Neutral Citation Number: [2025] EWHC 1650 (Ch)

Case No: CH-2024-BRS-000008

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 3 July 2025

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF PAUL JOHN MATTHEWS (A BANKRUPT)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

PAUL MATTHEWS	**Appellant**
- and -	
(1) BSN (SW) PROPERTY LIMITED	
(2) OAK FIRST INVESTMENTS LIMITED	
	Respondents

- -
- -

Paul French (instructed by **Direct Access**) for the **Appellant**
Robert Machell (instructed by **Kitsons LLP**) for the **Respondents**

Hearing dates: 31 March 2025

- -

This judgment was handed down remotely at 10:30 am on 3 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives

HHJ Paul Matthews :

Introduction

1. This is my judgment on an appeal against the order of DJ Wales made on 18 June 2024, whereby an application to set aside statutory demands was dismissed, and the appellant was adjudicated bankrupt. (I state here that, although I happen to share both a given and a family name with the appellant, so far as I know, I am not related to him.) The appellant's notice was dated 8 July 2024, but permission to appeal was given, by Michael Green J, only on 3 February 2025. The appeal was argued before me on 31 March 2025, by Paul French of counsel for the appellant and Robert Machell of counsel for the respondents. I am sorry for the delay in handing down this judgment, caused by pressure of other work.

Background

2. This matter arises out of a share purchase agreement dated 13 June 2019 in relation to a company called Chip Shack Ltd ("the Company"). The appellant was the buyer and a Mr William Lang was the seller. The respondents were also parties. This agreement recorded that the first respondent and the second respondent had lent £66,950 and £12,800 respectively to the Company. In addition to the sale and purchase of the shares, the agreement also provided (by clause 4.1) for the repayment of the two loans to the respondents by payments made by the Company at the appellant's discretion, but "the Loans shall be repaid in full prior to the fourth anniversary of Completion". It further provided (in clause 4.4) that the appellant "guarantees to each of the Seller and [the first respondent] repayment of the loans by the Company".

3. Clause 7 of the agreement provided for the seller (Mr Lang) and a Mr Simon Cachia (a director of the first respondent) "jointly and severally [to] indemnify the Buyer and the Company" against certain matters including "any liabilities of the Company other than those set out in Schedule 3". Schedule 3 does not set out or refer to either of the two loans the subject of clause 4 of the agreement.

4. Clause 8.1 of the agreement provided that:

> "The payment of the Consideration and the agreement of the Company and the Buyer to repay the Loans is in full and final settlement of all sums due from the Company or the Buyer to the Seller, Simon, BSN and Oak First including but without limitation all monies (including both capital and interest) due or to become due to the Seller or Simon prior to Completion and/or BSN and Oak First pursuant to the terms of the Loans made between each of them and the Company."

"Simon" refers to Mr Cachia.

5. Clause 10 of the agreement provided that:

> "The Buyer and the Company and Crab Shack Restaurants Limited (company number 10531660) shall be entitled to set off against repayments of the Loans any sum due from the Seller, Simon, BSN or Oak First to any of the Company, the Buyer or Crab Shack Restaurants Limited on any basis and whether contained in this Agreement or otherwise."

Again, "Simon" refers to Mr Cachia.

6. The Company did not repay the loans by the fourth anniversary of the completion of the sale. The first respondent wrote to the appellant on 30 May 2023, referring to the terms of the share purchase agreement, and in particular to clauses 4.1 and 4.4, the terms of which were set out verbatim in the letter. The letter went on to say:

> "As you confirmed to the judge, in court on 23 August 2021, you accept and agree that you gave a personal guarantee for the money owed by [the Company] to [the first respondent]. As such we are expecting you to honour this guarantee and repay the loan in line with the time set out in the SPA, before 13 June 2023."

The letter continued:

> "We must emphasise the importance of adhering to the pre-agreed terms of repayment. Failure to repay the outstanding amount amount within the specified timeframe will regrettably leave us with no choice but to pursue legal action against you."

The statutory demands

7. On 18 July 2023 the appellant was personally served with two statutory demands, one on behalf of the first respondent and the other on behalf of the second respondent. The first statutory demand, dated 12 July 2023 and sent by solicitors on behalf of the first respondent, was materially in these terms:

> "The creditor claims that you owe the sum of £66,950.00, full particulars of which are set out on page 2, and that it is payable immediately and, to the extent of the sum demanded, is unsecured."

The amount demanded was correct, but the "full particulars … set out on page 2" of how the liability arose were not. Those particulars referred to and exhibited a personal guarantee document entered into by the appellant in relation to the liabilities of a quite different company, Crab Shack Restaurants Ltd. The particulars said that the respondents relied on clause 2.1 of the personal guarantee. That was wrong. There was and is no separate personal guarantee given by the appellant in relation to the liabilities of the Company. But the "full particulars" *also* referred to and exhibited the share purchase agreement which had been entered into by the appellant, including clauses 4.1 and 4.4.

8. The second statutory demand is also dated 12 July 2023, was made by solicitors on behalf of the second respondent, and materially reads as follows:

> "The creditor claims that you own the sum of £12,800.00, full particulars of which are set out on page 2, and that it is payable immediately and, to the extent of the sum demanded, is unsecured."

9. Once again, the amount demanded was correct, but the "full particulars … set out on page 2" of how the liability arose were not. The error was the same as in the case of the first demand. The particulars referred to and exhibited the personal guarantee document entered into by the appellant in relation to the liabilities of the other company, Crab Shack Restaurants Ltd. The particulars said that the respondents relied on clause 2.1 of the separate personal guarantee. That was wrong, in the same way as before. There was and is no personal guarantee given by the appellant in relation to the liabilities of the Company. But the "full particulars" *also* referred to and exhibited the share purchase agreement which had been entered into by the appellant, including clauses 4.1 and 4.4.

