**Neutral Citation Number: [2025] EWHC 2021 (Ch)**

**Case No: CR-2024-004219**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST (ChD)**
**IN THE MATTER OF MARLBOROUGH OPPORTUNITIES LIMITED**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Rolls Building**
**Royal Courts of Justice**
**7 Rolls Buildings**
**London EC4A 1NL**

**Date: 2 May 2025**

**Before**:

**INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD**

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**Between:**

**FORTRESS POLICY PORTFOLIO LLC** **Petitioner**

**- and -**

**MARLBOROUGH OPPORTUNITIES LIMITED** **Respondent**

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Mr Samuel Hodge (instructed by Gunnercooke LLP) for the Petitioner
The Respondent Company was neither present nor represented
Mr Anthony Pavlovich (instructed by Trowers & Hamlins LLP) for the Opposing Creditors

Hearing date: 30 April 2025

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# JUDGMENT

## (APPROVED TRANSCRIPT)

**ICC JUDGE GREENWOOD:**

Introduction and Background

1. This was the final hearing of a winding-up petition presented by Fortress Policy Portfolio LLC on 17 July 2024 against a company called Marlborough Opportunities Limited ("**the Company**"). It was based on debts said to be due as a result of loans made on the terms of an information memorandum dated November 2019.

2. It was accepted by Mr Samuel Hodge of counsel, who appeared for the Petitioner, that the petition contained various errors, but nonetheless it was said that a significant sum is due, and unpaid. The various errors were set out in a draft amended petition, for which he sought permission to re-file and for the court to dispense with re-service.

3. At the hearing, the Company was not present or represented, and the petition was therefore unopposed by the Company itself.

4. It was however opposed by four other creditors, represented by Mr Anthony Pavlovich of counsel, namely, Brampford House Estate Limited, Patrick Simon O'Connor Tandy, Tri-Emirates Investments Limited and 21st Century Group Holdings Limited.

5. The opposing creditors are currently engaged in proceedings against the Company and others, including Mr Kevin Neal, who has given evidence in support of the petition, on behalf of the Petitioner, and who is its director. The opposing creditors, in the Part 7 proceedings, allege that Mr Neal is or certainly has been a shadow director of the company – and certainly he appeared to have been involved in its business; its appointed director is Mr Albert Turner. In those proceedings, allegations are made of deceit and conspiracy – it is alleged that the Company is or was a vehicle which was used for the purposes of fraud; it was on that basis, as I understood it, that a worldwide freezing injunction had been sought and granted against the defendants, including the Company and Mr Neal, and indeed, Mr Turner.

6. As to the procedural history:

    6.1. the claim form in the Part 7 proceedings was issued on 10 June 2024. The worldwide freezing injunction that I have mentioned was granted on the following day, 11 June 2024;

    6.2. on 17 July 2024, as I have said, this petition was presented based on a debt of £237,046.99, said to be due and payable immediately;

    6.3. it was served on the following day, 18 July, and on 31 July the opposing creditors filed a notice of intention to appear;

    6.4. the petition was advertised on 13 August 2024, and on 16 August, the opposing creditors filed a witness statement in opposition; that was the statement of Mr Rhode, which I shall come to in a moment; Mr Rhode is a partner at Trowers & Hamlins LLP, the opposing creditors' solicitors;

    6.5. on 27 August 2024, the Company sent a letter, enclosed with which was a statement, apparently signed by Mr Turner, who I have already referred to; the document was not,

as I shall explain in a moment, in the form of a witness statement in compliance with the rules;

6.6. on 28 August, the following day, there was a hearing, the first hearing I think, of the petition before Chief Judge Briggs in the general creditors' winding-up petition list; the Petitioner attended, and the opposing creditors also attended; the Company did not make itself known, certainly to the judge, I think, on that occasion, but I was told by Mr Pavlovich, who was there (Mr Hodge was not), that two gentlemen were present in court on behalf of the Company, and I think that he had some contact with them that day; but in any event, although nothing really turns on it, I understood them not to have made any submissions on behalf of the Company or to have made themselves known to the judge; the judge gave directions for evidence in the order that he made that day;

6.7. following that order, in fact the next day, the Petitioner filed its evidence in response, and that was the first statement of Mr Neal;

6.8. on 9 October 2024, the opposing creditors filed their evidence in reply and that was comprised in the second statement of Mr Rhode;

6.9. following that, on 8 November 2024, there was a non-attendance PTR and further directions were given, including for this final hearing;

6.10. on 21 December 2024, particulars of claim in the Part 7 proceedings were served.

