

Neutral Citation Number: [2023] EWHC 537 (Ch)

Case No: CR-2021-002383

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BANKRUPTCY COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, EC4A 1NL

Date: 21 March 2023

Before :

Deputy Insolvency and Companies Court Judge Addy KC

Between :

(1) **HEX TECHNOLOGIES LIMITED** **Petitioners**
(2) **HEX TRUST LIMITED**
(3) **HEX TECHNOLOGIES PTE LIMITED**

- and -
DCBX LIMITED **Respondent**
Company

Madeleine Jones (instructed by **Reynolds Porter Chamberlain LLP**) for the **Petitioners**
Rabya Anwar of **Keystone Law** for the **Respondent Company**

Hearing dates: 26 September 2022 with various further rounds of submissions made in writing

JUDGMENT

Deputy Insolvency and Companies Court Judge Addy KC:

1. This Judgment concerns a disputed winding up petition, presented on 17 December 2021 pursuant to section 122(1)(f) of the Insolvency Act 1986 against DCBX Limited, being a company incorporated on 17 August 2012 under the Companies Act 2006 with registration number 08184268 (the “**Company**”) by Hex Technologies Limited (“**Technologies**”), Hex Trust Limited (“**Trust**”) and Hex Technologies Pte Limited (“**Technologies Pte**”). For convenience and where appropriate to do so, I shall refer to the 3 petitioning companies, Technologies, Trust and Technologies Pte, together as “**HEX**” or “**the Petitioners**”. By the Petition, HEX claim that the Company owes to them a total debt of £108,765.15 (comprising principal of £96,184.33 – converted from USD 131,759.36 – and interest of £12,580.81, as at 9 November 2021), such sums having been invoiced pursuant to 4 different contractual agreements entered into by the Company. A statutory demand claiming such sums and accompanied by the requisite Condition B Notice dated 10 November 2021 was served upon the Company on that date.
2. The Petition was served upon the Company on 17 December 2021, by leaving it with the receptionist at the Company’s registered office address in London. Although the Company takes issue with the method of service in circumstances where the receptionist was not an employee of the Company, it was served in accordance with the requirements of the Insolvency Rules by being deposited at the registered office in such a way that it was likely to come to the notice of a person attending the office (in compliance with paragraph 2(2) of Schedule 4) and it obviously came to the attention of the Company’s director, Mr Angelo, as he has filed various witness statements in opposition to the Petition. The

Petition was duly advertised on 12 January 2022, identifying the Company's present and its recent former names (LDX EFOLIO Limited and London Derivatives Exchange Limited). The Petition was first heard on 2 February 2022, when directions for the filing of evidence were made by ICC Judge Barber.

3. The following background facts are not disputed:

- i) The Company operates or operated an online trading platform enabling clients to buy and sell digital assets and was regulated in such activity by the FCA.
- ii) HEX are a principally Hong Kong based corporate group which provides IT infrastructure for digital assets trading platforms, including digital assets custody (i.e. digital 'wallets' in which digital assets are stored), platforms on which trading service employees can interact, software which enables trading using blockchain technology and other related software.
- iii) The Company engaged HEX to provide it with IT services pursuant to written agreements consisting of the following:
 - a) An Engagement Letter dated 30 January 2019 pursuant to which Technologies and/or its affiliates provided to the Company a bespoke settlement and clearing interface (the "**LDX Interface**") and a supporting private blockchain (the "**LDX Blockchain**") to the Company (the "**Engagement Letter**"). Pursuant to the Engagement Letter HEX set up and maintained the LDX

Interface and LDX Blockchain, enabled trade clearing, settlement confirmation and regulatory reporting of transactions on the LDX Blockchain and revenue share distribution and corporate actions for these transactions.

- b) A “*Software License*¹ *Agreement*” pursuant to which Technologies Pte (a company incorporated under the laws of Singapore) provided to the Company a one-year licence for the Hex issuance platform with effect from 6 September 2019 (the “**Software License Agreement**”).
- c) A custodian agreement dated 26 September 2019 pursuant to which Trust provided digital assets custodial services to the Company for the Company’s own account (the “**Company Custodian Agreement**”).
- d) Nineteen separate custodian agreements entered into by Trust on various dates during September 2019 with various of the Company’s own clients and to which the Company was itself a contracting party, pursuant to which digital wallets were provided and maintained by HEX for those clients of the Company (the **Client Custodian Agreements**).

- 4. The matter first came before me on 12 July 2022 when counsel for the Petitioners, Ms Jones, and the solicitor advocate for the Company, Ms Anwar, both urged me to hear and determine the Petition substantively despite my

¹ The US spelling appears in the agreement and is accordingly used in this Judgment when referring to such document.

expressed reservations about what proved to be a grossly over optimistic half-day time estimate. Given the limited time, it was not possible to determine the Petition on that occasion. However, in light of various submissions made on behalf of the parties at that hearing, I gave permission for the parties to rely on further evidence which they had each filed and served the previous day and gave further permission for the Company to file and serve further evidence to be strictly limited to evidence in response to the further witness statement of Mr Paul Bagon dated 11 July which had been served on behalf of the Petitioners.

5. Accordingly, the following evidence has been filed in relation to the Petition and is relied upon by the respective parties:

i) For the Petitioners:

- a) A short witness statement of Charlotte Bennett of the Petitioners' solicitors, Reynolds Porter Chamberlain (**RPC**), dated 17 December 2021 verifying the content of the Petition.
- b) A witness statement of Alessio Quaglini, who is a director of the Hex group of petitioning companies, dated 2 March 2022, together with Exhibit AQ1.
- c) A short witness statement of Paul Bagon of RPC dated 7 June 2022, in support of HEX's application to amend the Petition so as to correctly state that the Company is not an undertaking within the meaning of Article 1.2 of the EU Regulation.
- d) A further witness statement of Mr Bagon dated 11 July 2022 together with Exhibit PB2 which was filed following receipt of

the skeleton argument on behalf of the Company for the hearing on 12 July 2022. Its particular purpose was, as it stated, to rebut an assertion made on behalf of the Company that there was only one active custodian account with a particular third party which I shall refer to for convenience (as did the parties) as **SGH**. Exhibit PB2 contained various documents which HEX wished to rely upon that had been redacted to remove reference to details of account holders. Such redactions had been made (so it was said) to protect confidential information in relation to such persons from being on the Court file and, at the hearing on 12 July 2022, I gave permission for HEX to rely upon such material upon their solicitors' undertaking to provide to the Company's solicitors an unredacted copy of such exhibit in advance of the hearing, leaving open the question of whether it might be necessary for the Court to be referred to any unredacted versions of such documents and, if so, whether it might be appropriate to make any order restricting public access to such materials. In the event, the parties considered it unnecessary for the Court to be referred to any unredacted versions of any documents contained in Exhibit PB2 and accordingly they were never placed on the Court file and it was not necessary to consider whether any confidentiality order could or should be made in relation to any unredacted copies of such documents.

- ii) The Company relies upon the following in opposition to the Petition:

- a) A witness statement of Vj Andrew Angelo, director and CEO of the Company, dated 25 January 2022.
- b) A witness statement of Ellie Puddle, who states that she is the Chief Operations Officer of the Company, having worked for the Company only since 1 July 2021 and having been appointed as the Company Secretary on 1 November 2021.
- c) A witness statement of Ms Anwar dated 16 February 2022, the purpose of which was to exhibit (as RA1 through to RA15) various documents which the Company wished to rely upon in opposing the Petition.
- d) A second witness statement of Mr Angelo dated 5 July 2022 together with Exhibit VA1.
- e) A third witness statement of Mr Angelo dated 11 July 2022 together with Exhibit VA2 (which, as noted above, I granted the Company permission to rely upon in opposition to the Petition at the hearing on 12 July 2022). Its intended purpose was to address the Company's financial position, particularly in response to doubts expressed in the skeleton argument filed on behalf of HEX for the hearing on 12 July 2022 as to the Company's asserted solvency.
- f) A fourth witness statement of Mr Angelo dated 29 July 2022 together with Exhibit VA3 which was filed pursuant to the

permission which I gave on 12 July 2022. I note that this witness statement is some 73 paragraphs long.

6. In advance of the substantive hearing on 26 September 2022 (which was listed for a full day with an additional half a day for judicial pre-reading) Ms Jones for HEX and Ms Anwar for the Company each filed skeleton arguments of some length (both closely typed, single line spaced and 26 pages each). At the end of the full day's hearing and it being necessary to reserve judgment in any event, I gave the parties permission to provide (and their respective advocates duly provided) further written submissions limited to a point that the Company wished to make (and that HEX wished to refute) which had not been possible to address properly at the hearing due to deficiencies in the contents of the authorities bundle.
7. Thereafter and prior to circulating draft judgment, Ms Jones quite properly wrote to the Court (copied to Ms Anwar) to draw attention to the existence of a recent *ex tempore* judgment of ICC Judge Prentis which was adverse to her clients' position (concerning the relevance of any exclusive jurisdiction clause) and making some submissions in relation to the same. In view of such correspondence in December, rather than circulating draft judgment to the parties, I gave the Company an opportunity to respond in writing and Ms Anwar duly filed a written response on 16 January 2023. However, a copy of the approved transcript of such Judgment of ICC Judge Prentis (*Ghanim Saad M Al Saad Al Kuwari v Cantervale Limited* [2022] EWHC 3490 (Ch)) did not become available to the parties and the Court until 30 January 2023. Consequently, on 3 February 2023, I gave directions for the parties to provide to the Court and

each other by 13 February 2023, any written submissions which they wished to make in consequence of the judgment in *Al Saad*, including in relation to the construction and effect of any jurisdiction clause sought to be relied upon, and for the parties to provide to the Court and to each other by 20 February 2023 any written submissions in reply. Notwithstanding my plea to the parties to endeavour to keep such written submissions short, I have received a further 35 pages of written submissions and an additional bundle of authorities comprising 293 pages. In view of the novelty and potential importance of the issue which has arisen (which I address below), I make no criticism of the parties for such length, but I note that it has increased the time required to further consider the matter and give this Judgment. I also note that, not least given their overall length, it is neither possible nor desirable to address each and every point raised in the various written and oral arguments advanced by the parties. However, I have considered all of the parties' oral and written submissions for the purposes of giving this Judgment.

8. Before addressing the Company's asserted grounds of opposition, it is necessary to identify the sums claimed by the invoices relied upon in the statutory demand and the Petition and to set out some of the relevant provisions of the underlying agreements which I have referred to above.