The insolvency proceedings

10. By an Insolvency Act application notice dated 27 July 2023, the appellant applied for an order setting aside the statutory demand on behalf of the first respondent. This was supported by two very short witness statements, one dated 27 July, containing two unnumbered paragraphs, and one dated 31 July 2023, containing six unnumbered paragraphs. In these statements, the appellant made two points. The first was that the Company claimed a set-off against the debts. The second was that the personal guarantee of the appellant had been given in relation to a different company. Both statements were obviously drafted without professional assistance, and neither contained a statement of truth. But the appellant made no similar application in relation to the statutory demand on behalf of the second respondent.

11. The hearing of the application was listed for 23 August 2023 at the County Court at Torquay and Newton Abbot. The notice of hearing was sent out to the appellant on 3 August 2023. The appellant did not attend the hearing on 23 August 2023, and neither was he represented at it. At the hearing, and in his absence, his application was dismissed by DDJ Squire.

12. The appellant received the sealed order dismissing his application from the court on 13 September 2023. In the meantime, the two respondents were preparing a single, joint petition for the appellant's bankruptcy, based on the service of the two statutory demands. On 20 September 2023, the appellant signed another Insolvency Act application notice, dated that day, for an order to set aside the order of DDJ Squire of 23 August 2023. The appellant's case is that he sent it to the court by email, although there is no trace of it after that, and the copy of the notice in the bundle is unsealed. On 21 September 2023 the single, joint bankruptcy petition was presented to the court. It is actually dated 18 September 2023. It was personally served on the appellant on 16 October 2023. On 6 November 2023, DJ Murray adjourned the first hearing of

the petition to 11 January 2024, because the appellant had applied for and entered a breathing space moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020. The breathing space began on 28 October 2023, and ended on 27 December 2023.

13. On 4 January 2024 the appellant made a further, lengthy witness statement in opposition to the petition. It contains 58 numbered paragraphs and a statement of truth. On 11 January 2024 two things happened. First, in relation to the listed hearing of the petition, DJ Salter further adjourned the matter, on the basis of the assertion by the appellant that he had applied to set aside the order of DDJ Squire. The district judge also ordered that the appellant should provide copies of his application. On the same day, a different district judge (DJ Eaton-Hart) made an order transferring further proceedings in this petition to Bristol, because it was contested. It was therefore no longer "local business" within paragraph 3.7 of the Practice Direction for Insolvency Proceedings, and therefore required to be transferred under paragraph 3.6.

14. On 21 January 2024, DJ Taylor in Bristol dealt with the matter on the papers, listing it for a directions hearing by video conference on 9 April 2024. At the hearing on 9 April 2024, the same judge ordered that, unless the appellant made an application to set aside the order of DDJ Squire, he would not be entitled to challenge the statutory demands. As a result, on 15 April 2024 the appellant made a further application by Insolvency Act application notice for an order setting aside the order of DDJ Squire. That application was listed for two hours, and was heard by DJ Wales on 18 June 2024.

The hearing before DJ Wales

15. At that hearing, both the appellant and the respondents were represented by counsel, and both counsel prepared written skeleton arguments for the hearing. It is to be noted that the skeleton arguments filed for the hearing dealt not only with the merits of the application, but also with the merits of the petition (which the appellant's skeleton argument said was flawed both in procedure and substance). The respondents were represented by Mr Machell, who also appeared before me on the appeal. The appellant was represented at that hearing by different counsel (not Mr French, who appeared before me on this appeal). At the outset of the hearing, Mr Machell is recorded in the transcript as saying to the judge:

> "I think it is common ground that application has been issued and I understand [counsel for the appellant] wants to pursue that application so I assumed that was the first thing that was going to happen and the court would decide whether to dismiss that or not and then to go on hearing the petition."

16. Having heard both sides, DJ Wales gave an extempore judgment dismissing the appellant's application to set aside. Having given that judgment, he went on and heard argument from both sides on the petition itself. Again, according to the transcript of the hearing, the appellant's then counsel raised no objection to the judge's taking this course, and indeed took the opportunity to make submissions as to why the petition should not succeed on the merits. DJ Wales

then gave a further extempore judgment, in which he held that the appellant owed a debt to the first respondent exceeding the statutory minimum, and that the statutory demand in respect of that remained unsatisfied, and he therefore made a bankruptcy order against the appellant. In those circumstances, the district judge came to no conclusion in relation to the debt alleged to be owed to the second respondent and made no order specifically in relation to that. The district judge further ordered that "Petitioner's costs should be an expense of the bankruptcy".

Grounds of appeal, and permission to appeal

17. As I have said, the appellant lodged a notice of appeal. There are six grounds of appeal, summaries of which I can take directly from paragraph 5 of the appellant's skeleton argument:

> "Ground 1: the Appellant's application to set aside the order of DDJ Squire made on 23 Aug 23 should not have been dismissed, but should have been allowed;
>
> Ground 2: a bankruptcy order should not have been made as the bankruptcy petition was not listed to be heard that day;
>
> Ground 3: there was no personal guarantee given by the Appellant to the First Respondent under Clause 4 of the Sale and Purchase Agreement;
>
> Ground 4: any liability under Clause 4.4 was a claim in damages, and so was not a liquidated debt capable of forming the basis of a bankruptcy petition or bankruptcy order; and
>
> Ground 5: any liability under Clause 4.4 was extinguished by contractual set off provisions in respect of sums due to the Appellant.
>
> Ground 6: a costs order should have been made in the Appellant's favour having defeated the Second Respondent's petition."

