CORPORATE INSOLVENCY LEGAL UPDATE

Chris Brockman and Holly Doyle, Guildhall Chambers

1. Agenda

1.1 In these notes we have attempted a round – up of cases of note in the corporate insolvency sphere over the last 12 months. Of necessity not every case could be included, but we hope that the reader finds our selection of interest and will excuse us any omissions.

1.2 In the first half of these notes we have chosen two areas (in which there have been a prolific number of recent decisions) for specific discussion: the first is the vexed question of the validity of administration appointments, the second is the recent guidance on the treatment of disputed debt petitions. We have then gone on in the second half to summarise the decisions of the Court of Appeal and the High Court in various other "important" cases from the last 12 months.

2. Administration Appointments

2.1 Unfortunately no talk on corporate law would be complete without a brief mention of the more recent cases flowing from the decisions of the court in respect of the technical defects in the appointment of administrators. Two distinct lines of authority emerged. In *Re Minmar (929) Ltd* [2012] 1 BCLC 798, the appointment was held to be a nullity because there was no quorate meeting of the directors, the board had never properly resolved to do anything and those who attended the meeting had no power to appoint. In an obiter comment the Chancellor expressed an opinion that an appointment was invalid if notice was not given to those persons prescribed under paragraph 26 (2) of the Insolvency Act ("IA") 1986 Schedule B1 (all of the paragraph references below are to this schedule unless otherwise stated) even where there was no one to serve under para 26(1), in this case the holder of a qualifying floating charge. This was directly contradictory to the earlier decision of HHJ McCahill QC in *Hill v Stokes PLC* [2010] EWHC 3726 (Ch) that a failure to serve a para 26(2) notice was not fatal to the appointment of administrators. The *Minmar* decision was followed by Warren J in *National Westminster Bank plc v Msaada Group* [2012] 2 BCLC 342 whilst on the same day the *Hill* decision was followed by Norris J in *Virtualpurple Professional Services Ltd* [2012] 2 BCLC 330.

2.2 So last year, when we gave this seminar, there were two directly conflicting approaches being taken by the judiciary and a recognition that the Court of Appeal needed to rule upon the correct approach to the problem. Unfortunately that has not happened, but there is an emerging convergence of judicial views that the court should adopt a purposive approach as opposed to the technical. Whilst there has been a plethora of cases in this area, these notes will be limited to the most relevant decided in 2012.

2.3 ***M F Global Overseas Limited*** [2012] 2 BCLC 638 is a decision of Mann J which addressed the question of which was the proper form to use. There was no qualifying floating charge holder, so no person to be given notice of intention to appoint under para 26(1). Notice was in fact given to the company (in form 2.8B) under para 26(2) leading to an appointment using form 2.9B (prescribed for use where a notice of intention to appoint had been given). The Judge asked himself three questions

2.3.1 was notice of intention in form 2.8B actually required?

2.3.2 if not, and an unnecessary notice was served, which was the appropriate form for an effective appointment, 2.9B or 2.10B (the latter being prescribed for use where a notice of intention to appoint had not been given)?

2.3.3 The third question was, if the appropriate form was 2.10B, had there been sufficient compliance to provide for an effective appointment?

2.4 Mann J identified the dilemma that cautious administrators would give a 2.8B Notice to the company anyway, whether required or not. He regretted that the conflicting decisions had led to a significant number of practitioners using court appointments instead of using the out of court procedure, contrary to Parliament's intention under the Enterprise Act 2002.

2.5 If *Minmar* was correct, then service of a notice under 2.8B on the company was required, which could validly be followed by a 2.9B appointment as had occurred in this case. However, although not required to choose, Mann J preferred the *Hill v Stokes/Virtualpurple* approach rather than the *Minmar* approach. He decided that the appointment was valid whether or not *Minmar* was correctly decided.

2.6 ***Re Ceart Risk Services Limited*** [2012] 2 BCLC 645 concerned a directors appointment which had been made without obtaining the prior consent of the FSA as required as *Ceart* was authorised by the FSA to carry on non-investment insurance intermediation for retail and commercial customers.

2.7 Notice of appointment was filed on 19 January 2012 and the FSA's consent was given on 8 February 2012. On 9 February 2012 the administrators entered into an agreement to sell the assets of Ceart. In *M.T.B. Motors* (as in the *Rangers FC* case in Scotland) the failure to obtain FSA consent led to the court deciding that there was an invalid appointment. In *Ceart* Arnold J decided to the contrary that the failure to obtain the prior consent of the FSA did not mean that the appointment was incurably invalid, but rather constituted a curable defect. Neither *M.T.B. Motors* nor *Rangers FC* was cited to the judge who then had to decide the date on which the administrators' appointment became effective; whether it was on the filing of the notice of appointment (minus the FSA consent), or was it when the consent was later given or filed at court? Arnold J held that the combined effect of s362A FSMA and paras 29(1)(b) and 31 of Schedule B1, was that the appointment took effect when the FSA's written consent was filed with the court, even if the notice of appointment had been filed previously.

2.8 Arnold J further considered a declaration should be made under para 104 of Schedule B1 IA 1986[1] as to the validity of the administrators' acts prior to the date when their appointment was made effective on filing the FSA's consent. One opinion, expressed in *G-Tech Construction Ltd* [2007] BPIR 1275, is that the failure to comply fully with the requirements of para 29 means there is no administration, and consequently para 104 cannot be relied upon to validate the purported administrator's acts. The other judicial view, adopted by Norris J in *Re Blights Builders Ltd* [2007] 3 All ER 776 and in *Re Care Matters Partnership Ltd* [2011] BCC 97 was that para 104 was appropriate for situations in which the defect in the appointment was curable.

2.9 As Arnold J pointed out:

> *"If para 104 does not apply where an appointment has been made subject to a curable defect, then it is difficult to see in what circumstances it would ever apply."*

2.10 ***Euromaster Limited*** [2012] EWHC 2356 (Ch) was a company which carried on business manufacturing and installing structural steel work. It experienced financial difficulties in early 2012. Following advice, the directors resolved to appoint administrators. Paragraph 28(2) of Sch B1 provides that: an appointment of an administrator may not be made after the period of 10 business days beginning with the date on which the notice of intention to appoint is filed. On 18 May 2012, notice of appointment in Form 2.9B was filed with the court whereby the directors appointed the administrators. It was later noticed, during the course of a regulatory review, that the 18 May 2012 was the 11th business day after the filing of the notice of intention to appoint. Therefore, the issue arose whether the appointment of the administrators was a nullity or whether their appointment was irregular.

2.11 The question to be addressed was whether, if appointment was made in breach of para 28(2) the appointment either had no legal effect because it was a nullity or whether it was defective

[1] *"An act of the administrator of a company is valid in spite of a defect in his appointment or qualification."*

or irregular and the irregularity might be regarded as curable. Consideration was given to r 7.55[2] IR 1986

2.12 Norris J held that having regard to the purposes of para 28(2) and the consequences of non-compliance Parliament could not have intended that an inadvertent appointment one day outside the 10-day window incurably invalidated the appointment of administrators namely that the appointment should be a nullity rather than merely irregular. Once the conclusion was reached that the appointment of the administrators was not a nullity then the provisions of r 7.55 IR 1986 was engaged.