The invoices and the agreements

9. The statutory demand and the Petition both contain a table setting out the 9 invoices which are relied upon by HEX. The first is dated 31 October 2019 and the last one is dated 7 July 2020, claiming monthly sums in respect of October 2019 through to July 2020 inclusive.

10. In his witness statement of 2 March 2022, Mr Quaglini also provided a schedule which further explained the sums invoiced and identified the relevant written agreement pursuant to which he said they were claimed. In her oral submissions, Ms Jones also took me through, by way of example, the invoice dated 31 October 2019 which claimed the following:
- i) “*Token Issuance and KYC Oct 2019 – Hex Technologies Pte Ltd*” USD 2,500.00;
 - ii) “*Enterprise Custody Account Oct 2019 – Hex Technologies Ltd*”, USD 833.00;
 - iii) “*Minimum custody fee Oct 2019 – Hex Trust Ltd*”, USD 500.00;
 - iv) “*SGH KYCs Oct 2019 – Hex Trust Ltd*”, USD 200.00; and
 - v) “*Custody fee SGH accounts Oct 2019 – Hex Trust Ltd*”, USD 15,232.00.
11. The subsequent invoices all contain similar descriptions (referable to the corresponding months), save that only the October and November invoices contain any charge for “*SGH KYCs*” (together totalling USD 800.00) and only the November invoice contains an additional charge for “*Distribution/Settlement fees*” (of USD 45.00). For each subsequent invoice, the monthly sums claimed for “*Token Issuance and KYC*”, “*Enterprise Custody Account*” and “*Minimum custody fee*” are the same, USD 2500.00, USD 833.00 and USD 500.00 respectively (save that the last invoice, dated 7 July 2020, claims 2 sums of USD 2,500.00 for both June and July), whereas the sums claimed for “*Custody fee SGH accounts*” varies for each month. Mr Quaglini in his written evidence and Ms Jones in her oral submissions explained that –

- i) The monthly sum of USD 2500.00 claimed in respect of “*Token Issuance and KYC*” was due pursuant to the Software License Agreement;
- ii) The monthly sum of USD 833.00 claimed in respect of “*Enterprise Custody Account*” was due pursuant to the Engagement Letter;
- iii) The monthly “*minimum custody fee*” of USD 500.00 was claimed pursuant to the Company Custodian Agreement;
- iv) The further “*Custody fee SGH accounts*” were claimed pursuant to the Client Custodian Agreements; and
- v) The USD 800.00 in respect of “*SGH KYCs*” and the additional USD 45.00 charge for “*Distribution/Settlement fees*” were also claimed pursuant to the Client Custodian Agreements.

12. Accordingly, together, the invoices claim the following:

- i) USD 25,000.00 being 10 months of fees claimed pursuant to the Software License Agreement;
- ii) USD 7,497 claimed in respect of “*Enterprise Custody Account*” and said to be due pursuant to the Engagement Letter;
- iii) USD 4,500.00 claimed in respect of “*minimum custody fee[s]*” pursuant to the Company Custodian Agreement; and
- iv) USD 110,917.36 claimed in respect of custody fees, USD 800.00 in respect of “*SGH KYCs*” and USD 45.00 for “*Distribution/Settlement fees*” pursuant to the Client Custodian Agreements.

Against which, the Company has made payments totalling USD12,500.00 which have been allocated towards the invoice dated 31 October 2019: 2 payments of USD 2,500 on 14 February 2020, a payment of USD 5,000 on 18 February 2020 and a payment of USD 2,500 on 7 April 2020. Consequently, HEX claim that the Company owes USD 131,759.36 before interest is applied, which must be regarded as comprising the following (after the payment of USD 12,500.00 is applied to the invoice dated 31 October 2019 in the order of the sums claimed therein):

- i) **USD 22,500.00** being 9 months of fees claimed pursuant to the Software License Agreement (the USD 2,500.00 claimed in the 31 October 2019 invoice having been paid);
- ii) **USD 6,664.00** claimed in respect of “*Enterprise Custody Account*” (the USD 833.00 claimed in the 31 October 2019 invoice having been paid) and said to be due pursuant to the Engagement Letter;
- iii) **USD 4,000.00** claimed in respect of “*minimum custody fee[s]*” pursuant to the Company Custodian Agreement (the USD 500.00 claimed in the 31 October 2019 invoice having been paid); and
- iv) **USD 102,450.36** claimed in respect of custody fees, **USD 600.00** in respect of “*SGH KYCs*” and **USD 45.00** for “*Distribution/Settlement fees*” pursuant to the Client Custodian Agreements (the USD 200.00 claimed in the 31 October 2019 invoice in respect of “*SGH KYCs Oct 2019*” having been paid and the USD 8467.00 balance of the USD 12,500 payment being applied to the custody fees claimed in such invoice).

13. In his evidence Mr Angelo confirmed that the Company entered into the Engagement Letter, the Software License Agreement, the Company Custodian Agreement and the various Client Custodian Agreements relied upon. At the time of doing so, the Company was known as London Derivatives Exchange Limited but later changed its name, on 16 June 2021, to LDX EFOLIO Limited and again, on 15 December 2021, to DCBX Limited.
14. The Engagement Letter, signed on behalf of Hex Technologies by Mr Quaglini and on behalf of the Company by Mr Angelo, was dated 30 January 2019. In so far as is material for present purposes, it provided as follows:
- i) Hex Technologies and/or its affiliates would provide to the Company the Services set out in Schedule A for the fees set out in Schedule B to the Letter. All fees under the Engagement Letter were payable “*on a monthly basis, unless otherwise specified in Schedule B*”.
- ii) Schedule A provided:
- “*The Services are limited to the following:*
- *Implementation of bespoke settlement and clearing interface (“**LDX Interface**”)*
 - *Setup and maintenance of EOS Private Blockchain (“**LDX Blockchain**”) to support LDX Interface;*
 - *Trade clearing, settlement, confirmation and regulatory reporting relating to all transactions recorded on LDX Blockchain; and*
 - *Revenue share distribution and corporate actions handling relating to all transactions recorded on LDX Blockchain.”*
- iii) Schedule B contained a table of fees, which in addition to certain transaction fees included 2 fees for USD 10,000. The first, relating to the LDX Interface, which was said to be an “*implementation fee*” for

“Trade clearing, settlement, confirmation and regulatory reporting” which was *“payable upfront”* and the second, relating to LDX Blockchain, which was said to be a *“support fee”* of *“10,000 per annum (payable annually in advance)”*.

- iv) HEX further agreed to grant to the Company a licence to use its software.
- v) The Engagement Letter was effective from 30 January 2019 and would expire after 12 months and either party could terminate the engagement without cause *“by providing ninety (90) business days prior written notice of termination to the other”*, with a final invoice to be provided for services provided up to the date of termination of the engagement.
- vi) The Engagement Letter was governed by the laws of Hong Kong and the Company submitted to the non-exclusive jurisdiction of the courts of Hong Kong should any dispute arise in respect of the engagement. In particular, such document stated –

“This Engagement Letter will be governed by and construed in accordance with the laws of Hong Kong and you hereby submit to the non-exclusive jurisdiction of the courts of Hong Kong should any dispute arise in respect of this engagement.”

15. The Software License Agreement, which was entered into between Technologies Pte and the Company, had an Effective Date of 6 September 2019 and contained the following relevant terms:

- i) Technologies Pte granted the Company a licence for the Term to use the *“HEX ISSUANCE PLATFORM”* software and agreed to provide the Company with maintenance services for such software.

- ii) The fees and reimbursements payable by the Company were agreed and set out in Exhibit A to the agreement and were required to be paid within 30 days of the date of invoice and HEX could block access to the software if the fees were more than 10 days overdue.
- iii) The agreement was for a Term of one year from the Effective Date and would automatically renew on each anniversary unless terminated in accordance with the provisions in clause 11.
- iv) Clause 11 provided that the Company could terminate the Software License Agreement by “*giving not less than three (3) months’ prior written notice to HEX before each Renewal Anniversary*” and that each party could terminate the agreement “*by giving not less than thirty (30) day [sic] notice in writing if the other Party is in material breach of any of the terms of this Agreement other than a breach which shall have been remedied to the satisfaction of that party within thirty (30) days after service of notice requiring the same to be remedied*”.
- v) Upon termination, all rights granted to the Company under the licence would cease and it was required to purge the software from its hardware and all other computer systems.
- vi) Clause 12.3 further required all notices to be given in writing to the other party and delivered by registered mail, international air courier or the equivalent.
- vii) The agreement and any dispute or non-contractual obligation arising out of or in connection with it was to be governed by the laws of Singapore

and each party irrevocably agreed to the courts of Singapore having “*exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter of formation (including non-contractual disputes or claims)*” however “*nothing shall prevent HEX and the Licensee from commencing legal proceedings for the purpose of seeking immediate preventative relief (such as an injunction or the equivalent) in the appropriate jurisdiction*”.

viii) The Software License Agreement could “*be modified only by a written amendment executed by duly authorized officers or representatives of both parties*” and also contained an Entire Agreement clause, which provided that, together with the Exhibits, it constituted “*the complete and exclusive statement of the agreement between the Parties and supersedes all proposals, oral or written, and all other prior or contemporaneous communications between the Parties relating to the subject matter herein*”.

ix) Exhibit A provided that the *License Fee* for the *HEX ISSUANCE PLATFORM* software was “*equal to USD 30,000 after taxes per annum*” and that “*License Fee shall be payable within ten (10) days of the Effective Date*”.

16. The Company Custodian Agreement which was dated 26 September 2019 and entered into between the Company (as “*the Client*”) and Trust contained the following relevant terms:

i) The Company authorised Trust and Trust agreed to “*establish and maintain on the terms of this Agreement a custody wallet or wallets (the*

“Wallet”) for the deposit of Digital Assets in each case, currently held or from time to time received by, transferred to or held to the order or under the direction or control of the Custodian for the account of the Client”. Trust would then hold such Digital Assets as Custodian and be responsible for their safe-keeping, for the account of the Company on the terms set out in the agreement.

- ii) The Company agreed to pay fees to Trust for its services in the amounts and at the intervals set out in *“Schedule 1 – Fees”*.
- iii) Clause 12 provided that the agreement commenced on 26 September 2019 and would continue until terminated in accordance with clause 12.2, which in turn provided that *“Except as otherwise provided in this Agreement, the obligations of the Custodian hereunder may be terminated by the Client or the Custodian upon ninety (90) days prior written notice to the other”*.
- iv) In addition, various specified events of default by the Company would enable Trust to terminate all or any part of the agreement forthwith.
- v) Clause 20 provided that the written agreement *“constitutes the entire agreement and understanding of the Parties with respect to its subject matter and supersedes all prior oral communications and other written agreements between them”* and clause 22 further provided that no amendment, modification or waiver would be effective unless in writing and executed by each of the Company and Trust.

