Neutral Citation Number: [2019] EWHC 540 (Ch)

Case Number: CR-2018-007097

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INSOLVENCY AND COMPANIES LIST(ChD)

IN THE MATTER OF CORE VCT PLC (IN LIQUIDATION)
IN THE MATTER OF CORE IV PLC (IN LIQUIDATION)
IN THE MATTER OF CORE V PLC (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

(1) LAURENCE PAGDEN
(2) SIMON JAMES UNDERWOOD

as Liquidators of Core VCT plc, Core VCT IV plc, and Core VCT V plc

Applicants

- and -

(1) MARK ROBERT FRY
(2) BEGBIES TRAYNOR GROUP PLC
(3) CORE CAPITAL PARTNERS LLP
(4) STEPHEN PETER EDWARDS
(5) WALID KHALIL FAKHRY

Respondents

- and -

(1) MARK ROBERT FRY
(2) WALID KHALIL FAKHRY

Applicants

- and -

(1) LAURENCE PAGDEN
(2) SIMON JAMES UNDERWOOD

as Liquidators of Core VCT plc, Core VCT IV plc, and Core VCT V plc

(3) TIMOTHY JAMES GRATTAN
(4) SIMON JAMES HUSSEY

Respondents

Rolls Building, Fetter Lane,
LONDON EC4A 1NL
Date: Friday, 15th March 2019

Before:

MR JEREMY COUSINS QC SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

APPROVED JUDGMENT

Mr Andrew Sutcliffe QC, Miss Sophie Mallinckrodt, and Mr William Day (instructed by **Messrs Stewarts**, of 5, New Street Square, LONDON EC4A 3BF) for the Liquidators

Mr Joseph Curl (instructed by **Messrs Pinsent Masons LLP**, of 30, Crown Place, LONDON EC2A 4ES) for Mr Fry and Mr Fakhry

Mr George McDonald (instructed by **Messrs Harcus Sinclair LLP**, of 3, Lincoln's Inn Fields, LONDON WC2A 3AA) for Mr Grattan and Mr Hussey

Hearing dates: 23rd and 26th November 2018

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JEREMY COUSINS QC:

1. This case, and the applications now before me, arise from the conduct of the affairs of three companies, all of them solvent, that were fund vehicles for investments in small and medium sized enterprises ("SMEs"), the decisions that were taken in 2015 to put each of them into members' voluntary liquidation, the conduct of those liquidations, and, following their dissolution, their restoration on 20th July 2018 to the Register of Companies by Fancourt J's order. The applications to restore the companies to the register were initiated by some of the former shareholders in the companies who maintained that the affairs of the companies had not been properly managed over several years before they went into liquidation, and that the liquidations themselves were not properly conducted by the former liquidators who vacated office after the final meetings of the companies. Those shareholders maintain that the concerns that they have raised deserve to be properly investigated. When Fancourt J ordered the restoration of the companies, he also gave directions for the appointment of new liquidators, who now wish to get on with investigating the companies' affairs. For that purpose, they seek the assistance of the court in gathering information and documents from the individuals who were previously involved in the management of the companies' investments, and from the former liquidators. For their part, those individuals and the former liquidators maintain that the order for restoration of the companies and appointment of the new liquidators should not have been made, without their even having the opportunity to be heard on the matter, and that in making it the court was misled, and that proper procedures were not followed. They seek to set aside the order, alternatively the removal of the new liquidators and the reappointment of one of the former liquidators, or at the very least, an order directing that there be further meetings of the companies.

2. On both sides of the dispute, counsel very experienced in such matters acknowledge that it gives rise to important issues of principle, although there

was not always common ground between them as to the identity, let alone the content, of the principles engaged.