Grounds 1 to 5 apply only to the first respondent, since the bankruptcy order made was in respect of that part of the petition relating to that respondent. Ground 6 applies only to the second respondent, and is the only ground so to apply. It relates only to the costs order made by DJ Wales.

18. As I have also said, on 3 February 2025, Michael Green J gave permission to appeal on all six grounds. His substantive reasons for doing so were the following:

> "(1) It is my view that the Appellant has crossed the threshold of a real prospect of success on this appeal. I am concerned about whether the correct test was applied in relation to the application to set aside the order of Deputy District Judge Squire made on 23 August 2023 and the procedural fairness of having refused the set aside application to then immediately hear the bankruptcy petition, particularly if it had not been listed to be heard. As to the merits of that petition, sufficient reasons are

> put forward as to the Appellant's liability under the Share Purchase Agreement to justify this being looked at again on appeal.
>
> (2) As to the Second Respondent, this only concerns the costs order that was made, but I do think there is a real prospect of successfully arguing on appeal that the Second Respondent should have paid the costs on its failed bankruptcy petition."

DJ Wales' decisions

19. In his two extempore judgments, DJ Wales found a number of facts, which are not challenged on appeal, including the following. In relation to the application to set aside the statutory demands, DJ Wales found that

> "9. … in all probability [the appellant] did receive the hearing notice dated 3 August [2023] shortly after 3 August and, therefore, did have ample notice had he chosen to read or recognise the date on the hearing notice of the forthcoming hearing on 23 August 2023",

and

> "10. … that [the appellant] returned home on 22 August 2023. In those circumstances it appears from his evidence that he could have attended the hearing in any event, regardless of when he received the hearing notice."

Accordingly, the judge was not satisfied that the appellant's evidence

> "discloses any good reason for not attending the hearing on 23 August 2023".

20. It is also clear from the terms of his first extempore judgment that he did not find that the appellant had actually filed at court his application to set aside the order of DDJ Squire in September 2023. Instead, he found that the application he was dealing with was made only in April 2024, and then only at the prompting of DJ Taylor.

21. In relation to the bankruptcy petition itself, the judge found that

> "21. … [the appellant] was a knowing party to the SPA, which was appended to the stat demand, he was therefore able to go behind the literal words used in the stat demands and consider exactly what was going on. The sums in the stat demands are not mistaken - they are the correct sums - and his failure in his evidence to set out the circumstances as he saw them, his alleged perplexity and confusion, seems to me contrary to the approach of Nicholls LJ in *Re A Debtor* of 1987.
>
> 22. It is to be remembered in these circumstances that the formal demand was made before the statutory demand and the formal demand set out in writing the grounds for the debts, namely arising under the SPA by reference to the correct paragraph and clause numbers.

> 23. Following service of the statutory demand, following the decision of DJ Squire not to set it aside and following [the appellant's] failure to attend the hearing of that application a petition was presented in which … the position set out in clear terms how it was said that the sums owed arose under the specific clauses of the share purchase agreement."

22. In relation to the application to set aside the statutory demands, DJ Wales said the following:

> "5. None of that, however, directly addresses the matters I need to consider under CPR 23.11. Under that rule a party who fails to attend a hearing may apply to the court to re-list the application. The court has a wide-ranging discretion under the rule.
>
> […]
>
> 12. So far as delay is concerned, the delay in this case is abysmal and it may of itself, in my judgment, be fatal to the application. The order of DJ Squire was made on 23 August 2023 - and we are now on 18 June 2024. This application was made at the prompting of Judge Taylor in April 2024, some eight months after the hearing before DJ Squire. In those eight months the petitioners prepared and presented a petition, served it and pursued these proceedings, firstly, in the Torquay County Court and then, later, transferred to the Bristol County Court as contentious business.
>
> 13. Since then, there have been a number of hearings and there have been some very significant costs incurred, all on the basis of the order of DJ Squire which dismissed Mr Matthews' application to set aside the stat demands. That order is the seed from which the tree of this litigation has grown, and Mr Matthews has waited until the tree has grown to the stature that it has before now seeking take an axe to it at its base. In my judgment this is not a legitimate way to go about utilising the powers of the court, is contrary to the overriding objective to deal with cases justly and at proportionate expense, and verges upon an abuse of the court's procedure.
>
> […]
>
> 17. In summary, the matters advanced concerning the alleged defective nature of the stat demands are not sufficient to tip the balance under rule 23.11 in favour of Mr Matthews. Even if his points about the stat demand are made out, there is still the question of the significant delay and the lack of any good reason for attending the hearing and, in the circumstances of this case, I am satisfied that that is the right way to go in furthering the overriding objective and doing justice between the parties. "

23. As a result, DJ Wales dismissed the application to set aside the statutory demands.

24. In relation to the bankruptcy application itself, the judge referred to the judgment of Nicholls LJ in *Re a Debtor (No 1 of 1987)* [1987] 1 WLR 271, CA, and in particular at 279, where Nicholls LJ said:

> "Nevertheless, applying the approach which I have indicated above is the correct approach to these statutory provisions, in my view it by no means follows from the existence of those defects that this statutory demand ought to be set aside. The court will exercise its discretion on whether or not to set aside a statutory demand having regard to all the circumstances. That must require the court to have regard to all the circumstances as they are at the time of the hearing before the court. There may be cases where the terms of the statutory demand are so confusing or misleading as, having regard to all the circumstances, justice requires that the demand should not be allowed to stand. There will be other cases where, despite such defects in the contents of the statutory demand, those defects have not prejudiced and will not prejudice the debtor in any way, and to set aside the demand in such a case would serve no useful purpose."