- vi) The agreement was governed by and to be construed in accordance with the laws of Hong Kong and clause 24 contained the following jurisdiction clause:

“Each Party agrees for the benefit of the other, but without prejudice to the right of any Party to take any proceedings in relation hereto before any other court of competent jurisdiction that the courts of Hong Kong shall have non-exclusive jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement ...and, for such purposes, irrevocably submits to the jurisdiction of such courts.”

- vii) The “Schedule 1 – Fees” contained the following table:

Custodial Platform	Service Fees
Custody	
<ul style="list-style-type: none"> - Setup of enterprise custody account - Integration with LDX platform 	USD 10,000
(A) Custody Fee	50 bps per annum
(B) Minimum Monthly Fee	USD 500 per month
(C) Withdrawal and settlement Fee	waived

17. Each of the 19 Client Custodian Agreements were tripartite contracts, entered into between, in each case, a named Client, the Company and Trust as Custodian. They were all executed on various dates in September 2019 and whilst some of the names of the clients have been redacted from the copies of the written agreements which are on the court file, Mr Angelo admits that the Company (which is referred to in these agreements as “LDX”) signed each of the relevant Client Custodian Agreements and that each related to a different “Client” (albeit the Company contends that they were all related in some way to SGH). Some of the clients were individuals and some were incorporated bodies. In each case, Recital (C) stated, “*The Client wishes to appoint the Custodian to provide custodial services, LDX wishes to pay the Fees to the Custodian on behalf of the Client for the provision of custodial services, and the Custodian is willing to perform such services on the terms and conditions contained in this Agreement.*”
18. The parties were agreed that each of the Client Custodian Agreements were in materially the same form (including in relation to fees). One of the Clients that entered into a Client Custodian Agreement was SGH and at the hearing both parties addressed me in relation to the terms which appeared in that agreement dated 5 September 2019, on the premise that all of the other Client Custodian Agreements were in materially the same form. I therefore proceed on that basis.
19. After the recital which I have set out above, the Client Custodian Agreements contained the following material terms:
 - i) Clause 2, which provided that “*Client and LDX authorize the Custodian and the Custodian so agrees to establish and maintain on the terms of*

this Agreement a custody wallet or wallets (the “Wallet”) for the deposit of Digital Assets in each case, currently held or from time to time received by, transferred to or held to the order or under the direction or control of the Custodian for the account of the Client”.

- ii) Clause 5.1, which materially provided “*LDX agrees to pay fees to the Custodian for its services on behalf of the Client upon presentation of a monthly invoice showing the amounts and at the intervals set out in Schedule 1 (“Fees”)*”.
- iii) Pursuant to clause 7, the Client was required to deliver or cause to be delivered to the Custodian from time to time the Digital Assets which it owned or thereafter acquired and Clause 7.3 further provided, “*The duties of LDX shall be to timely pay the Fees to the Custodian on behalf of the Client when called upon to do so or on the due date*”.
- iv) Clause 10.1 included a representation and warrant by each party to the other parties that “*its obligations under this Agreement ... constitute its legal, valid and binding obligations*”.
- v) Clause 13 provided that the Client Custodian Agreement would commence on the date thereof and continue until terminated in accordance with the provisions of clause 13.2, which stated “*Except as otherwise provided in this Agreement, the obligations of the Custodian hereunder may be terminated by the Client or the Custodian upon ninety (90) days prior written notice to the other*”. It was common ground between the parties that the Client Custodian Agreement did not confer any express right of termination upon the Company.

- vi) Clause 14 provided that the Company's failure to pay the Fees would constitute an *Event of Default* and that the "*Custodian shall be indemnified by LDX against any liabilities, losses, damages, costs and expenses (including but not limited to legal fees) incurred by the Custodian and arising out of or in connection with a breach by LDX of the material obligation to pay the Fees to the Custodian on behalf of the Client under clause 5 of this Agreement*".
- vii) Clause 21 provided that the Client Custodian Agreement "*constitutes the entire agreement and understanding of the Parties with respect to its subject matter and supersedes all prior oral communications and other written agreements between them*" and clause 23 provided that no amendment, waiver or modification would be effective unless in writing and executed by each of the parties.
- viii) Clause 24 provided that the Agreement was to be governed by and construed in accordance with the laws of Hong Kong and clause 25 provided,

"*25.1 Each Party agrees for the benefit of the other, but without prejudice to the right of any Party to take any proceedings in relation hereto before any other court of competent jurisdiction that the courts of Hong Kong shall have exclusive jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with this Agreement and any Instructions given hereunder and, for such purposes, irrevocably submits to the jurisdiction of such courts.*"

25.2 *Each party further irrevocably waives any objection which it may have or be entitled to claim at any time to the commencement of any such suit, action or proceeding before such courts, or that the any such suit, action or proceeding has been brought in an inconvenient forum, or the enforcement of any judgment in respect thereof over any of its assets or property (including without limitation, the Digital Assets) in any jurisdiction.”*

ix) “Schedule 1 – Fees” contained the following table:

Services	Service Fees
- Custody	<ul style="list-style-type: none"> - 50bp per annum based on the average daily assets under custody - Minimum USD 200/month
- Account Opening	- A one-time USD 200

20. The Petitioners do not rely on any invoices after 7 July 2020 as they accept that the relationship between HEX and the Company came to an end at the end of July. Although there is a dispute between the parties as to whether it should have ceased to continue doing so earlier, it is not disputed that HEX provided the Company with the licence and the services contracted for under the various written agreements referred to above and invoiced for the same. Although there was a tentative suggestion made by Ms Anwar in her oral submissions that, *if* all of the Company’s other grounds of opposition to the Petition failed, it *might*

take issue with the extent of any services provided and invoiced for, this was not a point which was taken by the Company in its evidence (or in the skeleton argument). Given the tenor and volume of the evidence and argument filed in opposition to the Petition, if there was any dispute about the provision of services or the quantum or computation of any of the sums invoiced pursuant to the written agreements (as opposed to the Company's argument that they should not be regarded as payable by the Company at all and/or that it was not appropriate to present a winding up petition for other reasons), it would have been raised by Mr Angelo in his witness statements in opposition to the Petition. In particular, it would have been raised by him both at the outset and in any event following receipt of the Petitioners' skeleton argument for the hearing on 12 July which clearly stated in its introduction that the Company did not dispute that it entered into the relevant agreements, that the services were provided by HEX and that, absent some terminating event, the amounts claimed were prima facie due. No issue has therefore been taken by the Company with the computation or quantum of any of the amounts invoiced referable to the services provided; the issues raised by the Company are whether they should have been invoiced for at all in circumstances where Mr Angelo claims that the Company had sought to terminate the written agreements (such that HEX ought to have ceased continuing to provide the relevant services) at an earlier date and/or that the Company should not be liable to pay such sums because of default by SGH.

21. Nevertheless, I have considered the sums claimed in the invoices referable to the terms of the written agreements identified above:

- i) As Mr Quaglini has explained and the invoices show, the USD 30,000 License Fee due from the Company to Trust pursuant to the Software License Agreement was billed to the Company in equal monthly instalments of USD 2,500.00, with the description “*Token Issuance and KYC*”.
- ii) However, I am not satisfied that the monthly payments of USD 833.00 invoiced in respect of “*Enterprise Custody Account*” were, as Mr Quaglini stated in his evidence, due “*pursuant to the Engagement Letter*”. In her oral submissions, Ms Jones explained that despite the reference in Schedule B to the USD 10,000 “*support fee*” being payable annually in advance, it was this figure which was being invoiced on a monthly basis in equal instalments of USD 833.00. However, and although this was not a point taken by the Company, the description does not obviously correspond with the services and fees specified in the Engagement Letter and Schedule B clearly provided that both the implementation fee and the support fee were to be payable either “*up front*” or “*in advance*”. I also note that the statement of account provided by HEX shows that on 26 June and 29 August 2019 the Company made 2 payments to HEX of USD 10,000 in relation to an earlier invoice issued in February 2019. This would suggest that the implementation fee and the support fee referred to in the Engagement Letter were, as specified, paid up front or in advance.
- iii) Nevertheless, I note that the fees provided for in the Company Custodian Agreement included (as I have set out above) the following:

- Setup of enterprise custody account	USD 10,000
- Integration with LDX platform	

In circumstances where no issue was taken by Mr Angelo with the particular amounts that had been invoiced (only with whether the Company was liable to pay them at all in the other extraneous factual circumstances) and given the description in the invoices (“*Enterprise Custody Account*”) it would seem very likely that the monthly sum of USD 833.00 claimed in the invoices related to this USD 10,000 fee. However, this was not Mr Quaglini’s evidence. His position was that they were claimed pursuant to the Engagement Letter and, in those circumstances and notwithstanding the fact that it seems highly probable that they were due pursuant to the terms of the Company Custodian Agreement, I have left these particular amounts out of account when considering whether a winding up order should be made and I make no determination about whether they are due and owing from the Company.

- iv) The USD 4,500.00 claimed in respect of “*minimum custody fee[s]*” were clearly such monthly fees specified in the Company Custodian Agreement.
- v) Similarly, the Client Custodian Agreements contained clear provisions for custody fees for which the Company was liable and no issue has been taken by the Company in relation to their computation. Moreover, on any view, each of the 19 such agreements provided for minimum monthly custody fees of USD 200.00.

- vi) Although it was Mr Quaglini's evidence (and Ms Jones submitted) that the USD 800.00 claimed in respect of "*SGH KYCs*" and the USD 45.00 claimed for "*Distribution/Settlement fees*" were due pursuant to the Client Custodian Agreements, having regard to the provisions to which I was taken during the course of the hearing and which I have set out above, the contractual basis for these claimed sums is not readily apparent. They may well be due pursuant to other provisions of the various written agreements but for the purposes of considering whether it is appropriate to make a winding up order, I have not taken these into account and accordingly I make no determination about whether they are due and owing from the Company.
 - vii) The Company accepts that it has only paid a total of USD 12,500.00 towards such invoiced sums and it is apparent that they have been applied by HEX to the sums claimed in the earliest invoice, dated 31 October 2019.
22. Accordingly, I have considered whether a winding up order should be made against the Company referable only to the following sums claimed by the Petitioners:
- i) **USD 22,500.00** being 9 months of fees claimed pursuant to the Software License Agreement (the USD 2,500.00 claimed in the 31 October 2019 invoice having been paid);
 - ii) **USD 4,000.00** claimed in respect of "*minimum custody fee[s]*" pursuant to the Company Custodian Agreement (the USD 500.00 claimed in the 31 October 2019 invoice having been paid); and

- iii) **USD 102,450.36** claimed in respect of custody fees pursuant to the Client Custodian Agreements. (For the reasons set out above, USD 8467.00 of the payments totalling USD 12,500 made by the Company have been applied against these fees. Even if, in light of the conclusions which I have reached in relation to the sums claimed pursuant to the Engagement Letter of USD 833 per month and the sums claimed in respect of “KYCs”, further credit should be given for the amount of such sums claimed in the 31 October 2019 which have otherwise been treated as discharged by the payments totalling USD 12,500, this total would only be reduced by a further USD 1003.00 to USD 101,447.36.)

