Neutral citation number: [2023] EWHC 2725 (Ch)

Case No: CR-2023-LDS-000706

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (Ch D)

Leeds Combined Court Centre,
1 Oxford Row,
Leeds LS1 3BG
Date: 31 October 2023

Before :
UPPER TRIBUNAL JUDGE MARK WEST
SITTING AS A JUDGE OF THE HIGH COURT

Between :

MORRISON WATER SERVICES LIMTED

Applicant

- and –

WILLIAM DAVID BROWNING

Respondent

Robert Allen (instructed by **Horwich Farrelly Limited)** for the **Applicant**

The Respondent in person

Hearing date: 27 October 2023

Remote hand-down: This judgment was handed down remotely at 10.30 am on 31 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judgment

The Parties

1. The parties to this application are Morrison Water Services Ltd ("MWS") and Mr William David Browning ("Mr Browning"). The application is brought by MWS pursuant

to rule 7.24 of the Insolvency (England and Wales) Rules 2016 for an order that Mr Browning be restrained from applying to wind up MWS because the presence of any debt owing to Mr Browning is disputed.

The Application

2. I heard the application by video on the morning of 27 October 2023. The company was represented by Mr Robert Allen of counsel. Mr Browning appeared in person. I had before me a hearing bundle of 228 pages, including witness statements by Mr Alain Looseveld and Mr Colin Jellicoe on behalf of MWS. On behalf of MWS Mr Allen had submitted a short skeleton argument. Mr Browning had also submitted a skeleton argument and witness statement on his own behalf in advance of the hearing, but unfortunately they were not sent to me by the Court until the hearing had begun. I heard the application, but reserved my judgment so that I could read Mr Browning's skeleton argument and witness statement in more detail after the hearing.

The Unredacted Material

3. In paragraph 16 of his witness statement Mr Jellicoe explained that MWS had advised Mr Browning of the position repeatedly and that his recourse in respect of any perceived tax overpayment was via HMRC. He exhibited the relevant correspondence at CJ5, but explained that any correspondence marked without prejudice had been redacted. Mr Browning sought to adduce an unredacted bundle of correspondence including the without prejudice material.

4. Without prejudice material is, however, not admissible in circumstances such as these. It is sufficient to cite the speech of Lord Griffiths in ***Rush & Tompkins Ltd v GLC*** [1989] AC 1280 at pp.1299D-1301D to this effect:

> "The "without prejudice rule" is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v. Head* [1984] Ch 290, 306:
>
> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy.

> It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. In *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151, 156, be encouraged fully and frankly to put their cards on the table. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation.

Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations … the underlying purpose of the rule … is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

…

I would therefore hold that as a general rule the without prejudice rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement. It of course goes without

> saying that admissions made to reach settlement with a different party within the same litigation are also inadmissible whether or not settlement was reached with that party."

5. Accordingly, I have not read the without prejudice material which Mr Browning sought to adduce.

The Statutory Demand

6. On 26 July 2023 Mr Browning served a statutory demand on MWS claiming payment of a debt of £51,537.00 made up of

(1) £24,794 bonus

(2) £2,705 expenses

(3) £950 mileage

(4) £3,626 additional tax because of the submission of incorrect details on form P11d

(5) £7,832 tax incorrectly deducted for the year 2021/22

(6) £11,630 tax incorrectly deducted for the year 2022/23.

7. Before the hearing Mr Browning had served an amended statutory demand (although a copy was not shown to me), omitting item 5, so that the debt claimed was now reduced to £43,705.

8. On 16 August 2023 MWS issued an application notice seeking an order restraining Mr Browning from applying to wind up the company on the grounds that the debt was disputed.

The Factual Background

9. On 3 November 2003, Mr Browning commenced employment with MWS in the role of Contracts Director. He was subject to terms of employment dated 30 October 2003 ("the Employment Contract").

