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 OPEN COURT

Appearances:	**Mr. Richard Gillis Q.C., Mr. Matthew Dors and Mr. Rupert Stanning of Collas Crill for GIC Private Limited, Petitioner**
	Mr. Tom Smith Q.C., Mr. Sebastian Said and Mr. Daniel Hayward-Hughes of Appleby for Nordic Trustee AS, Majority Creditor
	Mr. Mark Goodman, Mr. Guy Cowan, and Ms. Natasha Partos of Campbells for Green Dragon Gas Limited, the Company
Before:	**The Honourable Mr. Justice Robin McMillan**

Heard:	**8 and 9 February 2021**
Draft Judgement Circulated:	**29 March 2021**
Judgment Delivered:	**7 April 2021**

HEADNOTE

Whether there is a bona fide substantial dispute as to the validity of a petitioner's purported debt – The burden of proof – The interests of a company and the interests of the creditors in the circumstances of insolvency or near insolvency – The scope of contractual estoppel.

JUDGMENT

1. This hearing arises from an Order of the Court dated 14 October 2020 and confirmed on 15 January 2021 that the following issue be determined:

   "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."

2. A Petition was originally presented by GIC Private Limited ("GIC", "the Petitioner") on 4 September 2020 to wind up Green Dragon Gas Ltd ("GDG", "the Company") on the basis that it was unable to pay its debt to GIC, in the amount of US $69,249,411.12 as at 31 July 2020 (representing principal and interest but excluding enforcement costs). It is claimed that this debt is due under the terms of a guarantee provided by GDG to GIC ("the GIC Guarantee").

3. However, this Petition is opposed by Nordic Trustee AS ("NT", "the Majority Creditor"). It is also opposed by the current Directors of GDG, appointed by way of a Receivership.

4. In elementary terms NT asserts that there is a *bona fide* and substantial dispute as to the validity of the GIC Guarantee. In addition, the focus of the Receivers' objection is that there is no evidence of misconduct or mismanagement on the part of the Directors appointed by the Receivers as 100% shareholders such as to justify winding up and in any event that there is a *bona fide* substantial dispute as to the Petitioner's alleged debt.

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 is currently in official liquidation.

<u>The Background</u>

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, which is the company that 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").

10. The Directors are reporting to the Court and to the parties as to their work on a monthly basis, with further reports to be filed when there are any material developments. These reports have considerably assisted the Court.

11. The Directors have also provided a range of undertakings, protecting the assets of the Company, to which all parties and the Petitioner agreed, so as to allay any concerns that they were acting to the prejudice of the Company and creditors, although this remains an issue of apparent concern to the Petitioner.

12. Those undertakings were given, notwithstanding that the Company and the Majority Creditor neither conceded that the Petitioner was a creditor, nor that there was any reasonable basis to consider that the Directors had acted or would act to the prejudice of the Company and its creditors.

13. GDG's immediate subsidiary is a Dutch company, Greka Energy (International) B.V. ("GBV"). GBV is the G3E 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 G3E Group's exploration and development of coal bed methane in China. It is the PSCs which are the G3E Group's most valuable assets.

14. A helpful summary of the evidence previously filed on this Petition and relevant citations are set out at paragraphs 7 – 9 of the Majority Creditor's Skeleton Argument dated 4 February 2021 as follows:

"7. At the 13 – 14 October Hearing, the Court made an order for the winding up of G3E, declining to allow the GDG Petition to be used by the Petitioner to further delay the resolution of that long outstanding petition.

8. The Court further ordered the hearing before it today to be listed, to determine the bona fide substantial disputed debt issue, and set down directions for the exchange of evidence on 15 December 2020 (Majority Creditor), 25 January 2021 (Petitioner), and 1 February 2021 (Majority Creditor). The Court also granted leave for expert evidence on Norwegian contract law to be adduced.

9. Pursuant to those directions, and in addition to the evidence previously filed on this Petition, the Court has the following evidence before it, focusing on the disputed debt issue in particular:

(a) The Majority Creditor's Evidence:

(i) The First Affirmation of Mr Fredrik Lundberg, and Exhibit FL-1;

(ii) The Second Affirmation of Mr Fredrik Lundberg; and Exhibits FL-2 and FL-3;

(iii) The Expert Report of Professor Woxholth, Professor of Law at the University of Oslo, and Exhibits GW1 and GW2; and

(iv) The Third Affirmation of Mr Fredrik Lundberg, and Exhibit FL-4.

(b) The Petitioner's Evidence:

(i) The First Affidavit of Mr Jason Triplitt, and Exhibit JT-1;

(ii) The First Affidavit of Mr Justin Stock, and Exhibit JS-1.

(c) The Company's Evidence:

(i) The Fourth Affirmation of Mr Cosimo Borrelli, and Exhibit CB-5.

15. In terms of general perspective, an important point is made by the Majority Creditor at paragraph 12:

> *"12. First, and most importantly, the Court is not required to determine the dispute as to the validity of the Purported Guarantee. Consistently with the well-known case law set out below, and the terms of the preliminary issue drafted and approved in light of it, the function of the Court is merely to decide whether there is a bona fide substantial dispute as to the validity of the Purported Guarantee."*

16. The further related question is then raised as to whether the dispute is one whose resolution will require the sort of investigation that is normally within the province of a conventional trial and whether the circumstances are such as may require cross-examination on the Majority Creditor's or the Petitioner's evidence.

17. In order to address the issues raised it is first necessary for the Court to set out a chronology of the relevant events and then the relevant principles of the applicable governing law.

18. At this juncture it is important to note that the original Green Dragon Gas Ltd changed its name on 20 December 2017 to G3E, and that a new Green Dragon Gas Ltd entity, which is the Company and is the subject of these proceedings, was then incorporated on 2 January 2018.

The Chronology

19. On 2 June 2014, the Petitioner entered into a Bond Agreement with the G3E Group's ultimate holding company G3E, the latter issuing USD50m, 7% *"unsecured convertible bonds"* (the "GIC Agreement", "the GIC Bonds").

20. On 19 November 2014, a Bond Agreement was entered into between the Majority Creditor, as bond trustee and G3E, the latter issuing USD88m, 10% *"Senior Secured Callable Bonds"* (the "NT Bond Agreement", "the NT Bonds"). On the same day, Greka Exploration and Production Ltd ("GEP") (another indirect subsidiary of G3E) provided a guarantee with regard to the NT Bonds.

21. On 3 December 2014, G3E and the Majority Creditor executed a Share Mortgage over G3E's shares in GGC.

22. On 14 December 2016, the Petitioner entered into an Amendment Agreement in respect of the GIC Bonds, granting GIC a put option that could be used to require G3E to purchase the GIC Bonds ("the Put Option") and a Buy Back Option giving GIC the right to require G3E to purchase all G3E shares held by GIC at maturity. The final maturity date was extended from 30 May 2017 to 31 December 2020.

23. On 31 May 2017, the NT Bond Agreement was amended by an Amendment and Waiver Agreement ("the NT Bond Amendment Agreement").

24. On 23 June 2017, G3E sent the Petitioner an Amendment Letter, extending the Put Option exercise date to 27 October 2017, and amending its terms. Mr Grewal, for G3E, signed the letter, which included that: *"subject to our obligations in the senior secured bonds issued by the Issuer to Nordic Trustee ASA we have agreed in favour of GIC to use our reasonable endeavours to provide GIC with security over assets of the issuer or other assets reasonably acceptable to GIC, to secure the Issuer's obligations to GIC under the [GIC] Bonds…"*

25. On 5 October 2017, G3E sent the Petitioner a Comfort Letter stating that *"in anticipation of paying all [G3E] debt, we have initiated a sales process of certain assets"* and that, should it be implemented, sufficient cash would be allocated to settle GDG's obligations to GIC under the Put Option.

26. On 17 October 2017, Cooley UK LLP (acting for GIC) ("Cooley") sent G3E a Conditional Exercise Notice in respect of the Put Option seeking additional protection and payment of overdue interest.

27. On 23 October 2017, G3E send GIC an Amendment Letter seeking agreement to the withdrawal of the Conditional Exercise Notice on terms of cash payment, and agreement to negotiate to agree terms to provide additional comfort and security in relation to the GIC Bonds. There is no indication that this letter was ever countersigned as its terms required.

28. On 2 November 2017, G3E sent GIC what is now known as the "No Disposal Letter", stating that neither G3E nor its subsidiaries would sell or dispose of other material assets of any company in the G3E Group, or grant any interests or encumbrances; and *"other than the Nordic Bond extension, not to enter into any material agreement, or incur any material commitment which is not in the ordinary course of business and on arm's length terms."*

29. On 10 November 2017, Akin Gump Solicitors for NT entities sent an email to the Petitioner and Cooley, attaching copies of the Amendment Agreement and original NT Bond Agreement.

30. On 20 November 2017, the NT Bonds matured and should have been repaid on that date in the amount of 102% of the outstanding principal amount (i.e. of USD88m), together with all accrued and unpaid interest. From maturity to date, the NT Bonds have remained unpaid. As at 9 October 2020, in excess of USD142m was due and payable to the Majority Creditor in respect of the NT Bonds.

31. On 13 February 2018, the Majority Creditor sent formal notice to G3E that the undisclosed transfer of material Group assets that had been previously owned and controlled by GEP (the original guarantor under the NT Bonds) was in breach of the NT Bond Agreement. The Majority Creditor reserved its rights and informed G3E that it and Akin Gump *"will be in communication with you and your legal counsel to discuss immediate steps that are required to rectify the situation and to ensure that the Bond Trustee and Bondholders are put into the same legal and economic position they were before the Corporate Reorganisation"*

32. On 16 March 2018, GDG (and GGC) entered into a replacement Guarantee with the Majority Creditor in respect of the NT Bonds ("the NT Guarantee"), following the undisclosed transfer of material assets from GEP (the original guarantor under the NT Bonds).

33. On or about 6 April 2018, Mr. Triplitt of GIC and Mr. Stock of Cooley became aware of the existence of the NT Guarantee, following a call with Mr. Grewal.

34. On 9 July 2018, the Petitioner and GDG signed the GIC Guarantee which is relied upon as the basis for the alleged Petition debt in these proceedings. It is governed by English law, which at least for the purpose of the current proceedings is accepted as being materially identical to Cayman Islands law.

35. On 14 November 2018, a further extension letter was sent from G3E to GIC, stating that the Put Option date was extended further to 20 November 2019.

36. On 9 September 2019, the Majority Creditor exercised its rights under the Share Mortgage, and appointed the Receivers, who then affected a board cascade through the G3E Group including taking control over GDG.

37. On 17 September 2019, Cooley for GIC wrote to G3E confirming events of default under the GIC Agreement, relating to non-payment of interest on the GIC Bonds, and demanded payment of USD $64,635,761.11.

38. On 8 October 2019, the Majority Creditor was informed by the Receivers (by then the Directors of GDG following the above board cascade) of the granting of the GIC Guarantee.

39. On 14 October 2019, the Majority Creditor sent a formal reservation of rights letter to the Petitioner and GDG regarding the GIC Guarantee in the following terms:

"On 8 October 2019, the receivers appointed over the shares of GGC were notified that on 9 July 2018 GDG issued a guarantee in favour of GIC Private Ltd...in respect of the [GIC Bonds]. You will be aware that under the Bond Agreement [defined as amended], the Issuer [G3E] has undertaken not to, and shall ensure that no other Group company shall grant any loans, guarantees, or other financial assistance...to or for the benefit of any other Group Company, other than in relation to the [NT] Bonds (see clause 13.4.6...of the [NT] Bond Agreement).

Furthermore, you will be aware that under the [NT] Guarantee, GDG has undertaken not to, and shall ensure that none of its Subsidiaries shall

(a) incur create or permit any Financial Indebtedness (including guarantees other than the Permitted Financial Indebtedness (see clause 9.12...of the [NT] Guarantee).

(b) grant any loans, guarantees, or other financial assistance...to or for the benefit of any third party or other Group Company other than in relation to the Bonds (see clause 9.14(a)...of the [NT] Guarantee.

As such, the granting of the GIC Guarantee is in direct violation of the terms of the [NT] Bond Agreement and the [NT] Guarantee...We...reserve all our rights and the rights of Bondholders...including (without limitation) with respect to the granting of the GIC Guarantee, its validity and other matters arising in relation thereto." ("the Reservation of Rights Letter)."

40. On 7 November 2019, Cooley for GIC wrote to GDG demanding immediate payment of the sums then outstanding on the GIC Agreement with G3E, pursuant to the GIC Guarantee. As at 31 July 2020, the total indebtedness of G3E on the GIC Agreement was USD $69,249,411.12, excluding enforcement costs. As the Majority Creditor denied that the GIC Guarantee was valid, it has denied GDG has any such indebtedness to GIC.

41. On 19 November 2019, the Majority Creditor filed the G3E Petition, which was first heard on 11 December 2019 with the current JOLs appointed as Joint Provisional Liquidators ("JPLs") at that time.

42. On 9 June 2019, the G3E Petition came before the Court for the second time ("the G3E June Hearing"). During the course of the G3E June Hearing:

    (1) GIC sought to obtain confirmation from the Majority Creditor that its guarantee with GDG (seeking to secure the GIC Bonds), was accepted by the Majority Creditor as being valid.

    (2) Consistently with its position since the Guarantee was first discovered by the Majority Creditor (via the Receivers) in October 2019, the Majority Creditor did not confirm the GIC Guarantee with GDG was accepted to be valid, when that request was made by GIC.

    (3) The G3E June Hearing concluded with the Court granting a final four months adjournment of the G3E Petition. A hearing of that petition was then listed for 13 October 2020.

43. On 4 September 2020, with that final hearing approaching on the G3E Petition, GIC then presented a Petition for GDG's winding up, relying on the GIC Guarantee as the alleged Petition debt.

44. On 21 September 2020, the first Case Management Conference ("CMC") on the GDG Petition took place.

45. On 2 October 2020, the second CMC on the GDG Petition took place.

46. On 13 – 14 October 2020, the final hearing of the G3E Petition took place (winding up order made) and the first hearing of the GDG Petition took place (directions were given for this hearing) ("the October Hearing").

47. On 15 January 2021, the third CMC on the GDG Petition took place, leading up to the recent hearing to determine the preliminary issue of whether the Petition debt (the GIC Guarantee) is disputed on *bona fide* substantial grounds.

The Law Applicable to Disputed Debt Petitions

48. In this area of insolvency law the fundamental principle is set out by Lord Hoffman in *Parmalat Capital Finance v. Food Holdings* [2008] UKPC 23 at paragraph 9:

> *""If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute: see, for example, Brinds Ltd v Offshore Oil NL (1986) 2 BCC 98,916. But the Board does not find it necessary to examine the limits of the discretion..."*

49. The *Parmalat* case is a Privy Council decision made on appeal from the Cayman Islands Court of Appeal.

50. Similarly in *In re GFN Corp. Ltd* [2009] CILR 650 Vos JA states *inter alia* at paragraph 94:

> *"(b) The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a bona fide and substantial dispute as to the existence of the debt upon which the petition is based..."*

51. In French's *Applications to Wind up Companies*, Third Edition, a number of propositions which reinforce these *dicta* are found at paragraphs 7.515 – 7.518.

52. A representative selection of these relevant statements of law derived from the cited authorities is found at paragraph 18 of the Majority Creditor's Skeleton Argument:

> *"18. To like effect, are the following statements, cited by French:*
>
> *(1) "a winding up petition is not to be used as machinery for trying a common law action."*
>
> *(2) "it has been said over and over again that the presentation of a winding up petition is not a convenient, and often not a proper method of trying a disputed debt."*
>
> *(3) "the procedure of a winding up petition is not an appropriate course by which to attempt to resolve a disputed debt."*
>
> *(4) "the jurisdiction to wind up companies is not for the purpose of deciding a factual dispute concerning a debt which is sought to be relied on to found a petition."*

(5) *"the companies court is not to be the court which deals with disputed debts because...[it] is designed to wind up insolvent companies in the public interest, not as a way of getting a dispute between companies in the marketplace on before a court quickly."*

53. The Court considers these specific guiding principles to be of considerable assistance in providing a degree of definitive clarity in what is necessarily a difficult and challenging area.

54. At this point and for completeness only the Court reminds itself that on 13 October 2020 the Majority Creditor issued civil proceedings against the Petitioner and GDG in the High Court in London (in the Commercial Court), for, among other relief, a declaration that the GIC Guarantee is void and of no legal effect.

