

IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

Hasre Investments Ltd,
P.O. Box 146,
Road Town, Tortola,
British Virgin Islands.
Petitioner-Appellant

SC/APPEAL/32/2022

HC (CIVIL) 70/2018/CO

Vs.

1. Club Waskaduwa Beach (Private)
Limited, (Registration No. PV 73584),
No. 211, Jayanthi Mawatha,
Mahawaskaduwa North, Waskaduwa.
(Company sought to be wound-up)
2. National Development Bank PLC,
No. 40, Navam Mawatha,
Colombo 2.
(Opposing Creditor)
Respondents-Respondents

Before: Hon. Justice Mahinda Samayawardhena
Hon. Justice Sampath B. Abayakoon
Hon. Justice Sampath K.B. Wijeratne

Counsel: Avindra Rodrigo, P.C., with Rozali Fernando, Kasuni
Jayaweera and Drushika Michael Amirthanayagam for the
Petitioner-Appellant.

F.N. Goonewardena with Shevan Mututantri for the
Company sought to be wound up, the 1st Respondent.

Geethaka Goonewardena, P.C., with Rishan Vidanagamage
for the Opposing Creditor, NDB, the 2nd Respondent.

Argued on: 06.08.2025

Written submissions:

by the Petitioner-Appellant on 25.08.2022 and 22.09.2025

by the 1st Respondent-Respondent on 19.07.2023

Decided on: 14.09.2026

Samayawardhena, J.

Introduction

The Petitioner-Appellant, Hasre Investments Ltd, a company incorporated under the laws of the British Virgin Islands (“the Petitioner”), instituted these proceedings in the Commercial High Court of Colombo on 27.08.2018, seeking the winding up of Club Waskaduwa Beach (Private) Limited (“the Company”) under the Companies Act, No. 7 of 2007. The Company carried on the business of a hotel under the name “Club Waskaduwa Beach Resort & Spa”. The Petitioner holds 49% of the issued shares of the Company, while the remaining 51% is held by Mr. Athula Makavitage, its Chairman and Managing Director. National Development Bank PLC (“NDB”), the 2nd Respondent, is a secured creditor of the Company.

The Petitioner sought the winding up of the Company on two statutory grounds.

The first was that the Company was unable to pay its debts within the meaning of section 270(e), read with section 271, of the Companies Act. This ground was advanced on two distinct bases. Firstly, the Petitioner contended that the financial records of the Company demonstrated that it was unable to pay its debts within the meaning of section 271(c). Secondly, the Petitioner relied upon section 271(a), contending that the

Company had failed, within three weeks of demand, to repay the sum of USD 2,488,902.63 advanced by the Petitioner under the Loan Agreement marked P6(c).

The second ground was that, having regard to the circumstances concerning the affairs and financial position of the Company, it was just and equitable that the Company be wound up in terms of section 270(f).

The petition was supported on 07.09.2018, whereupon the Commercial High Court directed that it be advertised in the Government Gazette and in newspapers in all three languages. The Court fixed 26.10.2018 for the Petitioner to establish compliance with those directions and 28.11.2018 for the hearing of the petition.

The Company thereafter sought further time to file its affidavit in opposition. The Petitioner objected on the basis that the period prescribed by the Companies Winding-Up Rules had expired. The Company was permitted to file its affidavit in opposition subject to the Petitioner's objection. In the final judgment, the learned Judge overruled the preliminary objection and proceeded to consider the Company's opposition on its merits. The correctness of that decision, and more generally the consequences of filing objections outside the prescribed period, will be considered separately later in this judgment.

The Company filed its affidavit in opposition dated 21.02.2019. It denied that it was unable to pay its debts and resisted the application on the grounds relied upon by the Petitioner. In particular, the Company maintained that the Petitioner was not entitled to demand immediate repayment of the USD 2,488,902.63 advanced under the Loan Agreement, because repayment of that loan had been subordinated to the facilities granted by NDB.

The Petitioner filed an affidavit in reply dated 07.03.2019, responding to the matters raised in opposition and producing further material concerning the Company's financial position. The Petitioner maintained

that the Company's own records demonstrated its inability to meet liabilities as they fell due and that the matters relied upon in opposition did not answer its case under section 271(c).

NDB, as a secured creditor of the Company, also appeared in the proceedings. It acknowledged that the Company was in arrears in respect of its facilities. According to its objections dated 08.03.2019, the arrears amounted to approximately Rs. 0.815 million at the date of presentation of the petition and approximately Rs. 10.7 million as at 07.03.2019. NDB nevertheless opposed the winding up of the Company and favoured the continuation of its banking arrangements with the Company.

There was wider creditor interest in the proceedings. Forty-eight creditors gave notice under Rule 13 of the Companies Winding-Up Rules of their intention to appear at the hearing. The Employees' Trust Fund Board indicated its support for the petition, while forty-seven employees of the Company indicated their intention to oppose it. In the end, however, only NDB participated in and was heard at the inquiry.

On 02.08.2019, the parties agreed that the inquiry be disposed of by way of written submissions, which were tendered on 02.12.2019.

By judgment dated 13.03.2020, the learned Commercial High Court Judge dismissed the winding-up petition, placing considerable reliance on NDB's restructuring of its facilities and a Central Bank circular dated 13.01.2020 concerning the rescheduling of loans. The learned Judge also took into account the impact of the Easter Sunday attacks, the emerging COVID-19 pandemic and the consequences of winding up for the hotel employees. He considered that the Company should be afforded a further opportunity to "stand on its feet" and characterised the winding-up application as "premature".

The judgment, however, does not separately determine the distinct statutory bases upon which the winding-up jurisdiction had been invoked. There is no distinct determination whether the financial

evidence established inability to pay debts under section 271(c), or whether the Petitioner was entitled to accelerate repayment of the loan so as to attract section 271(a). Similarly, although the Petitioner independently invoked section 270(f), the judgment does not determine whether it was just and equitable that the Company be wound up.

The petition was presented on 27.08.2018, nearly eight months before the Easter Sunday attacks of 21.04.2019 and approximately one and a half years before the judgment was delivered on 13.03.2020. The judgment was delivered at the onset of the COVID-19 pandemic. Much of the financial material relied upon by the Petitioner related to the period preceding both events. While the Easter Sunday attacks and the emerging COVID-19 pandemic were matters which the learned Judge was entitled to take into account in considering the circumstances existing at the time of judgment, they could not retrospectively determine whether the statutory grounds for winding up had been established upon the financial position disclosed when the petition was presented.

Being dissatisfied with the judgment of the Commercial High Court, the Petitioner sought leave to appeal to this Court. Leave was granted on the following questions of law:

- (a) Did the High Court err in failing to appreciate the evidence contained in the Company's internal records, reports and analyses relating to its inability to meet its current liabilities?
- (b) Did the High Court err in law in failing to appreciate that the non-payment of a debt presently payable, by reason of lack of means, constitutes evidence that the Company is unable to pay its debts and/or is deemed unable to pay its debts?
- (c) Did the High Court err in failing to appreciate that the Company was deemed unable to pay its debts by reason of its failure or neglect, for a period exceeding three weeks, to settle the sum of

USD 2,488,902 claimed by the Petitioner under the Loan Agreement?

- (d) Did the High Court err in failing to consider whether it was just and equitable that the Company be wound up?

Two further questions were raised on behalf of the Company:

- (e) Was the amount advanced by the Petitioner to the Company under the Loan Agreement due and payable as at the date of institution of the winding-up proceedings?
- (f) If that amount was not due and payable to the Petitioner as at that date, is that circumstance relevant in determining whether the Company was unable to pay its debts?

The questions of law are closely interconnected. They essentially require this Court to determine whether the Company was unable to pay its debts within the meaning of section 271(c), whether the amount claimed by the Petitioner under the Loan Agreement was “then due” so as to attract section 271(a), and whether, independently of those grounds, it was just and equitable that the Company be wound up under section 270(f).

The appeal also raises two matters which were not separately formulated as questions of law when leave was granted but arise from the proceedings and are of recurring importance in the exercise of the winding-up jurisdiction. The first concerns the principle that a winding-up petition founded upon an unpaid debt will not ordinarily be entertained where the debt is genuinely disputed on substantial grounds. The second concerns the time prescribed by the Companies Winding-Up Rules for filing objections to a winding-up petition and the consequences of non-compliance.

A further issue concerns events occurring after the presentation of the petition. Material subsequently placed before Court bears upon whether

the financial difficulties disclosed at the time of presentation were merely temporary or continued thereafter. This raises the question whether, and to what extent, subsequent events may properly be taken into account in winding-up proceedings.

I shall consider these issues under appropriate headings and answer the questions of law at the end.

Since the institution of these proceedings, the Rescue, Rehabilitation and Insolvency (Corporate and Personal) Act, No. 12 of 2026 has been enacted. The present appeal must nevertheless be determined under the Companies Act, No. 7 of 2007, under which these proceedings were instituted. The effect of the new legislation upon the winding-up regime under the Companies Act and upon pending proceedings will be briefly considered later in this judgment.

Nature and purpose of the winding-up jurisdiction and the statutory framework

Before considering whether the Company was unable to pay its debts and whether it is just and equitable that the Company should be wound up, it is useful to identify the nature of the jurisdiction invoked by the Petitioner.

A winding-up proceeding must be distinguished from an ordinary action for the recovery of a debt. Although an unpaid debt may provide the occasion for a creditor to invoke the jurisdiction, the consequences of a winding-up order extend well beyond that creditor and debt. In an ordinary action, the creditor seeks judgment principally for its own benefit. In winding up, the Court exercises a supervisory jurisdiction over a collective statutory process affecting the company, its creditors, contributories and others having legitimate interests in its affairs. This distinction also explains why the winding-up jurisdiction should not ordinarily be employed as a means of exerting pressure upon a company

to pay a debt genuinely disputed on substantial grounds. That principle will be considered separately later in this judgment.

The collective character of the jurisdiction is reflected in Part XII of the Companies Act. Section 267 recognises three modes of winding up: winding up by the Court, voluntary winding up, and winding up subject to the supervision of the Court. The present appeal concerns winding up by the Court.

Of particular significance is section 280, which provides that an order for winding up operates in favour of all the creditors and contributories of the company as though it had been made upon their joint petition. The succeeding provisions of Part XII provide the machinery for the administration and liquidation of the company, including the proof and ranking of claims.