25. I have already set out above the relevant passages in paragraphs 21 to 23 of the judge's judgment. They make clear that, in relation to the bankruptcy petition, the judge decided that appellant knew what was being demanded and why, because he was a party to the share purchase agreement, which was exhibited to the statutory demand. Accordingly, he could not see how the appellant had been prejudiced. Although it was defective in containing errors, the statutory demand was still effective in law as such a demand.

26. DJ Wales then went on to hold that clause 4.4 of the share purchase agreement which the appellant signed constituted a guarantee by the appellant, at least of the debt owed to the first respondent, and this was a debt capable of supporting a bankruptcy petition. The appellant's counsel had argued that the indemnity given to the appellant by clause 7 of the share purchase agreement for liabilities of the company which were not noted in schedule 3 (and these loans were not so noted) operated as a set off. The judge said it was not necessary to decide whether the indemnity given by clause 7 extended to these loans or not, because the indemnity was given by Mr Lang and Mr Cachia, and not by the companies who were the creditors in respect of those loans, and who had presented the petition. There might or might not be a claim under clause 7 by the appellant against those who gave the indemnity, but there was none against the companies.

27. Finally, the judge held that the liability of the Company towards the first respondent was sufficient to justify the making of the bankruptcy order, and it was not therefore necessary to decide whether there was also a liability towards the second respondent. The judge accordingly made the bankruptcy order.

The law

28. A number of different areas of law are engaged in this case. I will briefly refer to them here.

Case management powers

29. The court has a range of powers to deal with case management, largely dealt with in CPR Part 3. These powers include the following:

> “3.1(2) Except where these Rules provide otherwise, the court may –
>
> (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
>
> (b) adjourn or bring forward a hearing;
>
> […]
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.”

Notice of hearings

30. The Insolvency (England and Wales) Rules 2016, rule 10.5, relevantly provides:

> “(1) On receipt of an application to set aside a statutory demand, the court may, if satisfied that no sufficient cause is shown for it, dismiss it without giving notice of the application to the creditor.
>
> […]
>
> (3) Unless the application is dismissed under paragraph (1), the court must fix a venue for it to be heard, and must give at least five business days' notice to—
>
> > (a) the debtor or, if the debtor's application was made by a solicitor acting for the debtor, to the solicitor;
> >
> > (b) the creditor; and
> >
> > (c) whoever is named in the statutory demand as the person with whom the debtor may communicate about the demand (or the first such if more than one).”

31. And rule 10.21 relevantly provides:

> “(1) The petition may not be heard until at least 14 days have elapsed since it was served on the debtor.
>
> (2) However the court may, on such terms as it thinks just, hear the petition at an earlier date, if—
>
> > (a) it appears that the debtor has absconded;
> >
> > (b) the court is satisfied that it is a proper case for an expedited hearing; or
> >
> > (c) the debtor consents to a hearing within the 14 days.”

Procedure in the absence of a party

32. The rules of civil procedure make different, but analogous, provision for proceeding in the absence of a party (i) at the hearing of an *application*, and (ii) at the hearing of the *trial*. As to the former, CPR rule 23.11 (applied to insolvency litigation by Insolvency (England and Wales) Rules 2016, rule 12.1) provides:

> "(1) Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in their absence.
>
> (2) Where –
>
> > (a) the applicant or any respondent fails to attend the hearing of an application; and
> >
> > (b) the court makes an order at the hearing,
>
> the court may, on application or of its own initiative, re-list the application."

33. As to the case of proceeding in the absence of a party on the hearing of the trial, CPR rule 39.3 provides:

> "(1) The court may proceed with a trial in the absence of a party but –
>
> > (a) if no party attends the trial, it may strike out the whole of the proceedings;
> >
> > (b) if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and
> >
> > (c) if a defendant does not attend, it may strike out his defence or counterclaim (or both).
>
> (2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.
>
> (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
>
> (4) An application under paragraph (2) or paragraph (3) must be supported by evidence.
>
> (5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
>
> > (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;

(b) had a good reason for not attending the trial; and

(c) has a reasonable prospect of success at the trial."

34. *R (Idubo) v Home Secretary* [2003] EWCA Civ 1203 was the case of an appeal against the decision on an application. Pumfrey J (with whom Judge LJ agreed) said:

> "Once an application has been called on in court there is a hearing. If the applicant does not turn up then the application is struck out or dismissed, which is what happened in this case. The court has a discretion to reinstate the application not because this is a decision of the single judge taken without a hearing, but because there is a general discretion under the Civil Procedure Rules, rule 23.11, to re-list an application on application made for that purpose which could be dealt with without a hearing if the court thinks it appropriate: see CPR 23.8. The discretion is a general one. The court will take into account no doubt the reasons advanced from non-appearance at the original hearing, any delay in making the application, but also the underlying merits. If the court did not have regard to the underlying merits then any application could be indefinitely continued by repeated applications to reinstate on which the applicant did not attend."

35. The reasons for non-appearance, the delay in making the application to (set aside and) relist, and the underlying merits, referred to by Pumfrey J as factors to take into account under rule 23.11(2), correspond to the three factors to be taken into account in the functionally equivalent rule (rule 39.3(5)) in the case of a trial where a party does not attend. In this respect the two rules are similar in effect, even though in rule 39.3 the factors are threshold conditions.