55. The Court is informed that on 1 December 2020 GDG agreed to submit to the jurisdiction of the English Court but the Petitioner had refused to do so, following which the Majority Creditor was granted permission to effect service on GIC out of the jurisdiction. The Petitioner was then served with proceedings in Singapore on 13 January 2021, and it would appear that the Petitioner intends to challenge the jurisdiction of the English Court.

56. Whether or not the present English proceedings constitute the appropriate type of proceedings and in the appropriate forum for a Guarantee governed as it is by English law of course remains to be seen.

57. For practical purposes it has been accepted that the Majority Creditor has taken carriage of the burden on GDG to establish that the debt upon which this Petition is based is disputed *bona fide* on substantial grounds.

58. The approach to the burden of the relevant company was stated by Kawaley J in *In the Matter of Sky Solar Holdings Ltd* (Unreported, FSD Cause No. 190 of 2020 (IKJ)) at paragraph 62. It is also to be found for example in *In the Matter of Altair Asia Investments Limited* (Unreported, Cause No. FSD 200 of 2019 (RPJ)) where Parker J states at paragraphs 54 – 56:

> "54. *The rule of practice concerning a creditor's disputed debt is long established and well-known. The court will usually dismiss the petition and leave the creditor to establish his claim in an action if the debt is bona fide disputed on substantial grounds. The court however retains the discretion to make a winding up order even though there is a dispute on substantial grounds. There is therefore a threshold question to determine.*
>
> 55. *The burden is on the company to establish the substance of any dispute that is raised. In this case the Hong Kong judgment is impugned but the fact that there is an appeal pending does not itself demonstrate that there is a bona fide dispute as to the debt.*

> *56. The court is also astute to identify cases where an unwilling debtor raises technical objections late in the day and puts forward many issues of law and fact on affidavit (and claims that cross-examination is required to resolve disputes of fact) so that the petition should not be heard at all. Or cases where matters are deliberately made opaque or overcomplicated by unwilling debtors."*

59. Finally by way of guidance *In Re Richbell Strategic Holdings* [1997] 2 BCLC 429 Neuberger J states, at page 435:

> *"A judge, whether sitting in the Companies Court or elsewhere, should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity [are] not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law."*

60. This passage is instructive in several ways. First, complicated and extensive evidence should not deter the Court from arriving at its decision.

61. Secondly, the question emerges of whether there is on a proper analysis no arguable defence to a claim whether on the facts or the law.

62. Thirdly, if there is an arguable defence to a claim it can be a defence either on the facts or on the law or of course on both of them.

63. The Court carefully notes that in the instant proceedings there are numerous and indeed complex disputes raised not so much as to the facts but much more particularly as to the law. In assessing whether the disputes of fact and law are the subject of *bona fide* substantial dispute it is necessary to decide not the intrinsic merits of the respective arguments presented but to examine how they are presented and whether their structure and content point to a substantial dispute or perhaps to one that is either non-existent or of a tenuous nature.

64. In this latter respect especially the Court must refrain from determining the ultimate issues themselves but must instead concentrate on the nature and quality of the arguments in relation to the established legal test earlier set out while also taking into account the evidence thus far adduced.

65. The Court will approach this task by now considering and examining the respective arguments themselves and also to the extent appropriate the facts.

The Submissions of the Majority Creditor

66. The Majority Creditor summarises the issue from its perspective at paragraphs 24 -26:

> *"24. GIC's Petition claims a debt of USD 69,249,411.12, said to be owed by GDG to GIC, pursuant to the Purported Guarantee said to have been entered into on 9 July 2018.*

> 25. *It is alleged that the Purported Guarantee, said to have been granted by GDG, was effective to guarantee repayment from GDG, of the liabilities of G3E to GIC, in respect of the GIC Agreement dated 2 June 2014 (as amended), and the GIC Bonds issued pursuant to that agreement.*
>
> 26. *The Majority Creditor disputes the validity of the Purported Guarantee for the reasons set out below…"*

67. It then explains its positions in relation to the issue at paragraph 27:

> *"27. In summary terms, the Majority Creditor submits that the Purported Guarantee is invalid and ineffective on the basis that:*
>
> *(1) it represented a clear breach of contract by GDG and G3E,*
>
> *(2) given with no corporate benefit to GDG,*
>
> *(3) at a time when GDG was not just of doubtful solvency, but was effectively insolvent;*
>
> *(4) Mr Grewal was therefore in breach of his fiduciary duties to GDG (by not acting in its best interests, for proper purposes, and not taking into account creditors' interests). Mr Grewal was thereby acting outside his actual authority as the sole director of GDG, in purporting to grant the Purported Guarantee;*

> (5) *the Petitioner knew or suspected that the Purported Guarantee represented a breach of contract by GDG and G3E; and*
>
> (6) *the Petitioner knew or suspected that Mr Grewal was acting in breach of his fiduciary duties to GDG, and therefore outside his authority as GDG's sole director, in signing the Purported Guarantee."*

68. There is then highlighted a statement by Mr. Fredrik Lundberg, Executive Vice President of Transaction and Loan Operations for NT, at paragraphs 27 and 29 of his First Affirmation dated 9 October 2020. He states that G3E was contractually bound, pursuant to restrictions contained in the NT Bond Agreement not to, and to ensure that no other Group company would, grant any loans, guarantees, or other financial assistance to, or for the benefit of, any third party, or other group companies, other than in relation to the NT Bonds, including by granting guarantees and that GDG was contractually bound not to grant guarantees such as the GIC Guarantee in this case, by equivalent restrictions contained in the NT Guarantee.

69. The Majority Creditor also contends that GIC's English legal advisers, Cooley, were on notice of the terms of the NT Bond Agreement and the NT Bond Amendment Agreement, having been sent those documents in the course of advising GIC, by Akin Gump LLP on 10 November 2017 and that GIC was also on notice of the terms of those agreements, as Mr. Triplitt, GIC's Managing Director of European Equities Active Strategy at the time, was copied on the relevant correspondence.

70. In addition, GDG's then sole director Mr. Grewal was said to be clearly on notice of the provisions of the NT Bond Agreement, the NT Bond Amendment Agreement and the NT Guarantee, as he had himself signed each of those documents on behalf of G3E and GDG. In assessing the roles of Mr. Grewal in these unfolding events the Court must ask whether in regard to the arguments propounded by GIC there is any element of artificiality and contrivance.

71. The following important submissions are then made at paragraphs 29 (9) – (11):

> *"(9) Notwithstanding this, GIC and GDG purported to execute the Purported Guarantee on 9 July 2018.*
>
> *(10) As explained by Mr Lundberg, this was commercially significant for Nordic Trustee as the Purported Guarantee purported to grant GIC "brand new and unjustified rights" against GDG "effectively elevating GIC from the position of a structurally subordinated creditor to the Bondholders to a pari passu creditor in respect of the assets of [GDG]."*
>
> *(11) The existence of the Purported Guarantee only came to the attention of Nordic Trustee on 8 October 2019, well over a year after the date of its execution in July 2018, following its discovery by the Receivers who were notified of it by GIC."*

72. Immediately after this discovery the Reservation of Rights Letter was sent to (among others) GIC and GDG reserving the rights of NT and the Bondholders: *"including (without limitation) with respect to the granting of the GIC Guarantee, its validity, and other matters arising in relation thereto."*

73. Mr. Lundberg explains at paragraphs 36 – 39 that the GIC Guarantee was signed by Mr Grewal – GDG's sole director at the time – in breach of the fiduciary duties he owed GDG. The GIC Guarantee was *"an upstream guarantee, entered into by a subsidiary entity (the Company) in connection with its parent's (G3E's) debt obligations, and for which the Company received no consideration."*

74. Two further submissions are made at paragraph 29 (13) (b) and (c) of the Skeleton Argument:

> *"(b) Although now the Petitioner says that the consideration for the Purported Guarantee was their providing consent to a proposed IPO, when initially confronted with the Purported Guarantee in October 2019, it appeared that GIC's position was that the consideration for the alleged guarantee was its forbearance in enforcing the Put Option in respect of the GIC Bonds. But the contemporaneous evidence entirely undermines any suggestion the Purported Guarantee was granted in return for GIC's forbearance in exercising the Put Option. None of the correspondence dealing with the extension of the Put Option – before or after the date of the Purported Guarantee – even mentions that document or arrangement.*

(c) *Furthermore, as Mr Lundberg states, any forbearance in the exercise of the Put Option would be a benefit accruing to G3E (which was required to purchase the GIC Bonds pursuant to it), rather than to GDG (which was not). Accordingly, even if forbearance in exercising the Put Option were to be suggested as the supposed corporate benefit to GDG of the Purported Guarantee (which is undermined by the evidence as above), it is clear that G3E, not GDG, would have enjoyed the benefit of any such forbearance;"*

75. It is then significantly stated at paragraph 29 (13) (e), adopted from paragraph 37 (c) of Mr. Lundberg's First Affirmation, that:

"(e) *The Purported Guarantee was "also granted by the Company at a point in time when it was effectively insolvent, since the NT Bonds were due and payable and the Company did not have the funds available to meet its obligations under its [pre-existing] guarantee of the NT Bonds, had it been called."*

76. The Court draws specific attention to this passage because it is potentially an important aspect of this entire matter and a subject to which the Court will later return.

77. The Skeleton Argument continues at paragraphs 30 – 32:

"30. *In light of these issues, the Purported Guarantee was entered into in breach of Mr Grewal's fiduciary duties since, in circumstances where there was no corporate benefit to GDG in providing any such guarantee, Mr Grewal:*

(1) *cannot have been acting bona fide in the best interests of GDG;*

(2) cannot have been acting for proper purposes; and

(3) cannot have considered the interests of GDG's creditors, including Nordic Trustee, in circumstances where GDG was not just in the 'zone of insolvency,' but was effectively insolvent.

31. *In these circumstances:*

(1) Where an agreement is purportedly entered into between a company and a third party, in breach of the company director's fiduciary duty, it will normally follow that the director acted in excess of the powers conferred upon him by the company's constitution: Mortimore, Company Directors at [19.08].

(2) A third party, who dealt with a company director knowing, or having reason to believe, that the agreement purportedly entered into is contrary to the commercial interests of the company, is unlikely to be able to assert with any credibility that he believed the director had actual authority, and lack of such a belief would be fatal to any claim that the agent had apparent authority: ibid; [19.09] at FN15; citing Lord Scott at [31] in Criterion Properties plc v. Stratford UK Properties LLC [2004] 1 WLR 1846 (HL).

(3) If, from the perspective of the third party, the director had no apparent authority to enter into the agreement, it will not be binding on the company: Mortimore at [19.09].

(4) The very nature of a proposed transaction may put a third party on inquiry as to the authority of the directors of a company to effect it: Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation [1986] Ch 246 (CA) Slade LJ at pgs 284 – 285; cited in Wrexham AFC Ltd v. Crucialmove Ltd [2007] BCC 139 (CA) Peter Gibson LJ at [46]; both cited in Mortimore at [19.15].

32. *In the circumstances, it is the Majority Creditor's position that the Purported Guarantee is invalid and ineffective. GIC was aware or must have suspected that Mr Grewal was acting outside his authority and indeed it was complicit in his action. Its conduct was commercially unacceptable; and it will be necessary for GIC's (and GDG's) documents relating to this issue to be reviewed, and for the relevant individuals to be examined at trial. It is wrong for GIC to think that it can rely on a purported guarantee – which it knew had been procured in breach of contract – as a basis for a winding up petition and thereby seek to evade the normal trial process."*

78. The Majority Creditor then goes on to set out what may be described as advocacy points in relation to the perceived evolution of the Petitioner's arguments. The Court will selectively set out only some of these, carefully bearing in mind that the Court is concerned not with their content so much as with their arguability, consistency and sustainability.

79. At paragraph 33 (2) – (3) it states:

> *"(2) In its Skeleton Argument for the 13 – 14 October Hearing, and at the hearing itself, the Petitioner took the (surprising) position that the Purported Guarantee was expressly permitted by the Bond Agreement. That was then corrected during the hearing by the Majority Creditor by pointing out – without prejudice to the Majority Creditor's position on the interpretation of the original NT Bond Agreement – that the Petitioner was relying on an outdated version of the Bond Agreement in which the relevant clause had been amended.*
>
> *(2) The fact that there were clear breaches of the NT Bond Agreement, the NT Bond Amendment Agreement, and the NT Guarantee, has now been settled beyond argument, in light of the unchallenged expert evidence of Professor Woxholth."*

80. The grounds of criticism continue at paragraph 33 (4) – (5):

> *"(4) Again, at the October hearing, the Petitioner argued that the Court should not get involved "at any level" with any issues as to the validity of the Purported Guarantee, that is to say even not considering whether a substantial dispute had been raised as to the Purported Guarantee's validity, since these issues "are now the subject of proceedings in the English Court".*
>
> *(5) In the evidence for this hearing, however, there has now been a complete volte-face. The Petitioner is now positively inviting the Court to do the very thing it was saying before should not be done, viz. to determine the actual validity of the Purported Guarantee at this hearing. In fact, this is misconceived since, as explained above, the sole question for this Court is whether the validity of the Purported Guarantee is disputed on bona fide substantial grounds."*

81. Again at paragraph 33 (7) there is a similar comment as follows:

> *"(7) It was only in its 17 November 2020 Letter, and in its evidence filed for this hearing, that the Petitioner has started to advance a case on the alleged corporate benefit to GDG from entering into the Purported Guarantee. These belated arguments lack any merit as explained below, but it is also relevant that these new arguments bear all the hallmarks of having been 'raised ex post facto' and 'contrived late in the day'."*

82. Then at paragraph 33 (8) a number of comments are made particularly in relation to a proposed Initial Public Offering ("the IPO") in respect of a new Hong Kong listed company described also as Green Dragon Gas. By way of example only, Mr. Stock of Cooley in a letter to Mr. Grewal dated 8 May 2018 characterises the new company as being *"spun-out"* of G3E.

83. Paragraph 33 (8) states:

"8. Furthermore, following the October hearing, the Petitioner has belatedly raised a 'cloud of objections' in its letter of 17 November 2020. These include the following new arguments, none of which had been raised before, whether in GIC's earlier evidence on the Petition, at the October hearing, or otherwise:

(a) that both the GIC and NT Guarantees had been executed "effectively as conditions precedent to [a proposed] IPO;"

(b) that had GDG not entered into both guarantees "the IPO would not have been able to be progressed to the obvious detriment to the Group, and to GDG". This argument is sought to be made despite the fact that the NT Guarantee was taken to restore its secured position following transfers of valuable Group assets from GEP (the original guarantor under the NT Bonds) to GDG (the Assets Transfer) in breach of the NT Bond Agreement and was not premised on any consent to an IPO, and that there is nothing whatsoever in the

contemporary documents to suggest that the Purported Guarantee was provided in return for GIC's consent to an IPO;

(c) *that the "board of directors" had approved the Purported Guarantee, despite GDG having only Mr Grewal as sole director;*

(d) *that GDG is "contractually estopped" from denying it had authority, because of representations in the Purported Guarantee, despite that argument assuming what it is seeking to prove viz. the contractually binding nature of the Purported Guarantee. An argument which is reliant on the contract and its representations already being binding, cannot help answer the prior question of whether the contract is or is not binding.*

(e) *that GDG benefitted because the restructuring proposed a "transfer of assets to GDG", when the clear evidence is that this had already taken place (in "early 2018"), and that the Purported Guarantee was signed subsequent to those transfers, in July 2018; and*

(f) *that "to the extent there is any question regarding the corporate authority of GDG to enter into the GIC Guarantee (which is denied), GIC will rely upon the fully informed and unanimous consent of GDG's parent [GGC] in accordance with the principle in Re Duomatic to establish proper authorization", when that principle does not apply to acts or omissions which are likely to affect the interests of the company's creditors where a company is insolvent; or on the verge of insolvency (as GDG clearly was in July 2018 at the time of the Purported Guarantee, as it had since March 2018 guaranteed the NT Bonds, which had matured and gone entirely unpaid since November 2017): Mortimore [10.52]-[10.53]; West Mercia Safetywear v. Dodds [1988] 2 BCLC 250 (CA) Dillon LJ at 252H – 253B."*

84. To such extent as this Court may find it necessary to weigh the probity and soundness of GIC's positions and how they may assist in determining whether there is in fact a *bona fide* substantial dispute, these commentaries may ultimately prove of some assistance.