THE APPLICATIONS BEFORE THE COURT

3. Two applications came before me on 23rd November 2018, namely:

   (i) The application dated 23rd August 2018 made by Laurence Pagden and Simon Underwood ("the Liquidators"), acting as liquidators in respect of Members' Voluntary Liquidations ("MVL(s)", "the Liquidations") of Core VCT plc, Core VCT IV plc, and Core VCT V plc (respectively "Core", "Core IV", "Core V", and collectively "the Companies") made under ss234 to 236 of the Insolvency Act 1986 ("the 1986 Act"). Mr Walid Fakhry ("Mr Fakhry") and Mr Stephen Edwards ("Mr Edwards") were the founders and managing partners of Core Capital LLP and Core Capital Partners LLP ("CC", "CCP"), respectively the Companies' fund manager ("the Manager") prior to 31st December 2013, and from 1st January 2014. By this application ("the Investigation Application"), the Liquidators seek certain information and documents from Mr Mark Fry ("Mr Fry") a former liquidator of the Companies, Mr Fakhry, Mr Edwards and others as part of an investigation into their stewardship of the Companies' investments. In particular they seek (a) the Companies' books, papers and records, (b) the liquidation files of Begbies Traynor Group plc ("Begbies"), and (c) copies of the Companies' material contracts.

   (ii) The application dated 11th September 2018 made by Mr Fry and Mr Fakhry ("the Removal Application"), seeks an order setting aside an order made by Fancourt J on 20th July 2018, whereby the Companies were restored to the Register of Companies and the Liquidators were appointed, alternatively an order under s108(2) of the 1986 Act for the removal of the Liquidators with the appointment of Mr Fry in their place, and further or alternatively, an order under 171(3)(b) of the 1986 Act directing that a meeting of members of the Companies be held to consider (i) whether or not the Companies should continue in MVL,

and, (ii) if so, the identity of their liquidator, or liquidators, together with other consequential relief.

4. There was consensus between all counsel, as emerged from discussion at the beginning of the hearing, that it was logical and sensible to begin with the Removal Application, because if that were to succeed, necessarily the Investigation Application must fail. For convenience, I was also invited to hear at the same time as the Removal Application, submissions as to whether Mr Timothy Grattan ("Mr Grattan") and Mr Simon Hussey ("Mr Hussey") (who were shareholders in the Companies, and who were joined by Mr Fry and Mr Fakhry as parties to the Removal Application "for the purposes of costs only") should, in the event of the failure of the Removal Application, have their costs ("the Non-Party Costs Issue"). In agreement with counsel I adopted that course, and I heard only submissions on the Removal Application and on the Non-Party Costs Issue. In the event, despite the commendable efficiency with which all counsel presented their submissions, and even with a slight extension of the court day on 26th November, it proved possible to complete only the hearing of submissions on the Removal Application, and on the Non-Party Costs Issue. Given that by that stage the two days allotted to the hearing of both Applications had been fully utilised, I reserved judgment on the Removal Application and on the Non-Party Costs Issue, and directed that I would, if necessary, hear the Investigation Application following the handing down of this judgment, which deals only with the Removal Application and the Non-Party Costs Issue.

5. The Applications generated a significant amount of material for the hearing; altogether five lever-arch files, with double sided printing, containing applications, evidence, and correspondence. There was also a full lever-arch file of authorities, again with double sided printing; in the course of the hearing, this was supplemented with additional authorities.

6. The evidence consisted of witness statements, and exhibits thereto, from the following individuals:

(i) Laurence Pagden ("Mr Pagden"), one of the Liquidators appointed by Fancourt J's order. His three witness statements are respectively dated 23rd August, 6th September, and 4th October 2018.

(ii) Mr Fry, an insolvency practitioner and partner in Begbies. He, together with his colleague, Mr Neil Mather, was one of the liquidators of the Companies during their period in MVL. (I refer to Mr Fry and Mr Mather together as "the Former Liquidators"). His three witness statements are respectively dated 7th and 24th September, and 11th October 2018.

(iii) Mr Fakhry, who together with Mr Edwards, was a founder and managing partner of both CC and CCP. Mr Fakhry's three witness statements are dated respectively 7th and 24th September, and 11th October 2018.

(iv) Mr Edwards whose two statements are dated respectively 7th and 24th September 2018.

(v) Mr Grattan whose two statements are dated respectively 14th June, and 31st October 2018.

(vi) Mr Hussey whose two statements are dated respectively 14th June, and 31st October 2018.