7. There was no evidence and no real explanation of why the Company has chosen not to oppose the petition - at most, the unevidenced suggestion made by Mr Pavlovich was that Mr Turner, for reasons of his own, simply does not wish actively to engage the Company in activity.

8. Further, there was no allegation of active collusion between the Company and the Petitioner, or between the Company and Mr Neal, As I shall explain, it was however said that Mr Neal is seeking to wind-up the company in order to protect himself in some way from the Part 7 proceedings.

9. The opposing creditors are said to have invested a total of £7,540,000 in the Company and to have received investment certificates accordingly. However, as a result of their investments they say they received nothing in return, not even the quarterly investment summaries that were promised, and certainly no payments of interest. There was therefore no real issue about the Company's insolvency.

The Position of the Opposing Creditors

10. The opposing creditors' case was that the petition should however be dismissed because the debt is genuinely disputed. In that regard, the law is of course uncontroversial. It is well established that a winding-up order will not be made on the basis of a debt that is genuinely disputed on substantial grounds: Angel Group Limited v British Gas Trading Limited [2012] EWHC 2702 (Ch), [2013] BCC 265 at [22] (Norris J). Where that is the case, the petitioner has no standing to present a petition because it is not regarded as a creditor of the company for the purposes of section 124(1) of the Insolvency Act 1986.

11. The opposing creditors therefore sought to make four points, all of which were directed at persuading the court to hold that the debt is disputed, such that the petition must fail.

    11.1. First, that the investment on which the Petitioner relies is in fact or may be owned by a company called Fortress International Fund Ltd ("**FIF**"); in that regard they sought to rely on Mr Turner's statement, and on affidavits made by Mr Colm Smith and Mr Christopher Samuelson, directors of FIF. Those affidavits appeared to have been made on behalf of FIF in the commercial court proceedings, in connection with the effect of the freezing injunction, although FIF is not party to those proceedings. In that regard, Mr Pavlovich showed me various documents, including copies of competing investment certificates, application forms and board minutes which suggested, he said, that FIF was the true creditor, not the Petitioner, and on the basis of which, he said, issues have been raised which this court on this application is not equipped to resolve.

    11.2. Second, that the Petitioner, incorporated in Delaware, appears at one point to have been dissolved, and then later restored, and that it has not explained in evidence whether and if so how its rights against the Company might in some way have been affected by those circumstances.

    11.3. Third, it was said that there are inconsistencies between the various statements of the sum said to be due, and the various demands.

    11.4. Finally, fourth, it was said that Mr Neal's evidence should be treated with some caution, apparently because he was at some point disqualified from acting as a director and because he has not openly declared or explained his "*motives*" in bringing the petition. It was also said that Mr Neal has done very well out of the Company and that somehow by putting it into liquidation he is seeking to protect what has already been received and to obstruct the opposing creditors' efforts to recover their losses.

12. In addition, for reasons which I shall explain further in a moment, it was said that no order should be made because the opposing creditors are the majority creditors, and that they would prefer no order to be made for good commercial reasons of their own, principally connected with the impact that it would or might have on their pursuit of the Company in the Part 7 proceedings, and the protection which they currently enjoy by virtue of the freezing injunction.

13. The points raised therefore fell into two classes – those concerning the Petitioner's rights against the Company - said to be disputed - and those concerning the opposing creditors' own rights and interests and/or those of the Company's creditors as a class.

14. It is of course correct that a company's creditors can appear on a winding-up petition to oppose it. That is because they are members of the class on behalf of which proceedings are pursued. Winding-up proceedings are a class remedy, and the court has a discretion whether or not to make an order - even if the petitioner proves its debt, which is unpaid, and proves the company's insolvency.

15. In this regard, I was taken to a number of authorities, in particular, Re Crigglestone Coal Co Ltd [1906] 2 Ch 327, Re JD Swain [1965] 1 WLR 909, Re Demaglass Holdings Ltd [2001] BCLC 633, and Re Maud [2020] BPIR 903.