36. In *Bank of Scotland v Pereira* [2011] 1 WLR 2391, CA, a case under rule 39.3, Lord Neuberger MR (with whom Lloyd and Gross LJJ agreed) said:

> "24. … all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused.
>
> 25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order … "

This approach to rule 39.3 was endorsed by the Court of Appeal in *Fatima v Family Channel Ltd* [2020] 1 WLR 5104.

Appeals

37. CPR Part 52, dealing with appeals, is applied to insolvency appeals by Insolvency (England and Wales) Rules 2016, rule 12.58. By virtue of CPR rule 52.21(1), an appeal is limited to a review of the decision of the court

below, unless the court considers that in the circumstances of a particular appeal it would be in the interests of justice to rehear the case: *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [83]. There being no need for a rehearing in this case, this appeal is a review.

38. A second point is that rule 52.21(3) provides that the appeal court will allow the appeal where the decision was (a) wrong, or (b) unjust, because of serious procedural or other irregularity in the proceedings below. Here "wrong" means wrong in law, wrong in fact, or wrong in the exercise of discretion. As to the second limb, in *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311, [33], Brooke LJ (with whom Lord Woolf MR and Peter Gibson LJ agreed) said:

> "So far as the second ground for interference is concerned, it must be noted that the appeal court only has power to interfere if the procedural or other irregularity which it has detected in the proceedings in the lower court was a serious one, and that this irregularity caused the decision of the lower court to be an unjust decision."

39. Thirdly, the court below must give reasons for its decisions: *Bassano v Battista* [2007] EWCA Civ 370. But these must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: *Piglowska v Piglowska* [1999] 1 WLR 1360, 1372.

40. Fourthly, the appeal court does not easily allow a new point to be raised which was not raised below. In *Singh v Dass* [2019] EWCA Civ 360, Haddon-Cave LJ (with whom McCombe and Moylan LJJ agreed) said:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial …
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs … "

41. Fifthly, the appeal court will not lightly overturn a judge's findings of fact or evaluative judgments. In *Volpi v Volpi* [2022] 4 WLR 48, [2], Lewison LJ (with whom Males and Snowden LJJ agreed) said:

> "(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

> (ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

42. And, in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA 5, Lewison LJ (with whom Longmore LJ agreed) said:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them … "

The Turner *principle*

43. There is a general principle that that a party cannot have two bites at the same cherry, and, in the absence of some material change of circumstances, argue a second time a point that has already been resolved against that party. In the insolvency context this principle is seen at work in the context of an unsuccessful application to set aside a statutory demand, followed by an attempt to use the same argument(s) on the hearing of the petition itself.

44. In *Turner v Royal Bank of Scotland* [2000] BPIR 683, 694, Chadwick LJ (with whom Aldous and Buxton LJJ agreed) put the point in this way when he said:

> "49. … the debtor cannot go back and reargue the very grounds on which he unsuccessfully sought to have the statutory demand set aside. It will require some change of circumstance between the unsuccessful attempt to set aside the statutory demand and the hearing of the petition before the court (on the hearing of the petition) can be asked to go into the question which has already been determined at the hearing of the statutory demand. To hold otherwise would be to encourage a waste of court time, and a waste of the parties' money; and would defeat the obvious purpose of the statutory scheme."

Grounds of bankruptcy petition, and liquidated sum

45. Section 267 of the Insolvency Act 1986 relevantly provides:

> "(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.
>
> (2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—

> (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,
>
> (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,
>
> (c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
>
> (d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts."

46. In *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695, an employer served a statutory demand on its employee in the sum of £17,329.58. This was said to represent money which the employee had allegedly misappropriated from the employer. The employee's application to set aside the statutory demand was dismissed, and an appeal from that decision was subsequently dismissed by consent. The employer thereafter presented a bankruptcy petition against the employee based on an alleged debt of £24,369.72. Having been informed that the petition would be adjourned, the employee's solicitor failed to attend the hearing of the petition. The district judge made a bankruptcy order. The bankrupt applied for the order to be annulled. The district judge dismissed the application without giving a reasoned judgment. The bankrupt appealed.

47. On the appeal, the bankrupt took a new point, that the petition debt was not a liquidated sum within section 267(2)(b) of the 1986 Act. In fact, Rimer J would have allowed the appeal without the new point. But, as to that, he said (at 699):

> "The point Mr Rainey [counsel for the employee] makes is that a creditor's petition can only be based on a debt for a liquidated sum (see s 267 of the Act). If there is no such debt then the court has no jurisdiction to make a bankruptcy order. He submits that there is no such debt in this case. The company's claim is that the debtor stole the money. The debtor disputes that but, assuming the company is right, what is its cause of action to recover the money? Mr Rainey submits, and I did not understand Miss Bristoll [counsel for the employer] to disagree, that the alternatives, in descending order of likelihood, are: (i) a claim for money had and received; (ii) a claim against the debtor as a constructive trustee; (iii) a claim in deceit; (iv) a claim for breach of an implied term in his contract of employment; and, (v) money paid under a mistake of fact.
>
> Mr Rainey submits, and I agree, that claims (iii) and (iv) are claims for damages and cannot be claims for a liquidated sum. He also submits that claims (i), (ii) and (v) are claims for an account and payment and cannot be claims for a liquidated sum either.
>
> […]

> Mr Rainey submits that it follows that none of the company's claims for a remedy is in the nature of an order for payment of a liquidated sum. It is irrelevant that the company claims to be able to identify its claim down to the last penny. It is still faced with the difficulty that its range of alternative claims against the debtor are claims for damages or for an account and payment. A claim for damages is not a claim for a liquidated sum; and nor is a claim whose remedy is that of an account, even though it may be that the taking of the account so ordered could be dealt with in a summary way and a judgment there and then given for a specific sum.
>
> I accept that submission. I agree with Mr Rainey that the petition is not based on a debt for a liquidated sum. It follows that in my judgment no bankruptcy order could properly be made on it. I will therefore not merely discharge that order. I will also dismiss the petition."