2.13 First, Parliament understood that there was a difference between the concept of 'nullity' and 'irregularity' and that the general policy of the law was to confine the concept of 'a nullity' fairly closely. Secondly, considerable weight should be given to the consideration that the object of introducing out-of-court appointments was to streamline the process of business rescue. It was highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator was automatically invalidated. Thirdly, Schedule B1 contained a mixture of provisions, some of which were naturally read as defining the circumstances in which the power to appoint arose and some of which were naturally read as prescribing procedural requirements that had to be fulfilled before the appointment was properly made. Fourthly, the mere fact that the non-compliance related to a time limit did not of itself compel the conclusion that the defect was fundamental and the purported act a nullity. Fifthly, the use of the words 'an appointment may not be made' did not compel the conclusion that para 28(2) imposed a fundamental requirement. Sixthly, although to treat non-compliance with the 10-day window as a nullity might not be the end of the day, because of the possibility of making an administration order with retrospective effect, that it was an artificial course to take. Moreover, a retrospective order did not have precisely the same effect as upholding the validity of the original appointment. Parliament should not be taken to have intended such artificiality.

2.14 He held that the appointment of the administrators was irregular but was not a nullity and cited HHJ Purle QC in *Re Assured Logistics Solutions Ltd* [2011] EWHC 3029 (Ch) where he held:

> *"In my judgment, however, it is wrong to regard failure to give a notice to those additionally prescribed as necessarily fatal to the appointment, thus treating the appointment as a nullity. The failure to give the requisite notice is, however, a material consideration when the court comes to exercise a discretion as to whether or not the court should, in the light of formal defects or irregularities, set an appointment aside, or remove administrators irregularly appointed. The court would then have to look at all the circumstances of the case, but the appointment, once completed by the filing of the appropriate form and documents, and then sealed by the court, would be good, and the onus would be on those challenging the appointment to demonstrate why it should be set aside . . . . IR 7.55 may also be relevant in this context . . . rule 7.55 has not hitherto proved to be of significant help in this area of the law, but the cases where it has been held to be inapplicable . . . may be characterised as cases where the defect in question has resulted in the appointments in question being treated as nullities. If a particular appointment is a nullity because some essential precondition has not been complied with then . . . no insolvency proceedings ever come into being and IR 7.55 can have no application. The position must in my judgment be different, however, in cases where the irregularity in question is not necessarily fatal to the appointment"*

2.15 He further held, contrary to his view in *Blights Builders Limited,* that an out of court appointment was "an insolvency proceeding" and:

[2] *'no insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that injustice cannot be remedied by any order of the court.'*

"In my judgment nothing in these cases prevents me from holding that in the case of an irregular (as opposed to a void) appointment of administrators such as that before me the position is governed by IR 7.55."

2.16 In ***Re BXL Services Ltd*** [2012] EWHC 1877 (Ch) HHJ Purle QC said:

"…the conflict between Virtualpurple and Msaada has been resolved at first instance by Arnold J in Re Ceart Risk Services who preferred the reasoning of Norris J in the former case over that of Warren J in the latter."

2.17 Whilst this may not be the last word on the matter it does, for the moment, reflect what appears to be the majority decision within the judiciary. The reality is that until there is a ruling by the Court of Appeal the uncertainty remains.

3. Disputed Debt Petitions

3.1 It is trite law that, if a petition debt is disputed on a substantial ground (i.e. not frivolous or without substance[3]) the Court will refuse to allow the petition to proceed[4]. Where the alleged debtor company disputes that any debt is owed at all, the petitioner's locus standi to present a petition as a creditor is called into question. Where it is the amount of the debt which is in dispute (not its existence), if the only evidence the petitioner has that the company is unable to pay its debts is that it has not paid the petition debt, this cannot be sufficient proof of insolvency for a winding up order to be made if liability to pay is properly disputed.

3.2 There have been a number of decisions in 2012 which have given some guidance as to how to determine when a dispute is substantial. This is a difficult exercise which involves navigating the proper course between failing to critically evaluate the defence raised because so much mud had been slung and (at the other end of the spectrum) embarking on a full "mini – trial" of the merits, which is not the role of the Companies Court.

3.3 On 21 December 2012 the Court of Appeal considered the extent to which the Court should go in order to determine whether a petition debt was genuinely disputed on substantial grounds in ***Tallington Lakes Ltd v Ancasta International Boat Sales Ltd*** [2012] EWCA Civ 1712. The appellant company and its controlling director appealed against an order striking out a winding-up petition issued against the respondent leisure company. The appellant's case was that the company had supplied a defective yacht and it sought to recover the cost of work incurred to remedy the faults and significant lost charter income. The company disputed the claim on the basis that it was entitled to rely on its terms and conditions of business which contained exclusion clauses, and in any event it disputed the defects alleged. The appellant submitted it was a consumer and liability for the defects had been admitted in correspondence.

3.5 At first instance a HHJ Pelling QC held that winding-up proceedings were not the place to determine whether the appellant could properly be regarded as a consumer and there were substantial grounds for saying no admissions had been made. The appellant challenged the judge's conclusions and argued that, even if the standard terms and conditions applied, there was no genuine dispute on substantial grounds as regards its claims and that the judge had not addressed each defect claimed in his judgment.

3.6 The Court of Appeal considered that this case should never have been the subject of a winding up petition. There was a substantial dispute as to whether the appellant was a consumer, particularly given its large claim for lost charter income. Further, if the company's terms and conditions did apply, there was a substantial dispute as to whether its liability for

[3] *Mann v Goldstein* [1968] 1 WLR 1091 per Ungoed- Thomas J at 1096

[4] "*It is the well established practice of this court to refuse to allow petitions for the winding up of companies brought at the suit of alleged creditors, whose debts are disputed bona fide on substantial grounds. It has been said in several reported cases that the procedure of a winding up petition is not an appropriate course by which to attempt to resolve such a dispute" - Re Laceworld Ltd* [1981] 1 WLR 133 per Slade J.

some of the defects might have ceased because of the appellant's non-compliance with certain conditions precedent to the warranty given.

3.7 The Court of Appeal complained about the extensive volume of evidence before the Court at first instance and re-iterated that the Companies Court was not the place for a detailed examination of claim and counterclaim. It cited *Re a Company No.00685 of 1996* [1997] BCC 830 in which Chadwick J referred to an earlier judgment of Oliver J in which he pointed out that that the court necessarily has to take a view whether on the evidence there really is substance in the dispute which is raised by the alleged debtor and cannot decline to determine the question, and commented that:

> "*I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible.*" (at p 836)

3.8 However, the Court of Appeal went on to say that:

> "*The practical issue is the extent to which the court must go in determining whether there is a genuine dispute on substantial grounds. The court must, as Oliver J put it, take a view whether, on the evidence, there really is substance in the dispute. It appears from Chadwick J's judgment that the facts before him were straightforward. It is not, however, practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side. Such a course will involve both delay in getting the issue ready for hearing and a potentially lengthy hearing. In this case, the evidence went through several rounds over a period of some six months. This time would have been better spent in getting a Part 7 claim under way. A lengthy hearing is likely to result in a wasteful duplication of court time. Petitioning creditors must take a realistic view of whether the company is likely to establish a genuine and substantial dispute. Where, as here, the petitioner insists on proceeding, the court is fully justified in taking the course sensibly adopted by the Judge in this case of concentrating on those points which the petitioner said were his strongest."* (at paragraph 41).