85. The Majority Creditor then examines what it perceives to be the various heads of dispute.

86. Regarding Breach of Contract, the argument proceeds thus at paragraphs 36 - 38:

> *"Breach of Contract*
>
> *36. As to the breach of contract by GDG and G3E, Mr Stock refers only to what "NT allege is the true meaning" of the NT Bond Amendment Agreement. The Petitioner takes that position, notwithstanding that it had been served with Professor Woxholth's Report.*
>
> *37. The Petitioner therefore apparently refuses to accept the unchallenged expert evidence of Norwegian law that the NT Bond Amendment Agreement was breached by the Purported Guarantee (as were the NT Bond Agreement, and the NT Guarantee).*
>
> *38. There cannot sensibly be any further dispute as to the breaches of contract alleged by the Majority Creditor, given that unchallenged expert evidence on this point."*

87. An argument is then made that no corporate benefit to GDG was conferred in relation for the Guarantee. GIC's argument is described in this way at paragraph 39:

> *"Lack of Corporate Benefit*
>
> *39. As to the lack of corporate benefit to GDG, the main argument now made in the Petitioner's evidence is that:*

> (a) *its consent was required in order for a proposed IPO of GDG to progress, the provision of which is said to have been a quid pro quo for the granting of the Purported Guarantee;91 and that*
>
> (b) *the IPO was the most realistic option to raise sufficient funds to repay the Nordic Bonds and the GIC Bonds."*

88. Endeavours to cast doubt on this proposition are then set out.

89. Paragraph 40 (a), (b) and (c) state:

> *"40. There are however a number of obvious issues with this new line:*
>
> (a) *The Petitioner refers on a number of occasions to the fact that the Purported Guarantee was necessary in order to protect GIC's position. However, on their own case, GIC's position in respect of the IPO was already protected through the negative covenant at paragraph 6.11 of the schedule to the GIC Bond Agreement (and, so the Petitioner says, through the No Disposal Letter.)*
>
> (b) *The Petitioner has not produced any evidence that it either provided its consent to the IPO, or that it contractually bound itself to do so. As such, even on its own new case, it did not in fact provide any consideration.*

(c) *There is no reference anywhere in the Purported Guarantee itself, or in the draft prospectus for the proposed IPO,97 to this being the consideration for the grant of the Purported Guarantee."*

90. The points in opposition continue at (f) – (i), for example:

"(f) Although the Petitioner's evidence is that their consent was required for the divestiture of the GDG shares contemplated as part of the distribution mechanism to effect the IPO (by issuing new GDG shares first to GGC, which would in turn provide them to G3E by way of dividend in specie), that divestiture was clearly only to occur on "the Global Offering becoming unconditional in all respects." Clearly, that could not happen before:

(i) The draft IPO Prospectus was in final form for prospective public investors - when it was still in working draft, with many key features left to be determined (e.g. the proportion of shares to be retained by qualifying G3E shareholders, as against the level of publicly offered shares); and

(ii) All the various conditions in the final prospectus – including formal HK Listing Committee approval of the proposed listing – had been satisfied.

(g) In short, the time at which GIC's consent to the divestiture might possibly become relevant, was clearly some considerable way off in July 2018.

(h) It would in fact never materialize, which, it is submitted, must have been viewed by GIC as at least a possible (if not the probable) outcome at the time.

> (i) *This was not a situation where an IPO was imminent, and only required GIC's consent to proceed, without which the virtually certain public offering – and the proceeds to be obtained from it – would be lost."*

91. An important issue of principle is then identified at (j), where it is stated that the IPO initiative was clearly just one of many and various capital raising schemes which Mr. Grewal had underway, and it is therefore suggested that this would be how GIC would view it. Moreover, it is claimed this Guarantee was an opportunity presented by the scheme to improve GIC's structural position as a creditor in the G3E Group and to secure their position.

92. Whether this is ultimately correct or not is irrelevant for the current analysis. It is enough to stipulate that these are the kinds of contested points which can legitimately be put forward for *bona fide* substantial dispute consideration.

93. Further contentions are put forward at (k) – (n):

> *"(k) Furthermore, and consistently with this, documents previously disclosed by the Petitioner with its 17 November 2020 letter, are directly at odds with the Petitioner's evidence in that they show that the Purported Guarantee was sought to be taken as protection in the event the proposed IPO did not happen.*

(l) *So in an e-mail of 8 May 2018, which attached the formal request for the Purported Guarantee, Mr Stock himself stated, having referred to a potential new bond issue, and the proposed IPO: "we need to have the assurances and protections in place, if those options do not materialize."*

(m) *Similarly, in a 31 May 2018 e-mail from Mr Stock to Mr Grewal requesting the execution of the guarantee, there is no reference to the Petitioner granting its consent to the IPO, or agreeing to do so in return for the guarantee. Instead, he "not[es] that there is a formal guarantee that has been given by Green Dragon to the Nordic Bondholders as well."*

(n) *Given the number and failure rate of Mr Grewal's 'schemes' to effect repayment (which the Court will recall from the G3E Petition), the prospects of a successful IPO cannot have been (or believed to be) as rosy as is now sought to be painted in the Petitioner's evidence."*

94. This contention may be right or it may be wrong, but it is hardly tenuous.

95. The Court also reminds itself that even if there was no corporate benefit to GDG in executing the GIC Guarantee it might still of course have genuinely thought otherwise. That is exactly what can form a dispute.

96. The Majority Creditor asserts at paragraph 41 that there is only a false equivalence between its guarantee and that of GIC:

"41. As to the Petitioner's proposed justification for the Purported Guarantee, that granting it a guarantee was merely the appropriate equivalent of GDG granting the Majority Creditor the NT Guarantee:

(a) That suggested equivalence between NT and GIC was and is obviously false, as it ignores the fact that the execution of the NT Guarantee represented remedial action to restore NT's pre-existing secured position before the Asset Transfers from GEP to GDG, whereas the Petitioner's Purported Guarantee sought to give it entirely new and unjustified rights which it did not – as an unsecured structurally subordinated creditor –previously enjoy.

(b) Similarly, Mr Stock's confected attempt to say that neither he, nor the Petitioner "has ever accepted that the Nordic Bonds are senior to the GIC Bonds" flies in the face of the contemporaneous documents sent by the Petitioner and Cooley, which expressly refer to the GIC Bonds being "second ranking", and the NT Bonds being "senior secured bonds.""

97. At paragraph 98 the Majority Creditor then repeats its claim that there is no evidence of GDG receiving any, or any sufficient, corporate benefit in return for Mr. Grewal executing the GIC Guarantee.

98. With regards to any suggestion that the GIC Guarantee was made by Deed and required no consideration, this is countered by the proposition then it is in any event not possible to remove the need for a transaction to be in the best interests of a company by simply saying that consideration was not required because the transaction was effected by Deed.

99. The Majority Creditor then turns to the matter of what it described as GDG's doubtful insolvency.

100. The contention is set out at paragraph 45:

> *"45. As the Court knows, the relevance of GDG's insolvency, or doubtful solvency, is that in those circumstances, a company director comes under a duty to consider and protect the interests of a company's creditors. So the Petitioner's evidence below can only be relevant in the context of their attempt to deny the existence of that duty. It is no answer, and is irrelevant to, the breaches of the ordinary duties of a director to act bona fide in the best interests of the company, and to act for proper purposes."*

101. By way of legal context, there are two relevant English Court of Appeal authorities which provide helpful guidance where such issues may arise.

102. First, in *West Mercia Safetywear Ltd v Dodd and Another* [1988] BCLC 250 it was held that once a company was insolvent the interests of the creditors overrode those of the shareholders since the Company's assets belonged in practical sense to the creditors who could displace the power of the shareholders and directors to deal with them.

103. Dillon LJ refers with approval at page 252 to the statement of Street CJ in *Kinsela v Russell Kinsela Pty Ltd (In Liq)* (1986) 4 NSWLR 722 where at page 730 he refers to the creditors in such circumstances becoming *"prospectively entitled."*

104. Secondly, in *BTI 2014 LLC v Sequana LLC [2019] 2 All ER 784* David Richards LJ states at paragraphs 215 – 217, page 837 a – c:

> *"a [215] In my judgment, the test of a real, as opposed to a remote, risk of insolvency is not part of the present law as regards the creditors' interests duty, and it would not be appropriate, in the light of the policy considerations and other provisions of the Companies Act to which I have referred, for the courts to introduce such a test as a development of the common law.*
>
> *b [216] I have, however, concluded that the duty may be triggered when a company's circumstances fall short of actual, established insolvency. This is certainly the view taken by many judges in the cases to which I have referred. However, for good reason, not least because it has rarely been necessary, judges have shied away from a single form of words, preferring instead a variety of expressions such as those that I have mentioned.*

c *[217] More than one explanation of the underlying rationale has been advanced in the cases but the prospective interest of creditors in the assets of an insolvent company put forward by Street CJ in Kinsela and expressly adopted by this court in West Mercia is not simply the only rationale authoritatively established in this jurisdiction but continues to: attract support; see, for example, Westpac and Bilta v Nazir."*

105. The learned Judge also raises at paragraph 222 what he describes as an important issue as to whether, once the creditors' interests duty is engaged, their interests are paramount or are to be considered without being decisive, commenting also that this is not *"straightforward"*.

106. With great respect to the parties here concerned, the Court considers that such questions wherever they may arise are entirely suitable subjects for a *bona fide* substantial dispute.

107. The Majority Creditor set out its position at paragraphs 46 – 49 in this way:

"46. Against that background, as to the Majority Creditor's position that GDG was of doubtful solvency (if not actually insolvent), the Petitioner's evidence from Mr Stock is that "there was nothing about it which gave me any particular cause for concern"; and that "he certainly did not think" the Company was cash-flow insolvent at the time.

47. *Mr Stock relies on the fact that assets he understood to be of substantial value had been transferred to GDG, and the fact that despite the default on the NT Bonds and the existence of the NT Guarantee, the guarantee "had not been called" so was only a contingent liability.*

48. *Similarly, Mr Triplitt says: "The Petitioner did not know whether or not the company was insolvent at the time the GIC Guarantee was entered into. Neither Petitioner nor Cooley had access to the accounts or details of the Company. As far as the Petitioner knew, the Company was a new company formed purely for the purpose of the IPO and was therefore holding, in its subsidiaries, various material assets...the guarantee that had been granted to NT had not been called upon (and it would have made no sense [to do so]), there was no reason to suspect the Company was insolvent."*

49. *But this evidence misses the point in relation to the position of a company of doubtful solvency. The company need not actually be insolvent for the duty to consider the interests of creditors to arise. The question is whether GDG was of doubtful solvency. And it is not credible to dispute GDG was at least of doubtful solvency at the time of the Purported Guarantee, given that:*

    (a) The USD88m face value NT Bonds were in default and had become due and payable on 20 November 2017;

    (b) GDG guaranteed the NT Bonds, pursuant to the NT Guarantee;

(c) The NT Guarantee could be called at any time;

(d) GDG did not hold the valuable producing assets itself, but only held illiquid shareholding in subsidiaries, and

(e) If the NT Guarantee was called, it was obvious that there would have been no cash or liquid assets available to satisfy the debt."

108. Finally, the attention of the Court has been drawn to this statement in Mr. Lundberg's First Affirmation at paragraph 37 (c):

> *"c. The GIC Guarantee was also granted by the Company at a point in time when it was effectively insolvent, since the NT Bonds had matured and were due and payable, and the Company did not have the funds available to meet its obligations under its guarantee of the NT Bonds had it been called. The granting of the GIC Guarantee by the Company also constitutes an act which is prejudicial to the Nordic Trustee's interests as majority creditor."*

109. Should it be the case that Majority Creditor is demonstrably right as to these submissions, then they would constitute an important part of its assertion as to there being at least a substantial dispute as to the validity and the enforceability of the GIC Guarantee.

110. The Majority Creditor's next area of challenge addresses an alleged breach of fiduciary duty by Mr. Grewal as sole director of GDG. It proceeds in summary terms at paragraphs 50 – 51:

"Breach of Fiduciary Duty

50. As to Mr Grewal being in breach of his fiduciary duties to GDG, the Petitioner denies that he was acting in breach, relying on the supposed corporate benefit to GDG referred to above. Mr Stock says "It did not occur to me then, nor do I even think now, that Mr Grewal was acting in breach of his fiduciary duties when he signed the guarantee."

51. The Majority Creditor does not accept this evidence. In particular:

(a) For all of the reasons set out above, the Petitioner's suggested corporate benefit for the guarantee lacks credibility, particularly in light of the complete absence of documentary evidence supporting it.

(b) There was in fact no corporate benefit to GDG, or its creditors, for it to immediately and permanently incur liability under a guarantee of in excess of USD60m in defaulted bonds (the GIC Bonds), in addition to GDG's substantial pre-existing liability on the NT Guarantee (in respect of the long-defaulted NT Bonds), which had already rendered GDG of doubtful solvency.

(c) In signing the Purported Guarantee, Mr Grewal was therefore acting in breach of his fiduciary duties (i) to act bona fide in the best interests of GDG, (ii) to act for proper purposes, and (iii) to properly consider the interests of GDG's creditors i.e. the Majority Creditor.

111. As to knowledge that the GIC Guarantee represented a breach of contract by GDG and G3E, it is claimed that Mr. Stock's evidence confirms that at least he and Mr. Clark at Cooley were sent a copy of the NT Bond Amendment Agreement on 10 November 2017.

112. The argument then proceeds at paragraphs 52 – 55:

> *"The Petitioner's Knowledge of Breach of Contract*
>
> *52. As to the Petitioner's knowledge that the Purported Guarantee represented a breach of contract by GDG and G3E, Mr Stock's evidence confirms what is already clear, namely, that at least he and Mr Clark at Cooley were sent a copy of the NT Bond Amendment Agreement on 10 November 2017.*
>
> *53. As with Mr Stock, Mr Triplitt confirms that he was sent a copy of the NT Bond Agreement, and that the Petitioner "had sight of" the NT Bond Amendment Agreement "on or around" 10 November 2017.*
>
> *54. Mr Stock claims that he did not "give careful consideration or analysis" to whether the Purported Guarantee was a breach of the terms of the NT Bond Agreement, or the NT Guarantee. Again, this is not accepted.*

> 55. *Nowhere in their evidence do either of the Petitioner's witnesses claim not to have read those agreements. Given the context here of two experienced professionals, seeking (respectively) to protect their client's and employer's interests; admittedly in receipt of agreements of another creditor; which agreements were likely to be relevant to whether the guarantee they were seeking from GDG could be granted; which were also relevant for them to understand in detail as part of negotiations for an inter creditor agreement in which they participated; and when the agreements were provided to them on their own express request – it is an irresistible inference, in the Majority Creditor's submission, that:*
>
> (1) *Mr Stock and Mr Triplitt read those documents, probably with some care; and*
>
> (2) *The Petitioner was therefore well aware of the contractual restrictions within them, which prevented GDG granting a valid agreement on the terms of the Purported Guarantee."*

113. At this point the Court reminds itself of a certain passage from Mr. Justin Stock's First Affidavit dated 28 January 2021.

114. He states at paragraph 10 n:

> *"n. I cannot say that I gave careful consideration or analysis to the question of whether the giving of the GIC Guarantee to the Petitioner was a breach of the terms of the amended Nordic Bond Agreement. That was a matter primarily for the Company and the Company represented that all necessary authorisations had been obtained."*

115. Notwithstanding the admitted absence of careful consideration Mr. Stock nonetheless goes on to state at paragraph 11:

> *"11. At no time did I believe that Mr Grewal was acting in breach of his fiduciary duties or his authority on behalf of the Company."*

116. It is frankly difficult to understand how if in the first passage he states that he cannot say that he gave careful consideration to the breach he can nonetheless state in the second passage that at no time did he believe that Mr. Grewal was acting in breach. In other words, if he had not turned his mind to the question to begin with, on what basis could he then make the assertion which he did subsequently make? This may well be an appropriate area for cross-examination in due course if the Majority Creditor/GDG succeed in this proceeding. Certainly at this stage there are some appearances of contrivance.