(vii) Mr Robin Goodfellow, a shareholder in various of the Companies, whose statement is dated 31st October 2018.

(viii) Mr Nigel Somerville, a shareholder in various of the Companies, whose statement is dated 1st November 2018.

7. On all issues, all counsel provided full and very helpful written submissions which they developed in the course of the hearing. Subsequent to the hearing, and at my invitation, Mr Sutcliffe QC, Miss Mallinckrodt, and Mr Day, for the Liquidators, and Mr Curl for Mr Fry and Mr Fakhry, made written submissions, on the decision of the Court of Appeal in *In re Pablo Star Limited* [2018] 1 WLR 738, which they maintained assisted their respective cases. At the hearing before me, reference had been made only to the first instance decision ([2017] 1 WLR 299) in that case of His Honour Judge

Behrens, sitting as a judge of the Chancery Division. (This authority did not figure in the Non-Party Costs Issue.) I have considered all of these written submissions.

THE BACKGROUND

8. The Companies were established as vehicles for investment in SMEs, which included the restaurant chain Brasserie Blanc and Allied International Holdings Limited ("Allied"), a corporate event planning business. The funds, raised from retail investors by a listing on the London Stock Exchange, were managed by CC and latterly CCP which, as mentioned above, were managed by Mr Fakhry and Mr Edwards. The Companies made investments in a diverse range of SMEs.

9. On 9th June 2011, a circular ("the 2011 Proposal") was sent to the members of the Companies proposing, amongst other things, the raising of £46.8m of capital, cash distributions to shareholders, and transfers of various assets to Core Capital I LP ("New Core I"). At the general meetings of the Companies subsequently held on 7th July 2011, substantial majorities (in no case less than 87 per cent), voted in favour of the 2011 Proposal, which was then implemented. On about 7th July 2011, the Companies transferred ("the 2011 Transfer") a number of investment holdings to New Core I in consideration for a cash payment, and a minority partnership interest in that entity, in which the majority interests were held by private equity houses known as "Access Capital" and "17 Capital". A twenty per cent interest in New Core I was held by various persons associated with the Manager, including Mr Fakhry and Mr Edwards.

10. The Liquidators maintain that the 2011 Transfer is something which ought properly to be the subject of investigation because it may have been at an undervalue, and because the Manager, Mr Edwards and Mr Fakhry benefited from such undervalue by virtue of undisclosed beneficial interests in New Core I.

11. By a letter of 10th March 2015 ("the MVL Proposal"), a joint letter was sent by the chairmen of the Companies to their respective shareholders. It proposed that the Companies be put into MVLs, each of which would be a solvent winding up, with the Manager "to retain sole responsibility for investment and realisation proposals consistent with the terms of the investment management agreement currently in place". These proposals were approved by the shareholders of the respective Companies, with the support of more than 99 per cent of the votes cast.

12. The Companies were put into MVLs, on 16th April 2015, following which the Former Liquidators were appointed as joint liquidators in respect of each Company. The lead liquidator was Mr Fry who is, as explained above, party to both the Applications now before me, as a respondent to the Investigation Application and as an applicant in the Removal Application.

13. In October 2015, the Manager, by a letter signed by Mr Edwards and Mr Fakhry, informed the shareholders that it had, in August 2015, concluded the sale ("the 2015 Transfer") of the Companies' remaining SME investments to a new vehicle, Core Capital II LP ("New Core II"). The Liquidators maintain that there are concerns that the 2015 Transfer was at an undervalue, and that the Manager, Mr Edwards and Mr Fakhry thereby benefited because of their interests in New Core II. Moreover, the Liquidators express concern that the Former Liquidators in their conduct failed properly to discharge their duties as insolvency officeholders of the Companies.

14. An annual progress report and draft final report (including as to receipts and payments) was sent to members of the Companies in advance of final general meetings for each Company. Following this, Mr Hussey set out a number of complaints in a letter dated 29th July 2016 which he sent to the Former Liquidators.