Section 270 provides:

270. A company may be wound up by the court, if—

- (a) the company has by special resolution resolved that the company be wound up by the court;*
- (b) the company does not commence its business within a year from its incorporation or suspends its business for one year;*
- (c) if the number of the members falls below the minimum number required under subsection (2) of section 4 of this Act;*
- (d) the company has no directors;*
- (e) the company is unable to pay its debts; or*
- (f) the court is of opinion that it is just and equitable that the company should be wound up.*

The grounds relevant to this appeal are those contained in paragraphs (e) and (f). They are separate statutory grounds. Section 270(e) applies where the company is unable to pay its debts. Section 270(f) confers a

distinct jurisdiction where the Court is of opinion that it is just and equitable that the company should be wound up.

Where inability to pay debts under section 270(e) is relied upon, section 271 becomes central. It provides:

271. A company shall be deemed to be unable to pay its debts where—

- (a) a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty thousand rupees then due, has served on the company by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks from the date of so leaving, neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;*
- (b) 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*
- (c) it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.*

Section 270(e) thus identifies the substantive ground for winding up, while section 271 identifies three circumstances in which a company *shall be deemed* unable to pay its debts. The three paragraphs of section 271 are expressed disjunctively and constitute alternative, rather than cumulative, means of establishing inability to pay debts.

Section 271(a) proceeds upon a particular debt owed to a particular creditor. The debt must exceed the prescribed statutory amount, presently Rs. 50,000, and must be “then due”. A demand complying with the section shall be served upon the company and, for three weeks thereafter, the company shall have neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. The

requirements of the paragraph shall therefore be satisfied before the statutory consequence can arise. Of particular importance in this appeal is the requirement that the debt be “then due”. The service of a statutory demand cannot make presently payable a debt which, according to the legal relationship between the parties, has not yet become due.

Section 271(b) concerns a different situation, where execution or other process issued upon a judgment, decree or order in favour of a creditor is returned unsatisfied in whole or in part. That paragraph does not arise in this appeal.

Section 271(c) is materially different from both. It does not depend upon a statutory demand or upon an antecedent judgment followed by unsuccessful execution. It applies where “it is proved to the satisfaction of the court that the company is unable to pay its debts” and expressly requires the Court, in determining that question, to take into account the contingent and prospective liabilities of the company. The focus under paragraph (c) is therefore upon the financial condition and capacity of the company itself. The nature of that inquiry will be considered in the next section of this judgment.

The distinction between paragraphs (a) and (c) is important. A petitioner may fail to establish section 271(a) because, for example, the debt was not “then due”, the statutory requirements governing the demand were not satisfied, or the debt was genuinely disputed on substantial grounds. Such a conclusion does not, without more, establish that the company is able to pay its debts. It establishes only that the particular route provided by section 271(a) has not been made out. The Court may nevertheless be satisfied upon the evidence that the company is unable to pay its debts within the meaning of section 271(c).

This distinction assumes particular importance in the present appeal. The Petitioner contends that the loan became immediately payable upon the occurrence of events of default and the exercise of its contractual right of acceleration, thereby attracting section 271(a). The Company

contends, principally by reference to the subordination arrangements concerning NDB and the Letter of Undertaking marked P14, that the Petitioner was not entitled to demand repayment at that time.

That controversy must be resolved for the purpose of section 271(a), but it does not dispose of the separate inquiry under section 271(c). Even if the Petitioner fails to establish that its own loan was “then due”, the Court must still determine whether the evidence concerning the Company’s financial position establishes its inability to pay its debts. Failure to establish section 271(a) shall not therefore be equated with solvency under section 271(c).

Section 273 is important in understanding the nature of the Court’s jurisdiction once a ground for winding up has been established. Section 273(1) provides that, upon hearing a winding-up petition, the Court may dismiss it, adjourn the hearing conditionally or unconditionally, make an interim order, or make any other order it thinks fit. Section 270 similarly provides that a company “may” be wound up, not “shall” be wound up. Accordingly, the establishment of a statutory ground for winding up does not, by itself, compel the making of a winding-up order. The Court retains a discretion as to the order ultimately to be made.

The relationship between sections 270, 271 and 273 shall therefore be kept clearly in view. Section 270 identifies the grounds upon which a company may be wound up. Where inability to pay debts under section 270(e) is relied upon, section 271 identifies the circumstances in which the company shall be deemed unable to pay its debts. Proof of inability to pay debts under section 271 establishes the grounds in section 270(e), but the order ultimately to be made remains governed by section 273.

Section 270(f) stands on a somewhat different footing. It constitutes an independent ground for winding up where the Court is of opinion that it is “just and equitable” that the company should be wound up. Since the ground itself requires the Court to form that opinion, once section 270(f) is established there will ordinarily be little room for declining to make a

winding-up order on discretionary grounds, although the powers conferred by section 273(1) remain applicable.

The discretion conferred upon the Court under section 273, as with judicial discretion generally, is not unfettered. It shall be exercised for the purposes for which the winding-up jurisdiction is conferred, upon relevant considerations and within the limits imposed by the Act. The Court shall first determine whether the statutory ground relied upon has been established. It cannot avoid that inquiry by proceeding directly to considerations favouring the continued existence of the company. Nor does the existence of such discretion permit a winding-up petition to be dismissed on grounds of expediency or desirability merely as a convenient means of disposing of the matter, as appears to have been done in the present case.

Parliament has itself expressly limited that discretion in one respect. Section 273(1) provides that the Court shall not refuse to make a winding-up order merely because the assets of the company have been mortgaged to an amount equal to or exceeding their value, or because the company has no assets. Thus, the fact that the assets of a company are wholly or substantially encumbered does not, by itself, justify refusing to wind it up. Nor does the absence of assets render winding up legally pointless.

This provision has particular relevance to the present appeal. The principal asset associated with the Company's hotel undertaking was mortgaged to NDB, and considerable reliance was placed before the Commercial High Court upon the position adopted by NDB as a secured creditor. While the views of a secured creditor may be relevant to the exercise of the Court's discretion, they cannot displace the statutory inquiry which the Court itself is required to undertake.

Section 273(2) deals specifically with a petition presented by shareholders as contributories on the ground that it is just and equitable that the company should be wound up, and addresses the relevance of

an alternative remedy in such a case. The Petitioner in the present case is both a creditor and a shareholder holding 49% of the issued shares of the Company. The application of section 273(2), including the availability of any alternative remedy, will be considered later in this judgment when dealing with that issue.

The statutory scheme thus reinforces the central point with which this discussion began: winding up by the Court is a collective statutory process and not merely a mechanism for the recovery of an individual debt.

Commercial insolvency under section 271(c)

Having considered the structure of section 271, I turn to whether the Company was, as a matter of fact, unable to pay its debts within the meaning of paragraph (c).

Section 271(c) provides that a company shall be deemed unable to pay its debts where “it is proved to the satisfaction of the court that the company is unable to pay its debts”, and further directs that, in determining that question, the Court shall take into account the contingent and prospective liabilities of the company. Unlike section 271(a), the inquiry is not confined to the non-payment of a particular debt following a statutory demand. It is directed to the financial condition and capacity of the company as a whole.

The direction to take into account contingent and prospective liabilities is significant. It requires the Court to look beyond debts presently due and to consider liabilities which may arise upon a contingency or become payable in the future. Such liabilities are not simply to be taken at their face value, but shall be assessed realistically, having regard to the likelihood of their becoming payable, when that may occur and the resources likely to be available to meet them. In *BNY Corporate Trustee Services Ltd v. Eurosail-UK 2007-3BL PLC* [2013] UKSC 28 at [38]-[40], the UK Supreme Court emphasised that the assessment of contingent

and prospective liabilities requires a realistic appraisal of the circumstances, including when the liabilities may become due and the assets likely to be available to meet them.

The expression “unable to pay its debts” is not further defined in section 271(c). Some assistance may, however, be obtained from the solvency test contained in section 57 of the same Act. Section 57(1) provides that a company satisfies the solvency test if

- (a) the company is able to pay its debts as they become due in the normal course of business; and
- (b) the value of the company’s assets is greater than the value of its liabilities and the company’s stated capital.

Section 57 further requires contingent liabilities to be taken into account in determining whether the second limb of that test is satisfied.

Sections 57 and 271(c) serve different statutory purposes. Section 57 prescribes a two-limb solvency test for those provisions of the Act which require that test to be satisfied, whereas section 271(c) concerns whether a company is unable to pay its debts for the purpose of winding up. The requirements of section 57 cannot therefore simply be imported into section 271(c).

Nevertheless, section 57 provides useful internal statutory guidance. In defining solvency, Parliament has expressly distinguished between the ability of a company to pay its debts as they become due in the normal course of business and the relationship between the value of its assets and the value of its liabilities and stated capital. Both requirements shall be satisfied. Section 271(c), although differently expressed, is consistent with that distinction. It requires the Court to determine whether the company “is unable to pay its debts”, taking into account its contingent and prospective liabilities. Section 57 therefore confirms that the practical ability to pay debts and the ultimate sufficiency of assets are related but distinct inquiries.

Further support for this interpretation of the statutory scheme is found in section 219. It requires the directors, where there is reason to believe that the company is unable to pay its debts as they fall due, forthwith to call a meeting of the Board to consider whether the Board should apply to Court for the winding up of the company.

This understanding accords with the established concept of commercial insolvency. Kanaganayagam Kanag-Isvaran and Dilshani Wijeyawardana in *Company Law* (2014), pp. 625-627, discuss inability to pay debts in the commercial sense of inability to meet current demands and distinguish that inquiry from an assessment based upon the ultimate sufficiency of the company's assets. At page 626 the learned authors describe the two main tests to decide inability to pay debts in the following manner:

There are two primary tests of inability to pay debts. One is the "cash flow" or "commercial insolvency" test. Under this test, a company is insolvent if it is unable to pay its debts. For this purpose the fact that its assets exceed its liabilities is irrelevant. If the company cannot pay its way in the conduct of its business, it is insolvent. The creditors are not expected to wait till the assets are realised. If the company is in fact paying its debts, the court assumes it to be solvent.

The second test of insolvency is the "balance sheet" (or asset) test. That is where the company's assets are insufficient to discharge its liabilities. The idea underlying this test is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for that purpose.

A company is therefore insolvent if either test is satisfied and the court may apply either the cash flow test or the balance sheet test to declare inability to pay debts for the purpose of making a winding up order.

The distinction between commercial insolvency and the ultimate sufficiency of a company's assets was authoritatively recognised by the Privy Council in *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] SGPC 2. At [12], the Board expressly approved as "impeccable" the following statement in *Buckley on the Companies Act*, 13th edition, p. 460:

In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

The principle is clear. A company may possess assets whose value exceeds its liabilities and yet be commercially insolvent if those assets are not available to meet its debts as they fall due. The existence of substantial assets is therefore not, by itself, an answer to an allegation of inability to pay debts.