117. Mr. Stock also incidentally makes some instructive comments at paragraphs 26 -27 which directly or indirectly may in due course bear upon the application of the *Sequana* case principles previously identified. He states at paragraphs 26 – 28:

> *"26. Because of the asset rich/cash flow poor nature of G3E, Mr Grewal was constantly looking at how to alleviate G3E's cash flow difficulties. That is what lay behind G3E's request (which GIC agreed on 14 December 2016) to extend the maturity date of the GIC Bonds from 30 May 2017 to 31 December 2020. However, from around the middle of 2017 onwards, the Petitioner and I were advised, through discussions with Mr Grewal, that the G3E Group was making efforts to restructure its debts in order to improve its financial position from a cash flow perspective. Mr Grewal confirms the same at paragraph 27 of his First Affirmation dated 27 November 2019.*
>
> *27. Mr Grewal's proposals for refinancing mainly took one of the three forms. In no particular order and at times in combination, they were: (i) a new bond issue or other form of asset or reserve backed loan to refinance the existing bonds; (ii) a trade sale of assets, again with the proceeds being used to repay the existing bonds; (iii) an initial public offering (with the proceeds of an issue raised in connection with the IPO being used to repay the existing bonds). Even within those three core ideas there were different proposals from time to time: for example, as I explain, at one time it was proposed that the bonds would be repaid from bridging finance or bonds taken out in advance of the IPO.*

> 28. *My understanding of what an IPO would entail developed over time and the structure around the IPO changed over time. Because an IPO ultimately became the focus of Mr Grewal's efforts, I will only refer to other financing efforts where relevant."*

118. Although throughout the course of the respective submissions which have been put forward emphasis has been placed upon the examination of detailed complexities both factual and legal, nonetheless it remains important to retain some accurate general perspective as to the unfolding and indeed unstable commercial realities underlying those complexities. In that regard paragraphs 26 – 28 are illuminating.

119. The Majority Creditor then identifies a further area of alleged dispute, *viz.*, that the Petitioner had knowledge of or reason to believe that Mr. Grewal was acting in breach of fiduciary duty. The essential point is that this knowledge or belief would have to be determined at a trial.

120. The argument proceeds at paragraphs 56 – 58:

> *"The Petitioner's Reason to Believe or Knowledge of Breach of Fiduciary Duty*
>
> 56. *As to the Petitioner's knowledge, or reason to believe, that Mr Grewal was acting in breach of his fiduciary duties to GDG, in signing the Purported Guarantee, the evidence from Mr Stock is: "At no time did I believe that Mr Grewal was acting in breach of his fiduciary duties or his authority on behalf of the Company." He*

also advances another new argument that Mr Grewal had authority as the GDG Articles authorize a sole director to act on behalf of the company.

57. *Similarly, Mr Triplitt's evidence is that: "I can confirm that the Petitioner reasonably relied on these representations [in the GIC Guarantee] and in no way had actual or suspected knowledge that Mr Grewal was acting outside his authority...The Petitioner absolutely believed that Mr Grewal, as the director of the Company...had power and authority to act on the Company's behalf in entering into the GIC Guarantee. The representations given in the GIC Guarantee, including that all necessary authorisations had been obtained, confirmed what the Petitioner reasonably believed."*

58. *In the Majority Creditor's submission, these statements lack credibility and will need to be tested in cross-examination, following full disclosure:*

    (a) *They are based on their statements as to the supposed corporate benefit to GDG of the Purported Guarantee which, as above, lack credibility.*

    (b) *Mr Stock and Mr Triplitt in fact had every reason to consider the Purported Guarantee to be contrary to GDG's commercial interests for the reasons set out above.*

(c) *As explained in the case law referred to above, third parties in such a position are unlikely to be able to assert with any credibility that they believed the director had actual authority, and lack of such a belief would be fatal to any claim that the director had apparent authority.*

(d) *That legal proposition is wholly unaffected by (i) the standard provisions of GDG's articles granting a sole director authority to act on behalf of the company; or (ii) representations in the Purported Guarantee that 'all necessary authorisations' have been obtained, in a purported agreement which has – necessarily – not yet been established to be binding. "*

121. Mr. Smith Q.C. supplemented the Skeleton Argument with numerous oral submissions, of which the Court takes note.

122. He indicated that it was now accepted by GIC that its Guarantee was granted in breach of GDG's Agreement with NT. He also reiterated that on the evidence GDG received no corporate benefit for giving the GIC Guarantee.

123. He referred to what has been characterized by GIC as the No Disposal Letter, and stated that it was difficult to see how it was binding as distinct from being simply a *"comfort letter"*.

124. Mr. Smith accepted that there were two relevant fiduciary duties, to act in the best interests of GDG and to act for a proper purpose. While accepting the broad legal proposition that the duty imposed on directors to act *bona fide* in the interests of the company is a subjective one, nonetheless he went on to raise certain passages in Mortimore's Company Directors, Third Edition, which amplified and possibly enlarged that characterisation.

125. Mortimore at paragraph [12.15] for example states that there are suggestions in some cases that *"the courts can go further than a mere appraisal of the director's belief about his or her state of mind."*

126. In *Hutton v West Cork Railway Co.* (1883) LR23 ChD 654 Bowen LJ states at paragraph 671:

> *" Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational."*

127. Mr. Smith then placed particular emphasis on this passage at paragraph [12.17]:

> *"[12.17] A requirement of some degree of objectivity is consistent with the duty of a director to exercise reasonable skill, care, and diligence in assembling the relevant material to enable him to make his decision. Although this is a developing area, two strands of analysis appear to have emerged. The first is where there is absence of good faith or where the interests of the company are disregarded. Here the courts have applied an objective standard of reasonableness. The second is where regard was had*

to the interests of the company; in which case the courts will only interfere if the decision is irrational or perverse."

128. If indeed Mr. Smith is correct, and moreover the interests of the Company might merge with the interests of the creditors, this pre-eminently would be an area for resolution at trial.

129. Turning specifically to the areas of absence of good faith or disregard of the interests of the company, reliance was also placed on paragraphs [12.18] and [12.19] as follows:

"Absence of good faith or disregard of the interests of the company

[12.18] In Charterbridge Corp Ltd v Lloyds Bank Ltd, Pennycuick J said that where the director had failed to consider whether the action that was the subject of complaint would be in the best interests of the company, the proper test was whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. This reasoning has been applied subsequently both in England and Australia.

[12.19] Certainly, where it can be demonstrated that the director's belief that he was acting in the best interest of the company was not well founded the court will be willing to interfere. Accordingly, in Re W & M Raith Ltd the court accepted that the onus was on the liquidator to show that the service agreement in question was not entered into bona fide in the interests of the company, but that the presumption was displaced by

the following matters: (i) the director concerned had been in office for more than 30 years without a service contract, and the late change was only referable to his desire to benefit someone other than himself; (ii) while the director remained alive there was no benefit to the company resulting from the existence of the contract; and (iii) when the director took legal advice as to how to secure his widow's position, it was considered immaterial which of the companies with which he was associated was actually to provide the pension. Accordingly, notwithstanding no actual dishonesty or secret profit, the interests of the company were subordinated by the transaction and the test of bona fides was not satisfied. It is clear in this regard that a finding of bad faith does not require a finding of dishonesty."

130. The question as to who may prevail on such issues according to Mr. Smith's argument would be an entirely open matter at this stage.

131. Reference was made to the Supreme Court case of *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71 and to the question of whether a director's power had been exercised for a proper purpose: Was the purpose in that event causative in the sense that without that purpose the power would not have been exercised? These were described as the kinds of disputes of law and fact with which a court would have to grapple in order to arrive at resolution.

132. The case of *Criterion Properties plc v. Stratford UK Properties LLC* [2004] 1 WLR 1846 was cited for the issue as to whether directors had actual or apparent authority to enter an agreement, leading then it was argued to the further question of whether GIC might in the circumstances have lacked belief in GDG's apparent authority as a matter of fact.

133. As with the instance of how the *Sequana* principle might apply, this submission appears to the Court to be one of some potential force.

134. Mr. Smith also stated the proposition that the provision of a guarantee to one creditor in breach of an obligation to another creditor does not constitute a director acting for a proper purpose. It seems to the Court that whether that is correct or not it would surely be a proper feature for argument and determination.

135. Mr. Smith then added that it would not be in the interest of the Company to act in that way because in so doing it would expose the Company, i.e. GDG, to a damages claim by NT. Once again, this is propounded as a legitimate and genuine area of dispute.

136. In relation to GIC's contractual estoppel point to which the Court will return in due course, Mr. Smith submitted that if the Guarantee itself is invalid then it is impossible to say the representations within it are of continuing and binding effect.

137. While this may or may not necessarily be strictly correct, nonetheless in relation to the application of *Sequana* principle as we shall see the GIC Guarantee may be invalid for other additional reasons.

138. The next submission is that if a representation is made and the party to whom it is made for whatever reason knows it is not the case, then there is no reliance on the representation in any material way. In other words if one knows that a representation as to estoppel is situated in an instrument which is known or suspected to be invalid, is it lawful and proper to rely upon it? Once again, it is argued, this is a properly justiciable issue.

139. The submission was then made that if reliance was nonetheless placed on the validity of a formal estoppel/non-reliance clause, then evidence would be required to show that to be the position.

140. Issue was taken with the principle set out in *Wallis Trading Inc v Air Tanzania Co Ltd* [2020] EWHC 339 (Comm) and with the proposition at paragraph 79 that there was a contractual estoppel arising, *"in the manner explained in Peekay International v Australia and New Zealand Banking Group Limited [2006] EWCA Civ 386 at [56-57] per Moore-Bick LJ,"*, the contention apparently being made by GIC that the *Peekay* case still gave rise to an estoppel absent a non-reliance clause. It was said that this is not a matter which the Court can resolve in the course of this particular hearing.

141. In relation to the subject of lack of corporate benefit, Mr. Gillis Q.C. intervened and clarified at this point that GIC was saying that there was corporate benefit to GDG, in that GIC gave consent to a proposed IPO in return for the GIC Guarantee.

142. The Majority Creditor complained that this was a new case advanced by GIC, but with great respect, a new case remains a case to be considered nonetheless.

143. Whether a benefit was conferred, irrespective of whether there was a *quid pro quo* or not, may well be another area of forensic dispute. In other words, it is argued, how can the merits of these points be assessed at this stage?

144. The comment was made that no IPO ever took place, so that arguably at the very least there was ultimately no genuine corporate benefit but an illusory benefit only.

145. In summary, it is claimed by NT that the GIC Guarantee was given in breach of fiduciary duty, was not entered into *bona fide,* was not entered into for a proper purpose, and was executed with no regard to the lawful interests of the creditors of the Company. It was either outside of Mr. Grewal's authority or alternatively an abuse of that authority.

The Legal Submissions of the Directors of GDG

146. Mr. Goodman on behalf of the Directors of GDG emphasised that in the course of a legal action as that term is widely understood there would be an opportunity for extensive discovery, while in winding up proceedings there was no discovery and indeed no cross-examination of witnesses.

147. Quite apart from that important consideration, there was no evidence of misrepresentation by the Company's current directors, and no justification for the appointment of JPLs.

148. In this context at paragraph 8 of the Company's Skeleton Argument dated 4 February 2021 it is stated:

> *"8. The Directors' responses are set out in detail in the evidence filed by the Company in these proceedings, which we invite the court to read. In summary:*
>
> *a. the asset realisation strategy that is being pursued by the Directors is sensible, fully considered and has a fair and reasonable chance of being successful. The Petitioner's claim that the strategy has failed and resulted in a "swathe of litigation" is untrue;*
>
> *b. all litigation commenced by Utilization Co in the PRC has been terminated, discontinued or dismissed such that there is no pending litigation by Utilization Co against GBV;*
>
> *c. the funding sought and obtained by the Company and GBV has been fully explained. It was both necessary and urgent, on full notice to all interested parties as to its terms (including the Petitioner) and on terms plainly consistent with market terms in the circumstances in which the Company and GBV found themselves. The Petitioner was also given every opportunity to assist with funding, but chose not to. The Petitioner has not sought to address (or challenge) the Directors reasonable explanations in relation to funding and just repeats its baseless assertion that the terms "appear ... to be uncommercial";*

d. *the Directors have provided the Petitioner with extensive information in relation to the asset realisation strategy, in fact, with substantially more information than the Petitioner would receive from any appointed liquidator. The Court only needs to read the Directors' monthly reports and the evidence filed in these proceedings to conclude that the Petitioner's complaint is unfounded; and*

e. *there is absolutely no evidence to suggest that the duties of the Receivers are in conflict with their duties as Directors. Even if such a conflict existed, it has been effectively managed by the numerous undertakings and assurances given to the Petitioner, as well as undertakings given to the Court in these proceedings. These undertakings and assurances were given by the Directors to try to avoid further unnecessary debate and cost, not because the Petitioner's complaints had any merit."*

149. To the extent that such remarks may be of any relevance at this stage, the Court considers them to be both helpful and cogent.

150. Finally, in relation to the major question currently before the Court, Mr. Goodman also refers at paragraph 12 to an illuminating and instructive dictum of the Vice-Chancellor Sir R.T. Kindersley:

"g. in In re Inventors' Association (Limited)14 the Vice Chancellor stated (at p. 558):

"But the question is whether a person claiming to be a creditor of a company (there being no question whatever except whether he is a creditor or not, and for how much, if at all, he is a creditor) can come to this Court upon a petition for an order to wind up the company. It appears to me that it cannot be necessary or proper that he should come to this Court upon a petition for a winding up order for the mere purpose of trying whether he is a creditor or not.""

The Legal Submissions of the Petitioner

151. The Petitioner states that what is described as the Key Issue that arises for determination is whether the Company (through NT) has established that there is a *bona fide* and substantial dispute. This dispute is as to whether the GIC Guarantee dated 9 July 2018 was executed by the Company's director, Mr. Grewal, in breach of his fiduciary duties to the Company, and thereby outside his actual or apparent authority as a Director of the Company; and if so whether GIC was aware of that. These statements are set out at paragraph 5 of the Petitioner's Skeleton Argument dated 3 February 2021.

152. GIC identifies an important contractual qualification to its current position at paragraph 9:

"9. Nordic Trustee has also served an expert report on Norwegian law from Professor Woxholth [HB3/40]. If the Petitioner were to challenge his conclusion of Norwegian law, namely that the GIC Guarantee was in breach of the terms of the NT Bond Agreement and the NT Guarantee (both of which are Norwegian law agreements), that itself would raise a triable issue. Accordingly, solely for the purposes of this hearing (and without prejudice to its position generally) the Petitioner does not dispute Professor Woxholth's Norwegian law conclusions. Accordingly, it is not necessary for the court to read his report. In any event, for the reasons set out in detail at paragraphs 69 to 76 below: (i) the Company is contractually estopped from alleging such a breach by the representations in the GIC Guarantee; and (ii) Nordic Trustee wrongly conflated a breach of contract with a breach of fiduciary duty (the key issue in this case): as explained at paragraph 75 below, a breach of contract does not, without more, imply a breach of fiduciary duty."

153. GIC sets out some helpful general legal guidelines at paragraph 12 (d) – (g):

"(d) On the facts of this case, where the GIC Guarantee is otherwise prima facie valid, the onus is on the Company to prove (on the balance of probabilities) that the debt is disputed on substantial grounds: see French at [7.451] and In Re Tag Capital Ventures Ltd [2012] EWHC 1171 Ch at [12] and [42]. [AB/7]

(e) An assertion of facts unsupported by evidence will not provide a substantial ground for dispute: see French at [7.455]; Feldman v Nissim [2010] EWHC 1353 Ch at [4], [66], [67] and [79] [AB/8]. The court will be wary of relying on unparticularised or unsubstantiated allegations: see French at [7.458]

(f) Whether a company's allegations are believable is to be answered not by taking those assertions in isolation but rather by taking them in the context of so much of the background as is either undisputed or beyond reasonable doubt: see French at [7. 458]; In re a Company 6685 of 1996 [1997] 1 BCLC 639. [AB/9]

(g) On the facts of the current case, it is not suggested that the requirement of "bona fide" adds anything to "disputed on substantial grounds"."