The court’s jurisdiction to wind up a company

23. Section 117(1) of the Insolvency Act 1986 provides that “*The High Court has jurisdiction to wind up any company registered in England and Wales.*”
24. Section 122(1)(f) of the Insolvency Act 1986 in turn provides that “*A company may be wound up by the court if - ... (f) the company is unable to pay its debts*” and section 123 of the Act materially provides -

“(1) *A company is deemed unable to pay its debts—*

(a) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company’s registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or

(b) if, in England and Wales, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or

[...]

(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.

(2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."

25. It is well established that for the purposes of section 123(1)(a) and (e), failure to pay a debt (or such part of the debt) which is above the statutory threshold and not disputed in good faith and on substantial grounds suffices to evidence inability to pay debts as they fall due; see *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44 at 48H-51B, citing, amongst other authorities, *Re Cornhill Insurance Plc v Improvement Services Ltd* [1986] 1 WLR 114.

26. More recently, Norris J summarised the principles applicable to a disputed winding up petition in *Angel Group v British Gas* [2012] EWHC 2702 (Ch), [2013] BCC 263, in the following terms (at [22]):

"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] 1 W.L.R. 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.012209 of 1991) [1992] 1 W.L.R. 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 of 1996) [1997] B.C.C. 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)."*

27. I note that whilst Norris J referred in sub-paragraph (b) to a substantial dispute in relation to so much of the petition debt as would bring the indisputable part below £750.00 (being the statutory minimum sum referred to in section 123(1) of the Act), for present purposes the relevant amount is to be regarded as £10,000.00 taking account of the provisions of Schedule 10 of the Corporate Insolvency and Governance Act 2020 (as amended by the Corporate Insolvency and Governance Act 2020 (Coronavirus)(Amendment of Schedule 10)(No. 2) Regulations 2021 (**CIGA 2020**)). In particular, sub-paragraphs 1(1) and 1(8) of Schedule 10 to CIGA 2020 materially provide:

“(1) During the relevant period a creditor may not present a petition for the winding up of a company under section 124 of the 1986 Act on the ground specified—

(a) in the case of a registered company, in section 122(1)(f) of that Act,

...

unless conditions A to D are met (subject to sub-paragraphs (9) to (11) [which do not apply in the present case]).”

“(8) Condition D is that—

(a) where the petition is presented by one creditor, the sum of the debts (or the debt, if there is only one) owed by the company to that creditor in respect of which conditions A to C are met is £10,000 or more;

(b) where the petition is presented by more than one creditor, the sum of the debts owed by the company to the creditors in respect of which conditions A to C are met is £10,000 or more.”

The “*relevant period*” being defined for such purposes by paragraph 4(1) of Schedule 10 to mean the period which “*(a) begins with 1 October 2021, and (b) ends with 31 March 2022*”.

28. Accordingly, taking account of the matters I have set out above, I proceed on the basis that I must determine whether the claimed debt of USD 128,950.36 (before interest is applied), or at least so much of it as would bring the indisputable part below £10,000.00, is bona fide disputed on substantial grounds, such total sum comprising the following:

- i) **USD 22,500.00** being 9 months of fees claimed pursuant to the Software License Agreement;
- ii) **USD 4,000.00** claimed in respect of “*minimum custody fee[s]*” pursuant to the Company Custodian Agreement; and

- iii) **USD 102,450.36** (or, for the reasons noted in paragraph 22(iii) above, USD 101,447.36 of such amount) claimed in respect of custody fees pursuant to the Client Custodian Agreements.

The applicable law and lack of evidence of foreign law

29. I should note at the outset that notwithstanding the fact that the Software Licence Agreement was expressly governed by the laws of Singapore and that the Custodian Agreements were all expressly governed by the laws of Hong Kong, neither side sought to adduce any evidence of such foreign law and each party proceeded on the basis that in the absence of such evidence English law should simply be applied by default (reference being made to Rule 25 in *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed, to that effect). Having drawn the parties' attention during the course of the hearing to the Supreme Court's relatively recent decision in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45 and in particular to the terms of the Judgment of Lord Leggatt at [96] – [149] (with whom Lord Reed PSC, Lord Lloyd-Jones, Lord Briggs and Lord Burrows JJSC agreed on the foreign law issue) and taking account of the Petitioners' and the Company's then essentially agreed position that I could and should regard both Singaporean and Hong Kong law of contract as materially similar to English law on the matters in issue, I am satisfied that that is a fair and reasonable assumption to make in the present case and I have proceeded on that basis. In particular, I take account of the fact that both Singapore and Hong Kong are common law jurisdictions and that the issues which arise are essentially issues of contractual construction and factual operation (there being

no dispute that the agreements I have identified above were entered into by the parties) and that the underlying documents were drafted in the English language.

The Company's grounds of opposition

30. In her submissions on behalf of the Company, Ms Anwar explained that there were 7 grounds of opposition which were put forward and relied upon by the Company as successive alternatives. In other words, the Company's position was that it was only necessary to consider each subsequently argued ground if and to extent that the prior argument(s) failed. Moreover, as I have noted above, it was not one of the Company's asserted grounds of opposition that the services invoiced for were not provided for; rather, it was the Company's position that, if and to the extent that English insolvency proceedings were otherwise the proper forum, in the events which had happened no payments were due from the Company to the Petitioners pursuant to the relevant contractual documents.
31. As put by Ms Anwar, those 7 grounds of opposition consisted of the following:
- i) The debts claimed by the Petitioners relate to a period of time during which restrictions pursuant to CIGA 2020 as enacted applied to the presentation of petitions and Parliament must be taken to have intended that winding up petitions could not subsequently be presented in respect of debts which arose during that same period. I shall refer to this argument as **the CIGA ground**.
 - ii) The Petitioners should not have commenced insolvency proceedings in respect of their claimed debts because the Company was and is solvent

and had provided the Petitioners with evidence of its solvency, which was referred to as **the wrong venue ground**.

- iii) The Petitioners should not have pursued their claimed debts in this jurisdiction because the proper forum for the determination of the dispute was Singapore, referred to as **the wrong forum ground**.
- iv) In any event, the claimed debts are bona fide disputed on substantial grounds, which I shall refer to as **the disputed debt ground**.
- v) A winding up order should not be made because the Company has provided evidence of solvency, which I shall refer to as the **asserted solvency ground**.
- vi) The petition should be dismissed because it is an abuse of process, which I shall refer to as the **abuse of process ground**.
- vii) The petition should be dismissed because it was presented with “*a vexatious and predatory motive*”, which I shall refer to as the **motivation ground**.

32. Although the Company’s position was that each of these 7 grounds were successive alternative reasons why the Petition should be dismissed, there was inevitably some overlap between them. Nevertheless, I address them below in the order in which they were presented.

(i) The CIGA ground

33. Although raised at the hearing, this was the point which needed to be developed further by way of written submissions due to deficiencies in the authorities

bundle originally before the court. In essence the Company relies upon the provisions within CIGA 2020 as enacted and subsequently extended, which restricted the use of statutory demands and the presentation of winding up petitions in the period (initially) from 1 March 2020 to 30 September 2020 and latterly through to 30 September 2021.

34. In particular, as enacted, paragraph 1 of Part 1 of Schedule 10 provided as follows:

- “(1) No petition for the winding up of a registered company may be presented under section 124 of the 1986 Act on or after 27 April 2020 on the ground specified in paragraph (a) of section 123(1) of that Act, where the demand referred to in that paragraph was served during the relevant period.*
- (2) No petition for the winding up of an unregistered company may be presented under section 124 of the 1986 Act on the ground set out in section 222 of that Act, where the demand referred to in section 222 was served during the relevant period.*
- (3) In this Part of this Schedule, the “relevant period” is the period which—*
- (a) begins with 1 March 2020, and*
- (b) ends with 30 September 2020.*
- (4) This paragraph is to be regarded as having come into force on 27 April 2020.”*

Furthermore, paragraphs 2, 5 and 21 of Part 2 of Schedule 10 as enacted provided –

- “2.(1) A creditor may not during the relevant period present a petition under section 124 of the 1986 Act for the winding up of a registered company on a ground specified in section 123(1)(a) to (d) of that Act (“the relevant ground”), unless the condition in sub-paragraph (2) is met.*
- (2) The condition referred to in sub-paragraph (1) is that the creditor has reasonable grounds for believing that—*

- (a) *coronavirus has not had a financial effect on the company, or*
 - (b) *the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company.*
- (3) *A creditor may not during the relevant period present a petition under section 124 of the 1986 Act for the winding up of a registered company on the ground specified in section 123(1)(e) or (2) of that Act (“the relevant ground”), unless the condition in sub-paragraph (4) is met.*
- (4) *The condition referred to in sub-paragraph (3) is that the creditor has reasonable grounds for believing that—*
 - (a) *coronavirus has not had a financial effect on the company, or*
 - (b) *the relevant ground would apply even if coronavirus had not had a financial effect on the company.*
- (5) *This paragraph is to be regarded as having come into force on 27 April 2020.”*

“5(1) This paragraph applies where—

- (a) *a creditor presents a petition for the winding up of a registered company under section 124 of the 1986 Act in the relevant period,*
 - (b) *the company is deemed unable to pay its debts on a ground specified in section 123(1) or (2) of that Act, and*
 - (c) *it appears to the court that coronavirus had a financial effect on the company before the presentation of the petition.*
- (2) *The court may wind the company up under section 122(1)(f) of the 1986 Act on a ground specified in section 123(1)(a) to (d) of that Act only if the court is satisfied that the facts by reference to which that ground applies would have arisen even if coronavirus had not had a financial effect on the company.*

- (3) *The court may wind the company up under section 122(1)(f) of the 1986 Act on the ground specified in section 123(1)(e) or (2) of that Act only if the court is satisfied that the ground would apply even if coronavirus had not had a financial effect on the company.*
- (4) *This paragraph is to be regarded as having come into force on 27 April 2020.”*

“21(1) In this Part of this Schedule, “relevant period” means the period which—

- (a) begins with 27 April 2020, and*
- (b) ends with 30 September 2020.”*

35. Although the relevant period referred to in this version of Parts 1 and 2 of Schedule 10 had been the subject of various extensions, with *The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021* (S.I. 2021/718) most recently extending the period to 30 September 2021, by the time the Petition was presented against the Company and indeed by the earlier date of the statutory demand upon which reliance is placed by the Petitioners (being 10 November 2021), such provisions of Schedule 10 no longer applied. Instead, the relevant restrictions prescribed by Schedule 10 to CIGA are those which I have referred to in paragraph 27 above.