Of particular assistance is *Byblos Bank SAL v. Al-Khudhairi* [1987] BCLC 232 at 247. Nicholls L.J., construing section 223(d) of the English Companies Act 1948, the language of which is materially similar to section 271(c), described the inquiry as one into "the present capacity of a company to pay all its debts". His Lordship continued:

If a debt presently payable is not paid because of lack of means, that will normally suffice to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities.

Nicholls L.J. further explained that the fact that a company can meet all its presently payable debts is not necessarily conclusive, since the statutory provision also requires contingent and prospective liabilities to

be taken into account. The inquiry under section 271(c) is therefore directed to the company's present capacity to pay its debts, considered not merely by reference to debts presently payable but also in the light of its contingent and prospective liabilities.

Under the English Insolvency Act 1986, section 123(1)(e) addresses inability to pay debts as they fall due, commonly described as cash-flow insolvency, while section 123(2) addresses the value of the company's assets in relation to its liabilities, commonly described as balance-sheet insolvency. Section 271(c) of our Companies Act does not adopt that separate formulation. It requires the Court to determine whether the company is unable to pay its debts, expressly taking into account its contingent and prospective liabilities. These expressions may therefore be useful analytical descriptions, but they should not displace the language Parliament has enacted.

The evidential significance of actual non-payment was recognised by the English Court of Appeal in *Re Taylor's Industrial Flooring Ltd* [1990] BCLC 216 at 219. Dillon L.J. stated that where a debt is due, an invoice has been sent and the debt is not disputed, "the failure of the debtor company to pay the debt is itself evidence of inability to pay". The failure to pay an undisputed debt may therefore support an inference of inability to pay, even where the company appears otherwise to be in a strong financial position. It does not follow, however, that every unpaid debt establishes insolvency. The circumstances surrounding the non-payment remain relevant, including whether the debt is genuinely disputed and whether there is some other substantial explanation for the failure to pay.

The principles emerging from these authorities may therefore be stated shortly. Commercial insolvency is not synonymous with trading at a loss, nor is it necessarily disproved by showing that the book value of a company's assets exceeds its liabilities. The essential inquiry is whether the company has resources reasonably available to meet its debts as they

fall due in the ordinary course of business. The nature and duration of defaults, the classes of creditors affected, the availability of cash and readily realisable resources, access to finance in the ordinary course of business, and contingent and prospective liabilities may all be relevant. The inquiry is ultimately one of commercial reality.

It is against those principles that the evidence concerning this Company shall be assessed.

Financial position of the Company

The financial difficulties of the Company pre-dated the Petitioner's investment. The Company had obtained substantial facilities from NDB for the development and operation of the hotel. By July 2015, its indebtedness to NDB exceeded approximately Rs. 443 million. The land upon which the hotel was being constructed had been mortgaged to NDB as security for those facilities. The material before the Commercial High Court indicates that the facilities had been classified by NDB as non-performing from 30.11.2014 and that, by June 2015, NDB had authorised steps towards the sale of the mortgaged property in exercise of its *parate* rights.

It was against that financial background that the Petitioner invested in the Company. The Petitioner ultimately brought into the Company approximately USD 3.49 million, comprising USD 1 million by way of equity and USD 2,488,902.63 by way of loan. Part of those funds was utilised to settle overdue liabilities to NDB, while the balance was utilised towards recommencing and completing construction of the hotel, which had come to a standstill for want of funds.

The significance of this evidence is not merely historical. The substantial injection of fresh funds afforded the Company an opportunity to overcome its existing financial difficulties. The question, however, is whether, following that investment and the commencement of hotel

operations, the Company attained the financial capacity to meet its liabilities in the ordinary course of business.

The audited financial statements as at 31.03.2017 (P18) disclose a loss of Rs. 52,658,248 for the year ended 31.03.2016 and a further loss of Rs. 94,258,836 for the year ended 31.03.2017. Those losses are relevant, but they do not by themselves establish commercial insolvency. A company may trade at a loss while possessing sufficient liquidity or access to finance to discharge its debts. Their significance lies in the context they provide for the evidence of actual non-payment which followed.

The contemporaneous records disclose persistent difficulty in meeting liabilities of different kinds. In March 2017, the Company sought a further six-month deferment and restructuring of its NDB repayments, which NDB declined by email dated 03.04.2017 (P30). In an email dated 18.09.2017 (P20), the Company's accountant informed Mr. Makavitage that approximately Rs. 5.8 million was payable as EPF contributions, Rs. 18.4 million as VAT, Rs. 3 million as NBT, approximately Rs. 28 million to vendors, construction payments approximately Rs. 4 million, and Rs. 1.2 million in respect of capital purchases. Significantly, the same communication recorded that vendors had stopped supplies because of delays in payment.

The cessation of supplies is more revealing than an accounting entry standing alone. It demonstrates the practical effect which the shortage of available funds was having upon the ordinary conduct of the Company's hotel business.

The Company was also the subject of a demand from the Board of Investment dated 19.09.2017 (P21) in respect of unpaid dues. The audited financial statements for the year ended 31.03.2017 (P18) themselves recorded liabilities of Rs. 11,731,272 in respect of VAT and Rs. 1,809,942 in respect of NBT. In October 2017, the NDB indebtedness

was again restructured (P31), with outstanding capital and interest being converted into further interest-bearing facilities.

Restructuring may be commercially prudent and, in an appropriate case, may enable a company experiencing temporary financial difficulty to restore itself to financial health. It does not, by itself, establish insolvency. But restructuring is not payment. Where existing indebtedness is repeatedly deferred, capitalised or converted into further interest-bearing debt because the company lacks the resources to service it according to its existing terms, the restructuring does not demonstrate an ability to pay those debts. Depending upon the circumstances, it may instead form part of the evidence from which the company's actual financial capacity is assessed.

The position continued into 2018. A Company email dated 13.05.2018, together with the attached statement and spreadsheet (P24), recorded, among other matters, outstanding EPF contributions of Rs. 7,644,845, together with outstanding ETF contributions, BOI charges and Tourism Development Levies. A document relating to construction and capital-purchase payables (P28) recorded approximately Rs. 23.47 million due to suppliers for capital purchases. Further information supplied by the Company's accountant by email dated 28.05.2018 (P25) recorded approximately Rs. 28.65 million as outstanding VAT and Rs. 4.46 million as outstanding NBT, in addition to further outstanding EPF and ETF liabilities.

The position in relation to trade creditors was no different. An internal All Creditors Aged Summary Report dated 25.05.2018, transmitted with the Company's email of 28.05.2018 (P29), disclosed approximately Rs. 16.61 million due to numerous creditors, of which approximately Rs. 8.88 million had remained outstanding for more than six months. The Department of Inland Revenue had also issued a Red Notice dated 23.05.2018 (P40) in relation to the Company's failure to furnish its income tax return for the year of assessment 2016/2017.

Of particular relevance is the Certificate of Solvency dated 03.07.2018 (P27) prepared by Messrs. Nanayakkara & Co., Chartered Accountants, at the request of the Petitioner. P27 was commissioned by the Petitioner, and the accountants expressly identified the limitations upon the work undertaken. They did not conduct an independent audit or investigation of the information supplied to them. Nevertheless, the certificate was based, among other material, upon the Company's audited financial statements for the year ended 31.03.2017 and the profit and loss account prepared by the management of the Company for the period from 01.04.2017 to 30.04.2018.

P27 recorded current assets of Rs. 67,510,613 against current liabilities of Rs. 233,639,435, leaving an excess of current liabilities over current assets of Rs. 166,128,822. It also recorded a net operating loss of Rs. 55,390,975 for the period from 01.04.2017 to 30.04.2018. The accountants considered that the excess of current liabilities over current assets indicated an inability to pay debts as they fell due. They recognised that measures taken by management to improve liquidity might alter the position, but stated that no such mitigation plan was known or available to them. They concluded that, unless the Company had a verifiable plan to improve liquidity, it would not be able to meet its debts as they fell due.

I do not regard P27, standing alone, as determinative of the issue under section 271(c). Its greater significance lies in the fact that the conclusion reached by the accountants is consistent with the audited financial statements and, more importantly, with contemporaneous financial information originating from the Company itself. The unpaid statutory liabilities, suppliers, aged creditors and banking difficulties existed independently of the opinion expressed in P27.

The concern had also reached Board level. On 21.05.2018, Mr. Pradeep Dominic Lobo, a director nominated by the Petitioner to the Board of the Company, wrote to the other directors by P34A stating his belief that the

Company was unable to pay its debts as they fell due and calling for a meeting of the Board to consider whether the Board should apply to Court for the winding up of the Company, as contemplated by section 219 of the Companies Act. His opinion is not conclusive evidence of insolvency, but it is consistent with the financial information then available.

The evidence must be considered cumulatively. The case is not founded merely upon trading losses, nor upon the non-payment of a single debt. The defaults extended across materially different classes of liabilities: bank borrowings, VAT and NBT, EPF and ETF contributions, BOI-related dues, trade creditors, suppliers and capital-purchase creditors. Some had remained unpaid for substantial periods. Suppliers had stopped supplying because they had not been paid. The bank facilities had repeatedly required restructuring. These difficulties persisted notwithstanding the substantial injection of equity and loan funds by the Petitioner.

The Company sought to answer this evidence principally by relying upon the value of its fixed assets and by asserting arrangements with creditors for deferred payment. The first answer confuses asset value with liquidity. The possession of valuable assets is not necessarily the same as having resources reasonably available to meet debts as they fall due. This is particularly evident in the case of a hotel. Its building, furniture, fittings, equipment, elevators, kitchen equipment and other operational assets may represent substantial value, but those very assets are required for the hotel to operate and generate income. Their book value does not mean that they are readily available to meet current liabilities. The Petitioner's submissions identify precisely this difficulty in relation to the Company's fixed assets.

This is where the distinction drawn by Parliament in section 57 becomes particularly instructive. Parliament did not regard an excess of asset value over liabilities as sufficient to establish solvency. It separately

required the company to be able to pay its debts as they become due in the normal course of business. As I have already stated, section 271(c) shall be applied according to its own terms, but asset value alone cannot answer convincing evidence of persistent inability to meet liabilities as they fall due.

The assertion that arrangements had been made with creditors for later payment shall likewise be considered in its factual context. An agreed extension of credit may alter the date upon which a particular liability shall be discharged and may therefore be relevant to the assessment. But a general practice of postponing debts because funds are unavailable is quite different from demonstrating the financial capacity to pay them. The Court must look to the substance of the arrangements and the resources available to the Company, rather than treating deferment itself as proof of solvency.