154. GIC adds at paragraph 12 (h):

"(h) It may be that no gloss or further explanation is required as to what constitutes a "dispute on substantial grounds": like an elephant, it is something the court can recognise when it sees it. Other articulations of what that test means in practice, include: whether the company's defence has "really no rational prospect of success,"; whether the dispute "has sufficient substance to justify it being determined in a normal civil trial;" the test of whether there is a "a genuine triable issue" has been held to be no less stringent that the summary judgment test of "real prospects" of success. All point in the same direction: an issue of substance unsuited for determination on paper."

155. At this juncture the Court carefully reminds itself that it is not here an issue of substance itself which the Court must decide but whether in relation to such an issue there is a dispute on substantial grounds. In the opinion of the Court, it is critical to bear that demarcation line firmly and consistently in mind.

156. At paragraph 13, GIC points out that the Company, through NT, relies on two fiduciary duties owed by directors: the duty to act *bona fide* in the best interests of the Company and the duty to act for a proper purpose.

157. Paragraph 14 proceeds as follows:

> *"14. As regards the duty to act bona fide in the best interests of the company:*
>
> *(a) This concerns the actual subjective motivation of the director in question (Hollington § 5-25). As Lord Greene MR put it in Re Smith & Fawcett [1942] Ch 304 at 306 [AB/13]:*
>
> > *"The principle to be applied in cases where the articles of association confer a discretion on directors ... are for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what the court may consider – is in the interests of the company and not for any collateral purpose".*
>
> *(b) The legal burden of establishing a breach of this duty rests upon the party asserting the breach: see Wessley v White [2019] B.C.C 289 [AB/14].*

(c) *Although the test is a subjective one, the Court will take into account whether the decision is one no reasonable director could have regarded as being in the interests of the company: Regentcrest PLC (in Liquidation) v Cohen [2001] B.C.C 494 ChD at [210] [AB/15]; Re Southern Counties Fresh Food Ltd [2008] EWHC 2810 (Ch) at [53] [AB/16].*

(d) *In short, for present purposes, it is necessary for NT to establish (to the requisite standard) that the granting of the GIC Guarantee was "Wednesbury" unreasonable – namely that no reasonable director could have regarded it to be in GDG's best interests to grant the GIC Guarantee.*

(e) *That addresses the breach issue. In order to impute Mr Grewal's authority, as NT seeks to do in reliance on Criterion Properties (see below) [AB/17], NT must also establish (again to the requisite standard) that GIC must have been aware that Mr Grewal's decision to grant the guarantee was "Wednesbury" unreasonable and thus outside his authority."*

158. As we have seen, however, the Majority Creditor takes issue with whether the current state of the law encompasses only *"subjective motivation."*

159. GIC then develops its theory as to the duty to act for a proper purpose at paragraph 15:

"15. As regards the duty to act for a proper purpose, the relevant test is part subjective and part objective:

(a) *It is subjective in the sense that it focuses on the purpose of the directors at the time they exercised their powers. As Viscount Findlay stated in Hindle v John Cotton Ltd (1919) 56 Sc Lr 625 at 630-632[AB/18]:*

> *"Where the question is one of abuse of powers, the state of mind of whose who acted, and the motive on which they acted, are all important and you may go into the question of what their intention was collection from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage of for any other reasons"*

(b) *It is objective in the sense that the question of what is the proper purpose of a power is a question of law.*

(c) *Whether the power was exercised for an improper purpose is determined by reference to what was the "substantial or primary purpose" per Lord Wilberforce in Smith v Ampol [1974] AC 821 at 832 [AB/19] or whether the purpose was causative in the sense that without it the power would not have been exercised (per Lord Sumption (with whom Lord Hodge agreed) in Eclairs Group Limited v JKX Oil and Gas PLC [2015] UKSC 71 at [21] [AB/20].*

(d) *Again, for the purposes of this case, NT must establish, to the requisite standard, not only that Mr Grewal acted for an improper purpose when he gave the GIC Guarantee, but also that GIC was aware that the guarantee had been given for an improper purpose."*

160. The argument then turns to want of authority at paragraphs 17 – 19:

"17. Breach of fiduciary duties and want of authority. As made clear in Criterion Properties v Stratford [2004] 1 WLR 1846 (HL) [AB/17] the question of whether a third party can enforce a transaction against a company allegedly entered in to in breach of the directors' fiduciary duties depends on the law of agency: see Criterion [2] and [27] to [29]. In short, was the transaction within the actual or apparent authority of the director?

18. It is accepted that a director has no actual authority to act in breach of his fiduciary duties and that a third party cannot rely on apparent authority where it is know that the agent has no actual authority.

19. Again, therefore, for the purposes of this case, NT must show, to the requisite standard, not only that Mr Grewal acted in breach of his fiduciary duties when he gave the GIC Guarantee but also that GIC must have been aware at that time."

161. However, an alternative approach would be to show that GIC knew or had reason to believe that the GIC Guarantee was contrary to GDG's interests in the broader way that the Majority Creditor has sought to define those interests, including the wider and growing interests of lawful creditors.

162. GIC then points out that the GIC Bonds were issued on 4 June 2014 and the NT Bonds were issued some 5 months later on 19 November 2014. However, unlike the GIC Bonds the NT Bonds are self-described as "*Senior Secured Callable Bond Issue*". There is some background dispute as to seniority which it is unnecessary for this Court to address for present purposes.

163. There were then four amendments in all to the GIC Bond Agreement.

164. Reference is made in the Petitioner's Skeleton Argument at paragraph 33 to what GIC calls the No Disposal Letter:

> *"33. 02/11/17 – The No Disposal Letter. On 2 November 2017 G3E signed the No Disposal Letter in favour of GIC (ML-1 page 112: [HB1/6]). GIC say this is a critically important document. By it, and for the consideration there recorded, G3E undertook on its own behalf, and on behalf of its subsidiaries not to: "sell or otherwise dispose of any material asset/s of any company in the Group (whether pursuant to the Sale Process or otherwise) or any interest therein not grant any encumbrance in respect thereof"; or "other than the Nordic Bond extension, not*

entire into any material agreement, or incur any material commitment which is not in the ordinary course of business or which is not on arm's length terms"."

165. It is necessary to set out the text of the letter, particularly in relation to the consideration described therein. It is from Mr. Grewal on behalf of G3E (albeit called Green Dragon Gas Ltd at that time) to GIC and it states:

"We refer to our letter to you GIC Private Limited ("GIC") dated 29 September 2017 (the "Comfort Letter") in relation to the convertible bonds issued by us, Green Dragon Gas Ltd ("GDG", "us" or "we"), to GIC on or about 2 June 2014 in the aggregate principal amount of US$50,000,000 (the "Bonds"), as amended.

As mentioned in the Comfort Letter we continue to pursue a sale process (the "Sale Process") with a view to selling certain assets (the Chengzhuang / GCZ assets comprising the Quinshuj Basin Chengzhuang Cooperative CBM Block) with a view to increasing the liquidity of GDG to enable GDG to settle its obligations to GIC.

As further comfort to GIC and in consideration for GIC continuing to negotiate with GDG and incur costs to diligence GDG and its assets, GDG confirms on its own behalf and on behalf of each of its subsidiaries (the "Group") that for so long as the Bonds are held by GIC (or members of its group) neither GDG nor any of its subsidiaries shall:

- *Sell or otherwise dispose of any material asset/s of any company in the Group (whether pursuant to the Sale Process or otherwise) or any interest therein, nor grant any encumbrance in respect thereof;*

- *Other than the Nordic Bond extension, not enter into any material agreement, or incur any material commitment which is not in the ordinary course of business, or which is not on arm's length terms; or*
- *Agree, conditionally or otherwise, to do any of the above activities,*

without the prior written consent of GIC."

166. The Majority Creditor takes issue with the characterisation of the self-described consideration alleging that there is really no consideration in substance, and it claims that the letter is no more than a comfort letter. Once again, these are significant differences of legal perspective.

167. On 10 November 2017 the GIC Agreement, the first three amendments, the Comfort Letter and the No Disposal Letter were provided to Akin Gump, who were the lawyers representing the largest holder of the Nordic Bonds, and Mr. Stock states at paragraph 10 g. of his First Affidavit that NT was also provided with a copy of the No Disposal Letter on 10 November 2017. He continues:

"Nordic Trustee cannot have failed to understand its significance in terms of how it gave control to the Petitioner over any restructuring G3E may have been contemplating to finance the re-payment of either or both of the Bonds. This is one of the most critical documents for the purposes of the application before the Court: the subsequent provision of the NT Guarantee (which Nordic Trustee did not provide to us at the time) was a clear breach of the No Disposal Letter. Mr Lundberg has offered no

explanation as to why Nordic Trustee felt entitled to act in what, on this occasion, they must have known was in breach of the Petitioner's contractual rights against G3E."

168. On 20 November 2017 the NT Bonds were not repaid on their maturity date.

169. There was a public announcement on 20 December 2017 to the financial markets of its intention to list the G3E Group's production assets (the GSS Block and the GCZ) Block on the Hong Kong Stock Exchange ("HKSE") as a dividend in specie.

170. G3E's annual accounts record that the accounts had been signed off on a *"going concern"* basis because of the directors' refinancing proposals and their belief that Bond Holders would not put the Bonds into default before additional funding had been received.

171. On 16 March 2018, it is said at paragraph 40 that in order to rectify certain concerns of NT, GDG, acting through Mr. Grewal as its sole Director, executed the NT Guarantee in favour of NT.

172. It is stated that NT did not provide GIC with a copy of the NT Guarantee at that time and that GIC first saw it some 18 months later on 2 November 2019.

173. The Petitioner's Skeleton Argument continues at paragraphs 43 – 45:

> *"43. 30/04/18 G3E Public Announcement. On 30 April G3E made a further public announcement to the financial markets (JS-1 page 7-8:[HB4/50]). It explained that the divestment of its producing assets (Blocks GSS and GCZ) would be achieved by spinning out GDG onto the HKSE, through a dividend in specie*

whereby G3E would retain a 25% shareholding in the GDG with the balance being distributed to G3E's existing shareholders.

44. *08/05/18 The Guarantee Demand letter. On 8 May 2018 GIC (acting by its solicitors Cooley) wrote to G3E (FL-3, pages 2-3: [HB3/39]) explaining: (i) that the 30 April 2018 Public Announcement indicated that the IPO would be achieved by a Proposed Divestiture of G3E's assets; (i) that the Proposed Divestiture required GIC's consent under the No Disposal Letter; (iii) that the Proposed Divestiture as currently structured would be prejudicial to GIC's interests; and that (iv) GIC would not consent to the Proposed Divestiture unless a guarantee, on terms acceptable to GIC was provided by the Company (Stock 1 [46]: [HB4/49]). It is GIC's case that this is a critically important letter.*

45. *24/05/18 – The draft prospectus. On 24 May 2018 Mr Grewal provided GIC (through Cooley) with a copy of the draft prospectus for the IPO. (Stock 1 [48(b)]: [HB4/49]. It runs to nearly 400 pages (FL-3 pages 12-393: [HB3/39])."*

174. GDG, acting by its sole director Mr. Grewal, provided a signed guarantee dated 9 July 2018.

175. It is also stated that just as NT had not provided GIC with a copy of its guarantee dated 16 March 2018 GIC did not provide NT to copy its guarantee dated 9 July 2018. The IPO still seems however to have been a fall back alternative if G3E was not successful in pursuing a sales process of the producing assets held by GDG to repay the two Bond Holders. Mr. Lundberg states that NT first learnt of the existence of the GIC Guarantee on 8 October 2019 from the Receivers. The appointed Directors of GDG on 14 January 2020 wrote to the Petitioner to inform them of their caveated conclusion that the GIC Guarantee was likely to be valid and enforceable.

176. GIC contends that NT has failed to establish either of the two key propositions to establish its case. Paragraph 51 states:

> *"51. NT has failed to establish, whether to the requisite standard or at all, either of the two key propositions, that it would have to establish to make good its case; namely:*
>
> *(a) First, that Mr Grewal's decision to grant the GIC Guarantee was "Wednesbury" unreasonable, in the sense that no reasonable director could have concluded that it was bona fide in GDG (and G3E's) best interests to grant the guarantee; alternatively, that he did so for an improper purpose.*
>
> *(b) Second, that GIC must have been aware that Mr Grewal was acting in breach of those fiduciary duties."*

177. GIC defines the issue thus:

> *"52. The question the Court will inevitably ask itself is why would Mr Grewal have issued the GIC Guarantee if he did not believe it to be in the best interests of GDG (and the G3E group) and its creditors?"*

178. In one sense the question assumes that as a matter of law the separate interests of third party creditors were of no account, and in another sense that economic expediency or necessity or perhaps desperation are at least consistent with the duty to act in the best interests of the Company and the duty to act for a proper purpose. That may be the position, but in the circumstances of this case is it the only position that could have been taken? Are these matters, in other words, the focus of a genuine dispute or are they not?

179. Nonetheless, GIC seeks to explain the situation to the Court in this way at paragraph 54:

> *"54. In contrast, the evidence of Mr Stock and Mr Triplitt puts the grant of the GIC Guarantee in its proper commercial context: (i) it was a transaction between arm's length parties; (ii) the proposed IPO could not proceed to completion unless GIC gave its consent; ((iii) Mr Grewal could reasonably believe that the refinancing under the proposed IPO was in GDG (and G3E's) best interests including those of its creditors) and so, having reviewed the guarantee, executed it. Further, and in any event, that is how GIC perceived the matter and so was not aware of any alleged breach of fiduciary duty."*

180. The relationship between GIC and G3E/Mr. Grewal is said to be an arm's length commercial relationship, and that GIC are viewed as outsiders to G3E. Why therefore would Mr. Grewal have granted the GIC Guarantee if he did not regard it as being in the best interests of GDG/G3E and its creditors? Although the rhetorical question is put conjunctively, the Court is not thereby persuaded that the best interests of GDG as so described and of its creditors are necessarily the same best interests. In a sense, we return time after time to what in the Court's opinion is the crux of this case.

181. The point is also made that unlike GIC, Mr. Grewal had access to all of the commercial, financial and legal information underlying the proposed IPO. With great respect, the implication of this could be that one party was simply in a superior position to take advantage of the other party while simultaneously disregarding the NT Guarantee commitment if it so chose.

182. Although, Mr. Lundberg had sought to suggest that GIC gave no consideration or derived a corporate benefit to support the GIC Guarantee this is rejected at paragraph 60:

> *"60. NT's position is untenable. The GIC Guarantee was by Deed so no contractual "consideration" was required. As for corporate benefit, Mr Stock explains at Stock 1 [43] [HB4/49] that the IPO refinancing required GIC's consent: (i) under clause 6.11 of the GIC Bond Conditions (because it required the declaration and payment of dividends: (ii) under the terms of the No Disposal letter."*

183. As far as the Deed aspect is concerned, even if for the sake of argument no consideration was required nonetheless how would a guarantee by Deed provide corporate benefit if a mere contractual guarantee did not do so? This is somewhat puzzling.

184. The central issue remains in any event, as GIC puts it, that the Guarantee Demand Letter sent to G3E by GIC (through Cooley) on 8 May 2017 is very clear: the Proposed Divestiture of G3E's valuable producing assets (Blocks GSS and GCZ) to GDG, around which the entire IPO Spin-Off was centred, required GIC's consent under the No Disposal Letter. The Letter was equally clear that no such consent would be provided unless a guarantee acceptable to GIC was provided - as this was the mechanism by which GIC would ensure that the IPO proceeds were used (as intended) to repay the GIC bonds.

185. Mechanically all of this is correct, but the Court must also ask itself the question whether that which is mechanically explainable is therefore perceived to be *bona fide* in the best interests of GDG, done for other than an improper purpose and of genuine corporate benefit to GDG? Certainly the Majority Creditor would contend that the issues identified in those broad summary terms are properly triable justiciable issues.

186. Emphasis is placed on what is called GIC's Guarantee Demand Letter, the legitimate strength of GIC's negotiating position and that GDG had no real option but to provide the GIC Guarantee requested. Equally it could be said that taking fully into account the cash flow predicament of GDG providing the GIC Guarantee was no real lawful option for GDG either. Once again, there can be different points of view in addressing this kind of situation.

187. Turning more specifically to the proposed IPO, GIC submits that the proposed IPO could reasonably be believed to be in GDG's/ G3E's and its creditors' best interests.