3.9 By contrast, a robust approach had been taken by Norris J in ***Angel Group Ltd v British Gas Trading Ltd*** [2012] EWHC 2702 (8 October 2012). Angel Group provided accommodation to asylum seekers in over 2,000 properties (at which it was responsible for gas and electricity), and also ran a private tenant letting operation in which the tenants were liable for utilities during their occupation. British Gas presented a winding up petition claiming that the sum of £619,733.60 was due under its running account with Angel Group.

3.10 Angel Group applied for an injunction restraining the proceedings, and argued, among other things, that no part of the sum claimed was indisputably due. It asserted that the sum claimed was part of a much wider dispute, that large sums had been paid but that the balance was disputed because British Gas had: billed on the basis of estimates when it had no entitlement to do so; failed to take account of changes in the occupation of various properties; billed for amounts that had already been paid; applied incorrect VAT rates; billed at rates other than the agreed tariff, applied standing charges with no entitlement to do so , failed to provide proper bills and would not explain their basis. Angel Group explained in its application that until the disputes were resolved, it was not known whether there would be any residual liability to British Gas or whether in fact a refund would be due, and in the circumstances, there was no way Angel Group could pay an undisputed part of the petition because there is no undisputed part.

3.11 Norris J summarised the relevant principles usefully at paragraph 22 of his judgment. These included that the Court will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined

without cross-examination and the court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment. He rejected Counsel for Angel Group's submission that the issues were manifestly too complicated, and the court should not embark on any inquiry but simply say it is obvious that there is a dispute and that everything should go off to be litigated in court since:

> "*No encouragement should be given to debtors to raise a cloud of objections on affidavit in the hope that the Companies Court will simply say that the issues are all too complicated: indeed anything that the law can do to discourage such behaviour should be done. So I shall consider the arguments, even though the application is made under the constraints of the vacation Applications List*."

3.12 Counsel for Angel Group further argued that unless the court could specify an exact sum which is due from Angel Group to BG then it must grant an injunction to restrain further proceeding on the petition: and that it could only reach that exact sum by undertaking a line by line examination of each of the invoices rendered by British Gas for the entire duration of the relationship between it and Angel Group, since only in this way would the exact sum and its precise constitution be established, and only in this way could Angel Group know how much it had to pay and what liabilities were thereby discharged. This argument was also rejected:

> "*On this application the question is whether or not there is an indisputable debt owed by Angel to British Gas sufficient to support a winding up petition. There may be uncertainty about the precise sum: but the court at this stage is not concerned to determine what could be proved in a winding up. It is concerned to see that the petitioner is indisputably a creditor in a sum exceeding the statutory minimum and so entitled to present a winding-up petition. It will be for the parties to agree or make their own respective judgements about what cannot be disputed and what can properly be disputed (and the court will be alert to identify every case where the winding up process is being used to exert pressure to pay a debt that is bona fide disputed on substantial grounds rather than to litigate it)."*

3.13 Finally Counsel submitted that it was not possible to point to a single penny of the amount claimed as indisputably due or free from some claim for set off under some other item on the running account. Norris J referred to the complaints made and indicated he adopted a two stage approach: First, to decide whether in principle there is a substantial dispute pursued in good faith in respect of each of the alleged deficiencies. Second, to assess whether in the light of that dispute and on the evidence alleged he could be confident that on the balance of probabilities there is a sum in excess of £750 due to British Gas.

3.14 Norris J considered the evidence that was filed and concluded that all the disputes were genuine but gave insufficient detail for the court to make a sensible allowance for the size of the dispute. These matters must have been within the knowledge of Angel Group (e.g. it must be able to identify alleges double payments and it alone knows the actual meter readings. And the changes in occupation of its properties). If the question was asked whether a debt exceeding £750 was owed by Angel Group to British Gas which was not bona fide disputed on substantial grounds, the answer would clearly be yes, even allowing for all the points taken by Angel Group since while there was a dispute as to the precise amount owed, *on the evidence* it seemed plainly to exceed £750 and to be of the order of £100,000. This case contains a salutary tale about the necessary detail required in the evidence to challenge the petitioner's locus standi. It must be shown not only that the resolution of the dispute *could* result in a reduction of the debt to below the £750 threshold, but that if the company's evidence is ultimately accepted, it *would*.

3.15 The Court has also had cause to consider the status of an adjudicator's award in ***Re Highgrove Homes Ltd*****,** unreported (6 November 2012). Mr and Mrs Towsey sought the compulsory winding-up of Highgrove Homes, the respondent company, on the basis that it

was indebted to them under an adjudicator's award. Mr and Mrs Towsey had not been paid for some plastering work they had carried out and referred a claim against Highgrove Homes to adjudication. Highgrove Homes defended the claim on the basis that it was not the contracting party and the adjudicator therefore lacked jurisdiction.

3.16 The adjudicator had given what he described as a non-binding decision on the question of jurisdiction, finding in favour of the Towseys, then issued his substantive decision on the claim in their favour. The Towseys contended that the adjudicator has determined what was owed and by whom and that his decision was binding and presented a winding up petition. Highgrove Homes submitted there was a substantial dispute that the debt was due.

3.17 The Court indicated that, but for the existence of the adjudicator's award, there could be no question that a winding up order could be made since there was a real dispute on the evidence about the identity of the party who contracted with the Towseys which would require oral evidence to resolve.

3.18 As to the effect of the adjudication: an adjudicator's decision, even if wrong, was usually temporarily binding and had to be complied with until the dispute was finally determined by the Court, an arbitrator or by agreement (see section 108(3) of the Housing Grants, Construction and Regeneration Act 1996). If there was a challenge to the enforceability of the decision, an enforcement order could be sought by a process akin to summary judgment in the Technology and Construction Court (TCC). The Court made it clear that it was not appropriate or necessary in the instant case to seek to reach a definitive view as to the status of an adjudicator's decision as a matter of general proposition. However, in this case, the adjudicator's decision on jurisdiction was expressed by him to be non-binding, and it followed that his substantive decision could not be regarded as binding either, since it necessarily took its force from his non-binding decision as to jurisdiction. Further, the existence of the TCC procedure for the enforcement of an adjudicator's decision appeared to constitute a filtering process so that such a decision was subject to review before being turned into an enforceable judgment or order. Where there had been no enforcement proceedings in the TCC, the court had to apply the filter that otherwise would be applied by the TCC. It does not do so by exercising the function that the TCC would exercise, but by exercising its discretion in accordance with well establish principles in this jurisdiction. In by passing the TCC filter process the petitioners had assumed the risks attendant on invoking this jurisdiction. In the instant case, there was a bona fide defence of substance as to jurisdiction in relation to a debt that was not a judgment debt and, accordingly, it would not be just and equitable to make a winding-up order. The lesson appears to be that it is advisable to get an enforcement order from the TCC before bringing the petition on the back of an adjudicator's decision.