I am mindful that the financial difficulties of a developing business must be assessed in their proper commercial setting. A hotel project may require substantial initial capital expenditure and may take time to become profitable. Temporary losses, reliance upon borrowed funds and even occasional liquidity pressures during that period do not necessarily establish commercial insolvency. The Court must distinguish between the ordinary financial pressures of a developing enterprise and a continuing inability to discharge debts in the ordinary course of business.

The evidence in this case crosses that line. The difficulties were not confined to the construction phase, nor to one creditor or one category of debt. They continued after the Petitioner's substantial investment and after the hotel commenced operations. By mid-2018, the Company's own records disclosed substantial statutory and trade liabilities which remained unpaid, aged creditors, continuing banking difficulties and suppliers withholding supplies. P27, although not conclusive, brought together much of the same financial material and recorded current

liabilities exceeding current assets by more than Rs. 166 million. Notwithstanding a major injection of fresh funds and repeated restructuring of its banking facilities, the Company remained unable to discharge significant liabilities in the ordinary course of business.

Section 271(c) requires inability to pay debts to be proved “to the satisfaction of the court”. That formulation calls for a judicial assessment of the evidence as a whole. It does not require the Court to wait until the company has ceased business, exhausted every asset or reached a point from which recovery is impossible.

I am satisfied that, as at 27.08.2018 when the petition was presented, the Company’s inability to pay its debts was not a temporary interruption of liquidity or an isolated default, but a continuing condition manifested across different classes of liabilities over a substantial period. I therefore hold that the Company was unable to pay its debts within the meaning of section 271(c).

Relevance of subsequent events

A petition unfounded at presentation cannot be made well-founded merely because the company subsequently becomes insolvent. That does not, however, render all subsequent events irrelevant. As already discussed, section 273(1) requires the Court ultimately to determine what order should be made upon the petition.

Where inability to pay debts has independently been established at presentation, subsequent events may, in an appropriate case, assist in determining whether the condition was merely temporary, whether the company has recovered, and how the Court’s discretion should ultimately be exercised.

Some support for that distinction may be found in the judgment of Megarry J. in *Re Fildes Bros Ltd* [1970] 1 WLR 592. That case concerned the just and equitable ground and should not be treated as authority for

retrospectively establishing insolvency. It nevertheless illustrates that, in exercising the winding-up jurisdiction, the Court is not invariably required to disregard material developments occurring between presentation and hearing.

That consideration assumes particular significance in this case because the learned Commercial High Court Judge considered that the Company should be afforded further time to “stand on its feet”. Once the prospect of recovery was relied upon as a reason for declining to wind up the Company, evidence bearing upon whether that anticipated recovery occurred became relevant to the exercise of the Court’s discretion.

The subsequent material did not demonstrate a recovery. NDB communications dated 12.02.2019 (X3) and 05.03.2019 (X4 and X5), filed by the Petitioner by motion dated 19.07.2023, recorded continuing arrears in the term-loan and short-term-loan facilities. I rely on those documents only to confirm that the financial difficulties established as at 27.08.2018 were not temporary.

The learned Commercial High Court Judge was entitled, in exercising the discretion under section 273, to consider the prospects of the Company recovering. But that discretion had to be exercised upon a correct appreciation of the financial evidence. In my view, the learned Judge failed to give adequate weight to the cumulative effect of the Company’s own financial records and thereby failed to appreciate that the statutory ground in section 270(e), read with section 271(c), had been established.

Inability to pay debts under section 271(a)

I have already concluded that the Company was unable to pay its debts within the meaning of section 271(c). That conclusion does not depend upon the Petitioner establishing that its own loan was due and payable when the winding-up petition was presented. The Petitioner, however, independently relies upon section 271(a).

The opening words of section 271 provide that a company “shall be deemed to be unable to pay its debts” where any of the circumstances specified in paragraphs (a), (b) or (c) is established. The expression “shall be deemed” is significant. Section 271 does not merely identify matters from which inability to pay may be inferred. This is particularly clear under section 271(c), which itself requires inability to pay to be proved to the satisfaction of the Court. That does not mean that a winding-up order follows automatically. The ground under section 270(e) is thereby established, but whether a winding-up order should be made remains subject to section 270, which provides that a company “may” be wound up, and section 273(1), which empowers the Court to make orders other than a winding-up order.

Section 271(a) requires, firstly, that the company be indebted to the creditor in a sum exceeding Rs. 50,000 which is “then due”; secondly, that a demand under the hand of the creditor be served by leaving it at the registered office of the company; thirdly, that the demand require payment of the sum due; and fourthly, that the company, for three weeks thereafter, neglect to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. These requirements are cumulative. Given the statutory consequence which follows from their satisfaction, compliance with them is important.

The word “neglected” in section 271(a) is significant and imports something more than the mere fact of non-payment. In the case of *In re London and Paris Banking Corporation* (1874) LR 19 Eq 444 at 446, Jessel M.R. explained: “*Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence.*” His Lordship accordingly held that where the debt is *bona fide* disputed, failure to comply with the statutory demand does not necessarily amount to the statutory neglect. A *bona fide* dispute as to the existence or amount of the debt may therefore constitute a reasonable excuse for non-payment.

This principle developed into the established rule that winding-up proceedings should not ordinarily be used as a means of enforcing a debt which is genuinely disputed on substantial grounds. That principle will be considered separately later in this judgment.

Of particular importance in the present appeal are the words “then due”. The existence of a debt and its present enforceability are not the same thing. A debt may unquestionably exist while, by reason of the terms governing repayment, the creditor is not yet entitled to demand payment. Section 271(a) is concerned with the latter. A future, contingent or prospective liability cannot satisfy the requirement that the sum be “then due”.

The distinction was emphasised by Buckley L.J. in *Stonegate Securities Ltd v. Gregory* [1980] Ch 576 at 579. Referring to section 223 of the English Companies Act 1948, which was materially similar to section 271(a), His Lordship stated: “*That provision has no application to a case in which the creditor is a creditor in respect of a sum which is not presently due.*” Buckley L.J. further explained that a contingent creditor is one whose debt will become due only upon an event which may or may not occur, whereas a prospective creditor is one whose debt will certainly become due in the future.

In the present case, the other formal requirements of section 271(a) present no substantial difficulty. The statutory demand dated 23.05.2018 (P38) demanded payment of USD 2,488,902.63 and was served by courier at the registered office of the Company. The Company acknowledged its receipt. It did not, within three weeks, pay the amount demanded or secure or compound for it to the reasonable satisfaction of the Petitioner. The real controversy is whether the amount demanded was “then due”.

There is no substantial dispute that the monies were advanced. The Loan Agreement dated 14.07.2015 marked P6(c) entered into between the Company and the Petitioner records the loan. The contemporaneous

material also includes the statement of Mr. Athula Makavitage, Chairman and Managing Director of the Company, in his email dated 28.04.2017 (P12), that the Petitioner had brought into the Company “1.0M in equity and 2.4M in debt”, the latter being an amount which had to be settled with interest by the Company. The supporting records identify the individual tranches by which the loan was advanced.

The Company’s position was that the loan was not “then due”. The controversy therefore concerns not the existence of the indebtedness, but its maturity. That question principally depends upon the proper construction of clauses 2, 3, 4 and 8 of the Loan Agreement, read with the related Loan Documents and the Letter of Undertaking dated 01.08.2015 marked P14.

The Company’s principal contention is that the Petitioner’s loan was subordinated to the facilities granted by NDB and could not be demanded while the NDB indebtedness remained outstanding. Clause 2 of the Loan Agreement provides, in substance, that the Petitioner’s loan “shall stand subordinated” to the rescheduled loan advanced by NDB. Clause 4 provides that the Company shall repay the Petitioner’s loan by equal consecutive monthly instalments commencing immediately after the NDB loan is repaid or prepaid, but “in any event not later than 30th June 2025”.

The effect of the subordination arrangement must be ascertained from the contractual documents read as a whole, and not from Clause 2 in isolation.

Clause 4 is significant. Although repayment was ordinarily to commence after repayment or prepayment of the NDB loan, the Clause adds the words “in any event not later than 30th June 2025”. Clause 3 contains materially similar language in relation to the commencement of quarterly interest payments.

The words “in any event” must be given meaning. They demonstrate that prior repayment of NDB was not intended to operate as an indispensable condition precedent to repayment of the Petitioner for all purposes and for all time. Even if NDB remained unpaid, the Agreement contemplated repayment to the Petitioner commencing no later than the stipulated long-stop date.

That does not itself establish that the loan was payable in May 2018 when demand was made. The long-stop date had plainly not arrived when the petitioner demanded payment. It does, however, demonstrate that the subordination was not absolute. The more important question is whether Clause 8 provided another circumstance in which the ordinary repayment arrangement could be displaced.

Clause 8 expressly deals with events of default. They include failure to make a payment under the Agreement when due, failure to pay the entire amount by the final payment date, default in the performance or observance of any term, covenant or condition contained in the Loan Documents, and breach or falsity of a representation or warranty contained in those documents.

Upon the occurrence of an event of default, clause 8(ii) confers upon the Petitioner, at its absolute discretion, the right to demand immediate payment of the remaining unpaid balance. Upon exercise of that option, the outstanding sum “immediately become[s] due and payable without further notice”. The clause itself describes the right as one to “accelerate” during any default.

That is the conventional function of an acceleration provision. In *ZCCM Investments Holdings PLC v. Konkola Copper Mines PLC* [2017] EWHC 3288 (Comm) at [34], the Court explained: “*An accelerated payment clause in a loan agreement entitles the lender to immediate repayment of the sums that he has lent: ie to the repayment of his own money.*” An acceleration provision thus brings forward an obligation which would

otherwise become payable in the future upon the occurrence of the contractually specified event and the exercise of the stipulated right.

The critical feature of Clause 8 is that it contains no language postponing its operation until NDB has been repaid or until 30.06.2025. On the contrary, the Clause expressly contemplates defaults which may occur before the ordinary repayment date and stipulates the consequence which may follow.

If Clauses 2 and 4 were construed as preventing Clause 8 from operating until NDB had been fully repaid, the contractual right of acceleration would be substantially deprived of effect during the period in which the loan remained subordinated. The Company could commit an event of default expressly identified in Clause 8, yet the Petitioner would be unable to invoke the very remedy which the same Clause expressly confers.

