout its Adjournment Application the Petitioner has confused and intermingled the affairs of GDG with those of the wider G3E Group.
54. In oral submissions Mr. Smith Q.C. asserted that the Adjournment Application was "hopeless".
55. Mr Smith contended that the structure chart on which the Petitioner claimed to have relied should not be treated as thorough it was a representation by Mr. Borrelli of there being no debt owing from GBV to GDC. In reality there had been serious difficulty in getting "accurate information from Mr. Grewal".
56. Mr. Smith also reminded the Court that his client had commenced a claim for declaratory relief in English proceedings in relation to this matter.
57. He reiterated that the evidence of an intercompany debt, even if technically admissible, had very little relevance to the issues which the Court actually decided. This is a comment which the Court frankly finds to be most compelling.

The Legal Submissions of the Directors of GDG

58. GDG summarises its position at paragraph 6 of GDG's Skeleton Argument dated 6 September 2021:



“6. Despite the Court confirming that it was not prepared to adjourn the matter and that the hearing would proceed on 8 September 2021, the Petitioner has indicated that it will include submissions on its adjournment application in its skeleton argument. Given this stance taken by the Petitioner, it is now also necessary for this skeleton argument to address the adjournment application. In particular:

- a. the fact that the information on which the adjournment application is based was provided to the Petitioner on a without prejudice basis and it is improper for the Petitioner to now seek to rely on that information without following the appropriate procedure for doing so;
- b. the information is not new. The Court can review the evidence filed in these proceedings without requiring the parties to file further evidence; and
- c. in any event, even if the Petitioner was able to rely on the without prejudice information and was correct that the information is new, it has no relevance or bearing on the consequential orders sought (i.e. costs and undertakings) for the reasons set out below.”

59. GDG’s position regarding the alleged new information comprehensively appears at paragraphs 13-17:

“13. Although the underlying basis of the rule is to exclude evidence of admissions, the concept of admissions must be given a wide meaning in this context so as in effect to include all matters disclosed or discussed in the without prejudice discussions concerned – see *Unilever plc v The Proctor & Gamble Co* [2000] 1 WLR 2436.

14. In *Unilever*, Walker L.J. said:

“... the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions

against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the Rush & Tompkins case [1989] A.C. 1280, 1300: “to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts.”

15. *The WP Email is clearly marked “WITHOUT PREJUDICE AND FOR SETTLEMENT PURPOSES ONLY SUBJECT TO CONTRACT” and is sent in response to a number of earlier emails also marked without prejudice, including an initial email from the Petitioner on 11 June 2021 that is marked “WITHOUT PREJUDICE”, a response from the Company on 14 July 2021 marked “WITHOUT PREJUDICE SUBJECT TO CONTRACT” and a further email from the Petitioner on 17 July 2021 marked “WITHOUT PREJUDICE”.*
16. *In the without prejudice email from the Petitioner dated 17 July 2021, the Petitioner says:*

Thank you for your proposal which we are considering. There are a few questions we have where either the position was not entirely clear, or where our evaluation of the proposal would be significantly assisted by the provision of some high level information (which of course we shall treat as confidential) (Emphasis added).



17. *The emails very obviously relate to settlement discussions between the parties, including in relation to reaching agreement on the Preliminary Issue (which is the subject matter of the Judgment and is also the subject matter of proceedings in England). As part of those settlement discussions and for the purpose of assisting the Petitioner in evaluating the settlements proposals, the Petitioner asked the Directors to provide the quantum of anticipated liabilities of GBV and provide a hypothetical distribution waterfall through GBV and the Company for hypothetical sale proceeds at hypothetical sale levels. It is the answers that were given to these question (some of which were hypothetical) in the context of those settlement discussions that the Petitioner now seeks to rely to form the basis of its adjournment application and costs submission.”*
60. The Court agrees with the logic of what has been set out, and once again it reminds itself that this subject is raised only in the context of an Adjournment Application by an unsuccessful Petitioner and not in the course of a trial where issues of relevance and admissibility can be fully canvassed.
61. In addition it is asserted that even if the WP Email is admitted the information about the GGC loan position is not new. This is elaborated upon at paragraphs 24-25:
- “24. *The Company does not waive privilege with respect to the WP Email, but can confirm that the WP Email confirms the amount owed to GGC by the Company and its subsidiaries is approximately US\$270m. The WP Email then provides a breakdown of the sum owed by the Company to GGC and the sum owed by GBV to GGC, which totals the US\$270m.*
25. *The Company has not, as suggested by the Petitioner, misrepresented the intercompany loan position to the Court. In an earlier version of a structure chart that was circulated in January 2020 (only four months after the appointment of the Receivers), the intercompany loan from GBV is not recorded. That is not a misrepresentation of the position – it is a*

structure chart prepared at a much earlier point in time and prior to receipt of any of the books and records of the Company and its subsidiaries. The Petitioner was aware that the Directors did not have the books and records of the Company or its subsidiaries at the time the earlier structure chart was circulated.”

62. The Court finds these passages to be both persuasive and cogent.

63. Indeed it seems to this Court that this entire Application is accurately summed up at paragraph 27:

“27. The Preliminary Issue determined that there was a bona fide substantial dispute as to the validity of the Petitioner’s guarantee, which is relevant to its debt at Company level and its standing as a creditor to petition at that level. This is unrelated to the liabilities and likely distributions to creditors of the Company’s subsidiary (at a different level in the Group structure) and at which the Petitioner is not (and does not claim to be) a creditor.”

64. A final consideration, which this Court has already fully recognised as valid and important, is set out at paragraph 29:

“29. Further, as the Petitioner and the Court know, at the time of issuing a winding up petition, a creditor does not ordinarily know the full financial position of the subject company or its intercompany loan positions, nor does it have knowledge of the likelihood of recoveries being made or the likely return it is to receive. Therefore, the suggestion that the Petitioner may not have issued the Petition had it known there was an intercompany loan recorded in the books and records of the Company is not believable. The Petitioner is seeking to use information it has discovered some time after the Petition was filed or with the benefit of hindsight to try and improve its costs position.”

65. In oral submissions Mr. Goodman denied that the information in question was new in any event.



66. Mr. Goodman also emphasised that the Directors had not acted to withhold disclosure and that considerable efforts had been made to stabilise the business affairs of GDG.

Conclusion

67. Notwithstanding the amount of material which the Court has been invited to consider and the extent of the written and oral submissions presented on behalf of the parties, ultimately the decision whether or not to grant an adjournment is a discretionary case management decision. It is one that arises at a very late stage of proceedings and in arriving at a fair, realistic and practical decision the Court has to bear in mind a variety of conflicting interests.

68. The Court must give significant weight to the precise nature of the preliminary issue which it has already addressed and which it has resolved. The Petitioner now seeks to come forward with a wider range of arguments and correspondingly a wider range of evidence. The narrow issue therefore is whether it should be allowed to do so in these proceedings, particularly in circumstances where winding up is not the natural or appropriate route for a *bona fide* and substantial dispute.

69. After weighing all of the factors ably identified by counsel for the respective parties, the Court is unable to see its way to granting an adjournment. There must be finality to these proceedings. The Application is refused.



MR JUSTICE ROBIN MCMILLAN

HONOURABLE JUDGE OF THE GRAND COURT