16. Those authorities support the following propositions relevant to the present case:

    16.1. that as between the petitioner and the company, if a petitioner establishes his case, he is entitled to an order virtually as of right;

    16.2. however, in every case the court has a discretion, both because of the language of the Act, which is permissive, and because an order of this sort is a class remedy, the class being that of the company's creditors;

    16.3. it follows that, because they are within that class, the class for whose benefit the order is sought, other creditors are entitled to appear on a petition, and to object, or indeed support, the making of an order; if they do so, they must have good and rational reasons for their position – see for example, Re Maud at [78], in which Snowden J (as he then was), said: "*In my judgment, the authorities demonstrate that the starting point for the court in determining whether to give effect to the right of the class ex debito justitiae to a bankruptcy order or a winding up order, is to look at the value of debts of the creditors on each side of a disagreement among the class. However, it is also clear that the court's role in determining whether or not to give effect to the class remedy is not limited to a question of simple mathematics. The court will also look at the reasons advanced by the creditors on each side of the debate in order to assess whether those reasons are commercially rational and will have regard to other evidence to assess whether the weight and rationality of a particular creditor's approach is diminished by any extraneous factors such as personal antipathy or affection on the part of the creditor for the debtor (or those connected with it in the case of a company)*";

    16.4. in that paragraph, the judge made clear that the court will assess all the evidence and circumstances in balancing the wishes of different members of the class – and will or might assess their rationality; the process is not merely a numerical one;

    16.5. it also follows that if opposing creditors do appear, they must do so - and in fact, can only do so - in their character as class members – that is the basis of their entitlement to appear and to make known their views; it is not for them to take points which the company has decided not to take, or to defend proceedings which a company has apparently decided not to defend, as in the present case;

    16.6. if opposing creditors have reasons which are advanced in their character as members of the class, the court must, as I have said, weigh them against the *prima facie* right of the petitioner to succeed, and indeed must weigh them against the wishes of any other creditors, including those who might support the order sought.

17. Returning to the points raised by the opposing creditors, it follows from what I have said that as a matter of law, insofar as they were components of a case that the petition debt was disputed, they were not points that were open to the opposing creditors; they were not made *qua* class members, objecting that the order ought not to be made because it is not in the interests of the class; they were made in substance on behalf of the Company and/or FIF,

although both have chosen not to appear, not to oppose the petition, and not to adduce (not at this hearing, at any rate) any evidence.

18. It was not for the opposing creditors to advance points of that character, and I was not shown a reported decision in which opposing creditors had succeeded in demonstrating that the debt was disputed despite that point not being taken by either the company or another member of the class said to be the true owner of the debt.

19. Mr Pavlovich sought to distinguish his clients' position on the basis that their case was that the issues raised went to standing, rather than insolvency, and that in any event, he was merely drawing to the court's attention materials which were in evidence. I do not accept those points.

    19.1. First, there is no relevant distinction in this context between a defence based on standing and a defence based on some other matter; that is particularly so in the context of a petition, in which the failure to pay an undisputed debt serves both to demonstrate the petitioner's status as a creditor, as well as that the company is insolvent, because it has failed to pay the debt; in almost every case of a defended petition, the dispute might be characterised as one concerning standing; to do so does not distinguish it or allow it exceptionally to be raised by a class member.

    19.2. Second, there is no distinction between, on the one hand, "*drawing attention to evidence and seeking therefore that the court should make certain findings*", and on the other, "*relying on evidence in support of a particular case*" – the former describes the latter; the problem is one of substance, which cannot be avoided by attempting to describe the process in a different way; opposing creditors cannot advance points in opposition other than in their character as class members; they cannot argue the company's case, however they might describe the process.

20. In any event, the opposing creditors have no personal knowledge of the position as between the Company, FIF and the Petitioner, and can adduce no evidence directly of it. The opposing creditors do not say, and are unable to say, one way or the other, whether or not they themselves believe that the investment is owned by FIF. In any event their belief about that would be irrelevant.

21. Had the Company itself raised these points, evidenced them, and then, more to the point, appeared and argued them, then in principle, as Mr Hodge acknowledged, they would have been relevant; but as I have said, it did not.

22. Mr Pavlovich also said that the Company is a litigant in person and ought not to be penalised or treated unduly harshly; he reminded me of the various discretions that the court has in respect of formally defective evidence for example, and said in particular that the statement of Mr Turner, albeit not compliant in form, should be afforded weight, and sufficient weight to raise a dispute.

23. As to its content, I shall comment in a moment, but as to the substance of that point – the Company has simply not sought to defend the proceedings, it has not attended this hearing, and has not made an application of any sort to rely on evidence in defective or any form, or for a relief from sanction. I acknowledge that it was unrepresented, but more to the point,

it was not present at all - it remains bound by the basic rules of litigation, and indeed, of course, by the substantive law.

24. In any event, the materials gathered up by the opposing creditors in support of their argument that there is a doubt about ownership of the investment were most unsatisfactory – my decision does not turn on that assessment, but it was certainly not contradicted by it. As to that:

    24.1. the Turner statement was not verified by a statement of truth, and did not comply with the requirements of CPR PD 32, paragraphs 17, 18, 19 and 20; it was not in the form of a witness statement made in these proceedings; those points were made in Mr Neal's witness statement last year but have not been remedied and there was no explanation of why evidence in proper form had not been provided.