Such a construction would be difficult to reconcile with the Agreement read as a whole. Lord Diplock's well-known emphasis on business common sense is particularly apposite in this context. In *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 at 201, he observed that "*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.*"

In my view, Clauses 2, 4 and 8 can be given effect without inconsistency. Clauses 2 and 4 regulate the ordinary position while the loan remains subordinated to the NDB indebtedness. Clause 4 also prescribes an ultimate date for commencement of repayment. Clause 8 addresses a different situation: the occurrence of a specified contractual default. In that event, the Petitioner is expressly given the option to accelerate the outstanding loan.

The next question is whether an event of default had occurred.

The Petitioner relied upon defaults under the Loan Documents, including the Company's failure to execute the promissory note required by Clause 7(i)(a) of the Loan Agreement. It also relied upon failures concerning statutory payments and the production of evidence of such payments under Clause 9 of the Mortgage of Shares dated 14.07.2015 marked P6(d). The Company itself acknowledged in paragraph 26 of its affidavit in opposition that there were "certain arrears of statutory liabilities".

The documentary sequence is relevant. By letter dated 25.03.2018 (P35), the Petitioner identified what it regarded as breaches of the contractual arrangements, including the failure to execute the promissory note and the continuing failure to pay taxes and statutory liabilities. The Company responded on 04.04.2018 (P36). On 11.04.2018 (P37), the Petitioner again raised the alleged breaches and called upon the Company to produce records and receipts evidencing payment of taxes and statutory dues.

Clause 8(i)(c) is expressed broadly. A default in the performance or observance of any term, covenant or condition contained in the Loan Documents constitutes an event of default. On the material before Court, I am satisfied that defaults falling within Clause 8(i) had occurred.

The occurrence of an event of default did not, by itself, automatically accelerate the loan. Clause 8(ii) conferred an option upon the Petitioner to demand immediate payment. That option therefore had to be exercised.

The statutory demand dated 23.05.2018 (P38) expressly relied upon the defaults and demanded immediate payment of the entire outstanding sum of USD 2,488,902.63. The Petitioner thereby exercised the contractual option conferred by clause 8(ii).

The sequence is important. The statutory demand did not itself transform an unmatured debt into one "then due". Contractual defaults had first occurred. The Petitioner then exercised the right of acceleration

conferred by Clause 8(ii). By operation of that Clause, the outstanding balance thereupon became immediately due and payable. The statutory demand operated in respect of a debt which, by reason of the contractual acceleration, had become presently payable.

The Company nevertheless contends that the Letter of Undertaking dated 01.08.2015 (P14) prevented the Petitioner from demanding repayment until the indebtedness to NDB had been fully settled. By P14, the Petitioner undertook to NDB, in substance, not to demand or receive repayment of the monies advanced by it until the facilities granted by NDB had been fully repaid.

P14 was an undertaking given by the Petitioner to NDB. Although its second page contains provision for the Company to signify its concurrence, that portion is left unsigned. The contractual rights and obligations between the Petitioner and the Company must therefore primarily be determined by the Loan Agreement and the other Loan Documents executed between them. P14 cannot, merely because it formed part of the wider financing arrangement, be treated as having amended the express terms of the Loan Agreement.

Even assuming in favour of the Company that P14 should be taken into account in determining the Petitioner's right to repayment, I do not consider that it produces a different result.

P14 confirms the priority intended to be afforded to NDB. In the ordinary course, the Petitioner was not to obtain repayment ahead of NDB. That is consistent with Clause 2 of the Loan Agreement. But P14 must be considered together with the Loan Agreement. Clause 4 itself demonstrates that repayment of NDB was not an absolute condition precedent for all purposes, since repayment of the Petitioner's loan was, "in any event", to commence not later than 30.06.2025. More importantly, Clause 8 expressly addresses contractual default and confers upon the Petitioner the right, upon such default, to accelerate the loan.

Nothing in P14 expressly excludes the operation of Clause 8 or provides that the right of acceleration is suspended until NDB has been fully paid. Had the parties intended the right of acceleration to remain inoperative until NDB was fully paid, one would expect so significant a restriction to have been stated expressly.

The documents can therefore operate harmoniously. Clause 2 of the Loan Agreement and P14 regulate the ordinary priority of repayment and protect NDB's position as senior creditor. Clause 4 of the Loan Agreement prescribes the ordinary repayment regime and its long-stop date. Clause 8 of the Loan Agreement addresses the different situation of contractual default and confers an express right of acceleration.

I therefore conclude that, upon the Petitioner's exercise of the contractual right of acceleration on 23.05.2018, the sum of USD 2,488,902.63 became immediately due and payable.

The Company thereafter neither paid the amount demanded nor secured or compounded for it to the reasonable satisfaction of the Petitioner within the prescribed period. The cumulative requirements of section 271(a) were therefore satisfied. The statutory consequence follows: the Company was deemed unable to pay its debts.

Disputed Debt

A recurring defence to a creditor's application for winding up is that the debt relied upon by the petitioner is disputed. The frequency with which that contention arises makes it necessary to state with some precision what constitutes a disputed debt for this purpose and the approach which a winding-up Court should adopt when such an objection is raised.

The principle is well established. As already stated, a winding-up petition should not ordinarily be used as a means of enforcing a debt which is *bona fide* disputed on substantial grounds. Winding up is not an

ordinary proceeding for the recovery of money. It invokes a jurisdiction having consequences for the company, its creditors and shareholders extending well beyond the enforcement of the petitioning creditor's individual claim. It would therefore be improper to employ the pressure inherent in winding-up proceedings to compel payment of a debt genuinely disputed on substantial grounds.

At the same time, a mere assertion that the debt is disputed does not suffice. The dispute shall be *bona fide* and shall rest upon substantial grounds. The former concerns the genuineness of the dispute, while the latter requires an objective factual or legal basis for it. Otherwise, a company could avoid the consequences of an unpaid debt simply by characterising an established liability as disputed. The Court shall therefore distinguish between a genuine and substantial dispute requiring determination in ordinary proceedings and a mere assertion raised to resist the winding-up petition.

This distinction was recognised in the case of *In re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 at 253. Jessel M.R. stated that it is not sufficient for the respondents merely to say, "We dispute the claim." They shall bring forward a *prima facie* case satisfying the Court that "there is something which ought to be tried". The essential distinction is therefore between asserting a dispute and demonstrating a substantial basis for one.

The complementary principle was stated in *Mann v. Goldstein* [1968] 1 WLR 1091 at 1098-1099. Ungood-Thomas J. explained that the winding-up jurisdiction is not intended for the determination of a debt "disputed on substantial and not insubstantial grounds", and that invoking the jurisdiction in respect of such a debt may amount to an abuse of the process of Court.

The Supreme Court of India stated the test with particular clarity in *Madhusudan Gordhandas & Co v. Madhu Woollen Industries Pvt Ltd* AIR 1971 SC 2600: "*The principles on which the court acts are first that the*

defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends.”

B.K. Sen Gupta, *Company Law*, 2nd edition (1990), pp. 606–609, similarly treats the relevant inquiry as whether the defence is *bona fide*, substantial and sufficiently supported in fact or law. The emphasis is upon the reality and substance of the defence, not upon the mere assertion that the debt is disputed.

The timing of the dispute may also have evidential significance. There is no rule that a defence first raised after a statutory demand is necessarily lacking in *bona fides*. Nevertheless, where a company has previously acknowledged the debt, made payments, requested time for payment or otherwise acted consistently with liability, a subsequent denial may properly be examined against that earlier conduct. Conversely, a consistently maintained contemporaneous dispute supported by documentary material may provide strong evidence of its *bona fides*. Timing is therefore relevant, but not decisive.

Where the petition debt is disputed *bona fide* on substantial grounds, whether on a question of fact, law or contractual construction, the creditor ordinarily cannot invoke the winding-up jurisdiction to have that dispute adjudicated and should first establish the debt in ordinary proceedings. The Court shall determine whether such a substantial dispute exists, but should ordinarily refrain from finally adjudicating a dispute which cannot fairly and conveniently be resolved within the winding-up proceedings. Where, however, the material facts are substantially undisputed and the issue can fairly be resolved by construing the documents before Court, the disputed-debt principle does not require the parties to be sent to separate proceedings merely because competing submissions have been advanced.

An important qualification to the disputed-debt principle was explained in *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572. The English Court

of Appeal made clear that the practice of declining to determine a substantially disputed debt in winding-up proceedings is a rule of practice rather than an inflexible limitation upon the jurisdiction of the Court. Shaw L.J. stated at 576 that “it is a rule of practice and not a rule of law”, while Oliver L.J. emphasised at 579 that the Court must “remain flexible in its approach to such cases”. This approach was recently reaffirmed by the English Court of Appeal in *Khan v. Singh-Sall* [2023] EWCA Civ 1119 at [36]–[40].

A different situation arises where the company admits the petitioner’s debt but nevertheless asserts a genuine and substantial counterclaim, set-off or cross-claim against the petitioner. If such claim is *bona fide*, based on substantial grounds, and equals or exceeds the petition debt, the Court will generally decline to wind up the company, save in exceptional circumstances.

In *Coilcolor Ltd v. Camtrex Ltd* [2015] EWHC 3202 (Ch), Hildyard J. of the High Court of England and Wales stated at [33]:

Even if not qualifying as a set-off, a genuine and substantial cross-claim exceeding the would-be petitioner’s claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter).

More recently, in *Aryan (SEA) Pte Ltd v. Pure Group (Singapore) Pte Ltd* [2025] SGHC 99, Jeyaretnam J. of the High Court of Singapore stated at [2]:

It is well-established that an injunction will lie to restrain the filing of an application for winding-up where there is a substantial cross-claim that equals or exceeds the debt.

There is also an important recent development in Sri Lankan law. Section 410(1) of the Rescue, Rehabilitation and Insolvency (Corporate and

Personal) Act, No. 12 of 2026 expressly distinguishes between a dispute as to the debt itself and a counterclaim, set-off or cross-demand. It provides for a statutory demand to be set aside where “the sum is disputed on grounds that appear to be substantial”, as well as where the company appears to have “a counterclaim, set-off or cross-demand” of the requisite amount. Although that Act does not govern the present proceedings, the provision is consistent with the distinction long recognised in the Commonwealth authorities between a substantial dispute as to the petition debt itself and a counterclaim, set-off or cross-demand relied upon by the company.

The governing principle may therefore be stated in this way. A winding-up petition should not ordinarily be permitted to proceed upon a debt which is *bona fide* disputed on substantial grounds. A mere assertion of dispute is insufficient. The Court shall examine the objection objectively to determine whether the dispute is genuine and rests upon substantial grounds. If it does, the Court should ordinarily decline to adjudicate the debt in the winding-up proceedings, leaving the creditor to establish it in appropriate substantive proceedings. If it does not, the Court should proceed to consider the winding-up application on its merits.