The interpretation of contracts

48. In recent times there have been a number of decisions of the Supreme Court concerned with the interpretation of contracts generally. For present purposes I need cite from only one of them. In *Sara & Hossein Asset Holdings Ltd v Black Outdoor Retail Ltd* [2023] 1 WLR 575, Lord Hamblen (with whom Lords Hodge, Kitchen and Sales agreed) said:

> "29. The relevant general principles are authoritatively explained by Lord Hodge in his judgment in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at paras 10 to 15. So far as relevant to the present case, they may be summarised as follows:
>
> (1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.
>
> (2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.
>
> (3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated."

49. In relation to contracts of guarantee in relation to a loan, there are a number of possible constructions that may be put on the words used. In *McGuinness v Norwich and Peterborough Building Society* [2012] 2 BCLC 233, [2012] BPIR 145, Patten LJ (with whom Ward and Moses LJJ agreed) said:

> "7. It is common ground that a guarantee of a loan may impose one or more of the following types of liability on the guarantor. These are:

> > (1) a 'see to it' obligation: i.e. an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor;
> >
> > (2) a conditional payment obligation: i.e. a promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments;
> >
> > (3) an indemnity; and
> >
> > (4) a concurrent liability with the debtor for what is due under the contract of loan.
>
> 8. The obligations in classes (2) and (4) create a liability in debt. But it is well established that an indemnity is enforceable by way of action for unliquidated damages … A guarantee of the "see to it" type has also been held by the House of Lords to create a liability in damages. The obligation undertaken by the guarantor is not one to pay the debt but consists of a promise that the debt will be paid by the principal debtor … "

It is clear from what Patten LJ said ("one *or more*") that a particular contract of guarantee may impose more than one type of liability. It is a question of construction as to what liability is imposed.

The six grounds

Ground 1

50. The appellant has two points. He says, first, that the judge applied the wrong test, that for relief from sanctions, rather than that for setting aside an order made in his absence. The transcript of the judgment shows that this is not correct. Paragraph 5 of his judgment (set out above) shows that the judge was considering the court's power under CPR rule 23.11 (also set out above). He also cited the passage quoted earlier from *Idubo*, which is an authority on rule 23.11. The appellant says that the relevant rule is rule 39.3 rather than rule 23.11. For the reasons given earlier, there is not much practical difference between the two rules on the factors to be taken into account. Nevertheless, in my judgment the relevant rule is 23.11. An application to set aside a statutory demand is not a trial. It is an application, albeit in the insolvency context. The district judge correctly directed himself on the test to apply. The first point therefore fails.

51. Secondly, the appellant says, relying on what Lord Neuberger MR said in *Pereira*, that if a party has not attended a hearing for good reasons, has an arguable case on the merits, and has applied to set aside promptly, it would require very unusual circumstances before the court would not set aside the order. The problem for the appellant is that in the present case the judge resolved each of these matters against the appellant. He found that the appellant had not shown any good reason for non-attendance. He held that the appellant had not acted promptly, having found that he did not fact make an application to the court in September 2023, and that it was in fact made only in April 2024. He held that the appellant did not have a reasonable case on the

merits, either on the basis that no was no personal guarantee or on the basis that if there were there was also a contractual set-off which extinguished the debt.

52. The first and second of these points are a combination of fact-finding and evaluation. I cannot overturn them unless I consider that no reasonable judge could so find. What I myself might decide is irrelevant. In my judgment, on the material before the judge, he was entitled to reach those findings. The third point deals with two points of law which form part of grounds 3 and 5, which I shall deal with later. There is an additional point taken on this appeal, as to whether the appellant's liability was a liquidated sum or not. But this was not argued before the judge below, and so he did not deal with it. It forms the basis of ground 4, also dealt with later.

53. But, even if any of those grounds had a real prospect of success, there is still the lack of good reason for not attending the hearing, and the lack of promptness in applying to set aside, and, as the judge himself said, the delay would have been sufficient in itself: *cf Bank of Scotland v Pereira* [2011] 1 WLR 2391, CA, [24], set out above. To the extent that his decision was not circumscribed by the rules (as in *Pereira*), his decision was an evaluative one, and therefore can be overturned only if it was one which no reasonable judge could have come to. In my judgment it was a decision available to him on the material before him. This ground accordingly fails.

Ground 2

54. To succeed on this ground, the appellant needs to establish both a serious procedural irregularity, *and* that it caused injustice. The appellant says that there was a serious procedural irregularity in that the *application to set aside* was listed to be heard by the judge, but the *petition* was not, and yet, after dismissing the application, the judge went straight on to deal with the petition.

55. The appellant relies on the decision of HHJ Jarman QC, sitting as a judge of the High Court, in *Black v Sale Service and Maintenance Ltd* [2018] BPIR 1260. In that case, SSM had served a statutory demand on B in respect of sums amounting to £196,538.87 due under a personal guarantee of his company's liabilities, of which £60,000 was said to relate to payments made to SSM by B's company after the presentation of a winding-up petition (and which were therefore void, and had to be returned by SSM to the liquidator). B applied to set aside the statutory demand. The application was listed for 15 minutes, and the parties and the district judge (who had not read the evidence) agreed at the outset that directions would be given for a longer hearing for the application. But during the hearing the judge nevertheless decided to dismiss the application. B appealed.