10. Mr Browning was made redundant on 30 June 2022. His redundancy was subject to a settlement agreement dated 1 July 2022 ("the Settlement Agreement"). Mr Browning accepted at the hearing that he was bound by the terms of the Settlement Agreement. He made a number of allegations about the circumstances leading up to the signing of the Agreement and the circumstances in which it was signed, but those assertions were all contested by MWS and I do not need to consider them further given the ambit of the application. Nevertheless, Mr Browning accepted that he was bound by the terms of the Settlement Agreement.

11. Pursuant to the Settlement Agreement, MWS made a payment to Mr Browning of £97,600 on 6 July 2022, although that included what was said to be a mistaken overpayment of £15,426.45. As explained by Mr Jellicoe, that was due to the wrong tax code being applied by the payroll team. As recorded on the spreadsheet in question, he should have received £82,173.55, compared to the actual payment of £97,600, with the result that he was overpaid. The payroll team manually calculated the sum owed to him to facilitate speedy payment and the error was then realised when payroll for the company was subsequently run. That overpayment, which is disputed by Mr Browning, is not the subject of the present application, although he made number of written submissions about it, which I do not have to determine.

The Settlement Agreement

12. So far as material the Settlement Agreement provided that

> (C) The parties have entered into this agreement to record and implement the terms on which they have agreed to settle any claims that you have or may have in connection with your employment or its termination or otherwise against us or any Group Company (as defined below) or our or their officers, employees or workers, whether or not those claims are, or could be, in the contemplation of the parties at the time of signing this agreement, and including, in particular, the statutory complaints that you raise in this agreement.
>
> (D) The parties intend this agreement to be an effective waiver of any such claims and to satisfy the conditions relating to settlement agreements in the relevant legislation.

…

Arrangements on termination
2.1 Your employment with us shall terminate on 30 June 2022 (Termination Date).

2.2 We shall pay you your salary and contractual benefits up to and including the Termination Date in the usual way.

2.3 We shall make a payment to you in respect of 14 of days' outstanding holiday up to and including the Termination Date.

2.4 We shall make a payment to you in lieu of your notice entitlement under the Contract in the amount of £69,316.65 (the PILON) plus employer pension contributions for the notice period. The parties agree that the amount of the PILON is equal to or exceeds the amount given by the formula in section 402D(1) of ITEPA and, accordingly, believe that your Post-Employment Notice Pay is nil.

2.5 We shall make a payment to you equivalent to your car allowance for the notice period under the Contract in sum of £5040.

2.6 The payments and benefits in this Clause 2 shall be subject to the income tax and National Insurance contributions that we are obliged by law to pay or deduct.

2.7 The payments in clauses 2.4 and 2.5 will be paid in within 7 days of receipt by the Company of this agreement signed by the Employee together with a letter signed by the Advisor in the form set out in Schedule 4.

2.8 Your P45 (made up to the Termination Date) shall be sent to you as soon as reasonably practicable after the Termination Date.

…

Waiver of claims
7.1 You agree that the terms of this agreement are offered by us without any admission of liability on our part and are in full and final settlement of all and any claims or rights of action that you have or may have against us or any Group Company or our or its officers, employees or workers arising out of your employment with us or its termination, whether under common law, contract, statute or otherwise, whether such claims are, or could be, known to the parties or in their contemplation at the date of this agreement in any jurisdiction and including, but not

limited to, the claim specified in Schedule 3 (each of which is waived by this clause).

7.2 The waiver in clause 7.1 shall not apply to the following:

(a) any claims by you to enforce this agreement;

(b) any claims in respect of personal injury; and

(c) any claims in relation to accrued entitlements under the Pension Scheme.

…

7.6 You agree that, except for the payments and benefits provided for in this agreement, and subject to the waiver in clause 7.1, you shall not be eligible for any further payment from us or any Group Company relating to your employment or its termination and you expressly waive any right or claim that you have or may have to payment of bonuses, any benefit or award programme, under any share plan operated by us or any Group Company or any stand-alone share incentive arrangement, or to any other benefit, payment or award you may have received had your employment not terminated or for any compensation for the loss of any such benefit, payment or award.