Turning to the present case, the Company did not dispute that the Petitioner had advanced USD 2,488,902.63 or that the amount was ultimately repayable. Its contention was that the debt was not yet due because the subordination arrangements precluded acceleration while the NDB indebtedness remained outstanding. That contention has already been considered and rejected. Accordingly, the Company failed to establish a *bona fide* dispute on substantial grounds sufficient to preclude reliance upon the debt for the purposes of section 271(a). Accordingly, the Petitioner has established the ground for winding up under section 270(e), read with section 271(a).

Just and equitable winding-up under section 270(f)

The Petitioner does not rest its case solely upon the Company's inability to pay its debts. It also invokes the separate and independent ground contained in section 270(f) of the Companies Act, namely, that the Court is of opinion that it is just and equitable that the Company should be wound up.

This ground shall be kept conceptually distinct from section 270(e). A company may be solvent and yet circumstances may exist which make it just and equitable that it should be wound up. Conversely, proof of insolvency does not automatically establish the just and equitable ground. Each provision has an independent statutory function.

The leading authority is *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360. Lord Wilberforce emphasised the breadth of the words "just and equitable" and cautioned against confining them within rigid categories. At page 379, His Lordship explained that the provision enables the Court "to subject the exercise of legal rights to equitable considerations". Whether winding up is just and equitable therefore depends upon the particular circumstances of the company and the relationship between those associated in it. The jurisdiction is not confined to predetermined categories.

One recognised situation arises where the company, although incorporated, is founded or continued upon a personal relationship involving mutual trust and confidence extending beyond the strict legal rights of its members. In *Ebrahimi*, at page 379, Lord Wilberforce identified circumstances which may bring such equitable considerations into play: a personal relationship involving mutual confidence; an agreement or understanding that some or all of the shareholders will participate in the conduct of the business; and restrictions upon the transfer of shares which prevent a participant from simply withdrawing his investment when confidence breaks down.

Companies exhibiting the characteristics identified in *Ebrahimi* are frequently described as “quasi-partnerships”. The expression is convenient but should be used with care. It does not mean that the corporate personality disappears or that partnership law replaces company law. The essential inquiry is whether the circumstances of the relationship give rise to equitable considerations which make it unjust for a participant to insist upon strict legal rights.

That approach was recently reaffirmed by the Privy Council in *Aquapoint LP (in Official Liquidation) v. Xiaohu Fan* [2025] UKPC 56. The Board cautioned against treating expressions such as “quasi-partnership”, “legitimate expectations” and “loss of mutual trust and confidence” as rigid categories. They may be useful descriptions, but the essential inquiry remains whether, in the particular circumstances, there are equitable considerations of a personal character which make it unjust or inequitable to insist upon legal rights.

One particular application of the jurisdiction was explained by the Privy Council in *Chu v. Lau* [2020] UKPC 24 at [14]–[15]. Lord Briggs distinguished between two related but distinct situations, which may or may not overlap. The first is functional deadlock, where the inability of the members to co-operate in the management of the company’s affairs renders the company unable to function at board or shareholder level. The second arises where the company is a corporate quasi-partnership and an irretrievable breakdown in trust and confidence between the participating members may justify winding up on the just and equitable ground.

Mere loss of confidence or disagreement is, however, insufficient. In *Loch v. John Blackwood Ltd* [1924] AC 783 at 788, Lord Shaw distinguished dissatisfaction arising merely from being outvoted in the affairs of a company from a justifiable lack of confidence founded upon the manner in which its affairs are conducted. His Lordship stated that “wherever the lack of confidence is rested on a lack of probity in the conduct of the

company's affairs", the former is justified by the latter and the just and equitable jurisdiction may be engaged.

In the same judgment, Lord Shaw referred with approval to *Baird v. Lees* 1924 SC 83 at 92, where Lord President Clyde observed that a shareholder invests in a company upon certain conditions, including that its business will be conducted in accordance with principles of commercial administration which provide "some guarantee of commercial probity and efficiency". His Lordship recognised that where those conditions are deliberately and consistently disregarded by a person exercising overwhelming control, circumstances may arise in which it is just and equitable to wind up the company.

Section 270(f) should not, however, become a remedy for every breakdown of relations between shareholders or every disagreement with decisions of the majority. The Court shall examine the nature of the association, the understandings upon which it was formed or continued, the participation contemplated by the parties, the manner in which the Company's affairs have been conducted, and whether the relationship has broken down in circumstances which make it inequitable to insist upon its continuation.

The 1st Respondent Company was closely held between two shareholders owning 51% and 49% respectively. The Petitioner's investment was not a passive acquisition of shares in an established enterprise. It was made at a critical stage in the development of the hotel and formed part of an arrangement involving shareholding, substantial financing and participation in management, including representation on the Board. The relationship therefore involved an important element of mutual confidence and continuing participation extending beyond the bare fact of share ownership.

I do not consider it necessary to characterise the Company formally as a quasi-partnership. The label is less important than the substance of the

relationship. As *Aquapoint* confirms, such terminology should not obscure the equitable inquiry required by the statute.

The relationship thereafter deteriorated seriously. The correspondence discloses persistent disagreements concerning the financial management of the Company, payment of statutory liabilities, the treatment of the Petitioner's investment and loan, and the remuneration and benefits received by Mr. Makavitage. These were not merely disagreements over ordinary commercial decisions, but concerned matters central to the financing, governance and management of the enterprise.

The Petitioner particularly questioned the remuneration and other benefits received by Mr. Makavitage as Chairman, Managing Director and majority shareholder, and whether they had received the approval contemplated by the Shareholders Agreement. It is unnecessary to make findings of dishonesty or misappropriation in that regard. The significance of these matters lies in their contribution, together with the other circumstances, to the breakdown of confidence concerning the management of the Company and the application of its resources.

Nor is it necessary to determine which shareholder bears greater responsibility for the breakdown. Responsibility may be relevant, particularly where a petitioner has itself created the circumstances upon which it seeks to rely. But section 270(f) is not an exercise in apportioning blame. The question is whether, in the circumstances which have arisen, it remains just and equitable to require the parties to continue their corporate association.

Viewed cumulatively, the material before the Commercial High Court disclosed a relationship which had ceased to function on the basis originally contemplated by the parties. The breakdown was not confined to personal hostility, but extended to the financing, governance and management of the Company and the application of its resources. There was no realistic prospect of restoring the trust and cooperation necessary for the continuation of that corporate relationship.

As I have already stated, the Petitioner expressly invoked section 270(f), but the learned Judge made no separate determination on that ground. The judgment concentrated principally upon the financial difficulties of the Company, NDB's position, the circumstances affecting the tourism industry, the interests of employees and the view that the Company should be afforded a further opportunity to "stand on its feet". Those considerations did not dispense with the separate inquiry required by section 270(f). Even if inability to pay debts under section 270(e) had not been established, it remained necessary to determine whether it was independently just and equitable that the Company should be wound up.

I am satisfied that the Petitioner has established the independent ground for winding up under section 270(f).

Since the Petitioner relies upon that ground as a shareholder and therefore as a contributory, it remains to consider the effect of section 273(2), including whether another remedy was available and whether the Petitioner acted unreasonably in seeking winding up instead of pursuing that remedy. I shall now turn to that question.

Alternative remedies and the winding-up jurisdiction

The availability of another remedy arises in different contexts in winding-up proceedings, and those contexts should not be conflated. Where a petition on the just and equitable ground is presented by a shareholder as a contributory, section 273(2) expressly regulates the effect of an alternative remedy. That provision does not apply where a creditor seeks winding up on the ground that the company is unable to pay its debts.

A creditor to whom an undisputed debt is presently due is not ordinarily required first to institute an action for recovery, obtain judgment and attempt execution before invoking the winding-up jurisdiction. Where the requirements of section 271(a) are satisfied, the company cannot ordinarily resist the petition merely by insisting that the creditor pursue

an ordinary action. To hold otherwise would substantially undermine the statutory procedure established by section 271(a).

The position was recently affirmed by the Privy Council in *Sian Participation Corp (in Liquidation) v. Halimeda International Ltd* [2024] UKPC 16. Lord Briggs and Lord Hamblen stated at [35]:

[T]he court's powers on the hearing of a liquidation application (or winding up petition) are discretionary. That is not to say that the court's discretion is entirely unfettered. In principle, a petitioning creditor with an unpaid debt which is not genuinely disputed on substantial grounds is often described as being in substance entitled to an order, as a statutory right, ex debito justitiae: see Bryanston Finance Ltd v. de Vries [1976] Ch 63, 78; In re Crigglestone Coal Co Ltd [1906] 2 Ch 327, p 337; and In re Southard & Co Ltd [1979] 1 WLR 1198, 1203, approved in Ebbvale Ltd v. Hosking [2013] UKPC 1, para 25.

That principle does not permit winding-up proceedings to be used indiscriminately as a means of debt collection. As already discussed, a petition should not ordinarily proceed upon a debt which is *bona fide* disputed on substantial grounds, nor may the jurisdiction be invoked for an improper purpose or as an abuse of the process of Court. Those limitations are conceptually distinct from the alternative-remedy rule expressly applicable to a contributory under section 273(2).

Section 273(2) of the Companies Act provides:

Where a winding-up petition is presented by shareholders of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court shall where it is of opinion that—

(a) the petitioners are entitled to relief either by winding-up the company or by some other means; and

(b) in the absence of any other remedy it would be just and equitable that the company should be wound up,

make a winding-up order, unless it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

It is clear that section 273(2) is specifically directed to a petition presented by a contributory on the just and equitable ground. In substance, it provides that where the Court considers that the petitioners are entitled to relief, either by winding-up or by some other means, and that in the absence of another remedy it would be just and equitable to wind up the company, a winding-up order shall be made unless the Court is also of opinion that another remedy is available and that the petitioners are acting unreasonably in seeking winding up instead of pursuing that remedy.

The structure of the subsection is significant. The mere existence of another remedy does not automatically defeat the petition. Two matters shall coexist: another remedy shall be available, and the petitioner shall be acting unreasonably in seeking winding up rather than pursuing it.

The applicant shall first establish the circumstances which would make winding up just and equitable. Where another remedy is then relied upon as a reason for refusing that relief, *Chu v. Lau* [2020] UKPC 24 at [20]–[21], dealing with the comparable statutory provision, explains the respective burdens. The burden is on the party opposing the winding-up petition to establish that an alternative remedy is available. Once such a remedy is shown to be available, the burden shifts to the petitioner to establish that it is not acting unreasonably in seeking winding up instead of pursuing that remedy. The petitioner is therefore not required at the outset to identify and negate every conceivable alternative remedy.