3.19 Finally a brief mention of the costs of these disputes. The usual practice of the Court is to award costs in favour of a company which is successful in defeating a winding up petition presented against it, even where the company only raises its defence to the petition late eg *Re Fernforest Limited* [1991] BCC 680 Warner J said (At 681-2):

> *"In my view as a matter of general approach to this type of case a claimant against a company who chooses to take the short cut of a statutory demand followed by a winding-up petition instead of the procedure of first issuing a writ to establish his claim, does so at his own risk that the claim will be disputed and that the petition will be dismissed or will have to be abandoned. It is no part of the duty of a person against whom a claim is made to formulate in detail, before proceedings are taken against him to enforce the claim, what his defence to those proceedings may be. Instructing solicitors to do that can be costly and the costs of doing it if as a result proceedings do not eventuate will be irrecoverable. That is a consideration which to my mind is material. Another material consideration is that experience in this court shows that if in every case of the withdrawal or dismissal of a winding-up petition the court is to go into the whole history of the case to assess whose conduct at which stage was reasonable and whose unreasonable, an enormous amount of the court's time and*

consequent costs will be spent on disputes of this kind. I think the principle should be adhered to that, unless there be exceptional circumstances, a petitioner whose petition fails on the ground that the debt is bona fide disputed on substantial grounds should pay the costs of that failure."

3.20 In ***Re Sykes & Sons Ltd*** [2012] EWHC 1005 (Ch) (18 April 2012) the Court took a different approach where the Company only produced its defence very late in the day, leading to a dismissal of the petition. Richard Snowden QC (sitting as a deputy judge of the High Court) ordered that determination of the costs (other than those associated with the presentation and service of the petition itself, which had to be paid by the Company since part of the debt over £750 was undisputed and paid after presentation) should be adjourned until after the determination of the proposed Part 7/ arbitration proceedings. He held that:

3.20.1 There was considerable merit in adhering to the principle that, save in exceptional circumstances, a petitioner whose petition failed on the basis that the debt was genuinely disputed on substantial grounds should pay the costs of that failure.

3.20.2 However, in determining whether there were exceptional circumstances to justify a different order, the Court was entitled to take account of the parties communications prior to presentation of the petition.

3.20.3 In the instant case the Petition had given the company every reasonable opportunity to set out the basis for the dispute, the company had not done so in any meaningful way prior to the presentation of the petition. The fact that the Company had given no meaningful account of its defence prior to presentation of the petition and then belatedly produced documents which could, if authentic, support its case amounted to exceptional circumstances to support departure for the usual rule.

3.20.4 The most appropriate course to achieve justice was for the question of costs to be adjourned (with liberty to apply) to await the outcome of the substantive proceedings, in which the company's evidence and the authenticity of its documents (and what the Petitioner should have known about them before issuing the petition) could be tested.

4. A selection of other cases of interest from 2012:

Re Corvin Construction Ltd**,** unreported **(**Alison Foster QC**,** 21 December 2012)

The Court exercised its discretion under IA 1986 s 124 A (winding up on grounds of public interest) to wind up 6 linked construction companies.

The Secretary of State brought petitions against 6 linked construction companies under IA 1986 s 124A. Two of the petitions were opposed on the grounds that the evidence presented by the Secretary of State decrying the respondent companies' business practices was anecdotal and did not constitute a fair view, that the false accounts were the result of a mistake and not deliberate deception and that undertakings as to future conduct were sufficient to protect the public interest in circumstances where the companies had ceased to trade and had or were attempting to correct the accounts.

The Court held that there was cogent evidence demonstrating that the respondent companies (1) lacked commercial probity (in the form of complaints from trading standards, the Federation of Master Builders and individuals and businesses who had dealings with the respondents), (2) had failed to file full and true accounts, (3) had allowed an un-discharged bankrupt to operate as a de facto director, and (importantly) (4) had entirely failed to cooperate with an Insolvency Service investigation which was further evidence of an absence of commercial probity and honesty and scant regard for their commercial or legal obligations. Part of the Court's function in exercising its jurisdiction to wind up companies in the public interest was to assist in the maintenance of minimum standards of commercial behaviour and of probity and to protect the public from inevitable loss, whether or not deriving from unlawful activity. Judged against the respondents' past dealings, it could have no confidence that the undertakings they offered would be a sufficient safeguard to the public and the public interest could only properly be served if the companies were wound up.

TAG Capital Ventures Ltd v Potter **[**2012] EWHC 3323 (Ch) (Warren J, 23 November 2012)

The Court considered whether a company's action against a former director should be struck out for abuse of process where there had been some delay and the official receiver had not progressed the claim.

The provisional liquidators of a company, T, brought proceedings P, a director of T, for breach of statutory/ fiduciary duty and certain equitable remedies and obtained a freezing injunction against him. T was then wound up upon a creditors petition which had been opposed by P. On 28 June 2012, very shortly after the winding up order had been made, P's solicitor contacted the Official Receiver to ask whether T was likely to pursue the action and the Official Receiver replied on October 4 to state he was "not in a position to continue" the action. P therefore applied for the action to be struck out and the freezing order discharged. In the meantime a liquidator (O) was appointed.

P argued that, in the email of October 4, T had demonstrated an intention not to proceed with the action, and that it would be an abuse to allow it to continue, since the intention not to proceed was communicated by the Official Receiver when he was in control of T, and T could not change its mind now that O was in control.

The Court refused the application. There was no evidence at all prior to the email of October 4 to suggest that T, through the Official Receiver, did not intend to pursue the proceedings. Such evidence as there was suggested that until that point, the Official Receiver had made no decision at all. It could not be said that the action was being kept on foot with no intention of continuing it to trial. It was doubtful whether the email of October 4 indicated an intention on T's part not to pursue the action to trial. The email spoke only of the Official Receiver not being in a position to proceed with the action; it left open the possibility that someone else in control of T might be in a position to continue with it. In any event, even if abuse was established, it was abuse at the very low end of the scale, and it would be quite wrong to visit it with the sanction of strike-out. Taking into account the periods required for the Official Receiver to consider his position and for the appointment of a private liquidator, the delay

for which T could be said to be responsible was, at most, two months and such a delay should not be visited with the loss of the injunction.
Re Bowen Travel Ltd [2012] EWHC 3405 (Ch) (Judge Simon Barker QC, 08 November 2012)

The Court considered the evidence required to be presented on an application by directors for an administration order.

The applicant directors of B, a travel company, applied for an administration order pursuant to Schedule B1 Pt 2 para.13 IA 1986 . The application was made on the basis that it was urgent because of, among other things, the recent presentation by T, a major creditor, of a winding-up petition and the freezing of B's bank account.