188. Paragraph 70 begins:

> *"70. In circumstances where the onus of proof is on NT, yet NT has chosen to adduce no evidence on this issue, the Court should proceed on the basis that a reasonable director could have concluded that the IPO was in GDG and G3E's creditor's best interests. In any event, even the limited evidence to an outsider such as GIC points to that self-evidently obvious conclusion."*

189. The point is reinforced at paragraph 70 (c):

> *"(c) At the time GIC demanded a guarantee, it was clear from (i) the two public announcements that had been made to the financial markets (Stock 1 [35] and [39] [HB4/49]; (ii) the IPO timetable provided on 5 April 2018 (Stock 1 [38]: [HB4/49]) and (iii) the draft prospectus provided on 24 May 2018 (Stock 1 [48(b)] and (FL-3 pages 12-393: [HB3/39] that a huge amount of work was being done by G3E and its professional advisers. Again, it is inconceivable that all that time and expense would be incurred unless G3E (and its board) viewed the proposed IPO as having reasonable prospects of success and in the best interests of the Group and its creditors."*

190. In effect, it is submitted that all the evidence suggests that a director would have been right to regard the grant of the GIC Guarantee as being in GDG and G3E's best interest.

191. GIC then turns to the matter of notice of alleged breaches of contract.

192. In relation to notice of alleged breaches of contract, GIC states at paragraphs 73 – 75:

> *"73. NT allege that GIC must have been aware that the GIC Guarantee was given in breach of: (i) GDG's obligations under the NT guarantee; and/or (ii) G3E's obligations under the NT Bond Agreement as amended. As already stated, for the purposes of these proceedings only, GIC does not dispute Professor's Woxholth's Norwegian law conclusions. Even so, NT's allegations do not bare scrutiny.*
>
> *74. As regards GDG's obligations under the NT guarantee, the evidence shows that neither GIC (nor its solicitors Cooley) saw the terms of the NT Guarantee until 2 November 2019 until over a year after the grant of the GIC Guarantee (Stock 1 [21](a)(iv)]: [HB4/49] and [63]; Triplitt 1 [12(j)]:[HB4/47]). Accordingly, at the relevant time they had no knowledge of the terms of any financial restrictions imposed on GDG under that guarantee.*
>
> *75. As regards G3E's obligations under the NT Bond Agreement as amended, the position is as follows:*
>
> *(a) Mr Stock says (Stock 1 [63]:[HB4/49]) that he regarded the question of whether the grant of the GIC Guarantee involved a breach of the Norwegian law provisions of the NT Bond Agreement, as amended, as being primarily a matter for G3E. That is obviously right. It is a matter*

that lies primarily within the knowledge of G3E not an outsider such as GIC.

(b) *On 1 June G3E, through Mr Grewal, informed GIC in writing that it would have to have the proposed guarantee reviewed (JS-1 pages 320-321: [HB4/50]). Mr Stock had no reason to believe that he did not do so (Stock 1 [48 (d)]: [HB4/49]). As stated, it was an arm's length transaction. Lundberg 3 does not, indeed cannot, challenge this.*

(c) *As "outsiders" invariably do, GIC sought (as part of the guarantee: ML-1 page 113: [HB1/6]) a series of representations ("the GDG Representations") from GDG regarding its power and authority to enter into the GIC Guarantee: see clause 5.3 (Power and Authority); clause 5.4 (Legal Validity); Clause 5.5 (No Conflict); clause 5.8 (Authorisations)."*

193. It would however appear to the Court that the question whether Mr. Stock is factually accurate in saying that he regarded whether the GIC Guarantee involved a breach as being primarily a matter for G3E in circumstances where GDG was a wholly owned subsidiary is in itself a concerning issue.

194. Surely if GIC is an outsider then so is NT, albeit with secured status. In other words, if there is a dispute as to whether GIC was indeed at arm's length, even if it is a dispute ultimately to be resolved in GIC's favour, it is still a dispute. The Court observes that describing a transaction as at arm's length does not in itself make a dispute go away.

195. At this point GIC elaborates on the submission to encompass also what is described as a contractual estoppel.

196. Paragraphs 76 – 77 proceeds:

> *"76. As regards those representations:*
>
> *(a) GIC was perfectly entitled to rely on them as evidencing that if any authorisations had been required to the execution of the GIC the authorisations had been obtained. That is particularly so in the light of the fact that Mr Grewal had indicated that he was having the guarantee reviewed.*
>
> *(b) As a matter of law, representations such as, for example, that given in Clause 5.8 to the effect that all necessary authorisations had been obtained, operates to create a contractual estoppel binding on the party: see Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221 [AB/21] and Lewison on The Interpretation of Contracts 7th Edition at [12.162] to [12.169] [AB/38].*
>
> *(c) Unlike an estoppel by representation, a contractual estoppel requires no proof of reliance: Lewison (supra) at [12.163].*
>
> *(d) A useful example of the operation of such a representation is provided by Wallis Trading Inc v Air Tanzania [2020] EWHC 339 (Comm) [AB/22]. In that case an aircraft lease contained a representation and warranty by the lessee that the lease was a legal, valid and binding obligation on it,*

and that the entry into and performance of the lease did not conflict with any laws binding on it. Butcher J. held that the representation and warranty estopped the lessee from contending that the lease was void for non-compliance with procurement legislation; see Lewison (supra) at [12.165] and Judgment [32] and [79].

77. It follows that (i) GIC was not on notice that the GIC Guarantee involved any breach of contract on the part of either G3E or GDG: indeed GDG had represented the exact opposite; and in any event (ii) GDG (whether it argues its case itself, or delegates that task to NT) is estopped from alleging that necessary authorisations were not obtained or that the GIC Guarantee was otherwise invalid."

197. The Majority Creditor on the other hand asserts that if the GIC Guarantee is otherwise invalid, or deemed to be invalid, then no reliance can be placed upon Clause 5.8. Hence for present purposes it may be argued that if a contractual estoppel is based upon a contract which is itself of no force and effect calling a provision in it an estoppel has no force and effect either.

198. This is not a dispute of no significance. On the contrary, it appears to the Court to be a dispute of some degree of significance and substance.

199. GIC seeks to counter these concerns at paragraph 78 as follows:

"78. Mr Lundberg (at Lundberg 2 [77.2] [HB3/37] suggests that no reliance can be placed on the contractual representations because NT is asserting that the GIC Guarantee is void. This argument is misconceived for two separate reasons:

(a) First, the argument is a boot-straps argument (or to mix metaphors puts the cart before the horse). In considering whether the GIC Guarantee is valid, the court has to take account of the representations made: as illustrated above, they go to the question of whether GIC was on notice of a breach of contract and/or contractual estoppel. They only fall to be ignored if the Court concludes that the guarantee is nevertheless void. NT's argument is a boot-straps argument (or puts the cart before the horse) as it asks the court to assume the conclusion of the argument (namely that the GIC Guarantee is invalid) and use that as the premise for ignoring the representations. That is obviously wrong.

(b) Second, and in any event, transactions entered into in breach of fiduciary duties are not void, they are merely voidable: see Gore-Browne on Companies Chapter 8 [1]."

200. GIC expressly complains that the contrary argument of the Majority Creditor asks the Court to assume the conclusion on the argument (*viz.,* that the GIC Guarantee is invalid) and uses that as the premise for ignoring the representations as above defined. However, the Court is equally being asked to assume that the GIC Guarantee is valid and to use that as the premise for enforcing the representations. On any reasonable analysis that seems to be a dispute of some substance.

201. GIC then seeks to develop what may be called the fiduciary argument. The Court notes that it does so in terms of artificially general propositions rather than by evidential reference to a company experiencing active cash flow problems and facing potential and/or actual insolvency as GDG did at the material time.

202. Paragraph 79 states:

> *"79. Generally, however, there is an overarching point to be made in relation to NT's (wrong) assertion that GIC was on notice that Mr Grewal executed the GIC agreement in breach of G3E's obligations to NT under the NT Bond Agreement (as amended). NT is wrong to suggest that it is outside of a director's actual or apparent authority, or that it necessarily involves a breach of his fiduciary duties, for a director to cause his company to breach its contract:*
>
> *(a) If it were outside the directors' authority, a company would never be able to breach its contract: yet directors cause companies to do that all the time.*

> (b) *If the proposition were correct, the first point any claimant in a contract breach claim for wrongful termination of contract would make is that the director had no authority on the part of the company to terminate the contract. That is not the case.*
>
> (c) *It is self-evidently sometimes in the best interests of a company to breach a contract.*
>
> (d) *In short, merely because an act involves a breach of contract says nothing about whether the act was outside the director's authority and/or involved a breach of his fiduciary duties."*

203. The Court notes that a little later GIC reviews the subject of creditors' interests. The Court's observation in this regard is that treating these subjects as separate does not in itself make them separate. Indeed, whether they should be treated separately is again a central area for proper and important debate in all the circumstances of this particular case.

204. By way of example, the Court carefully notes GIC's proposition that because an act involves a breach of contract this says nothing about whether that act was outside the director's authority and/or involved a breach of his fiduciary duties. With great respect, depending on the actual circumstances including the Company's financial circumstances it may say a great deal as distinct from saying nothing.

205. It is a debate which the current proceedings are obviously unsuitable to resolve.

206. GIC addresses creditors' interests in this way:

> *"81. NT also seek to allege that GIC must have appreciated that Mr Grewal failed to have proper regard for GDG's creditors' interests when he signed the GIC Guarantee. Once again, NT's allegations in this regard do not meet the requisite standard. There are two points to be made:*
>
> *(a) First, as indicated above, one of the primary purposes of the IPO Spin-Out was to repay the existing bondholders' indebtedness. Thus far from ignoring creditors' interests a reasonable director could quite properly have concluded that creditors interests were promoted by execution of the GIC Guarantee without which the IPO was doomed. Certainly, that is how it appeared from GIC's perspective. Further, no distinction can properly be brought between NT's interests as a contingent guarantee creditor of GDG and its interests as a bond-holder creditor of G3E. Its interests as the former would be promoted by a re-financing that facilitated the payment of the guaranteed liability to NT in its latter capacity.*
>
> *(b) Second, the duty to have regard to the interests of creditors arises when the directors knew or should have known that the company is, or is likely to become, insolvent. And in this context "likely" means "probable not some lower test.... ": see BTI 2014 LLC v Sequana LLC [2019] EWCA Civ 112 per Lord Justice David Richards at [220] [AB/25]. NT have adduced no evidence to establish (even to the requisite standard) that any reasonable*

director of GDG would have been bound to reach that conclusion. Lundberg 3 [HB4/51] and Borrelli 4 [HB4/53] do not address this issue at all. On the contrary, the evidence from both G3E's 2017 and its 2018 accounts was that the directors believed that the refinancing would be successful and that bondholders would not put the bonds into default until after additional funding had been received: it was on that basis that the Group's accounts were signed off on a "going concern" basis (JS-1 page 164, 174-176: [HB4/50]). Also by clause 5.6 of the GIC Guarantee GDG represented that "No Insolvency Proceedings have been taken or threatened in relation to it" ML-1 page 122 [HB1/6]. Mr Triplitt (Triplitt 1 [25] : [HB4/47]) also makes the compelling point that it would have made no sense for Nordic Trustee to call its guarantee at that point and that it would be "nonsensical" for an insolvent company to apply for a listing on HKSE. There was no view that the insolvency was "probable". It was self-evidently in all stakeholders' interests that the refinancing proposals should be pursued. "

207. It does not appear to be a matter of controversy that one of the primary purposes of the IPO Spin-Out was to repay the existing Bond Holders' indebtedness. It may have been an advantageous course to take but it was taken in circumstances where due to cash flow difficulty the indebtedness could not be repaid and had not been repaid.

208. Furthermore, while perhaps a reasonable director could have concluded that creditors' interests were promoted by execution of the GIC Guarantee *"without which the IPO was doomed"*, arguably a reasonable director might likewise have concluded that execution of the Guarantee would make an already bad situation a great deal worse. Once again, and based upon the necessary limited material presently available to hand, this is an entirely proper area for substantial and thus far unresolved dispute.

209. As to whether a director knew or should have known that a company was or was likely to become insolvent, that is a question of fact. Where Bond Holdings have become due and have not been paid insolvency is a question to be resolved in accordance with law. One might add that if any reasonable director had failed to reach that clear conclusion arguably he or she might not be as reasonable as they had appeared to be.

210. While the refinancing proposals may have been pursued in good faith, alternatively they could certainly be pursued, and arguably were pursued, in circumstances where insolvency was highly probable. With great respect, GIC's analysis does not meet or even recognise this aspect of what appears to be an entirely proper and substantial area of dispute. In a real sense therefore GIC's submissions invite the Court to resolve a dispute in one way only as a matter of narrow logic rather than to recognize it objectively in principle and in law and to ensure that it is properly addressed.

211. It is submitted at paragraph 82 that on commercial grounds the giving of the GIC Guarantee at the time that it was given was justified and a course for a reasonable director:

"82. Finally Mr Lundberg (at Lundberg 2 [73.8]: [HB3/37]) seems to suggest that no guarantee should have been given, unless and until, the IPO took place. Again, that is wrong.

(a) As Mr Stock explains at Stock 1 [67] [HB4/49] if GIC had waited until then, its position would already have been prejudiced. GIC would have had no mechanism to ensure the IPO proceeds were used to repay the GIC bonds and no leverage to demand a guarantee.

(b) GIC was fully entitled to use the strength of its bargaining position under the No Disposal Letter to demand the GIC Guarantee. Mr Grewal's assessment that that was the price that had to be paid to allow the IPO proposal to proceed was one that was well within the bounds of decisions open to a reasonable director. Indeed, it was the right one. Had it not been given it would have been open to GIC to object to the NT Guarantee which NT required if the IPO, as structured, was to proceed; Stock 1 [68] [HB4/49]."

212. Once again, these submissions must be seen within the broader context of the state of GDG's affairs. In other words, what may appear to be reasonable when viewed in complete isolation is not necessarily and dispositively so in the context of the total factual circumstances. It is not by any means self-evident that GIC perceived that important aspect in the manner that the Majority Creditor appears to do, while of course bearing firmly in mind that the Majority Creditor has the burden of satisfying the legal and factual applicable test.

213. GIC argues that the Majority Creditor suffered a paucity of evidence on what it described as a strong, indeed compelling, reason why GDG gave the GIC Guarantee.

214. GIC further contends at paragraph 85:

> *"85. In order to deflect attention from the paucity of their evidential case, NT has sought refuge in two arguments of prejudice: they should not be allowed to deflect the Court's attention from the key issues.*
>
> *(a) First, it seeks to cast an air of suspicion over the GIC Guarantee because it was not produced to NT at the time. There is nothing in the point. As Mr Stock explains [Stock [10(d):HB4/49] the bond parties simply did not co-operate or communicate in this way. There is nothing suspicious in it, just as there is nothing suspicious in the fact that NT did not produce the NT Guarantee to GIC at the time. Another example is the fact that NT did not*

notify GIC at the time of the conclusion of the NT Amendment and Waiver Agreement. [ML-1 page 96: HB1/6].

(b) *Second, NT asserts that it was the "senior" security. However, as Mr Stock explains, that was not by agreement: it is something NT took in conflict with GIC's negative pledge rights under Clause 2 of the Conditions and through its unilateral amendment in May 2017 to the financial restriction provisions in the original NT Agreement."*

215. Both 85 (a) and (b) are closely related. The historical argument that NT held the *"senior"* security may be correct. The Court is not in a position where it can categorically decide that issue one way or the other. If it is the correct position, however, then the Majority Creditor and GIC are not in a state of equivalence. The failure of GIC to produce its guarantee to NT would not in these circumstances be the same as NT not producing its guarantee to GIC. GIC may ultimately be right as to the point, but demonstrably the Majority Creditor has identified a matter of genuine dispute here that requires an orderly process of resolution.

216. GIC then develops further the contention that even if the Court were to conclude that it had been established to the requisite standard for this proceeding that the GIC Guarantee had been given by Mr. Grewal in breach of his fiduciary duties, the GIC Guarantee is nonetheless valid and enforceable against GDG. The first limb is contractual estoppel, and the second limb is the unanimous consent of the shareholders.