36. In particular, for present purposes paragraph 1 of Schedule 10 now materially provides:

“(1) During the relevant period a creditor may not present a petition for the winding up of a company under section 124 of the 1986 Act on the ground specified—

- (a) *in the case of a registered company, in section 122(1)(f) of that Act, ...*
- unless conditions A to D are met (subject to sub-paragraphs (9) to (11)).*
- (2) *Condition A is that the creditor is owed a debt by the company—*
- (a) *whose amount is liquidated,*
- (b) *which has fallen due for payment, and*
- (c) *which is not an excluded debt.*
- (3) *Condition B is that the creditor has delivered written notice to the company in accordance with sub-paragraphs (4) to (6).*
- (4) *Notice under sub-paragraph (3) must contain the following—*
- (a) *identification details for the company,*
- (b) *the name and address of the creditor,*
- (c) *the amount of the debt and the way in which it arises,*
- (d) *the date of the notice,*
- (e) *a statement that the creditor is seeking the company's proposals for the payment of the debt, and*
- (f) *a statement that if no proposal to the creditor's satisfaction is made within the period of 21 days beginning with the date on which the notice is delivered, the creditor intends to present a petition to the court for the winding-up of the company.*
- (5) *Notice under sub-paragraph (3) must be delivered—*
- (a) *to the company's registered office, or*
- (b) *in accordance with sub-paragraph (6) if—*
- (i) *for any reason it is not practicable to deliver the notice to the company's registered office,*
- (ii) *the company has no registered office, or*
- (iii) *the company is an unregistered company.*
- (6) *Where this sub-paragraph applies the notice may be delivered to—*
- (a) *the company's last known principal place of business, or*
- (b) *the secretary, or a director, manager or (in relation to an unregistered company) principal officer of the company.*

- (7) *Condition C is that at end of the period of 21 days beginning with the day on which condition B was met the company has not made a proposal for the payment of the debt that is to the creditor's satisfaction.*
- (8) *Condition D is that—*
- (a) *where the petition is presented by one creditor, the sum of the debts (or the debt, if there is only one) owed by the company to that creditor in respect of which conditions A to C are met is £10,000 or more;*
- (b) *where the petition is presented by more than one creditor, the sum of the debts owed by the company to the creditors in respect of which conditions A to C are met is £10,000 or more.*
- ... ”

37. As I have noted above, the requisite Condition B Notice was served upon the Company on 10 November 2021. Nevertheless, the Company's position is that in view of the restrictions which applied in the period from 1 March 2020 to 30 September 2021, Parliament must have intended that subsequent petitions could not be presented in respect of any debts which had arisen either before or during the previously prescribed relevant period unless the condition previously prescribed by paragraph 2(2) and 5 was met. In other words, the Company's submission was that upon the removal of such restrictions by the enactment of the present version of Schedule 10, Parliament could not have intended that statutory demands and winding up petitions could be presented by reference to debts which had arisen before or during the period of such restrictions if coronavirus had had a financial effect on the company – and the Company contended that it had been severely affected by coronavirus.

38. In my judgment, there is no merit in this submission. It is plain that when substituting Schedule 10 to CIGA with the current version, it was open to the

legislature to make retrospective provision in the form which the Company contends for. It did not do so. Instead, it is clear that having considered the question of historic debts, the only proviso which it saw fit to make was in respect of “*rent, or any sum or other payment that a tenant is liable to pay, under— (a) in England and Wales, a relevant business tenancy; or (b) in Scotland, a lease as defined in section 7(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, and which is unpaid by reason of a financial effect of coronavirus*”, such being the only “*excluded debt*” defined in paragraph 4(3).

39. Furthermore, I accept the Petitioners’ submission that in relation to the claimed debts which fell due for payment in the months prior to 1 March 2020 it is extremely difficult for the Company to contend that any inability to pay those debts at the time they fell due was attributable to any financial effect of coronavirus (which the Company has not shown, other than by mere assertion, in any event).

(ii) the wrong venue ground

40. Put simply, the Company’s submission in this regard was that as it had (so it contended) provided evidence of its solvency, it was inappropriate for the claimed debts to be pursued by way of insolvency proceedings and that instead, if the Petitioners wished to pursue them in circumstances where they were disputed, they should do so by means of ordinary civil litigation. This submission fed into and overlapped with the Company’s 5th and 6th grounds.
41. In my judgment, this submission as put overlooks the nature of winding up proceedings. They are not a means of enforcing a debt, rather they are a class

remedy to be pursued for the benefit of all creditors where a company is unable to pay its debts. Nevertheless, it is trite law that it is an abuse of process to bring or pursue a winding up petition in respect of a debt which is bona fide disputed on substantial grounds. Conversely, as I have noted above, it is well established that for the purposes of section 123(1)(a) and (e), failure to pay a debt (or such part of the debt) which is above the statutory threshold and not disputed in good faith and on substantial grounds suffices to evidence inability to pay debts as they fall due; see *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44 at 48H-51B, citing, amongst other authorities, *Re Cornhill Insurance Plc v Improvement Services Ltd* [1986] 1 WLR 114.

42. Accordingly, the issue for the Court is not whether the Company has provided evidence of solvency but whether the debts claimed are bona fide disputed on substantial grounds. If they are not, the fact that they are unpaid is itself evidence of the Company's insolvency. Nevertheless, in view of the repeated emphasis which the Company placed upon its asserted solvency, both in respect of this and its subsequent grounds, I make the following observations in relation to the evidence sought to be relied upon:

- (i) Whilst it was asserted by Ms Anwar in her submissions and Mr Angelo in his written evidence that the Company was solvent and able to pay its debts as they fell due, there was no documentary or witness evidence from the Company as to its overall assets and liabilities and there was no evidence as to its ability to satisfy the claimed debts if and to the extent that they were due. No accounts were put forward in order to demonstrate its asserted financial position whatsoever. Instead, the position taken by the Company

appears to have been that having asserted through its director that it was solvent and having not understood the Petitioners to take issue with that (being a position I find difficult to comprehend given the nature of the proceedings) it did not need to produce such evidence.

(ii) Moreover, as I have noted above, the stated purpose of the third witness statement of Mr Angelo dated 11 July 2022 together with Exhibit VA2 had been to address the Company's financial position in response to doubts expressed in the skeleton argument filed on behalf of HEX for the hearing on 12 July 2022 as to the Company's asserted solvency. Notwithstanding such stated purpose, it referred to and relied upon only the following:

(a) 2 letters said to be expressing financial support for the Company with accompanying bank statements in relation to their respective accounts. However, one of these letters dated 21 December 2021 was written by Mr Angelo on behalf of a company called LDXAM Limited which was said to be confirming an offer to purchase the shares in the Company and to "*reasonably support [the Company] in its current dispute with Hex Trust Limited Hong Kong, until such time as it deems the support no longer financially beneficial to LDXAM*". Little if any comfort could be taken by the Company or the court from the terms of this letter. Furthermore, whilst a Coutts bank statement for LDXAM Limited was produced showing a balance as at 10 January 2022 of £275,018.79, this included an unexplained transfer from the Company to which I refer below and a subsequent statement for the same account exhibited to Ms

Anwar's statement of 16 February 2022 appears to show a reduced balance as at 15 February 2022 of £125,018.79 and there was no evidence as to LDXAM Limited's own liabilities. The second letter relied upon was also written by Mr Angelo but dated 5 July 2022 and written on behalf of Inspira Wealth SA. Such letter also supposedly confirmed an offer to purchase the shares in the Company from the existing shareholder and to provide "*financial support ... for such time as Inspira Wealth Limited and Inspira Wealth SA deem to be necessary*". Again, whilst a Coutts bank statement as at 4 July 2022 appears to confirm funds held by "*Inspira Wealth Switzerland*" of £933,699.00 little if any comfort could be taken by the Company or the court from the terms of such letter and there was no evidence as to that entity's own liabilities. Accordingly, whilst I accept Ms Anwar's submission that as a matter of principle it is possible for a company to demonstrate that it is able to pay its debts as and when they fall due by reference to ongoing financial support from another entity, the evidence sought to be relied upon by the Company in this respect falls far short of establishing what would be required to reach such a conclusion in the present case.

- (b) A document which was said to evidence that the Company had "*£130,000.00 sitting as a payment on account with our firm of solicitors*". However, such statement of account from Keystone Law (the solicitors instructed by the Company) which referred to a "*Client Balance as at 11 July 2022*" of £130,000.00, contained the

following note, “[t]his is a statement to confirm the balance of DCBX Limited’s costs held on account by Keystone Law as at 11 July 2022”. This therefore appears to have been a payment made on account of costs, and by the time of the hearing before me the Company had served a schedule of costs with a total which greatly exceeded this sum and there was no evidence as to whether such costs had already been paid by the Company and, if not, how any of them were intended to be met.

(iii) In addition, Ms Jones took me to email correspondence sent by the Company’s solicitors to the Petitioners’ solicitors on 2 December 2021, in which it was stated that the Company “*does not have any assets*” and had by then “*effectively ceased trading*”.

(iv) In any event, as I have already noted, there was simply no evidence of the Company’s overall asset and liability position.

Accordingly, despite having had the opportunity and having purported to do so, there was no evidence put before the Court from which it could be concluded that the Company is solvent. Furthermore, I note with some concern that the evidence which was put before the Court by the Company (in the form of the bank statement for LDXAM Limited) revealed that on 10 January 2022 the Company had transferred to LDXAM Limited the sum of £104,000.00. No clear explanation has been provided on behalf of the Company as to the purported purpose of this transaction which is understandably the cause of some consternation of the part of the Petitioners, the Petition having by then been

served on the Company and no application for a validation order having been made.

43. In short, even leaving aside the fact that the material question is whether or not the claimed debts are bona fide disputed on substantial grounds, contrary to its claims the Company has not adduced evidence of its asserted solvency.