15. The final general meetings of the Companies were held on 10th August 2016; they were chaired by Mr Fry. Both Mr Hussey and Mr Grattan attended the meetings. The minutes are in evidence and they demonstrate that questions

were raised by the members, and that answers were given. In his evidence, Mr Hussey has elaborated upon the events of the meetings. He says that he and other investors voiced their concerns as to how the liquidations had been conducted. The outcome of the meetings was that the Former Liquidators' final report and account was approved by majorities in excess of 90 per cent of the votes cast in the case of each Company, and the Former Liquidators' release was also approved by majorities of at least 88 per cent in respect of each of the Companies. Following the meetings, Mr Hussey and Mr Grattan had a further informal meeting with Mr Fry and his colleagues to discuss various points, and e-mail correspondence continued into late September 2016. This was the last contact between the Former Liquidators, Mr Hussey and Mr Grattan, before the application was made to Fancourt J which I describe below.

16. The Companies were dissolved on 18th November 2016; at this time Mr Grattan was a shareholder in all of the Companies, whereas Mr Hussey was a shareholder in Core only.

17. Underpinning the case for the restoration of the Companies, and the case now advanced by the Liquidators, was the contention that there are three distinct aspects of affairs relating to the Companies that raise serious issues to be investigated. They concern:

(i) Management of the Companies' investments in a number of SMEs, and the level of fees and expenses which those SMEs were charged by the Manager ("the SME Issues").

(ii) The Manager's conduct in connection with the transfer of SME investments which were transferred to New Core I ("the 2011 Transfer Issues"). It is suggested that the 2011 Transfer was effected at an undervalue, and that the Manager, Mr Edwards, and Mr Fakhry benefited from this undervalue by virtue of undisclosed beneficial interests in New Core I.

(iii) The conduct of both (a) Mr Fry and Begbies, and (b) the Manager in connection with the 2015 Transfer ("the 2015 Transfer Issues"). It is suggested that the 2015 Transfer also was at an undervalue and that the Manager, Mr Edwards, and Mr Fakhry benefited from this by virtue of their beneficial interests in New Core II. Additionally, it is said that the Former Liquidatorswere in breach of their duties as insolvency officeholders of the Companies in that they agreed to the 2015 Transfer.

18. In respect of each of the SME Issues, the 2011 Transfer Issues, and the 2015 Transfer Issues, evidence has been filed on both sides, and is contained within the witness statements which I have mentioned above. Recognising that now was not the time even for attempting to determine any of the factual issues identified, both Mr Sutcliffe and Mr Curl commendably refrained from condescending into the minutiae of the evidence making allegations filed on behalf of Mr Hussey, Mr Grattan, Mr Goodfellow, Mr Somerville, or the Liquidators, on the one side, and the evidence in refutation from Mr Fry and Mr Fakhry on the other. The Liquidators' case is that the evidence filed by Mr Fry and Mr Fakhry does not answer, or does not satisfactorily answer, the allegations that have been raised, in particular in the witness statements of Mr Hussey, Mr Grattan, and Mr Pagden, so that the need for proper investigation into the three Issues identified remains.

19. Given the sensible approach taken by counsel in the presentation of their respective cases, it is neither necessary, nor appropriate because I cannot resolve the factual disputes, for me to describe extensively the content of the evidence filed on behalf of the parties respectively. I therefore confine myself to summarising the nature of the principal matters which are said to give rise to the three Issues as defined above, and to deserve investigation. They are alleged by the Liquidators to be as follows:

SME Issues

(i) Possible irregularities in audited accounts both as to the cost of acquiring Allied's business, and as to sums invested by the Companies in that business.

(ii) Shareholdings in Allied which were held by, or for, the Manager, Mr Edwards, Mr Fakhry and related persons, rather than by the Companies.

(iii) Amendments to Allied's articles of association. What is suggested is that in respect of the Companies' equity investments the effect of these amendments was to write them off, unfavourably contrasting with classes of shares held by the Manager where this was not the case.

(iv) Allied's making of substantial loans to subsidiaries, followed by their being written off. It is said that the subsidiaries concerned either never had any business, or that they were in the process of being shut down.

(v) The Manager's charging of excessive fees and expenses to each SME.