…

Employee indemnities

…

8.2 If you breach any material provision of this agreement or pursue a claim against us or any Group Company arising out of your employment or its termination other than those excluded under clause 7.2, you agree to indemnify us or any Group Company for any losses suffered as a result thereof, including all reasonable legal and professional fees incurred.

…

Entire agreement
14. Each party on behalf of itself and, in our case, as agent for any Group Company acknowledges and agrees with the other party (with us acting on our own behalf and as agent for each Group Company) that:

(a) this agreement constitutes the entire agreement between the parties and any Group Company]and supersedes and extinguishes all agreements, promises, assurances, warranties,

> representations and understandings between them whether written or oral, relating to its subject matter;
>
> (b) in entering into this agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement; and
>
> (c) it shall have no claim for innocent or negligent misrepresentation [or negligent misstatement] based on any statement in this agreement.

The Principles To Be Applied

13. In ***Angel Group v. British Gas*** [2012] EWHC 2702 Norris J summarised the principles to be applied by the Companies Court when considering the petitioning creditor's status as creditor (with emphasis added for ese of reference):

> "The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:-
>
> a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: *Mann v Goldstein* [1968] 1WLR 1091;
>
> b) The company may challenge the petitioner's standing as a creditor *by advancing in good faith a substantial dispute as to the entirety of the petition debt* (or at least so much as will bring the indisputable part below £750);
>
> c) A dispute will not be "substantial" if it has really no rational prospect of success: in *Re A Company No.0012209* [1992] 1 WLR 351 at 354B.
>
> d) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: ibid. at 354F.
>
> e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. *The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in*

> *nature from the effect of an ordinary action*: in *Re A Company No.006685* [1997] BCC 830 at 832F.
>
> f) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination (ibid. at 841C).
>
> g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid at 837B)."

14. The bar to demonstrating a dispute over a debt on substantial grounds is set low, as Etherton LJ (as he then was) observed in ***Tallington Lakes Ltd v. South Kesteven District Council*** [2012] EWCA Civ 443 at [22]:

> "I have to emphasise, however, in this context that it is well established that the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one for restraining the presentation of the winding-up petition, and may be reached even if, on an application for summary judgment, the defence could be regarded "shadowy"."

15. It is apparent that Mr Browning was not aware of the principles on which the Court acts in disputes such as this. He had been referred to the Gov.uk website and thought that issuing a statutory demand, followed by winding-up petition, was quick and easy means to recover the sums which he believed to be due to him.

MWS's Case

16. On behalf of MWS, Mr Allen submitted succinctly that, in performance of the Settlement Agreement, the company had made payment to Mr Browning of £97,600 on 6 July 2022 (which included an overpayment of £15,426.45). MWS had therefore discharged itself from any further sums owed to Mr Browning pursuant to the terms of the Settlement Agreement. In those circumstances, MWS argued that the sum of £51,537 was not due and owing to him.

<u>Bonus</u>

17. Mr Allen submitted that Mr Browning was not entitled to a bonus, either by operation of the Settlement Agreement, or otherwise.

18. In the first place, the scheme by which bonuses were awarded ("the Staff Bonus Scheme") was discretionary and non-contractual. Reference was made to the terms of the Scheme as set out in the Employment Contract, whereby:

(1) the company retained the power to amend, withdraw or replace the rules at the absolute discretion of the Board of Directors; and

(2) Mr Browning lost the right to bonus entitlement upon termination of his employment: "[f]or the avoidance of doubt, entitlement to bonus automatically ceases on termination of employment at any time and for whatever reason".

19. Secondly, Mr Browning's employment was terminated on 30 June 2022. According to the June 2022 Bonus Guidelines at [7]

> "employees who leave the business before 30 June 2022 are not eligible to receive a bonus".

20. Finally, whatever may have been the position under the Employment Contract, clause 7.6 of the Settlement Agreement provided that:

> "You agree that, except for the payments and benefits provided for in this agreement, and subject to the waiver in clause 7.1, you shall not be eligible for any further payment from us or any Group Company relating to your employment or its termination and you expressly waive any right or claim that you have or may have to payment of bonuses, any benefit or award programme, under any share plan operated by us or any Group Company or any stand-alone share incentive arrangement, or to any other benefit, payment or award you may have received had your employment not terminated or for any compensation for the loss of any such benefit, payment or award".