(iii) the wrong forum ground

44. As the argument in relation to the wrong forum ground was put at the hearing, it would not have been necessary to consider the terms and effect of the various different jurisdiction clauses which I have referred to in paragraphs 14 to 19 above because both sides were then agreed that they did not *of themselves* preclude the commencement of insolvency proceedings against the Company in this jurisdiction.

45. The Company's position at the hearing was that the proceedings were in the wrong forum *because* it is not insolvent, and thus insolvency proceedings are inappropriate. In particular, although the Company's position was that the various contractual documents relied upon the Petitioners were all required to be read together as one agreement and were thus all governed by the exclusive jurisdiction clause in favour of the courts of Singapore which was contained in the Software License Agreement (which I shall refer to as the **one overall agreement argument**), Ms Anwar accepted, having regard to *BST Properties Limited v Roerg Apport Penzugyi RT* [2001] EWCA Civ 1997 which was referred to by Ms Jones, that the jurisdiction clause relied upon by the Company would not preclude HEX from commencing insolvency proceedings in this court *if* the Company was insolvent. As the Company contended that it had

proved that it is solvent, its case was that insolvency proceedings were not justified and the exclusive jurisdiction clause which it relied upon meant that any dispute between the parties was required to be determined by the courts in Singapore.

46. As I have explained above, the Company has not demonstrated that it is solvent. However, prior to giving judgment in this matter, as I have noted above the Petitioners' counsel notified the Court of a subsequent *ex tempore* judgment given by ICC Judge Prentis which was relevant to the issue of jurisdiction. In particular, although an approved transcript was awaited, Ms Jones properly informed the Court and Ms Anwar that ICC Judge Prentis had recently decided not to follow *BST Properties Limited* in light of the subsequent decision of *Salford Estates (No 2) Limited v Altomart Limited (No 2)* [2014] EWCA Civ 1575 and had therefore set aside a statutory demand given the existence of an exclusive jurisdiction clause in the contractual documentation relied upon. Unsurprisingly, Ms Anwar's position in response was that this supported the Company's argument that the appropriate forum for any dispute was Singapore, based on the one overall agreement argument, and that accordingly the Petition should be dismissed.

47. As I have explained above, an approved transcript of ICC Judge Prentis' judgment in *Ghanim Saad M Al Saad Al Kuwari v Cantervale Limited* [2022] EWHC 3490 (Ch) was not available to the parties and the Court until 30 January 2023. Consequently, on 3 February 2023, I gave directions for the parties to provide to the Court and each other by 13 February 2023, any written submissions which they wished to make in consequence of the judgment in *Al*

Saad, including in relation to the construction and effect of any jurisdiction clause sought to be relied upon, and for the parties to provide to the Court and to each other by 20 February 2023 any written submissions in reply. The parties filed a further 35 pages of written submissions and an additional bundle of authorities comprising 293 pages.

48. In the *Al Saad* case, ICC Judge Prentis held that, following the decision of the Court of Appeal in *Salford Estates (No 2) Limited v Altomart Limited (No 2)* [2014] EWCA Civ 1575, the existence of an exclusive jurisdiction clause in favour of the courts of Hong Kong in the contractual documentation being relied upon meant that the bankruptcy court should not consider the merits of any dispute as to the debt (that being a matter which the parties had agreed should be determined only by the courts of Hong Kong) and accordingly, in the absence of the debt being admitted, the statutory demand in that case had to be set aside.
49. In light of such Judgment, the parties revised positions are as follows:
- i) The Petitioners contend that only part of the debts claimed are governed by an exclusive jurisdiction clause (being those pursuant to the Software Licence Agreement itself), that properly construed the other contractual agreements are subject to non-exclusive jurisdiction clauses (such that the principle in *Al Saad* does not apply) and that in any event *Al Saad* is incorrect and should not be followed.
 - ii) The Company contends, based on the one overall agreement argument, that all of the debts claimed are subject to an exclusive jurisdiction clause in favour of the courts of Singapore and that, following *Al Saad*, the court must dismiss the Petition. Alternatively, the jurisdiction clause

contained in the Client Custodian Agreements should be construed as an exclusive jurisdiction clause in favour of the courts of Hong Kong and, following *Al Saad*, the court must dismiss the Petition.

The jurisdiction clauses in the contractual documentation

50. For the reasons I have explained above, the material debts claimed by the Petitioners from the Company consist of the following:

- i) USD 22,500.00 being 9 months of fees claimed pursuant to the Software License Agreement;
- ii) USD 4,000.00 claimed in respect of “*minimum custody fee[s]*” pursuant to the Company Custodian Agreement; and
- iii) USD 102,450.36 (or alternatively, for the reasons explained in paragraph 22 above, USD 101,447.36) claimed in respect of custody fees pursuant to the Client Custodian Agreements.

51. The Petitioners do not dispute that the Software Licence Agreement contains an exclusive jurisdiction clause in favour of the courts of Singapore. I must therefore consider whether this impedes the court’s ability to consider whether the USD 22,500.00 claimed pursuant to its terms is bona fide disputed on substantial grounds.

52. Subject to the one overall agreement argument advanced by Ms Anwar, the parties accept that the USD 4,000 claimed pursuant to the Company Custodian Agreement is subject to a **non**-exclusive jurisdiction clause in favour of the courts of Hong Kong. However, taken alone, this debt would not meet the Condition D threshold of £10,000.
53. Subject to the one overall agreement argument advanced by Ms Anwar, the USD 102,450.36 (or alternatively, for the reasons explained in paragraph 22 above, USD 101,447.36) claimed in respect of custody fees pursuant to the Client Custodian Agreements is subject to the jurisdiction clause which I have set out in paragraph 19(viii) above (**Clause 25**). The Petitioners contend that Clause 25 should be construed as a non-exclusive jurisdiction clause whereas the Company contends that, if and to the extent that the one overall agreement argument fails, Clause 25 should be construed as an exclusive jurisdiction clause in favour of the courts of Hong Kong.
54. I must therefore consider:
- (i) the one overall agreement argument advanced by Ms Anwar;
 - (ii) the correct construction of Clause 25; and
 - (iii) the effect of *Al Saad*, in particular whether the existence of an exclusive jurisdiction clause precludes the court from considering whether the relevant debts claimed are bona fide disputed on substantial grounds.

The one overall agreement argument

55. In essence, the Company contends that the various contractual documents relied upon by the Petitioners are all required to be read together as one overarching agreement and thus any dispute arising between the parties is subject to the exclusive jurisdiction clause in favour of the courts of Singapore which is contained in the Software License Agreement. For these purposes Ms Anwar placed reliance upon the Judgment of Sir William Blackburne in *Cinnamon European Structured Credit Master Fund v Banco Commerical Properties SA* [2009] EWHC 3381 (Ch), where the Judge held (at [30] – [40]) that 2 contractual documents (a purchase agreement and Representation Letter) were so inextricably linked that properly construed any dispute arising out of the Representation Letter was to be regarded as within the scope of the express jurisdiction clause contained within the relevant purchase agreement.
56. Mr Angelo put the Company’s case in paragraph 43 of his 4th witness statement in the following terms, “*It was a common understanding that the Engagement Letter, the Software Licence Agreement and the Custodian Agreements were various terms and conditions and sub-agreements which formed the same overarching agreement (the ‘Agreement’)* in pursuit of the same business terms”. In Ms Anwar’s submission, the primary contractual document is the Software License Agreement to which the other documents are all said to be “*very closely linked*” with the result that, so she submits, any dispute in relation to any aspect of the relevant overall business arrangement falls within the exclusive jurisdiction clause in the Software License Agreement, notwithstanding the fact that the other documents each have their own jurisdiction provisions (all of which contemplate at least the courts of Hong Kong having relevant jurisdiction).

57. Whilst the various separate written agreements all related to the same business venture between Hex and the Company (namely the provision of the services envisaged in the Engagement Letter), notwithstanding Ms Anwar's attempts to persuade me otherwise, in my judgment it is plain that, in contrast to the facts under consideration in *Cinnamon European Structured Credit Master Fund v Banco Commerical Properties SA*, they were all entered into by the Company as separate and distinct contractual agreements. In *Cinnamon European Structured Credit Master Fund v Banco Commerical Properties SA* the 2 documents together set out the contractual arrangements which governed the terms of the purchases of the relevant Notes and it was artificial to regard them as wholly free-standing documents, operating independently of one another. In that case, both had been entered into on the same day, between the same parties, concerned the same subject matter, neither could be given effect to without reference to the other, were inextricably linked as a matter of commercial reality, both contained English choice of law clauses and only the purchase agreement contained a jurisdiction clause. In the present case, each of the documents relied upon comprised a standalone contract, envisaged and capable of operating in accordance with its own terms. Moreover, as I have set out above, each of them had their own choice of law, jurisdiction and, crucially, entire agreement clauses. I therefore do not consider there to be merit in the Company's position that, notwithstanding their own express terms, each of the Engagement Letter, the Software Licence Agreement, the Company Custodian Agreement and the separate Client Custodian Agreements, as Ms Anwar put it in her skeleton argument, "*consisted of a single suite of contracts*" and/or together "*form[ed] the same overarching Agreement*". Whilst I accept Ms

Anwar's submission that contracting parties can enter into interconnecting agreements which may fall to be construed together, the fallacy of such proposition applying in relation to the written agreements relied upon in the present case is highlighted by the following material facts:-

- (i) As I have noted above, each of the individual agreements (which were capable of operating in accordance with their own terms), contained express entire agreement clauses;
- (ii) The Software Licence Agreement was entered into between the Company and Technologies Pte (being a company incorporated in Singapore) and was expressly governed by and to be construed in accordance with the laws of Singapore;
- (iii) By contrast, in addition to the individual Client, the contracting parties to the Client Custodian Agreements were the Company and Trust (being a company incorporated in Hong Kong) and the relevant agreements were expressly governed by and to be construed in accordance with the laws of Hong Kong; and
- (iv) Whilst the Software Licence Agreement contained an exclusive jurisdiction clause in relation to the courts of Singapore, the Letter of Engagement, the Company Custodian Agreement and the Client Custodian Agreements all expressly envisaged that the courts of at least Hong Kong would have appropriate jurisdiction to hear and determine any relevant dispute between the parties to those agreements.

58. There is therefore no basis to regard any dispute in relation to the debts claimed pursuant the Custodian Agreements as being subject to the exclusive jurisdiction clause contained in the Software License Agreement. On the contrary, the Company Custodian Agreement is subject to the expressly *non-exclusive* jurisdiction clause recited in paragraph 16(vi) above and the relevant jurisdiction clause for the purposes of the Company Custodian Agreement Client Custodian Agreements is Clause 25.