2011 Transfer Issues

(i) The Manager's undervaluation of SME investments that were transferred from the Companies to New Core I.

(ii) The Manager and related persons profited from the transfer at an undervalue by virtue of their indirectly held twenty per cent beneficial interests in New Core I.

(iii) The Companies received a smaller stake in New Core I than promised in the prospectus.

(iv) There was a lack of disclosure in the prospectus proposing the 2011 Transfer, particularly as to the extent of the Manager's interest in New Core I. It is said to have been 20 per cent but it was described as nominal. Criticism extends to the Manager's remuneration and costs generated by the transaction, and the terms of the Manager's management contract with New Core I.

(v) Whether the 2011 Transfer was in the best interests of the Companies and all their shareholders.

2015 Transfer Issues

(i) Lack of sufficiently wide marketing of the Companies' remaining SME investments. The complaint is that the Manager (on delegated authority from the Former Liquidators) sold them all to New Core II via the 2015 Transfer shortly after the Companies entered into liquidation.

(ii) The 2015 Transfer, proposed shortly after the start of the Liquidations, was not disclosed to shareholders when voting on the Liquidations.

(iii) The Companies' remaining investments were incorrectly valued when sold to New Core II in the 2015 Transfer. Reliance is placed by the Liquidators (see Mr Pagden's third witness statement at para 82(4)) on what is said to be a significant accounting error revealed in paras 68-71 of Mr Fry's second witness statement. It is suggested that Begbies' Final Progress Report did not account for the proceeds of sale from one business (Kelway Holdings Limited) at all. I note that Mr Fry's evidence at para 69 states that the Kelway proceeds were "incorrectly labelled" as attributable to Allied proceeds. Mr Pagden questions why this and another significant accounting error that he identifies were not detected before, and calls into question the competence exercised by Begbies.

(iv) The Manager and related persons profited from the 2015 Transfer, and the undervaluation, by virtue of their undisclosed beneficial interests in New Core II.

(v) The Liquidations in general, and the 2015 Transfer in particular, were not in the best interests of the Companies and all their shareholders.

(vi) I fully take into account what Mr Fakhry has said in his second witness statement to the effect that the questions that have been raised by the Liquidators were not put to any of the Respondents to their Investigation Application before the application to restore the Companies to the Register and appoint the Liquidators ("the

Restoration Application") was made. I also fully take into account that the case raised in the evidence upon which the Liquidators rely is disputed, and in considerable detail in some instances. It goes without saying that the extent to which the evidence presently before the court, though extensive, does not address the matters that have been raised in the detail that would be expected if any of the issues were eventually to become the subject-matter of a trial. I do not draw adverse inferences from that. It is in the nature of the present state of the enquiries being conducted.

(vii) For completeness I add that the Liquidators rely upon the evidence of Mr Goodfellow, and Mr Somerville, and correspondence from some 30 or more other shareholders sent to Mr Hussey's solicitors, in which concerns are expressed on matters relevant to the subject-matter of the three Issues which I have identified.

The Restoration Application

20. On 18th June 2018, Mr Grattan issued 3 Part 8 claim forms by which he sought orders which respectively included that:

    (i) Pursuant to s1029 of the Companies Act 2006, Core, Core IV, and Core V should be restored to the Register of Companies.

    (ii) Pursuant to s108 of the 1986 Act, Mr Pagden and Mr Simon Underwood of Menzies LLP should be appointed as liquidators of the Companies.

    The only other party joined to the application was the Registrar of Companies.

21. The Restoration Application, as I shall refer to it, was supported by witness statements from Mr Grattan and Mr Hussey, both dated 14th June 2018. Mr Grattan's statement ran to 6 pages. Mr Hussey's statement ran to some 42 pages with hundreds of pages of supporting exhibits. Mr Hussey summarised what he described as "serious questions that need to be answered" at para 62 of his statement. These concerned (i) the management of the Companies' investments ("the SME Allegations"), (ii) the 2011 Transfer, and (iii) the

Liquidations and the 2015 Transfer. Allied's affairs were amongst the matters relied upon.