Expenses/mileage

21. There was no basis under the Settlement Agreement for those sums to be paid.

22. Whilst there was provision within the Employment Contract for reasonable out-of-pocket expenses to be met by the company, by virtue of clause 7.1 of the Settlement Agreement Mr Browning had waived any such rights as he might purport to rely upon from the Employment Contract.

23. In fact clause 2.5 of the Settlement Agreement dealt with a sum for car allowance amounting to £5,040. That was part of the package paid to Mr Browning. No further sums were due; all duties had been discharged.

Tax

24. The 3 (latterly 2) sums for “overpaid tax” across various years were, in Mr Allen’s submission, entirely a matter between Mr Browning and HMRC. Moreover, clause 7.1 of the Settlement Agreement again applied and the arguments regarding waiver of such claims were repeated.

25. In summary, the sum of £51,537 (now reduced to £43,705) stood to be disputed on substantial grounds and Mr Browning should be restrained from applying to wind up the company.

Mr Browning’s Case

Bonus

26. Mr Browning submitted that, whilst MWS might contend that the bonus was strictly non-contractual or discretionary, the award of bonus had become a contractual entitlement over time, as an implied term of his Employment Contract. A bonus had always been paid on achievement of company profit targets or company cash-flow targets or both. There were no personal targets. In the 18 years of his employment, bonus had been paid in the same way on 17 occasions, with the sole exception being as a result of Covid 19 and the exceptional costs which the pandemic imposed on the business. The long-term payment of bonus had become custom and practice and had become an implied term of the Employment Contract.

27. In the fiscal year ending March 2022, the business achieved some/all of its targets and bonus was paid to all staff. Mr Browning was the exception, even though he had worked very hard and effectively for his contracts to generate over £4 million of the company's annual total of £34m profit and also achieve cash-flow targets. Given that there were about 15 Contracts Directors in the business, Mr Browning's achievements were amongst the very best, with others losing money or facing large losses to come. All of the staff on Mr Browning's contracts also received a bonus. Not awarding him a bonus was a breach of contract.

28. To the extent that an award of bonus was discretionary, ***Clark v Nomura International Plc*** [2000] IRLR 766 was authority for the proposition that an employer exercising discretion which on the face of it was unfettered or absolute would be in breach of contract if no reasonable employer would exercise the discretion in that particular way. In applying a test of perversity or irrationality, the Court asked whether any reasonable employer could have come to such a conclusion. In that case the Court awarded the expected bonus as damages for breach of contract.

29. As a consequence of the established practice of paying bonus over 18 years, the bonus was sufficiently certain and quantifiable. The calculation of the bonus in the statutory demand had been assessed as an average of the last 10 years in which bonus had been paid in the usual way.

30. Mr Browning had no performance, attendance or disciplinary issues. He was still employed on 30 June 2022, the date on which the bonuses were paid. He therefore should have received his bonus.

Expenses/mileage

31. With regard to his claim for expenses and business mileage, Mr Browning submitted that

> "The contract of employment states that:
>
> > The Company will meet all reasonable out-of-pocket expenses incurred on the company's business on presentation of documentary evidence through the normal

expenses procedure as outlined in the Employee Handbook.

There was no Employee Handbook. There was never a time limit for submitting expenses in the contract. Any suggestion by the employer to put time limits on expense submissions would have been rejected by Mr Browning as he would find it nearly impossible to comply, given his heavy workload. Mr Browning has always had a very heavy workload and his Executive Director line manager for 16 years allowed him to do his expenses when he got the opportunity and to bundle his expenses. The problem was increased approximately 6 years ago when the company insisted that the most senior managers incurred expenses and this meant that Contract Directors, like Mr Browning, as the most senior operational managers had the largest volumes of receipts to submit. Mr Browning's new Executive Director was still accommodating but less flexible. He pressured Mr Browning to submit his expenses in shorter time frames but still recognised that the workload of Mr Browning needed to take priority. At the time of commencing Settlement Agreement discussions, Mr Browning had £2705 of expenses to recover. He followed the instructions given to get these paid but they were never paid.