    24.2. moreover, the statement was in somewhat curious terms - it referred to Mr Turner in the third person, and appeared to contain reference to matters which would not have been within Mr Turner's own knowledge, but which might have come from one or other or both of Messrs Samuelson and Hitchens; it was not explained who had drafted the document or in what circumstances or by reference to what materials; it was highly unsatisfactory. There are good reasons for the rules which govern the production of witness statements, reasons which protect the integrity of the whole judicial process; they cannot be disregarded, and in particular they cannot be disregarded without explanation from the very persons in default, in this case, Mr Turner and the Company.

    24.3. the affidavits of Mr Samuelson and Mr Smith were stated on their face to have been made in the commercial court proceedings. One of them was made before the petition was even presented. Their purpose seemed to be, at least in part, to obtain some sort of variation of the freezing order, in order to secure access to the Company's frozen assets – on the face of things, that would seem to be a wish to improve FIF's own private position, not a collective class consideration; moreover, they were referred to without any detailed explanation of their context, of why they were made, whether they were responded to, whether they have been deployed in court, or even served, and if so with what consequences, if any. By reference to CPR 32.12, I am not satisfied that they were admissible in these proceedings.

    24.4. finally, no documents were exhibited to the affidavits in support of FIF's alleged claim, and there was for example, no documentary evidence of nomineeship, or the transfer of any funds by FIF to the Petitioner, or of the relationship between FIF and the Petitioner, or the circumstances in which, so it was said, the certificates that were issued to the Petitioner in error were cancelled and replaced by certificates in favour of FIF.

25. In the circumstances, it follows that I reject the opposition to this petition on the basis of the alleged dispute, because it was not made by the Company or even by the allegedly true creditor. The evidence of the Petitioner, contained in the statements of Mr Neal, was *prima facie* credible and consistent – he exhibited some even if not all of the certificates, board minutes, and management accounts which stated that the Petitioner was the holder of three certificates, and he confirmed that the Petitioner made the applications and payments; it was the only directly relevant witness evidence before the court.

26. The opposing creditors were of course entitled to oppose the making of an order on grounds that it would not serve the interests of the class, or on some other basis but of a similar nature.

Class Considerations: the Balancing Exercise

27. Turning then to class considerations, and to the exercise of the court's discretion more generally, the circumstances were as follows.

28. The opposing creditors themselves contended that the Company has not paid them sums which it owes. There was no suggestion that the Company is solvent. Its last filed accounts to 30 June 2023 - albeit now historic - stated that it was balance sheet insolvent with significant creditors, and had, in the relevant period, operated at a loss. The opposing creditors have apparently invested some £7.6 million, and received no payments of interest – due annually – in return. It was therefore in substance common ground that the Company is insolvent. No alternative insolvency regime has been sought by the opposing creditors.

29. In the Part 7 proceedings, the Company, its director, Mr Turner, and Mr Neal, are alleged to have acted fraudulently – the Company was described by Mr Pavlovich as having been a vehicle for fraud. Although not shown the evidence in support of those allegations, it plainly exists, or I confidently infer that it does, because a worldwide freezing injunction was granted on 11 June 2024. There is some public interest in such companies and their directors being investigated by office-holders. Moreover, a liquidator has a whole variety of powers, to investigate and make claims, some of which only arise in liquidation, such as under sections 236, 238 and 239 of the Insolvency Act 1986. Those powers can as much be used against Mr Neal as against any other person, and they are to be used for the benefit of the whole of class of creditors.

30. There was nothing to suggest that the Company's business, such as it is, or its assets or their value, would in some sense be damaged or diminished by the mere fact of a winding-up order.

31. As matters stand, the Company is still under the control of Mr Turner. Further, notwithstanding the injunction, the Company is entitled to act in the ordinary and proper course of business - it has not been caused to cease business, and it might therefore in principle incur further debt, and/or deal with other innocent third parties. Indeed, there is no certainty that either the Part 7 proceedings or the injunction will continue – I have no knowledge of those proceedings, or how they might unfold.

32. The point of a freezing injunction is not to elevate the interests of a claimant above those of other creditors, or to give it some private advantage, but to prevent a defendant from dissipating assets in advance of trial in such a manner as to wrongfully prejudice the ability of the claimant to secure a worthwhile victory. Because of that, in the usual way, the injunction in the present case allowed for assets to be dealt with in the ordinary and proper course of business, and of course therefore risked in that manner. If the rationale of the injunction in the present case were to be to be removed because the Company went into liquidation, and its affairs were made subject to the control of an untainted and trustworthy liquidator, and if, because of that, the injunction were to be discharged (a point on which I express no views) then that would not be a good reason to complain – the claimants'

interests would, *ex hypothesi*, be as well protected afterwards as before; it is difficult to complain that one has been deprived of the benefit of an order that has become unnecessary.