56. On appeal, HHJ Jarman QC said:

> "14. In my judgment, the hearing below was unjust because of a procedural irregularity. It was difficult for the District Judge to deal with this application in 15 minutes. At the outset everyone proceeded on the basis that directions would be given. That would have given Mr Black an

> opportunity to deal with the very great disadvantage he was under then in not having access to documentation held by the liquidator. The point is made that the liquidator has not raised these issues, despite having interviewed Mr Black. But he was, in my judgment, entitled to see the documents. He may fairly be criticised for not asking for them sooner. The payment of £60,000, I agree, is prima facie evidence that that sum at least was due, but there was evidence before the District Judge of the circumstance in which that was paid. Mr Black may well face evidential difficulties in light of the time of these payments in relation to when work was suspended by TIG, but it is clear that these were fast-moving events in the latter part of 2015 and the early part of 2016 in respect of a project which was in serious difficulties. In my judgment, it was wrong to focus simply on the payment of the £60,000."

57. But that is not this case. Here the parties were prepared for the hearing of the petition. Both sides' skeleton arguments were prepared on that basis. Enough time was allowed for both the application and the petition to be dealt with. There was no further documentation that the appellant was seeking from anyone else in order to be able properly to put his case. When, after dismissing the application to set aside the statutory demands, the judge turned to hearing the petition itself, the appellant by his counsel did not object to this course. Instead, his counsel played a full part in the proceedings, in deploying arguments already foreshadowed in the skeleton. On the face of it, the proceedings were held in a fair and even-handed manner, not disadvantaging the appellant.

58. The appellant says that he was deprived of the opportunity of putting forward a defence such as unreasonable refusal of an offer to pay or secure the debt. The problem is that there is no evidence that the appellant had made such an offer, and no indication since that that he had been intending to make one. If the appellant had wanted to make an offer after the dismissal of his application and before the hearing of the petition, he could have done so, by asking for a few moments' adjournment in which to give instructions to his counsel. But he did not. On the contrary, his own evidence was that he simply did not owe anything to either company. So, the appellant has not been prejudiced.

59. The point is made that the petition had not been *listed*. But listing, in the sense of publishing a list of matters to be heard on a particular occasion by a particular judge, is an *administrative* act by court staff, following on from the *judicial* act of the judge's deciding what to hear and when (*judicial* listing). But the judicial act may be made at short notice, including at the hearing of another matter in the same case. For example, a point arises during a hearing, and one party makes an immediate informal application for some order, for example disclosure of a document. The judge has to decide whether to hear the application at all, and if so whether immediately or at some later stage. The judge's power to decide to deal with the matter immediately is not hamstrung by the fact that the application has not been placed on a *list*. The question of procedural irregularity is one of substance and not of form.

60. In my judgment it was not an irregularity for the judge to decide when he did that he would go on to deal with the petition. It had been served in September 2023, and then the hearing of it was adjourned twice by the court. So the court could certainly hear it in June 2024. The court has power under CPR rule 3.1(2) (set out earlier so far as relevant) to take various steps, including to abridge time limits set by any rule or order and to bring forward a hearing. The latter power is often exercised when the parties and the judge find themselves present together, with sufficient time to deal with a further matter, and they are prepared for it. If any party objected, the judge would consider and decide whether it was just to bring forward the further matter and hear it then. That would be a case management decision, not lightly to be interfered with by an appeal court.

61. The appellant's skeleton argument argued the point about the errors in the statutory demands. As to that, I consider that the judge applied the correct legal test, and he reached a conclusion open to him. The amounts of the liability were correct. The appellant knew very well that he had entered into the share purchase agreement and what clause 4 said about the loans to the Company and his liability for them. He had been expressly reminded of this by the respondents' letter of 30 May 2023, a few weeks earlier. The appellant could see straight away that there was an obvious error and that it was clear what had been intended. There was no prejudice to him whatsoever. He was simply seeking to take advantage of the error.

62. If there were any irregularity here it lay in the judge's allowing the appellant to argue the defects in the statutory demands twice, once on the application to set aside, and again in the petition, contrary to the *Turner* principle. But that was in the appellant's favour, not against him. Even if (contrary to my view) it were some kind of irregularity to decide to hear the petition after dismissing the application, it would not be a *serious* irregularity. And, certainly, in the present case, for the reasons already given, it caused no injustice to the appellant. Accordingly, this ground of appeal fails.

Ground 3

63. The appellant argues that paragraph 4.4 of the share purchase agreement (set out earlier) did not create a guarantee liability in the appellant. This is because an identically-worded clause was inserted in the share purchase agreement in relation to the other company already referred to, Crab Shack Restaurants Ltd, but the appellant entered into a standalone personal guarantee document in relation to *that* company's liabilities. The appellant says that the reason for doing that must be that the clause in the share purchase agreement was not intended to create a guarantee liability. And, if it did not do so in the Crab Shack agreement, the same words could not do so in relation to the Chip Shack agreement.

64. I reject this argument for two reasons. First, the Crab Shack agreement is not part of the Chip Shack agreement. It may be part of the entire factual matrix, but the particular agreement to be construed is the Chip Shack agreement, which must be construed objectively. Looking at the words of clause 4.4 in the

latter, the only sensible meaning to ascribe to them is that the appellant was thereby undertaking to guarantee the repayment of the two loans by Chip Shack Ltd. This is fortified by the provisions of clauses 8(1) and 10, which I consider later. The second reason is that, even if the Crab Shack agreement were relevant, it would not follow that the relevant clause in the Crab Shack agreement meant something other than a guarantee liability *merely* because there was also a personal guarantee. It would still be necessary to construe the terms of the clause as part of the whole contract. In my judgment those terms are clear. They create a guarantee liability, despite the co-existence of a separate guarantee document.