An alternative remedy shall, moreover, be considered as a matter of practical reality. The question is not merely whether another cause of action or form of relief can be identified in law, but whether that remedy is realistically available and capable of providing effective relief in the circumstances confronting the petitioner.

The point has recently received authoritative consideration by the Privy Council in *Aquapoint LP (in Official Liquidation) v. Xiaohu Fan* [2025] UKPC 56, on appeal from the Cayman Islands. At [85], the Board reaffirmed that a Court may, and usually will, refuse a winding-up order on a shareholder's petition where an alternative remedy is available and the petitioner acts unreasonably in not pursuing it. The Board nevertheless examined the suggested alternatives in practical terms. A proposed contractual action was not a reasonable alternative on the facts, while a derivative action which could at best produce relief for the entity rather than the petitioner personally was not an adequate remedy for the petitioner. The Board concluded at [89] that no alternative remedies were reasonably available.

The importance of *Aquapoint* lies in the distinction between the mere existence of another legal procedure and the availability of an adequate remedy to the particular petitioner. An alternative remedy shall be adequate in substance, not merely available in form.

The English courts have adopted a similar approach under section 125(2) of the Insolvency Act 1986, which is materially similar in this respect to section 273(2). In *Duneau v. Klimt Invest SA* [2022] EWHC 596 (Ch), the Court described just and equitable winding up as a remedy of last resort and an exceptional remedy in the context of disputes between shareholders, reflecting the statutory requirement that an available and reasonable alternative be considered. The Court did not, however, treat the mere existence of a possible buy-out as sufficient. The proposed alternative had itself to provide a reasonable means of resolving the dispute.

In *Taylor v. The Whitehall Partnership Ltd* [2023] EWHC 596 (Ch) at [26], the Court regarded the discussion in *Duneau v. Klimt Invest SA* [2022] EWHC 596 (Ch) at [185]-[199] as a helpful summary of the governing principles. The Court reiterated at [28]-[30] that, although winding up is a remedy of last resort and an exceptional remedy in the context of shareholder disputes, the existence of another remedy does not by itself make winding up unavailable. The question is whether another remedy is available and whether the petitioner is acting unreasonably in seeking winding up instead of pursuing it.

The qualification “in the context of disputes between shareholders” is important. The expression “remedy of last resort” should not be elevated into a general rule requiring every creditor to exhaust ordinary recovery proceedings before presenting a winding-up petition. As I stated previously, such a proposition would be inconsistent with the statutory procedure contained in section 271(a).

The 1st Respondent Company relies principally upon the remedies available under sections 224 and 225 of the Companies Act in respect of oppression and mismanagement. Section 228 confers substantial remedial powers upon the Court, including powers to regulate the future conduct of the Company’s affairs, provide for the purchase of shares, and modify or terminate agreements. In an appropriate case, particularly where the company remains commercially viable and the dispute can effectively be resolved by regulating its affairs or facilitating the exit of a shareholder, such relief may provide a more satisfactory remedy than winding up.

The availability of those remedies shall, however, be considered together with section 227. That section expressly contemplates that, at any stage of winding-up proceedings, the Court may, in the circumstances specified therein, exercise powers under sections 224 or 225 as though an application under those provisions had been made. The statutory

scheme therefore does not treat winding up and relief against oppression or mismanagement as mutually exclusive.

In the present case, by the time the petition was presented, the dispute had gone beyond particular acts of management capable of correction or future conduct capable of regulation. The relationship underlying the parties' participation in the enterprise had broken down at a fundamental level, extending to the financing, governance and management of the Company. The question was therefore no longer merely how the Company's affairs should thereafter be regulated, but whether there remained a viable corporate relationship capable of being restored.

There is a further consideration. The Petitioner was not merely a shareholder complaining of the manner in which the Company was being managed. It was also a substantial creditor in respect of the USD 2,488,902.63 advanced under the Loan Agreement. A remedy regulating the future conduct of the Company's affairs might address aspects of the shareholder relationship, but would not necessarily resolve the Company's indebtedness to the Petitioner or its inability to meet the claims of its statutory, trade and other creditors.

The financial condition of the Company is therefore relevant in assessing the adequacy of the suggested alternatives. As already found, the Company was unable to pay its debts within the meaning of section 271(c). The remedies under sections 224 and 225, although relevant, did not adequately address the combination of a fundamentally fractured shareholder relationship and a company unable to meet its obligations.

In these circumstances, I am unable to conclude that the Petitioner acted unreasonably in seeking winding up instead of pursuing an alternative remedy. Section 273(2) therefore did not require the Court to refuse a winding-up order.

The position of NDB as a secured creditor

The position adopted by NDB assumed considerable importance in the reasoning of the learned Commercial High Court Judge. NDB was the Company's principal institutional creditor and opposed the winding up of the Company. The learned Judge placed substantial reliance upon that position and, in particular, upon NDB's willingness to reschedule the facilities granted to the Company.

The separate issue concerning the subordination of the Petitioner's loan to NDB, including the effect of the undertaking marked P14, has already been considered. The question here is different: what weight could properly be attached to NDB's opposition to winding up?

NDB was not merely a creditor but a secured creditor. The hotel property had been mortgaged to NDB as security for its facilities. NDB therefore stood in a materially different position from unsecured creditors who depended upon the assets of the Company generally for payment.

The wishes of creditors are nevertheless relevant, but they are not decisive. The Court shall consider the nature of their interests and the reasons underlying the positions they take, rather than merely count the creditors supporting or opposing the petition. In *Re Demaglass Holdings Ltd (Winding Up Petition: Application for Adjournment)* [2001] 2 BCLC 633 at 639, Neuberger J. recognised that, in considering the wishes of creditors, less weight may be attached to the views of secured creditors because they are entitled to proceed against their security and therefore occupy a different position from unsecured creditors. Similarly, in *Re P & J Macrae Ltd* [1961] 1 WLR 229 at 235, Willmer L.J. emphasised that opposition by a majority of creditors is not, without more, sufficient to defeat a winding-up petition. The Court shall consider the reasons underlying their opposition rather than merely count their number or the value of their debts.

Those principles are directly relevant to NDB. As a secured creditor, NDB could, for legitimate commercial reasons, prefer restructuring, continued trading or enforcement of its security to winding up. Its position was therefore not comparable to that of the Company's unsecured creditors. Accordingly, NDB's willingness to grant further time or to reschedule its facilities could not, without more, establish that the Company was able to pay its debts.

The statutory inquiry under section 271(c) remained whether the Company was unable to pay its debts, taking into account its contingent and prospective liabilities. NDB's position could not relieve the Court of its duty to determine that question upon the whole of the evidence. In my view, the learned Judge placed disproportionate weight upon NDB's opposition without sufficient regard to its position as a secured creditor.

There have since been significant developments. During the pendency of this appeal, material relating to steps taken by NDB towards the exercise of *parate* execution was placed before this Court by the Petitioner by motion dated 19.07.2023. More importantly, after the appeal had been argued and judgment reserved, the Petitioner informed Court by motion dated 07.09.2026 that NDB had since proceeded with *parate* execution and that the hotel property had been sold.

Section 358 of the Companies Act expressly recognises the rights of secured creditors in a liquidation. Section 358(1)(a) provides that “*a secured creditor may seize, attach and realise, issue execution against or appoint a receiver in respect of property subject to a charge, if entitled to do so*”. NDB, as a secured creditor, had recourse to the mortgaged property and, subject to the requirements of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, was entitled to realise its security by *parate* execution.

This position is consistent with the other provisions of the Companies Act. Section 277(2) provides that winding up by Court is deemed to commence at the time of presentation of the petition. Although section

276(1) generally renders void any attachment, sequestration or execution put in force against the estate or effects of the Company after presentation of the petition, section 276(2) expressly excludes execution or attachment against property for the benefit of a creditor entitled to a charge over that property. The same position is preserved by section 279(2) after a winding-up order has been made or a provisional liquidator appointed.

The subsequent sale was brought to the attention of this Court, albeit belatedly, by the Petitioner, and not by NDB or the Company. The hotel was the principal business of the Company and its sale was plainly a material supervening event in an appeal concerning the winding up of that Company. Quite apart from the statutory consequences of the sale, an event of such significance ought to have been brought promptly to the attention of this Court by the parties directly concerned.

The sale does not, however, render a winding-up order unavailable. Section 273(1) expressly provides that the Court shall not refuse to make a winding-up order merely because the assets of the company have been mortgaged to an amount equal to or exceeding their value, or because the company has no assets. The Company did not cease to exist upon the sale of the hotel property, and there remain assets, liabilities and claims requiring administration. The subsequent sale is therefore relevant to the practical consequences of the order now to be made, but does not preclude the making of a winding-up order.

Winding-up Rules of 1939 and affidavit in opposition

Although the objection relating to the Company's affidavit in opposition does not determine the merits of this appeal, I consider it necessary to deal with it. The issue is one of recurring practical significance in winding-up proceedings. In the present case, the Company's affidavit in opposition was filed outside the period stipulated in the Companies Winding-up Rules of 1939, available in Volume II of the Subsidiary Legislation of Ceylon (1956). The Commercial High Court permitted it to

be filed subject to the Petitioner's objection and subsequently overruled that objection in the judgment.

Rule 15 provides:

15(1) Affidavits in opposition to a petition that a company may be wound up by or subject to the supervision of the court shall be filed within seven days of the date on which the affidavit verifying the petition is filed, and notice of the filing of every affidavit in opposition to such a petition shall be given to the petitioner or his proctor on the day on which the affidavit is filed.

(2) An affidavit in reply to an affidavit filed in opposition to a petition shall be filed within three days of the date on which notice of the affidavit in opposition is received by the petitioner.

The difficulty lies in the event from which the period prescribed by Rule 15(1) is expressed to commence. Rule 8 requires the petition to be served upon the Company. Rule 9 requires an affidavit verifying the petition to be sworn after the petition is presented and filed within four days thereafter. The Rules do not require the verifying affidavit to be served upon the Company. Yet Rule 15(1) requires the affidavit in opposition to be filed within seven days from the date on which the verifying affidavit is filed in Court. On a literal application of the Rule, the period may therefore commence, and even expire, before the Company is served with the petition and becomes aware of the proceedings against it.