The Court emphasised that, when it was asked to exercise its powers by making an administration order, it was essential that the evidence presented to the court was reliable. Implicit in the noun "reliable" in this context was not only that it was accurate evidence and true insofar as it was factual but also that (1) a clear account was given of all potentially relevant facts and circumstances (2) where explanations were given or judgments, estimates or opinions stated, they should be supported by the underlying material, and not contradicted by it and (3) they should also be credible in the sense of being realistically likely to be true. This should be neither onerous nor unreasonable, since it required no more than that an applicant, who, as a director, should know what had been going on at the company, told the court the informed truth and did not attempt to mislead, including by omission.

Here, the evidence appeared to be contradicted by underlying documents in material respects. Where, as also occurred in this case, important matters were not addressed in the evidence, one likely consequence would be a want of confidence in the evidence; that, in turn, was likely to cast a shadow over reliance on the applicants' witness evidence as the basis for determining the outcome of the application. Further, T had expressed concern over recent transactions which were said to involve land and vehicles being transferred, in part by B, at suspected undervalues to or for the benefit of one of B's directors.

The appropriate course was to make a compulsory winding-up order. For years, B's solvency had been propped up by the existence of intra-group debtors which did not appear to have been subjected to anything approaching adequate scrutiny by those responsible for the accounts. Liquidation was inevitable, and this was a case in which the sooner the voice of the creditors was heard the better. A particular advantage of a compulsory winding-up was that the Official Receiver had a statutory duty to investigate B's failure and its business, dealings and affairs; he could make such report to the court as he thought fit. In an appropriate case, an investigation might provide a very important service to the creditors, and a report to the court might benefit the creditors and the wider public interest; this was such a case.

Re Portsmouth City Football Club Ltd (In Liquidation) [2012] EWHC 3088 (Ch); **(**Morgan J**,** 02 November 2012)

The Court considered the status of the fees owed to a solicitor acting for a company in relation to a winding up petition which was subsequently suspended upon the appointment of administrators. It concluded they were not a disbursement under the Insolvency Rules 1986 r.2.67(1)(f) and were not to be treated as such under the Lundy Granite principle. However, the sums were determined to be an expense of liquidation pursuant to r.4.218(3)(h).

P (a company) had instructed N in connection with a winding-up petition. N ceased to act less than two months later when their instructions were withdrawn. Administrators were appointed with the effect that the winding-up petition was automatically suspended under Schedule B1 Pt 6 para.40(1)(b) IA 1986. The administrators' proposals for a CVA were approved and they acted as the supervisors of the CVA. The administration was subsequently brought to an end on the administrators' application under Sch.B1 para.79. Liquidators were appointed.

N sought alleged unpaid fees and disbursements from the company. The issues were whether the fees and disbursements should be determined to be an expense of the (i) administration; (ii) CVA; (iii) liquidation. N submitted that under the Senior Courts Act 1981 s.51, the court could order that the

company's costs in relation to the winding-up petition, including its unpaid fees and disbursements, should be paid by the administrators, and that if the court made such an order, the payment of the fees would be "necessary disbursements" within the Insolvency Rules 1986 r.2.67(1)(f) and so would be expenses of the administration.

The Court considered that an order that the company or the administrators should pay the fees would not make any such payment a disbursement within r.2.67(1)(f), and certainly not a disbursement in N's favour. N had not incurred any costs and it was not open to the court under s.51 to order that the company or the administrators pay N's fees. In substance, N were seeking an order that the company's costs in relation to the fees and disbursements be added to the permissible list of administration expenses, but s.51 did not confer power to make such an order. The fees were not to be treated as if they were within r.2.67 under the *Lundy Granite* principle. Before the CVA, the company was in administration and so r.1.23(2) of the 1986 Rules applied. In view of the court's conclusions on administration expenses, N's fees were not expenses properly incurred and payable under the 1986 Act or Rules, and it followed that there was no relevant sum due to the administrators which the supervisors of the CVA were obliged to discharge under r.1.23. It was appropriate to adopt the same general approach in principle to the costs of a company unsuccessfully applying to strike out a petition as to the costs of a company unsuccessfully opposing a petition. In view of the fact that the administrators did not oppose a determination that the company's costs should be allowed as an expense of the liquidation, and that the liquidators had stated that they did not oppose that result, it was appropriate to allow the company's costs of appearing on the petition, represented by whatever their liability was to pay N's fees for their work in that respect, as an expense pursuant to r.4.218(3)(h) of the 1986 Rules.

Re Collier International UK Plc (In Administration) [2012] EWHC 2942 (Ch) (David Richards J, 24 October 2012)

The court had jurisdiction to grant retrospective permission for the commencement of legal proceedings in insolvency cases where prior permission was required by IA, s.285(3) or Sch.B1 para.43(6).

The applicants (B) applied under Schedule B1 Pt 6 para.43(6) IA 1986 for retrospective permission to institute legal proceedings against the first respondent, a company in administration (C). The application was not opposed by C's administrators. The issue was whether the court had jurisdiction to grant retrospective permission to issue proceedings.
The Court considered the contrasting views which had emerged in the caselaw. On the one hand, in *Re Saunders (A Bankrupt)* [1997] Ch. 60, the Court did not consider that proceedings commenced without permission were a nullity, instead endorsing the practice of giving leave for their continuation where appropriate. However, the High Court in *Davenham Trust Plc v CV Distribution (UK) Ltd* [2007] Ch. 150 had relied on the unqualified language of the legislative requirement for prior permission and concluded that *Saunders* had been wrongly decided. Nonetheless, *Saunders* had been preferred in a series of subsequent decisions . Although a statutory requirement for prior permission appeared in a number of different contexts in legislation, none of the relevant provisions indicated whether a failure to obtain such permission could be cured retrospectively. Decisions in other contexts required the court to look beyond the language of the requirement and to consider its context, purpose, and any consequences of a decision as to its effect, with a general pre-disposition that the lack of prior permission should not render the proceedings a nullity.

There was little to support a conclusion that proceedings brought without the permission required by the IA 1986 were a nullity, and much to support the contrary conclusion. In an insolvency context the purpose of the requirement for prior permission was to ensure that when a winding-up order had been made by the court, any proceedings having any bearing on the winding up remained under that court's supervision and control. Given that purpose, it was hard to see why the court should not be permitted to grant retrospective permission, where appropriate. Furthermore, there was no convincing reason why an administrator should not be permitted to grant retrospective consent.

The Court concluded that *Saunders* had been correctly decided and retrospective permission could be given for the commencement of proceedings, whether under s.130(2), s.285(3) or Sch.B1

para.43(6) of the 1986 Act. *Wilson* and *Davenham Trust* were not followed. Jurisdiction having been established, the court granted retrospective permission.

Re Globespan Airways Ltd (In Liquidation) [2012] 4 All E.R. 1124 (Court of Appeal, 24 August 2012)

Where a notice under para 83 Sched B1 of IA 1986 ("moving from administration to CVL") is both sent to and received by the Registrar before the end of an administration but not actually registered until after the date the administration would otherwise have ended, the conversion to CVL takes place only when the notice is actually registered. No "gap" will arise between administration and liquidation because the administration will usually be automatically extended until the conversion to CVL is complete.