22. It was common ground that the Restoration Application was governed by the Practice Note "Claims for an order restoring the name of a company to the Register" ("the Practice Note"). The Practice Note explains that where the requirements of the Registrar of Companies have been met and the Treasury Solicitor is able to approve the application, a consent order may be filed. Para 3 of the Note identifies papers that are required to be filed at court and these include (para 3.5) "if the company was dissolved whilst in or following its liquidation, original evidence of service of the claim form on the Official Receiver or the former Liquidator if one was appointed." Mr Curl emphasised that despite this express requirement, the Former Liquidators were not given such notice of the Restoration Application; he submitted that had they been given notice they would have attended and would have wished to advance submissions, not least for the purpose of persuading the court that if the Companies were to be restored, then the liquidator should be Mr Fry. This deprivation of opportunity to be heard Mr Curl relied upon heavily as serious prejudice which had been suffered by the Former Liquidators, and which arose from the manner in which the Restoration Application was handled. I must return to this later.

23. The Restoration Application was heard by Fancourt J on 20th July 2018. A full transcript of the hearing (12 pages), including the judgment, is in the Bundle before me. The same counsel who appear upon the present applications for the Liquidators appeared for Mr Grattan. No other party was present or represented. Fancourt J specifically confirmed that he had had the opportunity to read the papers before him, and in particular that he had considered the evidence of Mr Hussey. Mr Sutcliffe QC specifically addressed Fancourt J on issues as to the need for expedition, and the question of jurisdiction as to transfer from the county court, where the claim forms were issued, and as to the appointment of liquidators, and then drew his attention to the Practice Note, fairly pointing out para 3.5, and that whilst there had been compliance with other parts of the Practice Note, there had not been compliance with that

para - "We have done all of those matters except in 3.5 [the passage cited verbatim above]". Mr Sutcliffe then said:

> "Now, we made it clear to the Registrar that we were not doing that which is why the Registrar has given her consent to us giving notice to the former liquidators within 21 days of the making of your order, so we would ask your Lordship to do the same. There are reasons we had for not wishing to notify the former liquidators as apparent (inaudible)."

A note of the hearing was taken by a senior paralegal from Stewarts who attended upon counsel. The material passage is at page 2A/3/55 of the hearing bundle. It suggests, and I am prepared to accept it as accurate given how generally it corresponds with the transcript, that where the transcript records "inaudible" in the passage cited, Mr Sutcliffe explained why the Liquidators were delaying notification to the Former Liquidators, at which point Fancourt J observed that "there could potentially be a claim against the liquidators". In the transcript, this observation by the judge is recorded simply as "Actually a claim against (inaudible)".

24. At this point, it is convenient to mention the correspondence with the Registrar, because Mr Curl relies upon this very much in connection with the Removal Application. Mr Curl has fairly pointed out that the correspondence concerned (nearly fifty pages of it) does not support the statement that the Registrar was actually told of the non-compliance, or intended non-compliance, with para 3.5, nor does it support the statement as to the Registrar's being content to the giving of notice within 21 days of Fancourt J's order. In fact, he submits that there was material to the opposite effect, in that the requirement of compliance with paragraph 3 of the Practice Note was referred to without qualification in letters addressed to Mr Grattan's solicitor from the Treasury Solicitor in respect of each of the Companies.

25. Very properly, in my view, Mr Curl did not suggest that there had been any deliberate misleading of Fancourt J on the part of Mr Sutcliffe, or any other counsel or their instructing solicitors. As I explain more fully below, I consider that the misstatement of the position to Fancourt J was entirely

inadvertent. What is very clear is that although the Registrar was not made aware of the intention not to notify the Former Liquidators until a later stage, Fancourt J most certainly was aware that they had not been notified, and would not be notified until after the hearing. Further, he had been alerted expressly to the requirements of the Practice Note.

26. Following the submissions that Mr Sutcliffe made as to paragraph 3.5, he took Fancourt J to paragraph 6 of the Practice Note, dealing with the need for there to be evidence to explain why a former liquidator is not the proposed liquidator under the proposed restoration order. Mr Sutcliffe suggested that there had been compliance with that requirement, with which the judge concurred.