The facts of the present case demonstrate the anomaly. The petition was presented on 27.08.2018 and the verifying affidavit was filed on 30.08.2018. On a literal application of Rule 15(1), the seven-day period expired on 06.09.2018. Yet the petition was served upon the Company by the Fiscal only on 14.09.2018. The Company would thus have lost its opportunity to file an affidavit in opposition before it was even served with the petition seeking its winding up. That cannot have been the intended operation of the Rule.

Rules 8, 9 and 15 must therefore be construed harmoniously so as to give effect to the scheme and purpose of the Rules. Rule 8 requires service of the petition upon the Company so that it receives formal notice of the proceeding and an opportunity to respond. It would be inconsistent with that requirement to hold that the time for responding may expire before service takes place. Accordingly, in the case of the Company whose winding up is sought, the seven-day period under Rule 15(1) shall be calculated from the date on which the petition is served upon the Company under Rule 8. That determines the commencement of the prescribed period. The consequence of failure to comply with it is a separate question.

This construction finds support in the reasoning of the Court of Appeal in *Rowlands Ltd v. Emirates Bank International Ltd* (CA/281/89(F), CA Minutes of 24.01.1997). The Court regarded as “quite logical” the contention that an intending opponent could not reasonably be expected to comply with Rule 15 before receiving notice of the proceeding. In that case, however, the opponent thereafter received notice and had sufficient opportunity to act, but remained inactive until the petition came up for hearing. The Court declined to excuse that failure.

There remains the question whether the seven-day period calculated from the date on which the petition is served upon the Company under Rule 8 is mandatory in the sense that an affidavit filed thereafter cannot be received by Court. As a general rule, where procedural law prescribes a time within which a litigant is required to take a particular step, that requirement shall be complied with, particularly where the provision uses the word “shall”. Rule 15(1), however, presents an unusual situation. For the reasons already explained, when Rule 15(1) is read together with Rules 8 and 9, I do not consider that the expiry of the seven-day period was intended to operate as an absolute bar to the Court receiving an affidavit in opposition filed thereafter.

A person seeking to file an affidavit in opposition out of time shall make an appropriate application under Rule 3 and satisfactorily explain the delay. The Court may then determine whether to receive the affidavit, having regard to the length of the delay, the reasons for it, any prejudice caused, the need for expedition in winding-up proceedings and the interests of justice.

The short periods prescribed by the Rules for taking procedural steps demonstrate that winding-up proceedings are intended to be dealt with expeditiously. That object should not be defeated by technical objections or procedural applications which merely delay the determination of the petition. The Court shall discourage the invocation of Rule 3 to raise preliminary objections separately while withholding the objections in opposition, thereby obstructing or delaying the substantive determination of the winding-up petition. Ordinarily, preliminary objections should be incorporated in the objections in opposition and may be determined first, before the Court proceeds to consider the objections on the merits. An objection which goes to the root of the proceedings may, however, stand on a different footing.

The position of creditors, contributories and other persons wishing to support or oppose the petition requires separate consideration. Rule 7 requires advertisement of the petition at least seven clear days before the hearing. Rule 7(2) expressly contemplates persons intending to appear at the hearing for the purpose of supporting or opposing the petition. Rule 13 prescribes the notice which such persons shall give of their intention to appear. These Rules enable an interested person, upon compliance with the prescribed requirements, to appear at the hearing and support or oppose the petition.

Rule 15(1), on the other hand, deals with “affidavits in opposition to a petition” and requires them to be filed within seven days from the date on which the affidavit verifying the petition is filed. Those words are not expressly confined to affidavits filed by the Company. Rule 8, however,

provides for service of the petition only upon the Company, while creditors, contributories and other interested persons ordinarily receive notice of the petition only upon its advertisement under Rule 7.

This gives rise to a further practical difficulty. Since Rule 7 permits advertisement as late as seven clear days before the hearing, an interested person may become aware of the petition only after the period prescribed by Rule 15(1) has expired. The Rules do not expressly address how that period is to operate in relation to such a person.

It is also significant that Rule 7(2) expressly recognises the right of an interested person to appear either in support of or in opposition to the petition, whereas Rule 15 deals only with affidavits in opposition. There is no corresponding provision prescribing a period for filing an affidavit in support. The right to appear under Rules 7 and 13 should therefore not be equated with, or made dependent upon, compliance with Rule 15. Whether an interested person who appears under those Rules should also be permitted to place affidavit in opposition or in support before Court is a separate procedural question to be determined by the Court having regard to the circumstances and the requirements of fairness.

Rule 15(2) presents a similar difficulty. It requires an affidavit in reply to be filed within three days from the date on which notice of the affidavit in opposition is received by the petitioner. The period therefore commences from an event of which the petitioner necessarily has notice. This contrasts with Rule 15(1), where the prescribed period is expressed to commence from the filing of the verifying affidavit, of which the Company is not required to be notified.

A person cannot reasonably be expected to comply with a short procedural time limit unless he is made aware of when that period begins to run. Rule 7(2) reflects this principle. It requires the advertisement of a winding-up petition to inform any person intending to appear at the hearing not only that notice of such intention shall be served upon the

petitioner or his attorney-at-law, but also of the time within which that notice shall be given.

The importance of giving a litigant clear notice of a short procedural time limit is also reflected elsewhere in procedural legislation. Section 85(4) of the Civil Procedure Code requires the copy of an *ex parte* decree served upon a defendant to bear an endorsement informing the defendant that an application to set aside the decree shall be made within fourteen days of service. Similarly, section 4(3) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 requires the decree *nisi* to specify the day on which the defendant shall appear and show cause, since no further extension of time is granted for that purpose.

Accordingly, as a matter of practice under the existing Rules, when a winding-up petition is served upon the Company, the Company should at the same time be informed that any affidavit in opposition should be filed within seven days of service. Such a practice would provide certainty to the Company while preserving the expedition contemplated by Rule 15.

Turning to the present case, the petition was served upon the Company on 14.09.2018, and the Company filed its affidavit in opposition on 21.02.2019. The Petitioner thereafter filed an affidavit in reply dated 07.03.2019.

There is a broader matter which this case brings into focus. The Companies Winding-up Rules were framed in 1939, and the periods prescribed by Rule 15 may no longer be adequate for many contemporary winding-up proceedings. Such proceedings may involve extensive financial, banking, contractual and other documentary material requiring proper examination. The seven days allowed for opposition, and the three days for reply, may therefore be grossly insufficient.

Expedition remains important, but it must be consistent with fairness and a reasonable opportunity to place the relevant material before Court.

When new rules governing corporate insolvency are framed, consideration should therefore be given to prescribing sufficient but firm periods for opposition and reply, commencing from clearly identifiable events. The Rules should also clearly regulate the procedure by which creditors, contributories and other interested persons may support or oppose an application and place relevant material before Court.

The Rescue, Rehabilitation and Insolvency (Corporate and Personal) Act, No. 12 of 2026

During the pendency of this appeal, Parliament enacted the Rescue, Rehabilitation and Insolvency (Corporate and Personal) Act, No. 12 of 2026, which introduces a new regime governing corporate and personal insolvency in Sri Lanka. It is therefore necessary to consider briefly its effect upon the present proceeding.

The Act was certified by the Speaker on 17.06.2026. Section 1(2) came into operation on that date. Section 1(3), subject to subsection (4), provides that the remaining provisions shall come into operation upon the expiry of six months from the date of the Speaker's certificate. Accordingly, unless that period is extended by an Order made under section 1(4), those provisions will come into operation on 17.12.2026.

Upon commencement, section 477(1)(c) repeals Part XII of the Companies Act, No. 7 of 2007, except sections 393, 394 and 395. Sections 270 and 271, under which the present winding-up proceeding was instituted, form part of Part XII. The effect of that repeal upon pending proceedings is, however, expressly addressed by section 478.

Section 478(1) provides that actions instituted or proceedings commenced which are pending immediately before the Act comes into operation and which relate to insolvency shall be "continued and completed as if this Act had not come into operation". It further provides that the written law under which such actions were instituted or proceedings commenced shall be deemed to remain in force.

The effect of that provision is clear. Pending insolvency proceedings are expressly saved. There is no statutory conversion of a winding-up proceeding instituted under the Companies Act into a proceeding under Act No. 12 of 2026, nor is a party required to abandon a pending proceeding and commence afresh under the new regime. The proceeding shall continue and be completed under the former law.

The requirement that a pending proceeding be “continued and completed” necessarily extends, in my view, to an appeal arising from that proceeding. An appeal is not a new insolvency proceeding detached from the proceeding in which the order under appeal was made, but forms part of the judicial process by which that proceeding reaches its final determination. Any other construction would produce the anomalous result that a proceeding validly commenced under one statutory regime could become subject, at the appellate stage, to a different statutory regime.

The saving must likewise extend to the procedural framework necessary for the continuation and completion of the proceeding, including the Companies Winding-up Rules, 1939, insofar as those Rules remain applicable.

The present proceeding was instituted in 2018 under sections 270 and 271 of the Companies Act, No. 7 of 2007. It is therefore preserved by section 478 and shall continue and be completed under that Act and the law applicable to it, notwithstanding the subsequent legislative change.

Conclusion

In the light of the foregoing findings, the questions of law upon which leave to appeal was granted are answered in the affirmative.

The judgment of the Commercial High Court dated 13.03.2020 dismissing the Petitioner’s application for winding up is set aside and the appeal is allowed.

I hold that the Petitioner has established that the Company is liable to be wound up under section 270(e) of the Companies Act, No. 7 of 2007, being unable to pay its debts within the meaning of both sections 271(a) and 271(c). I further hold, independently, that the circumstances established in this case justify the winding up of the Company on the just and equitable ground under section 270(f).

Accordingly, I make order that the Company be wound up in accordance with the provisions of the Companies Act, No. 7 of 2007.

The subsequent sale of the mortgaged hotel property by NDB by way of *parate* execution does not preclude the making of this order. The realisation of the security may have satisfied, in whole or in part, NDB's claim as a secured creditor, but it neither brings the corporate existence of the Company to an end nor provides for the administration of its remaining assets and liabilities and the claims of its other creditors.

The matter is remitted to the Commercial High Court to give effect to the winding-up order made by this Court and to take all consequential steps required by law, including the appointment of a liquidator and such further orders and directions as may be necessary for the due administration and completion of the winding up.

The Petitioner is entitled to taxed costs in this Court and in the Commercial High Court, payable by the 1st Respondent Company.

Judge of the Supreme Court

Sampath B. Abayakoon, J.

I agree.

Judge of the Supreme Court

Sampath K.B. Wijeratne, J.

I agree.

Judge of the Supreme Court