The administration period of a company was due to end on 16 December 2010. On 14 December 2010, the three joint administrators hand-delivered to the Registrar of Companies a notice (the First Notice) under Paragraph 83 of Schedule B1 in which they proposed two of them be appointed liquidators in the CVL. The three administrators provided their full names and addresses in section (a) of the prescribed form (Form 2.34B), but in section (e) they included only the names of the two proposed liquidators, without repeating their addresses. On 16 December 2010, the Registrar rejected the First Notice as incomplete because the addresses of the proposed liquidators had been omitted (albeit it appeared higher up on the form). A second, good, notice was sent on 6 January 2011 and wrongly rejected by the Registrar. A third notice, identical to the second, was sent and, on 4 February 2011, registered, with the records at Companies House purporting to show that the company's administration had ended and voluntary liquidation had commenced on that day. The former administrators sought guidance from the Court as to the interpretation of Paragraph 83 in these circumstances.

At first instance Briggs J had took a purposive approach and decided that paragraph 83(4) should be interpreted as requiring registration of the notice with effect from the day of receipt, so the company went into CVL on the date the Registrar received the notice and when administrative registration took place, the records would be backdated to that date The Registrar of Companies appealed.

The Court of Appeal reversed the decision, holding that a conversion notice took effect when it was registered by the registrar. It gave 7 reasons: (1) this was the natural meaning of para.83(4). (2) "register" had to bear the same meaning in para.83(4) as in para.83(6). (3) para.83 should be interpreted with a view to achieving its statutory objectives where the wording permitted it, which included achieving a streamlined conversion from administration to a CVL. (4) the ordinary interpretation of para.83(4) avoided a gap between a liquidator's appointment and publication of that appointment on a company's file. (5) the date of registration would almost certainly always be subsequent to the date of receipt and that underscored the need to interpret para.83 in a way that treated those dates differently. (6) prior to the registration of a conversion notice, a registrar would check the information in some way, and the court should prefer an interpretation that allowed that checking to happen prior to conversion. (7) registration normally only took around three days and there was no practical difficulty which warranted giving the words in para.83(6) a different meaning from their natural meaning. An administrator's term of office was by implication from the words in para.83(6) extended by filing a conversion notice from the date on which it would otherwise expire by effluxion of time until para.83(6) came into effect upon registration of the conversion notice. Like para.76(1), that automatic extension was subject to paras 87 to 89. Thus, the term of office would end if an administrator resigned, died, was removed from office by court or ceased to be qualified before the conversion date occurred.

Applying these principles to the facts, registration of the third notice was not a valid conversion of the first notice as the administrator's term of office had been terminated by the date it was filed and executed. However, since the registrar had a statutory obligation to register the valid first conversion notice, the court should, in order to give effect to Parliament's intention, treat his registration of the third notice as amounting to effective registration of the first notice. Accordingly, registration occurred on February 4, 2011.

Re BTR (UK) Ltd [2012] EWHC 2398 (Ch) (Behrens J, 23 August 2012)

Where an administrator's original proposals were rejected by creditors at an initial creditors' meeting, the administrator was bound to apply to the court under IA 1986 Schedule B1 para.55 for directions as to the appropriate course of action. The Court had the power, to be exercised cautiously and in an exceptional case to make a winding up order of its own motion.

The applicant unsecured creditors (X) applied for an order compelling the respondent administrator (S) to seek a compulsory winding-up order of the debtor company (B) which was in administration. S's proposals, which envisaged that there would be insufficient funds to pay the unsecured creditors, were rejected by over 50 per cent of B's creditors, who voted for a resolution requiring S to petition for the compulsory winding-up of B. S declined to apply for a compulsory winding-up order on the basis that he had insufficient funds , and he further declined to apply to the court for directions under the IA 1986 Sch.B1 para.55. X submitted that an administrator was bound to apply to the court for directions under *Sch.B1 para.55* where an administrator's proposals were rejected.

The Court agreed that the language of paragraph 55(2) necessarily implied that if the administrator's proposals were rejected, there must be a hearing. An application must ordinarily be made by the administrator and if it is not, there is no reason why it cannot be made by a creditor. Furthermore, whilst the Judge had power to direct the administrator to present a winding up petition or to adjourn and give permission for the creditors to present a petition. , he also held that the Court had power (to be exercised cautiously and in an exceptional case) to make a winding up order under paragraph 55(2)(e) of Schedule B1 of its own motion and it was appropriate to do so in this case to avoid unnecessary further costs being incurred.

Re St John Spencer Estates and Development Ltd [2012] EWHC 2317 (Ch) (Robert Harn QC, 07 August 2012)

The court granted an administration order in respect of a company following an application made under the little used Sch.B1 Pt 5 para.35 IA 1986 *by a bank which held a floating charge over the company's assets*

The bank (B) had granted the company (S) a facility in exchange for the company providing security in the form of a debenture over its assets and B subsequently granted various additional facilities by way of supplementary facility letters. Disputes arose over the basis on which the bank had originally agreed to make the facilities available: S asserted that the bank had reassured it that it would be able to provide the facilities on a "risk funding basis", whereas the bank denied that it had ever made such representations. S subsequently entered into a CVA.

B made formal demand for payment, which was not forthcoming, and subsequently applied to the court under Sch.B1 para.35 to the 1986 Act for administrators to be appointed (under the court could make an administration order only if it was satisfied that the applicant could appoint an administrator under Sch.B1 para.14). S argued that B could not make an appointment under Sch.B1 para.14 for various reasons, including that S's indebtedness to B was discharged by the CVA; and further that B's application should be refused because the company had substantial cross-claims against the bank for negligent misrepresentation and breach of contract and it should be allowed to litigate them.

The deputy judge made the administration order. The company's indebtedness to the bank could not have been discharged by the CVA given the statutory limitation inherent in a CVA in relation to secured creditors. The claim based on negligent misrepresentation was extremely weak: the basis upon which it was alleged that the bank owed the company a duty of care was unclear, and evidence of the misrepresentations was lacking. It was unclear why the alleged misrepresentations were negligent, and there was no explanation as to how such misrepresentations caused the loss alleged. Further, the company had failed to establish any breach of contract by the bank. Even if the company's claims of negligent misrepresentation and breach of contract had been stronger, the no-set off clause meant that they would not prevent the bank from being a creditor who was entitled to appoint an administrator under Sch.B1 para.14. Accordingly, Sch.B1 para.35 was satisfied and it was appropriate for the court to exercise its discretion to grant the administration order sought.

Bilta (UK) Ltd (In Liquidation) v Nazir [2012] EWHC 2163 (Ch) (Sir Andrew Morritt 30 July 2012)

A claim by a company in liquidation, which had been the vehicle for a VAT fraud, against its former directors and overseas suppliers alleged to have been involved in the fraud was not barred by the principle of ex turpi causa and the decision in Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm) [2009] UKHL 39, [2009] 1 A.C. 1391, since that decision was not applicable to claims based on a breach of duty the scope of which encompassed persons or interests other than the fraudsters in corporate form.