217. The contractual estoppel point is then reiterated at paragraph 87:

> *"87. Contractual Estoppel. The effect of the Springwell contractual estoppel is not just to estop GDG from asserting that it failed to obtain a necessary authority such as under clause 5.8. Clause 5.4 (entitled Legal Validity) represented that "The obligations expressed to be assumed by it in the Deed are legal, binding, valid and enforceable obligations". That operates to estop GDG from asserting that the guarantee is invalid (in this case because of a prior breach of fiduciary duty). The point is exactly covered by Butcher J. in Wallis (supra) at [79] where he held that provisions in materially similar terms to clause 5.4 operated to prevent the claimant from advancing arguments based on the invalidity of the underlying contractual arrangement (in that case an aircraft lease)."*

218. As this Court has already indicated, despite the contention of GIC to the contrary, this argument is not obviously free-standing. According to the Majority Creditor it is dependent on the Guarantee itself being valid. Although paragraph 79 of the *Wallis* case refers to a contractual estoppel, as we have seen the Majority Creditor takes issue with whether the authorities on which the proposition is based actually state what in paragraph 79 they are interpreted to state.

219. In *First Tower Trustees Limited v CDS (Superstores International) Limited* [2019] 1 WLR 637 a number of issues are considered in relation to contractual construction at paragraph 50. For example, the question is raised as to whether there is an estoppel which is valid as a matter of contract and if there is whether that estoppel has effect to exclude a liability for misrepresentation which would otherwise arise.

220. Leggatt LJ discusses some of the problems of construction at paragraphs 94 – 96 of his judgment:

> *"94 Like Moore-Bick LJ in Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006) 2 Lloyd's Rep 5 II, para 57, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear. But I question whether a clause, such as clause 5 .8 of the lease in this case, which says simply that A "acknowledges" that it has not entered into the contract in reliance on any representation made by B, clearly expresses such an intention. It seems to me that such wording is more naturally understood as stating a fact which may or may not be true. That, indeed, is how a similarly worded clause was understood by the Court of Appeal in Watford Electronics Ltd v Sanderson CFL Ltd [2001] 1 All ER (Comm) 696. If what the parties wish to agree is that A will not assert in any future dispute that it relied on a representation made by B even if A did in fact rely on such a representation, then it seems to me that this is what the clause ought to say. However, a different*

view was taken by the Court of Appeal in the decision in the Springwell case, at para 170. No doubt for that reason the tenant did not dispute in the present case that clause 5.8 of the lease has that meaning, and I shall therefore assume that it does.

95 *It is important, none the less, not to be misled by the use of the word "basis". To say that a clause giving rise to a contractual estoppel establishes the "basis" of the contract could be taken to suggest that the clause is of fundamental or foundational importance to the parties' bargain. That in turn might encourage the thought that a "basis" clause is entitled to particular respect in order not to interfere with freedom of contract and is different in nature from a common or garden exclusion clause. Such a line of thought, however, is fallacious, as it turns on an ambiguity in the word "basis". There is nothing in the terms of the lease in this case, for example, to suggest that clause 5.8 is intended to have a special foundational or fundamental importance as a term of the parties' contract. The same is true of other clauses which have been considered in the case law to give rise to a contractual estoppel. Those clauses have no more been agreed to form the basis of the contract in this sense than any other term of the contract. The statements in the Peekay case [2006] 2 Lloyd's Rep 5II and subsequent cases that the parties have agreed that a particular state of affairs is to form the "basis" on which they are contracting use the word in a different sense to mean an assumption that is agreed for the purpose of the transaction. Such statements are just another way of saying that the parties have agreed to assume that the*

relevant state of affairs is true, whether or not it is in fact true. It would be conducive to clarity if the use of the expression "basis clause" were to be avoided.

96 What then of the suggestion that a distinction should be drawn between a contract term which excludes liability and one which defines the parties' obligations in a way that prevents liability from arising? I agree with Lewison LJ that the relevance of this distinction is limited to a situation in which there is an issue about the extent of the primary obligations undertaken by a contracting party. Where a party relies on a term of its contract to argue that it has no liability under the contract to the other party, an issue can arise as to whether the term excludes liability for breach of the contract or merely shows that no relevant contractual obligation has been undertaken. This is a question of construction of the contract in question."

221. The Court observes at this juncture that there may well be primary obligations owed to the parties other than a contracting party, such as in this case, creditors.

222. Clauses 5.4 and 5.5 of the GIC Guarantee state:

"5.4 Legal validity

The obligations expressed to be assumed by it in this Deed are legal, binding, valid, and enforceable obligations

5.5 Non-conflict

The entry into and performance by it of, and the transactions contemplated by, this Deed do not conflict with:

(a) Any law or regulation applicable to it;

(b) Its constitutional documents; or

(c) Any document which is binding upon it or any of its assets.

223. Clause 5.8 states:

"5.8 Authorisations

All authorisations required by it in connection with the entry into, performance, validity and enforceability of, and the transactions contemplated by, this Deed have been obtained or effected (as appropriate) and are in full force and effect."

224. Does this language reflect a clear intention by the parties to the GIC Guarantee to give up any right to assert that they were induced to enter into it by misrepresentation? Or does it reflect more broadly an intended exclusion of liability? Even if it does reflect only an exclusion of liability, does it in terms of the language which is actually used clearly estop GDG from asserting that the GIC Guarantee is invalid in any and all circumstances? If GIC's analysis of the *Wallis* case is right, it could estop GDG. However, both in terms of documentary construction and in terms of what the respective legal authorities appear to state especially in relation to creditors' rights, GIC is still some way from refuting the

arguments which the Majority Creditor seeks to deploy. In other words, the Court has difficulty in seeing its way to concluding that there is once again no *bona fide* substantial dispute at all. The extent to which clause 5.4 and indeed for that matter clauses 5.5 and 5.8 conform to the generic contractual estoppel claimed by GIC is frankly far from self-evident or straightforward. GIC may be right, but the Majority Creditor and GDG itself may be right instead.

225. GIC then states that the execution of the GIC Guarantee was part of a wider scheme at paragraphs 88 - 89:

> *"88. <u>The Unanimous consent of shareholders.</u> The execution of the GIC Guarantee was not a stand-alone corporate act by GDG. As is clear from the above, it was but one step in a group wide scheme that aimed to refinance the entire group. It was a scheme that necessarily involved all intermediate holding companies as declarations of dividends in specie were required to spin-out the development assets at the G3E level through the IPO.*
>
> *89. In the case of GDG, GGC was its immediate holding company. GGC owned 100% of GGC's shares and Mr Grewal was its sole director (Stock 1 [51]: [HB4/49]). GGC, through Mr Grewal, clearly knew of the granting of the GIC Guarantee. Indeed the only proper inference (given the group wide nature of the scheme) is that GGC approved of the giving of the guarantee."*

226. The principle in the *Re Duomatic Ltd* case is then relied upon at paragraph 90:

> *"The well-known principle in Re Duomatic Ltd [1969] 2 Ch 365 [AB/26] was summarised by Lord Neuberger in EIC Services Ltd v Phipps [2003] 1 WLR 2360 at [122] [AB/27]:*
>
> > *"The essence of the Duomatic principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at general meeting, that requirement can be avoided if all the members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter". (Emphasis added)*

227. The Court would comment without prejudgment that what is equitable or inequitable in the context of the G3E Group approaching or arriving at a state of collective and individual corporate insolvency may as a matter of fact be different from where there are no such existing constraints. From time to time one principle of law may have to be considered and applied in relation to another principle of law rather than in complete isolation from it.

228. GIC contends at paragraphs 91 – 92:

> *"91. Further, as Lord Justice Jackson observed in Sharma v Sharma [2014] B.C.C. 73 at [49] [AB/28] assent can, in appropriate circumstances, be inferred from silence.*
>
> > *"When a court is considering what, if anything, can be inferred from a party's silence, the factual context is a matter of critical importance. If the surrounding circumstances are such that it would be unconscionable for a party to remain silent at the time and only raise his objections later, then I would have thought that assent can be inferred from silence."*
>
> *92. That analysis is entirely apposite to this case. GDG's shareholders unanimously assented to the grant of the GIC Guarantee such that the guarantee is binding on GDG whether or not it was executed in breach of fiduciary duty."*

229. GIC's argument may of course be right, but in terms of the surrounding circumstances including the stewardship of Mr. Grewal it is not inevitably so. What is unconscionable needs to be considered and weighed by a Court. What GIC is seeking to do is to have these issues disposed of, disputed though they are, without the rigours of a trial and without the benefit of proper discovery.

230. A final point arises which is perhaps worth identifying. At paragraph 89 of the Petitioner's Skeleton Argument it has been submitted that GGC, through Mr. Grewal, clearly knew of the granting of the GIC Guarantee and *"the only proper inference"* (given the group wide nature of the scheme) is that GGC approved of the giving of the guarantee. When one person exercises such dominant control as Mr. Grewal has done, is inference sufficient? Should there be objective evidential verification that appropriate decisions regarding assent were taken? In the *EIC Services Ltd* case, for example, there appear to have been up to 33 different shareholders.

231. In other words, there may be a situation where inference alone as argued for here may not be quite enough to satisfy even the test in *Re Duomatic Ltd*.

232. In addition, the fact that Mr. Grewal *de facto* controlled everything in any event may not be enough by way of answer either, particularly in relation to the balancing of equitable considerations and a need for transparency.

233. In his oral submissions Mr. Gillis drew to the attention of the Court a number of contemporary documents. He did so with a view to showing that the corporate benefit asserted by GIC was not a new case, but rather one that was genuine and well-established.

234. He emphasised that the decision taken by Mr. Grewal as director of GDG was subject to the question whether it was a decision that no reasonable director could have made. It was reiterated that the relationship between GDG and GIC was an arm's length one.

235. Mr. Gillis further stated that in the circumstances, and bearing in mind the No Disposal Letter, GIC was in an entirely legitimate and strong commercial position regarding the release and sale of assets on an IPO.

236. The Majority Creditor had in effect known about the No Disposal Letter from 10 November 2017.

237. There followed a review of the relevant published GDG accounts, as confirmation that the IPO refinancing was being done or would be done in the interests of creditors.

238. The point was also made that where Mr. Grewal could not proceed with his plans without providing the GIC Guarantee his decision was *Wednesbury* reasonable. In substance, funds would become available and could be released to repay existing creditors.

239. While apparently conceding that the GIC Guarantee was granted in breach of contract, it was submitted that this was irrelevant. What NT had to establish was a breach of fiduciary duty. A related issue was whether in any event GIC was even on notice of any such breach.

240. It was submitted that sometimes it is in a company's best interest to breach a contract. Mere knowledge of a breach of contract did not put one on notice of a breach of fiduciary duty. The Court has some concern however with whether these two propositions exhaust the full range of possibilities. There may be other considerations as we have seen where it is not in a company's best interest to breach a contract and where doing so may also give rise to a breach of fiduciary duty. Are these alternative possibilities excluded by the

facts in this case? If they are not excluded, can they instead form a basis of a substantial dispute?

241. Mr. Gillis said it made no difference that the breach of contract was deliberate even if it meant that NT had a damages claim against GDG and that if it had become aware it might have been able to obtain an injunction. In fact, Mr. Gillis went on to suggest that if the IPO had been successful and NT had been repaid there would be no basis for damages anyway.

242. With great respect, these are problematical hypotheses when one considers the actual precarious state of GDG's finances. What is considered commercially adventurous and even enterprising on one view might be considered utterly reckless on another. All of this may well indicate the clear necessity of a trial.

243. The submission was then made on behalf of GIC that the doctrine of contractual estoppel was not limited simply to express non-reliance clauses but extended more widely as the *Wallis* case illustrated. However, if the *Wallis* principle is a sound one it seems to be a principle there confined to representation. In those circumstances, even assuming the *Wallis* principle to be sound law, how is the Court to know that the representation itself was or was not operative? One might enter a contract knowing or suspecting that an agreed and represented state of affairs is completely false to begin with. In that case, would the representation be irrelevant? Once again, these are difficult issues, even if they are ones that are resolved in favour of GIC, but difficult issues nonetheless.

244. GIC submitted that contractual estoppel provided a free-standing reason as to why there is no substantial dispute in this case.

245. GIC further submitted that where no demands for payment have yet been made no debt is due and owed, merely a contingent debt, and that GDG was not at the material time cash flow insolvent. However, given the expanding level of creditors' interests and the corresponding duty to protect those interests, it was clearly not open to the director of GDG simply to do as he pleased irrespective of creditor interests. In that sense, GIC's submission has a certain unreality about it.

246. Reference was also made to the authority of *In Re Smith & Fawcett* [1942] Ch 304, and to the dictum at page 306 that directors must exercise their discretion *bona fide* in what they consider – not what the court may consider – is in the interests of the company and not for any collateral purpose.

247. It was accepted by GIC that if a company is insolvent the shareholders cannot ratify a breach of duty but they can ratify it if the company is not insolvent. It therefore seems that whether GDG was or was not insolvent is a triable issue, as is the separate but related issue of whether it was nearing insolvency.

<u>The Majority Creditor's Legal Submissions in Reply</u>

248. Mr. Smith in reply stated that the central question was whether, in relation to the matter before it, the Court was equipped to determine the hearing issue, or if another method of determination was required.

249. It was contended that GIC's submissions had ignored the fact that the NT Bonds were senior and secured, and held over the shares in the subsidiary Company. The two sets of bonds were not therefore merely in competition with each other, a point which the Court itself has on occasion previously highlighted.

250. Turning to the IPO episode, Mr. Smith said than the key point was that the IPO initiative itself did not answer the question of what corporate benefit did GDG obtain from granting the GIC Guarantee to GIC. Furthermore, was the GIC Guarantee given in breach of GDG's agreement with the Majority Creditor, as no consent was given?

251. Nothing was said to have been gained in relation to the GIC Guarantee.

252. Forbearance from exercising one's rights on the part of GIC did not constitute a gain to GDG. There was no legally binding agreement entered into whereby GIC agreed not to exercise its rights.

253. The grant of the GIC Guarantee was also a breach of the Majority Creditor's agreement, and it was clear that GIC was aware of that. Mr. Stock had read that agreement.

254. Accordingly, it was argued, GIC's case relied upon there being no triable issue as to breach of fiduciary duty.

255. In terms of breach, GDG had agreed not to do something and had then turned around and had done what it had promised not to do. This was unconscionable conduct. Mr. Smith stated that these comments were made in relation to the GIC Guarantee only. That breach gave rise to a damages claim for granting a guarantee in return for which GDG had received nothing. Equally, it could be said that GDG's director had exercised his powers for no proper purpose.

256. Mr. Smith then turned to the contractual estoppel argument, taking as its premise whether the GIC Guarantee was properly entered into or not.

257. Mr. Smith stated that it was clear from paragraph 90 onwards of the *Wallis* case that Butcher J did not apply the principle in that case, ultimately finding at paragraph 98 that in entering the lease in question the allegations that Mr. Mattaka was acting in breach of his fiduciary duties were not proved. Certainly there were other considerations as well, but it does seem to this Court that contractual estoppel was one of a number of collective factors in the decision. The broader question will be as to the relevance of the decision where creditor interests are also engaged at the same time.

258. Mr. Smith nonetheless went on to state that the Majority Creditor was not bound by the GIC Guarantee, and had not been a party to it.

259. It was argued that there had been a breach of duty carried out by Mr. Grewal. He had entered into the GIC Guarantee in breach of duty to GDG. It was a gratuitous act with no corporate benefit conferred. It was not entered into for a proper purpose and moreover it was entered into in knowing breach of contract as we have seen. It was said that GIC in turn knew there was lack of consideration.

260. The Court notes that where an alleged contractual estoppel is claimed to arise but it is within the context of a broader background of pending or active insolvency, how that is to be resolved is not entirely clear as a matter of law. In other words, if a contractual estoppel is bilateral in scope how should it operate if at all in what are at a minimum trilateral circumstances?

261. If a Court concluded in due course that the director did not have authority, then it would simply declare the transaction invalid. Given the importance of the *Sequana* principle and the duty of directors to have regard to the interests of creditors even when a company's circumstances fall short of actual established insolvency, what is the scope of contractual estoppel? Conceptually putting the matter another way, what happens when an equitable principle and a company law principle may appear to collide?

262. When Mr. Smith stated that the Majority Creditor is not bound by the GIC Guarantee, not having been party to it, it seems that he was making a point of law as well as a simple point of fact.

263. In relation to the application of the *Duomatic* principle of ratification, Mr. Smith submitted that it did not apply here. Shareholders could only assent in a completely lawful manner to what had been unsuccessfully attempted to be done in an unlawful manner.