Ground 4

65. The appellant submits that any liability arising under clause 4.4 of the share purchase agreement does not amount to a liquidated debt, and sounds only in damages. This, however, is a new point, not raised below. The criteria set out by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 were quoted above. The court is naturally cautious in allowing a point to be taken on appeal that was not taken below. For one thing, the point of an appeal is to *be* an appeal, and *not* a decision at first instance. You cannot decide whether a first instance court made a bad decision on a particular point if the point now argued was not put to it. So, it is exceptional to allow a new point to be taken on appeal.

66. In particular, the appeal court will not generally allow a point to be raised if either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regard to the evidence at the trial. The respondents say that they could have adduced evidence going to the construction of clause 4.4 as a "see to it" guarantee. I do not consider that this would *necessitate* new evidence, but I can easily see that the evidence at trial and the trial itself might well have been different. Accordingly, I do not think it would be fair at this stage to argue the point on the basis of the evidence adduced below.

67. In any event, as a matter of construction, in my judgment clause 4.4 *did* give rise to a claim for a liquidated sum, amounting to a debt for the purposes of a bankruptcy petition. The words of the clause by themselves are ambiguous, but the ambiguity is dispelled by the terms of clause 8.1 and 10 (the terms of which were set out earlier). Clause 8.1 refers to "the agreement of the Company and the Buyer to repay the Loans …" Clause 10 provides that "The Buyer … shall be entitled to set off against repayments of the Loans any sum due from … " Each of these provisions makes sense only if the appellant has a primary liability to repay the loans. In my judgment, clause 4.4 created a conditional payment obligation, that is, the second of the four constructions referred to by Patten LJ in *McGuinness v Norwich and Peterborough Building Society*, quoted above. That creates a debt sufficient for the purposes of the petition.

68. For these reasons I reject the fourth ground of appeal.

Ground 5

69. The appellant argues that, even if he is liable to the petitioners, he is entitled to a set-off by virtue of clause 10 (set out earlier). Under that clause, the appellant is entitled to set off against repayments of the Loans any sum due from (amongst others) the seller (Mr Lang) or Mr Cachia to the appellant (amongst others). The appellant says that the seller and Mr Cachia are obliged to indemnify him under clause 7 (the material words of which were set out earlier) against any liabilities of the Company which are not set out in Schedule 3. The Loans are not set out in Schedule 3. Therefore, argues the appellant, the seller and Mr Cachia are obliged to indemnify him *against the Loans*, and under clause 10 he can set off that liability against repayments of the Loans.

70. There are a number of problems with this argument, not least the extraordinarily uncommercial reading of the share purchase agreement which is required in order to be able to make it. Why the parties would go to the trouble in clause 4 of dealing expressly with the outstanding liability for the Loans and then provide (in a roundabout way, via a combination of clauses 7 and 10) for there to be no liability for the Loans, is not explained. There is also the problem that the remedy for breach of an indemnity contract is damages, and not debt. But the set off under clause 10 can be only of "any sum due". An unliquidated claim for damages is not such a sum. However, for present purposes I can rest my decision on a third point. This is that the indemnity is given by the seller and Mr Cachia, and not by the respondents. Yet it is the respondents who are the petitioners. Accordingly, the debts remain due to the petitioners. It is irrelevant for present purposes that the seller and Mr Cachia *may* (if the argument is correct) have an obligation to indemnify the appellant in respect of his obligation to repay the Loans.

Ground 6

71. The appellant submits that the second respondent's petition was in effect dismissed, but that the judge below failed to consider, either properly or at all, the costs position as between the appellant and the second respondent. The first point to note, however, is that there was a *single* petition, in which both respondents were petitioners, rather than two separate petitions, one by each respondent. The second point is that the judge below did not dismiss anything. On the contrary, the petition succeeded. What the judge said at the end of his judgment was:

> "I will leave out the question - because I do not need to decide it - whether or not there was also a liability to Oak First Investments Limited under Clause 4.4 of the SPA. The liability to BSN alone is well in excess of the bankruptcy threshold and in the circumstances, it is right to make a bankruptcy order."

After giving judgment, the judge asked:

> "So, costs of petition are the petitioner's costs in the bankruptcy, yes?"

Mr Machell, for the petitioners, said Yes. The judge asked the appellant's counsel if he wished to say anything else, but he said No.

72. The position accordingly is that the judge did not decide that the (single) petition failed so far as related to the second respondent. Because the debt due to the first respondent was well in excess of the petition threshold, he did not need to decide anything in relation to the second respondent, and did not do so. As is well-known, the general rule is that costs follow the event, but the court may make a different order. The judge considered that it was right to make a bankruptcy order, and he proposed to apply the general rule, albeit in a modified way because of the bankruptcy. The appellant's counsel did not suggest that there was any reason to make a different order. It was a joint petition, and the judge had no need to go on, once the appellant's liability to the first respondent was established. The costs involved would have been the same whether there was one petitioner or two. Given that the appellant's counsel did not wish to say anything, the judge was entitled to apply the general rule. There is nothing in this point.

Conclusion

73. In my judgment, all six grounds of appeal fail. The appeal must be dismissed. I am minded to order that the respondents' costs of this appeal be paid from the estate in bankruptcy, on the basis that this is the result of applying to the bankruptcy context the general rule that costs follow the event. However, if the appellant wishes to argue for a different order, he may file and serve written submissions by 4 pm on 3 July 2025. If he does so, the respondents may file and serve responsive submissions by 4 pm on 4 July 2025.