The applicants, a Swiss company (J) and its sole director (D), applied for the claim against them by an English company (B) and its liquidators for conspiracy and fraudulent trading to be summarily dismissed on the grounds that it was precluded by the maxim ex turpi causa non oritur actio, it had to fail so far as it was brought under s.213 because that section had no extraterritorial effect and it constituted impermissible enforcement of a foreign revenue debt. J and D submitted that the claim was barred by the principle of ex turpi causa and the decision in Stone & Rolls Ltd (in liquidation) v Moore Stephens (A Firm) [2009] UKHL 39, [2009] 1 A.C. 1391 since the frauds of B's controllers were to be attributed to it and it relied on those frauds in the claim against them. B argued that it was the victim of the fraud and not the villain, and that the duty breached was that of the directors, and not of the auditors as in *Stone & Rolls* , which extended in the circumstances to the interests of creditors.
The Court agreed with B. In circumstances where a company was or was likely to become insolvent the requirement to consider and act in the interests of creditors was imposed on the directors. As B never had any assets of its own of any substance, but entered into commitments of considerable value, that duty was operative on its directors at all material times. The conspiracy alleged subjected the directors to the duty imposed by the Companies Act 2006 s.172(3) and involved its infringement by them with, as alleged, the active, knowing and fraudulent participation of J and D, amongst others. Thus the present and future creditors of B were within the scope of the directors' duty. J and D were one step removed from the directors, but if the defence of ex turpi causa was not available to the directors it could not be available to those who fraudulently conspired with them to breach their duties. The ratio decidendi of *Stone & Rolls* was not applicable to cases in which the claim was based on a breach of duty the scope of which encompassed persons or interests other than the fraudsters in corporate form, *Stone & Rolls* distinguished. Therefore B's claim against J and D should not be dismissed on the ground of ex turpi causa. Section .213 IA 1986 did have extraterritorial effect. The section conferred a discretion on the court and was directed to recovering assets, wherever they might be, or compensation for the benefit of all the creditors of the company in liquidation whether resident in the United Kingdom or elsewhere . Further, the claim was not the enforcement directly or indirectly of a revenue debt and no question of comity arose.

Re UK Steelfixers Ltd *[*2012] EWHC 2409 (Ch) (HHJ Purle QC, 23 July 2012)

A court declined to make an administration order in respect of a company, despite having power to do so, as the validity of dispositions of property made after presentation of a winding-up petition against it required consideration under the IA 1986 s.127.

The court was required to determine an application for an administration order in respect of a company (U). The Revenue and Customs had presented a winding-up petition against U. Knowing that U's bank account was about to be frozen, U's director had arranged for an employee's company to receive payment from a customer so that U could continue trading. It was proposed that U's business would be sold to the employee's company

HHJ Purle QC refused the application. While the Court had power to make an administration order since U was (on the evidence) insolvent and there was evidence that the result of an administration would be better than a liquidation, the arrangement for switching U's funds to the employee's company was at best a disposition of U's assets that was potentially void under IA if U were wound up (alternatively, the arrangement could be seen as pre-empting the court's decision). Therefore the Court exercised its discretion to refuse to make an administration order. Instead a winding up order was made so that the post-petition transactions could be considered against the background of s.127.

Wedgwood Museum Trust Ltd (in admin) [2012] EWHC 1974 (Ch) (HHJ Purle QC, 19 July 2012)

The court was required to determine the costs arising out of an application by administrators of a company (W) for directions as to whether W's assets were subject to a charitable trust. The issues were the (i) costs entitlement of the Attorney General; (ii) costs entitlement of the administrators; (iii) basis on which costs were to be determined.

Further to the substantive judgment of the court, in which the administrators of the museum company applied for directions as to whether an art collection was held in a separate charitable trust, the court ruled that the collection was part of the assets of the museum company. Consequently, the administrators' application had been both necessary and appropriate. The defendant pension plan trustees and the Pension Protection Fund had succeeded in their submissions, whereas the defendant Attorney General had failed. The issue of costs fell to be determined, with the pension plan trustees and Pension Protection Fund seeking their costs against the Attorney General. Further, it was submitted that, although the administrators' costs of the application generally were justified, their briefing of leading counsel had been inappropriate and his costs of attendance at one day of a three day trial should be disallowed.

It was held that in the facts, it was an over-simplification to regard the Attorney General as having made a hostile claim to the company's assets; he had been an involuntary defendant joined as the proper party to represent the public interest. He had not made any adverse claim before the administrators had chosen to seek the court's directions. In those circumstances, it was not appropriate to order the Attorney General, as losing party, to pay any part of the costs. It was established law that the Attorney General would ordinarily be entitled to his costs out of the fund in question and that position was no different in the case of an insolvent company. It was a matter of common occurrence for the costs of the parties to applications for directions by office holders to be paid out of the assets, even in the case of an unsuccessful party, so long as that party had acted properly. Different considerations might apply where the unsuccessful party had in substance conducted the application as ordinary adversarial litigation, or had provoked the application for directions by making an adverse claim, but that was not so in the instant case. Given the Attorney General's participation in the instant proceedings as a necessary party representing the public interest it was appropriate that his costs should be costs and expenses of the administration. Consequently, it would not be right to order the Attorney General to pay the costs of the pension plan trustees and the Pension Protection Fund. Their costs would also come from the museum company's.

HHJ Purle QC further held that it had clearly been inappropriate for the administrators to have briefed leading counsel just in case the two other leading counsel had, between them, proved deficient. Nor had it become appropriate because the precise arguments to be put by the Attorney General had not been known, and would not be known until delivery of skeleton arguments. It was not the role of administrators to supervise the Attorney General in his role of representing charities in the public interest. Once the Attorney General had decided to participate in the hearing and had briefed leading counsel, the administrators should have recognised that there was no longer any need for them to appear at the hearing, certainly not be leading counsel. The administrators' costs of briefing leading counsel would be disallowed.

Re Reynolds DIY Stores Ltd (No.2) Chancery Division, unreported (Alan Steinfeld QC, 12 June 2012)

An application to set aside an alleged voidable preference payment under the IA 1986 s.239 was refused where the applicant liquidators had failed to present evidence that the company had been unable to pay its debts at the time the payment was made.

The applicants (L), liquidators of an insolvent company, applied to set aside an alleged voidable preference payment that the company had made to its former director, the respondent (R). Upon discovering that they lacked sufficient evidence to support their application, L applied for an adjournment. R had caused the company to pay him £100,000 within the two years prior to the company entering into liquidation. R admitted that he withdrew the money from the company's

account but denied that it was the company's money, stating that he had paid the money into the account and that the company had been holding the money in trust for him.
At the hearing L was represented but R did not appear, nonetheless the applications were refused. Alan Steinfeld QC (sitting as a judge of the High Court) held that there was no doubt that the s.239(4) IA 1986 applied: by making the payment the company had put R into a position that, if the company went into liquidation, was better than that which he would have been in had the payment not been made. As R was a director of the company, the burden was on him, under s.239(6) IA 1986, to establish that when the company made the payment, it did not intend to put him in such an improved position. There was nothing in the evidence to substantiate R's assertion that the money had been held in trust for him. The money came out of the company's ordinary bank account and no attempt had been made to segregate it from the rest of the funds. It followed that the money was paid to him to put him in an improved position.