33. There was therefore nothing in the point apparently made in correspondence, that the Petition was pursued in breach of the injunction; that thought was misconceived.

34. Contrary to the suggestion made in the evidence of Mr Rhode, the Part 7 proceedings against Mr Neal would not be prejudiced or affected by a winding-up order; indeed, the existence of the Company or its participation as a defendant is unnecessary to the continuation of those claims. There was nothing in the point that a winding-up order would somehow advantage Mr Neal in his defence of those proceedings; at best, it was suggested that because he ought not to be trusted, and because one cannot see his reasons for causing this petition, one should assume that there was some unknown unfair advantage which he was seeking, and of which he ought to be deprived; not only was that not said in the opposing creditors' evidence, but it would be too speculative as a basis upon to which act.

35. As against the Company, the opposing creditors will be able to seek permission to continue to pursue the Part 7 proceedings, and in any event, they would be entitled to make their claims against the Company in the liquidation, as would FIF and of course the Petitioner; any adjudication by the liquidator would be subject to an appeal to the court; creditors would share *pari passu*; they would be collectively protected, and their rights would not be prejudiced; no one creditor would be able to steal a march on the others, by executing against its assets, and scooping the pot. Indeed, the Company may, as I have said, be made more valuable in liquidation, by virtue of the use of powers to seek compensation not otherwise available.

36. Neither do I accept the suggestion that an order would have a detrimental effect on the flow of documents in the Part 7 proceedings – the office holder would be entitled to gather up the Company's documents, and the Company would remain subject to disclosure obligations. If anything, documents are more likely to be preserved and made available.

37. Mr Pavlovich submitted that his clients would be adversely affected by the costs of liquidation, otherwise avoidable. To some extent, the costs he referred to were costs of defending the proceedings, instructing solicitors for example, and unlike Mr Turner, actively conducting the defence – he referred for example to a consideration of whether documents were relevant or privileged. I do not accept that a concern that in different, independent hands, the Company might incur costs in the litigation itself is a legitimate reason to dismiss the petition - if anything, that submission suggested that the opposing creditors were reluctant to be deprived of the benefits (peculiar to themselves) of litigating against an unwilling and quiescent defendant.

38. To the extent of costs to be incurred that would otherwise be avoided – the costs of the liquidation itself – I accept that the opposing creditors will or at least might be affected, and I accept that they will have to deal with two sets of proceedings. As to that: first, if true that the opposing creditors are the majority creditors, they will have majority voting control in the liquidation, including for example in respect of the choice of liquidator and his remuneration, subject to the Rules and to the court; the Petitioner would be in a minority; in any event of course, the court can exercise powers of control over the course of a compulsory liquidation; second, the costs of the liquidation are the costs of securing its effects and operation, which *ex hypothesi* inure to the benefit of the whole class.

39. It was said that Mr Neal is connected to the Company, and is not to be trusted; but against that, an allegation which is in any event denied as I understand it, Mr Turner is also said to be a fraudster, not to be trusted: a winding-up order would not be to assist a fraudster, first, because Mr Neal has not been shown to be fraudster, although it has been alleged, and second, because an order would remove the Company from the control of both Mr Neal, to the extent that he might have been in a position to exercise it, and Mr Turner.

40. I have of course held that the Petitioner is entitled to an order subject to the outcome of the balancing exercise – and is therefore a creditor; it would not be obviously just to compel the Petitioner, if it wants a remedy, to have to begin new, separate Part 7 proceedings to vindicate its rights; in any event, there is no reason to think they would be defended; in which case, default judgment would follow (and almost inevitably, another petition).

41. Accordingly, having considered and weighed the various interests and wishes of the creditor class, in my judgment, this is a case in which a winding-up order ought surely to be made: the company is insolvent; competing creditors are circling; subject to the injunction, it remains in the hands of a gentleman against whom serious allegations have been made, with apparently at least some real substance; the liquidation will serve and protect the interests of all, equally; it will not advantage Mr Neal in his defence of the Part 7 proceedings, and, if anything, would expose him to claims and powers to which he is not presently subject. In the circumstances, the balance is firmly in favour of liquidation, and that is therefore what I shall order.

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This transcript has been approved by the Judge