Clause 2.2 states that salary and contractual benefits will be paid in the usual way. Expenses are a contractual benefit written into the contract. Mr Browning had actually submitted the majority of these expenses around 25th March 2022. The usual way normally pays expenses within days separately into the employee's bank account and avoiding payroll [sic]. There has been no such payment and £2705 is claimed".

32. He continued with regard to business mileage:

"Reimbursement for mileage
Mr Browning had a company fuel card and drove a company car. When Mr Browning was first notified that the Company intended to terminate his employment they took away his access to IT and systems. The mileage returns are submitted on an electronic system and allow the recovery of the cost of business mileage whilst also showing the private mileage that can be deducted from pay. Despite many requests to reinstate his access so that he could submit £950 of business mileage returns, this was never given. Consequently all business miles default to personal miles and this has cost Mr Browning £950.

The payment of business mileage is an implied condition which goes alongside having a company car with fuel card as this is

the procedure that the company has always operated. The £950 is therefore due pursuant to a breach of clause 2.2".

Tax

33. On the two items relating to tax, Mr Browning submitted that

> **"Additional Tax paid due to incorrect P11d entry.**
> Mr Browning has a company car and gets a company fuel card for which he reimburses the company for private mileage. There is thus no benefit in kind and no cost to Mr Browning. This is standard company policy. Clause 2.2 of the Settlement Agreement states that Mr Browning will be paid his salary and contractual benefits in the usual way up to the Termination Date. The provision of a fuel card is in line with company policy and goes hand in hand with having a company car.
>
> After the Settlement Agreement was signed the company sent through Mr Browning's P11d. They had changed it so that Mr Browning was now going to get charged a benefit in kind of £9065 for use of the card for business and private mileage. Mr Browning asked several times for it to be corrected but it never was. Mr Browning therefore had no choice but to submit a tax return with the incorrect P11d allocation and this has cost him £3,626 in additional tax paid. The P11d was not completed to reflect Mr Browning's benefits being paid in the usual way which is a Breach of the Settlement Agreement and Mr Browning is owed £3626.
>
> …
>
> **Tax incorrectly deducted for 2022/23**
>
> Due to errors by the Company's payroll department, too much tax was paid to HMRC by the Company. The Company have stated that they don't believe that HMRC will refund the overpayment of tax. The amount of tax overpaid has been calculated from the spreadsheet provided by the Company. The errors in the spreadsheet are such that, if the Company's formulas are correct and after inserting the correct bandings, the overpayment of tax could be as high as £18,544. The errors showed Mr Browning paying tax in the 45% tax band when his total taxable income for the year were only £129,768.66 i.e. far below the £150,000 that the 45% band starts at. The Company had Mr Browning paying tax of £38,511.44 in the 45% tax band when the actual figure should have been £nil".

Discussion

Bonus

35. Whatever may have been the original position under the Employment Contract, it is now the Settlement Agreement which governs the position between the parties. At first blush, under the terms of the Employment Contract it would appear that the original bonus scheme was discretionary and non-contractual for the reasons stated by Mr Allen. I accept, however, that Mr Browning has an arguable case that the position changed over time and that at some point the discretionary entitlement became a contractual entitlement, but I cannot resolve that question on the limited material before me, nor in particular when and on what precise terms such a change may have taken place. (For the sake of completeness I should add that I do not accept the argument that Mr Browning was not entitled to a bonus because he was made redundant before 30 June 2022 and thus fell outside the 2022 Bonus Guidelines. It is apparent from clause 2.1 and clause 4 of the Settlement Agreement that he was made redundant *on* 30 June 2022 and not *before* it.)