However, under s.240(2) IA 1986, it was L's burden to establish that, at the time the payment was made, the company was unable to pay its debts or became unable to do so as a consequence of the payment. L relied on the cash-flow test under s.123(1)(e) IA 1986, alleging that the payment had rendered the company unable to pay its debts as they fell due. But they provided no evidence to support their allegation, or to rebut R's statement that the company had been able to continue to pay its debts after the payment had been made, as he had left enough money in the account for the company to meet its financial commitments at the time. On R's unchallenged evidence, therefore, the cash-flow test was not satisfied as of the date the payment was made. The court could not conclude that L had shown that the company had become unable to pay its debts as a result of the payment.

L then sought an adjournment to allow them to supplement the evidence to satisfy the above-mentioned deficiencies. However they could not come to trial, see that they did not have the evidence they needed, and then ask the court for an adjournment. It was not a proper exercise of the court's case-management powers to give L two bites at the cherry. They should have had the evidence necessary to support their case from the outset.

Healthcare Management Services Ltd v Caremark Properties Ltd [2012] EWHC 1693 (Ch) (Morgan J, 29 May 2012)

Where creditors to an insolvent company could not agree on the administrators to be appointed, and there was no basis to choose between the rival candidates, the relative value of the debts owed to the creditors was used as a tie-breaker and the nominees of the creditor with the larger value of debt were appointed.

Singla v Stockler [2012] EWHC 1176 (Ch); [2012] B.P.I.R. (Briggs, J, 10 May 2012)

In the course of litigation conducted by the liquidator of a company and funded by the company's major creditor, there had been such a high degree of co-operation and disclosure of confidential information between the two as to give rise to a strong inference that the ordinary duty of confidence owed to the liquidator by his solicitor had been displaced. The solicitor had not acquired information that had to be kept confidential from the creditor and he could therefore act for the creditor in subsequent proceedings against the liquidator.

The appellant (S) appealed against the striking out of his claim for an injunction against the respondent firm of solicitors (B). S, an insolvency practitioner, had instructed B to act for him in litigation that he had successfully concluded as the liquidator of a company (X). S's conduct of those proceedings had been funded by one of X's major creditors (Y). Throughout the proceedings, B had kept Y informed of progress. In doing so it had, with S's knowledge, disclosed to Y material that would otherwise have been confidential to S. After the close of the proceedings, a third party began an action in the United States against S and X. For a short time before S instructed US attorneys, B gave him legal advice and assistance falling short of a formal retainer. During that time, S, B and Y communicated on the proceedings, which S ultimately compromised on terms which Y regarded as involving misfeasance against X. Y therefore began a misfeasance application in the liquidation, retaining B to act for it. S sought injunctions restraining B from acting for Y in connection with the liquidation, and restraining it from disclosing to Y communications it had received from him. His claim

was struck out on the basis that he had no arguable case against B for breach of confidence. The master found that in both the English and the US proceedings there had been such a degree of common interest between S and Y, and such a degree of sharing of what would otherwise have been confidential material, that B could not have acquired any information that it was obliged to keep confidential from Y. B submitted that any obligation of confidence it might have owed to S had been disapplied by reason of the common interest between S and Y in the English and US proceedings.

Appeal dismissed. In order to succeed, S had to show that B was in possession of information that was confidential to him, that he had not consented to its disclosure, and that it might be relevant to Y's misfeasance application. Where a solicitor acted on a joint retainer by two or more clients in relation to the same matter, he would generally be under no obligation to keep his communications with one client confidential from the other. By analogy, there could be situations in which there was such a community of interest between a litigant and a third party that the litigant's solicitor was not obliged to keep information arising in the performance of his retainer confidential from the third party. That release from the ordinary obligation of confidence could arise expressly, or could be implied by reason of the circumstances or the parties' conduct.

While the court would be slow to deprive someone such as S of the ordinary expectation of confidence, there could be circumstances in which the parties' mutual conduct was such that the only rational explanation was that the ordinary obligation of confidence had been displaced as between the solicitor and the third party, albeit remaining in place as between the solicitor and the rest of the world. The court therefore had to ask itself whether the litigant's expectation of confidentiality had been displaced by mutual conduct, In this case, S had no prospect of establishing that B possessed confidential information that should not be disclosed to Y, or that there was any real basis for restraining B from acting for Y in the misfeasance application. While the close correlation between a liquidator's duties in pursuit of litigation and the interests of a creditor funding that litigation was not of itself sufficient to displace the obligation of confidence, it was evident that there had been a high degree of co-operation between S, B and Y, and S had appeared content for confidential material to be disclosed to Y. That gave rise to the strongest inference that the ordinary duty of confidence had been displaced by S and Y's mutual conduct. Moreover, S had no prospect of persuading a judge at trial not to draw such an inference.

Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd (In Administration) [2012] 4 All E.R. 894 (Judge Pelling QC, 28 March 2012)

Where rent was payable in advance and fell due prior to liquidation or administration, it was provable but not payable as a liquidation or administration expense. A landlord was not entitled to rent due from tenants prior to the commencement of administration as administration expenses.

The applicant landlords (L) applied for orders requiring the administrators (Y) of the respondent tenants (T) to pay pre-administration rents in full as administration expenses. T, as part of a company group which had been one of the largest nightclub operators in the United Kingdom, had leased four properties from L for that purpose. Rent was payable quarterly in advance on each quarter day. At the time of Y's appointment T had fallen into arrears. L demanded payment from Y of sums allegedly due before Y's appointment. Y maintained that any rent due prior to the appointment of Y would constitute a pre-appointment debt and would not be payable as part of the expenses of the administration. Y agreed to sell the majority of T's business and assets to a buyer (R). R agreed to seek L's consent to the assignment of the leases to R. The issue was whether Y were obliged to pay the accrued rent as an expense of the administration even though it fell due before their appointment.

The Court held that where rent was payable in advance and fell due for payment prior to the commencement of liquidation or administration, then it was provable but not payable as a liquidation or administration expense even though the liquidator or administrator retained the property for the purposes of the liquidation or administration for the whole or part of the period for which the payment in advance was payable. Where rent payable in advance became due during a period when the liquidator or administrator was retaining the property for the purposes of the liquidation or administration, then the whole sum was payable as a liquidation or administration expense even though the liquidator or administrator gave permission to forfeit or vacated before expiry of the period for which the payment in advance was due. Where rent was payable in arrears and accrued due

during a period when the administrator or liquidator was retaining property for the purposes of the liquidation or administration, the liquidator or administrator would be liable to pay as an administration or liquidation expense at least the rent that accrued from day to day for so long as he retained possession of the premises for the purposes of the liquidation or administration.

Chris Brockman
Holly Doyle
Guildhall Chambers
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