264. In the *In Re Duomatic* case in relation to what is lawful in manner Buckley J notes the following at paragraph 372 a – d:

> *"In Parker and Cooper Ltd. v. Reading [1926] Ch. 975, the second case relied upon by Mr. McCulloch, the directors of a company had created a debenture and proceedings were commenced to establish that the debenture and the resolution which authorised its issue and the appointment of a certain receiver under it were invalid. Astbury J. referred to In re Express Engineering Works Ltd. [1920] 1 Ch. 466 and to In re George Newman & Co. Ltd. [1895] 1 Ch. 674 and himself expressed this view [1926] Ch. 975, at p. 984:*
>
> > *"Now the view I take of both these decisions is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."*

Thus, the effect of his judgment was to carry the position a little further than it had been carried in In re Express Engineering Works Ltd. [1920] 1 Ch. 466, for Astbury J. expressed the view that it was immaterial that the assent of the corporators was obtained at different times, and that it was not necessary that there should be a meeting of them all at which they gave their consent to the particular transaction sought to be upheld. In Parker & Cooper Ltd. v. Reading [1926] Ch. 975, as in In re Express D Engineering Works Ltd. [1920] 1 Ch. 466, no question arose about the position of any shareholders whose shares conferred no right of attending or voting at general meetings of the company."

265. Finally on this issue a specific submission was made on behalf of the Majority Creditor that in any event there was nothing about the company articles in the Court Binders themselves.

GIC Summons

266. Subsequent to the hearing, GIC issued a Summons Application dated 23 February 2021 seeking relief as follows:

"1. an order that unless the Company acting through the Directors and/or Nordic Trustee AS. (NT) provide to the Court and to the other parties the Articles of Association of Greka Gas China Ltd in force as at 9 July 2018 (the July 2018 GGC Articles) by 4pm on the business day following the date of this order that they may be taken into consideration by the Court following the hearing on 8 and 9 February 2021 (the Hearing), then the Court be at liberty to disregard submissions made in reply based on the fact that the July 2018 GGC Articles were not before the Court at the Hearing and/or to draw such adverse inference as it sees fit from the Company's and NT's decision not to put the July 2018 GGC Articles before the Court;

2. an order that, in the event that the Company acting through the Directors and/or NT do provide the July 2018 GGC Articles in accordance with paragraph 1 above, any written submissions which the parties wish to make in respect of the July 2018 GGC Articles shall be filed by 4pm on the third business day following the date of this order;

3. an order that NT and/or the Company shall pay GIC's costs of and occasioned by this Application;

4. such further and/or other relief as the Court deems appropriate."

267. The Court considered an Affirmation of Mr. Rupert Stanning, an attorney of Collas Crill, GIC's attorneys, together with Written Submissions for GIC, NT and GDG.

268. In a Minute of Order dated 12 March 2021 the Court refused the Application, stating that there is ordinarily no disclosure in a winding up petition, nor an exceptional Order for disclosure in this proceeding, and in any event disclosure was not directly sought or applied for. Alternatively, even if the Court did have jurisdictional authority to do so, the Court at this particular stage of the proceedings considered that it was not in the best interests of justice to grant the application.

269. The Court refers to this particular matter in the context of the present Judgment only for a reason to which the Application itself indirectly gave rise.

270. The GGC articles themselves would in all likelihood have been produced as part of the discovery process in *inter partes* litigation.

271. Two points should briefly be made in that regard. First, winding up proceedings do not normally include disclosure for the determination of contested issues of fact. Secondly, where as here, an effort effectively has been made to induce or bring about the further production of material or alternatively to direct how its absence should be treated, the application inevitably even if inadvertently raises the serious question of whether the current proceedings provide the appropriate forum to resolve what then emerges as an underlying dispute, if not in fact a series of underlying disputes.

272. The Court should add at this point that as with a number of subjects which have come under scrutiny it is functionally impossible to examine the subjects without simultaneously examining the overarching significance of the *Sequana* principle as well. In this regard the *Re Duomatic* controversy is really no different from a number of other controversies which cannot be viewed as segregated and self-contained.

The Findings of the Court

273. In *Tallington Lakes Ltd and another v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712 Mr. Justice David Richards sitting in the English Court of Appeal states at paragraph 41:

> *"41. The practical issue is the extent to which the court must go in determining whether there is a genuine dispute on substantial grounds. The court must, as Oliver LJ put it, take a view whether, on the evidence, there really is substance in the dispute. It appears from Chadwick J's judgment that the facts before him were straightforward. It is not, however, practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side. Such a course will involve both delay in getting the issue ready for hearing and a potentially lengthy hearing. In this case, the evidence went through several rounds over a period of some six months. This time would have been better spent in getting a Part 7 claim under way. A lengthy hearing is likely to result in a wasteful duplication of court time. Petitioning creditors must take a realistic view of whether the company is likely to establish a genuine and substantial dispute. Where, as here, the petitioner insists on proceeding, the court is*

fully justified in taking the course sensibly adopted by the Judge in this case of concentrating on those points which the petitioner said were his strongest."

274. It should be noted that the Court discovered the final sentence of this paragraph by going directly to the Judgment.

275. Unfortunately on this occasion it has not been possible to adopt this valuable guidance with perhaps the economy and concision indicated. A considerable number of arguments have emerged which it has been necessary for this Court to address and upon which in varying degrees the Court has already commented. Moreover the Petitioner has not explicitly identified its strongest points in the manner approved in the *Tallington* judgment.

276. However, bearing fully in mind that the burden is upon the Majority Creditor to satisfy the Court upon a balance of probabilities as to the legal test earlier identified the passage quoted does provide some support for the benefits of clarifying what for the purpose of the present exercise is centrally important rather than what is only peripherally so.

277. In this regard this matter essentially turns on the question of whether in contravention of the equitable principles earlier identified Mr. Grewal as a director of GDG in executing the Guarantee has acted in breach of his fiduciary duties.

278. In order to examine that issue it is necessary to define what are the interests of the Company itself. There are grounds for arguing that GDG was approaching a state of insolvency when the GIC Guarantee was executed.

279. In weighing this consideration and the assumption of new obligations this Court finds the following guidance from David Richards LJ in the *Sequana* case at paragraph 147, pages 820 (e) – 821 (a) to be of particular assistance:

> *"The recognition of duties to creditors, restricted as already outlined, is justified by the concept that limited liability is a privilege. It is a privilege healthy as tending to the expansion of opportunities and commerce; but it is open to abuse. Irresponsible structural engineering - involving the creating, dissolving or transforming of incorporated companies to the prejudice of creditors - is a mischief to which the Courts should be alive. But a balance has to be struck. There is no good reason for cultivating a paternal concern to protect business people perfectly able to look after themselves. For those reasons, among the many authorities cited to us I would respectfully adopt the approach of Cumming-Bruce and Templeman LJJ in Re Horsley & Weight Ltd [1982] Ch 442, 454-456. Both Lord Justices favoured an objective test: whether at the time of the payment in question the directors "should have appreciated" or "ought to have known" that it was likely to cause loss to creditors or threatened the continued existence of the company. In my opinion, a payment made to the prejudice of current or continuing creditors when a likelihood of loss to them ought to have been known is capable of constituting misfeasance by the directors; and they may be made liable for it in an action of the present kind. Alternatively an application may be made under s 321 of the Companies Act, which in the substituted form enacted in 1980 extends to "any negligence, default, or breach of duty or trust in relation to the company".*

I also share the view to which Cumming-Bruce and Templeman LJJ evidently inclined in their obiter observations that in such cases the unanimous assent of the shareholders is not enough to justify the breach of duty to the creditors. The situation is really one where those conducting the affairs of the company owe a duty to creditors. Concurrence by the shareholders prevents any complaint by them, but compounds rather than excuses the breach as against the creditors"

280. It is also of interest to note that David Richards LJ had earlier stated at paragraph [143], page 818 h – j in relation to the status of an insolvent company:

"[143] This court's decision in West Mercia establishes two propositions. First, the shareholders of an insolvent company cannot ratify the acts of directors taken in disregard of the interests of creditors, and, as a necessary corollary; it is incumbent on the directors of an insolvent company to have regard to those interests. Second, the rationale is that, because of the company's insolvency; its assets are in a practical sense the assets of the creditors, pending its liquidation or return to solvency."

281. On the one hand, there are the *West Mercia* and *Sequana* authorities providing to varying degrees protections to creditors in circumstances in which they need protection. On the other hand there are authorities such as *Wallis* and *Re Duomatic* which are concerned with issues of absence from liability in conditions where winding up itself does not arise. Both are respected streams of authority, but the question as to how if at all they can be reconciled is a difficult one which it is not the present responsibility of this Court to resolve.

282. In determining what are the interests of GDG it will inevitably be necessary to examine the evidence adduced including relevant material documentation and to make findings of fact, to which principles of law may be applied. In the opinion of the Court, there is pre-eminently a *bona fide* substantial dispute as to the debt claimed by the Petitioner. This is equally so whether the issues be considered issue by issue or whether they be considered in larger and broader terms. Accordingly, this is the decision of the Court.

Should the Petition Proceed in any Event?

283. The Petitioner further argues that should the Court entertain some doubts as to GIC's standing, the Court should nevertheless allow GIC to proceed with the Petition and it raises two points.

284. The first point is that if there is an issue on which the Court concludes that there is a substantial dispute (and the Court has now reached that conclusion), the Petitioner *"resumes the right"* to ask the Court to depart from the usual rule of practice to dismiss the Petition and instead determine the disputed question on the hearing of the Petition according to the normal balance of probabilities test.

285. The second point is summarized at paragraph 96 of the Petitioner's Skeleton Argument:

> *"96. Second, this is a case which falls within the exception recognised in Alipour v Ary [1997] 1WLR 534 at 546 B [AB/29] where it would be appropriate to depart from the usual rule of practice because, "the petitioning creditor has a good arguable case that he is a creditor and the effect of the dismissal would be to deprive the petitioner of a remedy or otherwise injustice would result or for some other sufficient reason the petition should proceed."*

286. Regarding the first point, the Petitioner identifies the reason for the usual rule of practice at paragraph 97 (a) – (b):

> *"(a) The primary reason underpinning the usual rule of practice does not apply here. The main reason for this rule, as expressed by Lord Hoffmann in Parmalat Capital Fin. Ltd. v. Food Holdings Ltd. [2008] CILR 202 [AB/30], is the danger of abuse of process: "a party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a bona fide disputed debt". This particular evil (and thus the need to address it) is simply not applicable in this in instance: the Company is insolvent and is already effectively in liquidation. The Company's expressed (albeit caveated) view is that the debt is probably valid. In those circumstances it is far from clear whether the Company would have opposed the debt but for the agitation of NT, a competing creditor. All parties accept that the debt will not be paid until the underlying assets are realised. If necessary, any dispute as to entitlement to receive proceeds of*

realisation in due course can be resolved through the CWR 16 adjudication process if it becomes necessary

(b) the Petitioner clearly has a good arguable case that it is creditor even if the Court concludes that there is, on some aspect of its claim, a substantial dispute as to the validity of the GIC Guarantee. Further, in the event that the GIC Guarantee is, ultimately, not found to be valid for some reason, GIC would have a prima facie claim in tort against GDG for misrepresentation regarding authority, validity, and consent."

287. The Court recognizes the force of these arguments set out at (a) and (b) as far as they go, and it is certainly no discredit to the Petitioner that it should seek to make them in the form of additional submissions. Unfortunately as the course of this Judgment has shown the issues raised both individually and collectively could hardly be described as straightforward.

288. The Court has already indicated that on matters such as the insolvency or near insolvency of GDG, more evidence will almost inevitably be required. Documentary disclosure as we have seen is already emerging as a troubled and sensitive area. Perhaps even more fundamentally, if this Court were to determine the issues which the Petitioner has invited it to determine a great deal of further consideration would have to be given to identifying and weighing the interests of the Company and applying the relevant body of law to those contested areas.

289. In summary, it does not seem to this Court to be fair to all concerned to take that course of action when so much remains unsettled. Accordingly, in relation to the first point which has been made the Court respectfully declines the invitation.

290. Turning to the Petitioner's second point, the Petitioner highlights at paragraph 98 series of concerns and anxieties which it is claimed would lead to and cause an injustice if the Court declined to proceed.

291. They are thus summarised:

> *"98. As regards the second of those requirements, an injustice would be caused because:*
>
> *(a) GIC would, if it subsequently established its debt, lose its remedy altogether: the likely timeframe is such that by the time of the likely resolution of adversarial proceedings (initiated not by the Company but by NT), that the underlying assets will have been realised by NT's appointees and the primary purpose of and protection afforded by the appointment of Court-supervised officeholders within collective proceedings will have been lost.*
>
> *(b) The Directors (possibly because they are NT's appointees) seem disinclined to engage in determining the validity of the GIC Guarantee. Independent officeholders ought therefore to be appointed to take direct control of the determination of that issue.*

(c) *Furthermore, to the extent there is an evidential shortfall (as the Directors assert), appropriately empowered Court-appointed officeholders stand the only realistic chance of obtaining the books and records that the Directors have so far been unable to obtain. If that is going to be done, it needs to be done sooner rather than later.*

(d) *There is a pressing need for the appointment of liquidators to provide independent supervision of the sale and refinancing process and to report back to the court on whether those processes are being conducted in the best interests of all creditors."*

292. These complaints focus primarily on the conduct of the present Directors of GDG and their management of the Company's affairs.

293. The Directors in turn defend their management practices and activities in the course of their own Skeleton Argument. In effect, they contend that the Petition is being pursued by the Petitioner despite the Directors (who have extensive experience selling distressed assets in the oil and gas industry in Asia and internationally) advancing a sensible and fully considered asset realisation strategy that has a fair, possible and reasonable chance of being successful, in the interests of all of the Company's creditors.

294. The Directors state at paragraphs 21 – 22 with particular reference to section 104 (2)(a) of the Companies Act (2021 Revision):

"21. On any view, there is no prima facie case for making a winding-up order. On the contrary, there is:

a. a substantial dispute about the Petition debt (which needs to be resolved in the appropriate forum); and

b. clear evidence before the Court that the asset realisation strategy that is currently underway (and has been for some time) is in the best interests of the Company's creditors. As such, there is no tangible benefit to be derived from the appointment of liquidators to the Company.

22. Therefore, it cannot be said that there is a prima facie case for a winding-up order to be made against the Company by a creditor who has not yet established that it has standing to issue a petition."

295. Then turning to section 104 (2) (b) of the Companies Act, the Directors also state:

"23. Having regard to all of the above, and even if the Court were to find that there is a prima facie basis for making a winding-up order (which is denied), the Company respectfully submits that any application for the appointment of provisional liquidators must fail in circumstances where none of the requisite criteria set out in section 104(2)(b) of the Act are met. More particularly:

a. there is no possibility of the Company's assets being dissipated or misused, given the ongoing undertakings provided by the Directors (nor is there any evidence of the same);

b. *section 104(2)(b)(ii) of the Act does not apply, as the Petitioner is not a shareholder of the Company; and*

c. *there is no evidence whatsoever of any misconduct or mismanagement on the part of the Directors. On the contrary, the directors are pursuing a clear and appropriate asset realisation strategy in the interests of all of the Company's stakeholders, and are providing monthly progress reports to the Court and the Petitioner (and, in the process, providing more information and transparency about the Company's affairs than the Petitioner would receive from any appointed liquidator). Moreover, the undertakings given by the Directors provide the Petitioner with an additional level of comfort and security as to the propriety of the Directors' actions."*

296. Over what is now a considerable period of time the Court has had ample opportunity to assess and consider both the professionalism and indeed the probity of the Directors. They have provided to the Court and to the relevant stakeholders progress reports on a monthly voluntary basis and it appears to the Court that they have managed to discharge their duties competently under difficult and occasionally uncomfortable circumstances. No evidence has been presented thus far that could reasonably detract from these observations in any conceivable way.

297. While the Court appreciates that the Petitioner should of course be free to express its genuine concerns the Court is unable to arrive at any other conclusion than that those concerns are unfounded.

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 GIC Guarantee. Accordingly after duly weighing all of the circumstances the Court directs that the Petition dated 4 September 2020 should be dismissed.

Robin McMillan

MR JUSTICE ROBIN MCMILLAN

HONOURABLE JUDGE OF THE GRAND COURT