36. Nevertheless whatever may have been the position under the Employment Contract, the position is now governed by the Settlement Agreement which provides by virtue of clause 7.6 that (with emphasis added)

> "You agree that, except for the payments and benefits provided for in this agreement, and subject to the waiver in clause 7.1, you shall not be eligible for any further payment from us or any Group Company relating to your employment or its termination *and you expressly waive any right or claim that you have or may have to payment of bonuses*, any benefit or award programme, under any share plan operated by us or any Group Company or any stand-alone share incentive arrangement, or to any other benefit, payment or award you may have received had your employment not terminated or for any compensation for the loss of any such benefit, payment or award".

37. If Mr Browning accepts that he is bound by the Settlement Agreement, it seems to me that clause 7.6 is a compete answer to the claim for unpaid bonus, whether the payment of bonus was contractual or non-contractual. At the very least it seems to me that, by virtue of clause 7.6, the claim to the unpaid bonus is disputed by MWS on substantial grounds.

38. At certain points in his argument Mr Browning suggested that he had been the subject of victimisation and harassment at the time if the signing of the Settlement Agreement. He did not, however, go so far as to assert that he was not bound by it, but if his claim is now that he was not bound by it and is thus not subject to clause 7.6, that simply reinforces the point that MWS disputes the position on substantial grounds.

Expenses/mileage

39. Again, whatever may have ben the position under the Employment Contract so far as expenses were concerned, the position is now governed by the Settlement Agreement and the waiver clause 7.1. It may be that Mr Browning had submitted an expenses claim in the sum of £2,705 on or about 25 March 2022 which was outstanding at the date of the termination of his employment, but clause 7.1 provided (with emphasis added) that

> "You agree that the terms of this agreement are offered by us without any admission of liability on our part and are *in full and final settlement of all and any claims or rights of action that you have or may have against us* or any Group Company or our or its officers, employees or workers *arising out of your employment with us or its termination*, whether under common law, contract, statute or otherwise …".

40. Moreover, clause 2.5 of the Settlement Agreement provided that Mr Browning was to be paid a sum for car allowance amounting to £5,040. It is therefore difficult to see on what basis, given the terms of the waiver clause, that he could be entitled to a further sum of £950.

41. At the very least it seems to me that, by virtue of clause 7.1, the claim to the expenses and mileage is disputed by MWS on substantial grounds.

Tax

42. The short answer to Mr Browning's arguments about tax is that that is a matter between him and HMRC and that he should be pursuing HMRC rather than MWS in respect of those matters. His claims in relation to tax are not the proper subject for invoking the winding-up jurisdiction of the Court. At the very least it seems to me that

again, by virtue of clause 7.1, the claim to the tax sums in question is disputed by MWS on substantial grounds.

43. I therefore accept Mr Allen's submissions. MSW is not unable to pay its debts on the evidence before me. There is a range of reasonable potential defences to the claim (of which I have outlined some, but not all, of the elements above).

44. I have undertaken the analysis of the materials required by ***Angel Group*** to determine whether there are serious, albeit not necessarily winning, points to be made by MSW and have concluded that there are. I therefore accept the submissions of Mr Allen that the totality of the petition debt (even in the reduced amount) is disputed on bona fide and substantial grounds.

45. I am therefore not satisfied that, at the date of the petition, Mr Browning was not a creditor of MSW and that he had standing to present this petition. To the contrary, Mr Browning appears to be in the position of a conventional claimant on a claim where the liability to pay is disputed and where the dispute is wholly unsuited to resolution in insolvency proceedings.

46. To quote Mr Daniel Alexander QC (sitting as a Deputy Judge of the Chancery Division) in ***Breyer Group Ltd v RBK Engineering Ltd*** [2017] EWHC 1206 (Ch) (again with emphasis added for ease of reference)

> "48. *The courts have recognized on numerous occasions that such proceedings are not the place for resolving genuinely disputed debt claims which the court cannot properly determine, either as to merits or as to quantum, at this stage.* I have in mind, in particular, the summary of authorities reviewed in *Re a Company No 006685 of 1996* [1997] BCC 830 Chadwick J and the judgment of the Court of Appeal in *Wilson and Sharp Investments Ltd v. Harbour View Developments Ltd* [2015] EWCA Civ 1030, which related to a contract which was, in some respects, similar to the present one but where the facts were less clearly in favour of the applicant than here. In that case, the applicant had not raised the potential defences at an earlier stage. Nonetheless an injunction was granted to restrain further proceedings on the petition.