The construction of Clause 25

59. I have set out the terms of Clause 25 in paragraph 19(viii) above. In my judgment, it is clear that the use of the word “*exclusive*” in paragraph 25.1 was in error. The clause expressly refers to “*the right of any Party to take any proceedings in relation hereto before any other court of competent jurisdiction*” before referring to the courts of Hong Kong having “*exclusive jurisdiction*”. Plainly, the courts of Hong Kong could not have exclusive jurisdiction if the parties considered that there would be other courts of competent jurisdiction.
60. In this regard, I also note that in both the Letter of Engagement and the Company Custodian Agreement the parties provided for the courts of Hong Kong to have *non-exclusive* jurisdiction. The Petitioners contend that Clause 25 should be similarly construed notwithstanding the (erroneous) use of the word “*exclusive*” (or alternatively rectified accordingly) whereas the Company contends (its one overall agreement argument having failed) that Clause 25 should be construed as an exclusive jurisdiction clause.

61. I do not consider that it would be appropriate, in the context of determining a winding up petition, to consider any unpleaded claim for rectification, not least in circumstances where all of the parties to the relevant agreements are not before the court. However, it does not seem to me that any claim for rectification is required because I accept Ms Jones' alternative submission that the use of the word "*exclusive*" was an obvious error which can be resolved as a matter of construction. As drafted and when read in its totality, clause 25 plainly permits but does not require the parties to bring proceedings in Hong Kong as it expressly contemplates that the parties have the right to bring proceedings in another court of competent jurisdiction. Such other court of competent jurisdiction could not exist if the parties had contemplated that *only* the courts of Hong Kong were to have relevant jurisdiction. As is summarised in *Chitty on Contracts*, 34th ed at 5-060,

"Where a mistake is obvious, for example because the literal meaning of the words would be absurd, and it is clear what is meant, rectification is not necessary; the matter will be dealt with as one of construction. As Brightman LJ said in East v Pantiles Plant Hire Ltd [[1982] 2 E.G.L.R. 111, 112]:

"It is clear on the authorities that a mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied, then either the Claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention."

62. Indeed, the fact that the Company thought it necessary to advance the one overall agreement argument was most likely a reflection of its recognition that, when the Client Custodian Agreements are read in isolation, properly construed they are subject only to a non-exclusive jurisdiction clause. It would otherwise have been unnecessary to advance the one overall agreement argument.

Al Saad and the effect of an exclusive jurisdiction clause

63. As I have already noted, at the oral hearing, the Company did not advance any argument that the exclusive jurisdiction clause of itself precluded the court from considering the merits of the dispute. Rather, it accepted there was an exception for insolvency proceedings (if, contrary to its assertion, its evidence did not show that it was solvent) and it sought to dispute the claimed debts based on arguments under English law (which it contended should be considered to be the same as the laws of Singapore and/or Hong Kong).
64. Having considered *Al Saad*, it is perhaps surprising that, in the time since the Court of Appeal's Judgment in *Salford Estates*, the issue of whether the principle decided in that case should be applied to exclusive jurisdiction clauses has not arisen for determination previously. *Salford Estates* concerned a winding up petition presented based on debts said to arise out of a contract containing an arbitration agreement. The Chancellor rejected the submission that section 9 of the Arbitration Act 1996 (which essentially provides that a party to an arbitration agreement against whom legal proceedings are brought in respect of any matter which is to be referred to arbitration may apply to the court for such proceedings to be stayed, and that such stay shall be granted

unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed) applied directly to winding up proceedings so as to require the Petition to be stayed or dismissed. Nevertheless, the Chancellor held (at [39]) that as section 122(1) of the Insolvency Act 1986 confers on the court a discretionary power to wind up a company, “*the court should, save in wholly exceptional circumstances, which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act*”.

65. As the intention of the legislature in enacting in the 1996 Act had been to exclude the court’s jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975, the Court of Appeal in *Salford Estates* considered that it would be anomalous, in the circumstances, for the companies’ court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a petition was grounded, when the creditor had agreed to refer any dispute relating to the debt to arbitration. In reaching such conclusion, the Court noted that the exercise of the companies’ court’s discretion “*otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement – as a standard tactic – to by-pass the arbitration agreement and the 1996 Act by presenting a winding up petition*”, which would be “*entirely contrary to the parties’ agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act*”. The debt relied upon in the petition fell within the wide terms of the arbitration agreement and was not admitted, which would, in ordinary civil proceedings, trigger the automatic stay provision in section 9 of the 1996 Act irrespective of the merits of any defence.

Accordingly, the Court of Appeal held that as a matter of the exercise of the court's discretion under section 122(1)(f) of the Insolvency Act the petition ought to have been dismissed, compelling the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than the court being required to investigate whether or not the debt was bona fide disputed on substantial grounds.

66. The question which arose in *Al Saad* (there being no material difference between winding up and the substantial grounds test embodied in Insolvency Rule 10.5(5)(b) for bankruptcy) was whether the same principle should be applied to a debt where the contract pursuant to which it was claimed contained an exclusive jurisdiction clause instead of an arbitration clause, the parties having agreed that any dispute between them should be resolved by the courts of another jurisdiction. In his *ex tempore* judgment, noting that the policy in *Salford Estates* had been reiterated by the Chancellor's successor, Sir Geoffrey Vos, in *Telnic Limited* [2020] EWHC 2075 (Ch) (another case concerning an arbitration clause), ICC Judge Prentis considered (at [31]) that the difference between arbitration clauses and jurisdiction clauses was "*a distinction without a difference*" and that, accordingly, *Salford Estates* applied to the determination of the application to set aside the statutory demand before him, resulting in him acceding to such application.
67. However, in *BST Properties Limited v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997, which is referred to in the current (4th) edition of the well-known textbook *Derek French, Applications to Wind Up Companies* at 7.637 as authority for the proposition that an exclusive jurisdiction clause does not

preclude the companies court from deciding whether there is a dispute about the debt sufficient to prevent the winding up petition, the Court of Appeal (Lord Justice Jonathan Parker with Lord Justice Dyson agreeing) held, in relation to an exclusive jurisdiction clause in favour of the courts of Hungary (clause 18),

“whether or not proceedings raising a dispute as to the effect of the loan agreement could be stayed on the basis of clause 18, that does not in my judgment affect the question which was facing the Companies Court, namely whether the petition debt is bona fide disputed on substantial grounds.”

Accordingly, permission to appeal having been granted by Chadwick LJ in light of the existence of clause 18, the Court of Appeal held that Laddie J below had been entitled to conclude that (notwithstanding the various objections raised) the debt claimed was not bona fide disputed on substantial grounds and accordingly to have dismissed the company’s application to restrain further proceeding on the petition.

68. Whilst ICC Judge Prentis considered *BST Properties Limited* in *Al Saad* he formed the view that if it was intended to express a general proposition it was inconsistent with the later decision of *Salford Estates* and that, if there was a conflict between the two, he should follow the latter. Having considered the matter carefully, I respectfully disagree. I accept that it would be open to argument at appellate level that, when considering a petition based on a debt falling within the ambit of an exclusive jurisdiction clause, the Companies Court ought to exercise its discretion pursuant to section 122(1)(f) in a manner which would be consistent with the now established exercise of its discretion in relation to debts subject to arbitration agreements. However, with due

deference to ICC Judge Prentis, I do not consider that there is an irreconcilable conflict between *BST Properties Limited* and *Salford Estates* and, as such, pending further consideration of the relevant issue by the Court of Appeal I consider that I am bound to follow *BST Properties Limited*. In particular, notwithstanding ICC Judge Prentis' conclusion that arbitration agreements and exclusive jurisdiction clauses are, for these purposes, a distinction without a difference, in my judgment *BST Properties Limited* and *Salford Estates* can presently be distinguished on the basis that *Salford Estates* was decided by reference to the legislative policy of the 1996 Act, which differed materially from the prior Arbitration Act, whereas there is no equivalent legislative policy in relation to exclusive jurisdiction clauses to inform the exercise of the court's discretion. Accordingly, unless and until *BST Properties Limited* is reconsidered by the Court of Appeal, I consider that I should follow it and therefore, notwithstanding the existence of any exclusive jurisdiction clause, proceed to determine whether the claimed debts upon which the Petition is disputed are bona fide disputed on substantial grounds.

69. Although Ms Anwar submitted that *Al Saad* must be followed, I am not bound by that decision as a matter of judicial precedent. As is explained in Volume 11 of *Halsbury's Laws of England* at paragraph 32 (references omitted):

“Decisions of co-ordinate courts.

There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of coordinate jurisdiction

should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of earlier decisions.”

70. By contrast, I am bound by any relevant decision of the Court of Appeal and, for the reasons which I have explained above, I consider that whilst it may be appropriate in due course for the issue to be reconsidered by the Court of Appeal in light of the analysis in *Salford Estates*, I am presently bound by the decision in *BST Properties Ltd*.
71. In any event, in light of the conclusion which I have reached above in relation to the construction of Clause 25, if I am wrong about whether I should follow *Al Saad*, it would only affect the debt claimed pursuant to the Software License Agreement and not the debts claimed pursuant to the Custodian Agreements which exceed USD 100,000.00. However, *if* the Custodian Agreements had also contained exclusive jurisdiction clauses, I would have granted permission to appeal in respect of the *Al Saad* issue and invited the parties to address me in relation to whether it would be appropriate to grant a leapfrog certificate (given the arguably different approaches in 2 judgments of the Court of Appeal and that the point is obviously one of general importance).

(iv) the disputed debt ground

72. Ms Anwar submitted that the threshold for determining whether a debt is bona fide disputed on substantial grounds is low and that, having raised grounds of

dispute, the Petition should be dismissed and such disputes determined in the different forum and/or venue which the Company proposes. However, it is not enough to simply raise a cloud of objections and a dispute will not be substantial if it has no rational prospect of success; see *Angel Group v British Gas* referred to in paragraph 26 above. The court is therefore permitted and indeed required to consider the grounds advanced by the Company in opposition to the debts which, for the reasons I have set out above, are otherwise due pursuant to the terms of the corresponding agreements, namely

- i) USD 22,500.00 in respect of fees due pursuant to the Software License Agreement;
- ii) USD 4,000.00 in respect of “*minimum custody fee[s]*” due pursuant to the Company Custodian Agreement; and
- iii) USD 102,450.36 (or alternatively, for the reasons explained in paragraph 22 above, USD 101,447.36) in respect of custody fees due pursuant to the Client Custodian Agreements.