> 49. *Such petitions also have the potential to create injustice because a company against whom a winding up petition is sought may feel pressurized into paying simply to avoid the petition being advertised which may itself have a range of serious commercial consequences on banking and other contractual relationships. In that way, such proceedings can operate as a form of commercial oppression, where the very existence of proceedings can be the source of disproportionate injustice. While the court must be astute to avoid having the wool pulled over its eyes by a debtor trying to escape its obligations, it must be equally astute to avoiding injustice being caused by a potential creditor using insolvency proceedings to make it less likely that a justified defence or counterclaim will be pursued because the alleged debtor will be pressurized into paying the claim in full before that can be done*."

Costs

47. Accordingly, the application is successful.

48. The basis of the Court's discretion as to costs is set out in CPR Part 44 and in particular in CPR 44.2 which provides that

> "**Court's discretion as to costs**
>
> 44.2 (1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.

49. In the ordinary course of events the loser pays the winner's costs and I see no reason to depart from that course in this case.

50. Mr Browning submitted that the case had been brought before the court by MWS and thus he should not be responsible for paying its fees. It was, however, Mr Browning who had set the ball rolling by serving the statutory demands as a preliminary to issuing and serving the winding-up petition, which compelled MWS to take action and bring this application for the restraining of the issuing of the winding-up petition.

51. Mr Browning said that he had made concerted attempts to settle the matter and had made no less than 5 offers to settle. However, as I have explained above, the without prejudice material is not admissible and the fact remains that the mater has not been settled and MWS was compelled to come to Court to protect its interests.

52. Thirdly, Mr Browning submitted that clause 8.2 of the Settlement Agreement precluded the making of an order for cost against him. What clause 8.2 provides is that

> "If you breach any material provision of this agreement or pursue a claim against us or any Group Company arising out of your employment or its termination other than those excluded under clause 7.2, you agree to indemnify us or any Group Company for any losses suffered as a result thereof, including all reasonable legal and professional fees incurred".

53. In other words, what the clause provides is that if Mr Browning breaches any material provision of the Settlement Agreement or pursues a claim against MWS or any group company arising out of his employment or its termination, he will indemnify MWS or any group company for any losses which they suffer as a result, including all reasonable legal and professional fees incurred. The only exception to that contractual indemnity which binds Mr Browning is for those claims arising under clause 7.2 namely

> "(a) any claims by you to enforce this agreement;
>
> (b) any claims in respect of personal injury; and
>
> (c) any claims in relation to accrued entitlements under the Pension Scheme".

54. But the fact that no contractual indemnity binds Mr Browning in respect of those claims arising under clause 7.2 does not precludes MWS from obtaining a costs order against him in respect of fees incurred in litigation brough by him in circumstances which amount to an abuse of the process of the Court. As Ungoed-Thomas J said in ***Mann v Goldstein*** [1968] 1 WLR 1091 J at p.1099:

> "…the prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition."

55. Paragraph 9.2 of the Practice Direction to CPR Part 44 provides that

> "The general rule is that the court should make a summary assessment of the costs –
>
> …
>
> (b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,
>
> unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily".

I see no reason to depart from that general rule in this case.

56. Mr Allen claimed counsel's fees of £850 plus VAT (amounting to £1,020) and 8.6 hours of a Grade C fee earner at an hourly rate of £170 (amounting to £1,530), making a total of £2,550.

57. I do not regard those sums as being unreasonable. I therefore accept the total sum and I summarily assess the costs which Mr Browning must pay at £2,550. The usual order is that that sum must be paid within 14 days. As a concession to Mr Browning I will give him 28 days to make the payment.

Conclusion

58. I therefore make the order sought by Mr Allen on behalf of MWS which is set out in the attached order. Mr Browning is to be restrained indefinitely from applying to wind up MWS. Mr Browning must pay the costs of the application, summarily assessed at £2,550, within 28 days.