73. The Company has sought to dispute these debts on essentially 2 alternative bases: (i) frustration and (ii) termination.

Frustration

74. The Company claims that the Client Custodian Agreements and “*all its related agreements*” were rendered impossible to perform from 31 October 2019 onwards and thereby frustrated because, so it claims and as it communicated to the Petitioners, SGH defaulted on its payment obligations to the Company.

75. Both Ms Anwar and Ms Jones relied upon the following extract from *Chitty on Contracts* (at 26-001), as stating the correct test for the application of the doctrine of frustration:

“A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract”.

76. Essentially, the doctrine is concerned with the allocation of risk in the circumstances of a subsequent unforeseen event which makes the performance of the contract either impossible or so onerous (or, to use the words relied upon by Ms Anwar from the judgment in *The Sea Angel* [2007] EWCA Civ 547, so “*radically different*”) as to have been beyond the contemplation of the parties when the contract was made.

77. The authors of *Chitty* recite (at 26-012) the test which found favour with the House of Lords in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 and Ms Jones relied upon the same. In that case, Lord Radcliffe stated (at 729) –

“frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.”

Lord Reid (with Lord Somervell agreeing) spoke in similar terms (at 721):

“there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they

had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."

78. The test for frustration (which occurs automatically) is an objective one and not a subjective inquiry into what an individual contracting party may have thought at the time; *Chitty on Contracts* 26-016, referencing Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* at 729 and other authorities.
79. In my judgment, there is no merit in the Company's claim that the Client Custodian Agreements and/or the Software License Agreement and the Company Custodian Agreement were frustrated by any non-payment to the Company by SGH. The Software License Agreement and the Company Custodian Agreement were free-standing contractual arrangements between the Company and Technologies Pte and the Company and Trust respectively, under which the Company was obliged to pay for the services which it contracted to be provided with. As regards the Client Custodian Agreements, only one of these directly involved SGH. Whilst it appeared to be common ground that the other Clients were in some way associated with or investors in SGH, and that digital tokens in the wallets had initially been provided by SGH, the payment obligations which fell upon the Company pursuant to the Client Custodian Agreements were not dependent upon the performance of any payment obligations by SGH (or others). The Company's position was that its role under the Client Custodian Agreements was merely one of facilitation; being obliged only to pass on to Trust payments which it received from clients without it having any independent liabilities. However, that was plainly not what the terms of the Client Custodian Agreements which I have set out in paragraphs

17 to 19 above provided for. Under the terms which were agreed, the Company clearly promised to pay the Fees on behalf of the Clients on an unconditional basis. Effectively, the Company indemnified Trust in the event of default by the Clients, an arrangement which made objective commercial sense in terms of allocation of risk. Essentially, the Company's position now is that it made a bad bargain but it is not the role of the Court to rewrite its terms. The fact that even the Company recognised that its payment obligations under the Client Custodian Agreements were not contingent upon receipt from the corresponding Client is also evidenced by the fact that in various WhatsApp communications during March 2020 between Mr Angelo and Mr Quaglini, Mr Angelo repeatedly made reference to the Company seeking investment in response to Mr Quaglini's requests for payment.

Termination

80. In addition to its claims that the agreements had been terminated on the grounds of frustration (which I have rejected), the Company's position appears to be that (i) there was an implied term which would have allowed the Company to terminate on a similar basis to the Petitioners and/or (ii) the Petitioners should have exercised their right to terminate the contracts in view of the Company's non-payment.
81. I have set out the various termination provisions of the relevant agreements above. In short:
- i) Clause 11 of the Software License Agreement provided that the Company could terminate the Software License Agreement by “*giving not less than three (3) months' prior written notice to HEX before each*

Renewal Anniversary” (the Renewal Anniversary being 6 September) and that each party could terminate the agreement “*by giving not less than thirty (30) day [sic] notice in writing if the other Party is in material breach of any of the terms of this Agreement other than a breach which shall have been remedied to the satisfaction of that party within thirty (30) days after service of notice requiring the same to be remedied*” (my emphasis).

- ii) Clause 12 of the Company Custodian Agreement provided that “*the obligations of the Custodian hereunder may be terminated by the Client or the Custodian upon ninety (90) days prior written notice to the other*” (my emphasis).
- iii) The Client Custodian Agreements could each be terminated “*by the Client or the Custodian upon ninety (90) days prior written notice to the other*” (my emphasis) but there was no express term permitting the Company to terminate such agreements.

82. However, even if the termination provisions in the Engagement Letter (which allowed the Company to terminate the agreement without cause by providing 90 business days prior written notice of termination – see paragraph 14(v) above) could be read across into the Software License Agreement and/or the Client Custodian Agreements, the Company accepts (as it must in light of the evidence) that it did not purport to terminate any of the contracts *in writing* until (at best) 23 June 2020 (when Mr Angelo wrote an email to Mr Quaglini stating “*please cancel the SGH tokens immediately*”). Although, by his email of 8 September 2020, Mr Angelo claimed that previously the “*service was cancelled*

in writing”, Ms Anwar was not able to point to any communication other than the email of 23 June 2020 which the Company relied upon for those purposes. Indeed, it was no doubt for this reason that at the hearing the Company contended for an implied term enabling it to give “*verbal notice with a reasonable period*”. However, I can see no basis for implying such a term. In my judgment, the commercial expectation given the relevant business environment and consistent with the overall terms of the agreements, would be for any such communication to be required to be given in written form.

83. Furthermore, it is trite law that an innocent party is not required to accept a defaulting party’s repudiatory breach of a contract but may elect whether to do so or to continue with the contract; see e.g. *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788 (HL).
84. Accordingly these arguments, or more accurately complaints of unfairness, amount to no more than the Company inviting the Court to rewrite what it now considers to be a bad bargain. They do not constitute a bona fide dispute on substantial grounds in relation to the debts which I have found are due pursuant to the relevant terms of the contractual agreements.

(v) the asserted solvency ground.

85. I have already addressed the deficiencies in the Company’s asserted evidence of solvency in paragraphs 42 to 43 above.
86. In any event, having concluded that there are debts which are above the statutory minimum and are indisputable, that is sufficient to establish insolvency for the

purposes of section 123 of the Act, as the Court of Appeal made clear in *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44 at 48H-51B.

(vi) the abuse of process ground and (vii) the motivation ground.

87. The Company's arguments that the Petition should be dismissed as an abuse of process and/or because (so the Company alleges) it was presented with "*a vexatious and predatory motive*", in large part overlap both with each other and with a number of the grounds already addressed above.

88. As I have found that the Company has not adduced evidence of solvency and that in any event there are debts which are above the statutory minimum that are indisputable by the Company, the Petition is well founded and cannot be contended to be an abuse of process for lack of foundation. Nor, for the reasons I have identified above, can it be said to be an abuse of process having regard to the provisions of CIGA or by virtue of having been brought in an incorrect forum.

89. It is further alleged by the Company that the Petition has been pursued with an ulterior motive, namely for the purposes of causing reputational damage to the Company and/or Mr Angelo and to put the Company out of business. However, as I have noted above, the Company confirmed in correspondence sent to the Petitioners' solicitors on 2 December 2021 prior to the presentation of the Petition (on 17 December 2021) that it did not have any assets and had already "*effectively ceased trading*". Moreover, even if (which I do not find to be the case) the Petitioners were in part motivated to pursue the Petition by malice, it remains the case that the Petition was well founded and I was not taken to any authority to suggest that such motivation should prevent the Court from making

a winding up order. Instead, the Company's submissions that the Petition was brought with malicious intent were premised on its case (which I have rejected) that the proceedings were without merit.

90. By its own admission (I refer to paragraph 29.2.5 of the Company's Skeleton Argument) the Company "*was unable to make payment from October 2019*" and "*had been struggling to make small payments from August 2019*".
91. As I have held above, it cannot be said to have been improper for the Petitioners to have elected not to accept the repudiatory breach of the contractual arrangements by the Company. In choosing not to terminate, particularly in circumstances where the Company was effectively seeking time and proposing to make late payments (as is apparent from the course of WhatsApp communications to which I was referred), it cannot be said (to adopt the words used in the Company's Skeleton Argument) that the Petitioners were "*accruing an extortionate and illegitimate debt*" and by pursuing the present Petition engaging in "*blackmail*".

Conclusion

92. Accordingly, despite the best efforts of Ms Anwar to persuade me otherwise, in my judgment it is appropriate for a winding up order to be made in respect of the Company. For the reasons which I have identified above, the sums of (i) USD 22,500.00, (ii) USD 4,000.00 and (iii) at least USD 101,447.36, which together (and in the case of (i) and (iii) alone) exceed the Condition D threshold of £10,000.00, are indisputably due and owing from the Company to the Petitioners pursuant to the terms of the Software License Agreement, the Company Custody Agreement and the Client Custodian Agreements

respectively. The Company is therefore unable to pay its debts as and when they fall due for the purposes of section 123 of the Insolvency Act.

93. Subject to the 2 matters identified below being complied with, I will therefore make a winding up order upon handing down this Judgment:

(i) Pursuant to the application made by the Petitioners dated 7 June 2022 I will give permission for the Petition to be amended so as to include the word “*not*” in paragraph 11, in order to make clear that the Company is not an undertaking with the meaning of Article 1.2 of the EU Regulation. It is obvious from the rest of the Petition that that was a typographical error and that no prejudice has been caused to the Company as a result. Accordingly, upon the Petitioners’ solicitors providing an undertaking to make such amendment, I will dispense with any requirement for reverification or reservice.

(ii) As the Company is regulated by the FCA, a copy of the Petition is required to have been served upon the FCA pursuant to IR 7.9(4). Whilst I note that the Petition states that it is intended to be so served, I have not yet been shown the evidence of such service and I would ask the Petitioners’ solicitors to provide a copy of the same.

Postscript

94. Following circulation of this judgment in draft to the parties on 13 March 2023, the matters referred to in paragraph 93 have been addressed. The Petitioners’ solicitors have filed a draft Amended Petition and I have been provided with evidence of the service of the Petition on the FCA which I am satisfied with. In

the draft which was circulated to the parties I had indicated in paragraph 93 my intention to make the “*usual compulsory order*” upon handing down judgment (which would therefore have provided for the Petitioners’ costs of the Petition to be paid out of the assets of the Company on the ordinary basis), anticipating that any attendance on hand down would therefore be unnecessary. However, both sides stated that they wished to argue for different orders in relation to costs and accordingly paragraph 93 now refers only to making a winding up order. I will hear the parties’ submissions on costs upon handing down this judgment, which has been rearranged for a time convenient to the parties.