27. Having heard the application, Fancourt J delivered a short judgment in which he said that he ordered the transfer of the Restoration Application and the application for the appointment of a liquidator to the High Court. He said that he was satisfied that there should be an order for restoration of the Companies to the Register on the terms agreed with the Treasury Solicitor, and that in the light of the evidence that he had read that it was in the interests of justice to do so, and he directed the appointment of the Liquidators.

28. On 24th July 2018, by letters from the Liquidators, the Former Liquidators and, the Manager (marked for Mr Edwards and Mr Fakhry's attention) were notified of the making of Fancourt J's order, but this was not accompanied with copies of the supporting evidence or documents. Correspondence followed with Pinsent Masons acting for the Former Liquidators, the Manager, Mr Edwards and Mr Fakhry. The Liquidators made requests for documents and other information, and they sought document preservation undertakings. On 30th July 2018, Pinsent Masons asked the Liquidators to explain the purpose of the Liquidations, and the need for the information and undertakings requested. In reply, the Liquidators, whilst not substantively responding, promised to do so shortly, but they also requested non-dissipation and information preservation undertakings.

29. On 7th August 2018, the Liquidators provided a USB stick containing the applications filed at court, the witness statements of Messrs Hussey and Grattan, with exhibits, written consents to act, the skeleton argument used before Fancourt J, and copy correspondence with the Treasury Solicitor and the Registrar. No transcript of the hearing before Fancourt J was provided until 29th August 2018. By a letter of 15th August, the Liquidators suggested that Pinsent Masons had been entirely uncooperative in not providing information or the requested undertakings. They threatened an application to court. Pinsent Masons replied on 17th August, stating that the voluminous documentation provided by the Liquidators on 7th August was being reviewed. They asked why the Restoration Applications had been made without notice, and also for an explanation of the Liquidators' asserted entitlement in relation to each category of documents sought. On 20th August, the Liquidators by letter to Mr Edwards and Mr Fakhry asked them to provide documentation by 3rd September, making reference to ss.234 to 236 of the 1986 Act. On 23rd August, the Investigation Application was issued and served by Stewarts (the Liquidators' solicitors). Mr Curl criticises this conduct on behalf of the Liquidators as premature, being before any answer had been made to Pinsent Masons' reasonable inquiry concerning the failure to give notice of the Restoration Application, and without waiting until their own "unilateral deadline" of 3rd September had expired. The Liquidators issued and served the s.236 Application on 23rd August 2018. Mr Curl drew attention to the facts that the draft order which had been prepared by Stewarts was backed by a penal notice, and that the application was certified by Leading Counsel as fit for urgent vacation business in the interim applications list before a High Court judge. He emphasised that after this, the Liquidators refused Pinsent Masons' suggestion that directions be agreed to enable the Investigation Application to be properly answered and the hearing vacated.

30. Before the Investigation Application could be heard, in correspondence in late August and early September 2018, Pinsent Masons, by letter to Stewarts, explained the need for additional time properly to prepare for the hearing, explained their clients' desire to file evidence, and challenged the adequacy of the time estimate that had been given. They intimated that the Removal

Application might be made, and suggested that in order to avoid the need to make the same, the Liquidators should agree to summon a meeting of the members of the Companies in accordance with s171(3)(a) of the 1986 Act in order to provide the members with an opportunity to determine the direction in which the Companies should move forward. The prospect of joining Messrs Hussey and Grattan was also raised. The suggestion as to summoning a meeting was declined in Stewarts' letter of 6th September 2018, the reason given being that it was not possible to do so because of the failure on the part of the Respondents to the Investigation Application to deliver up the Companies' statutory books. It was said that the joinder of Messrs Hussey and Grattan would be totally inappropriate.

31. The Investigation Application initially came on before Arnold J in the interim applications list on 10th September 2018. Mr Curl highlights the fact that although the Liquidators had given a total time estimate in excess of two hours, they sought to argue the matter and obtain substantive relief in that list. Mr Curl referred to Arnold J's observations made when declining to grant any relief as sought on that occasion:

> "…I am not prepared to grant any interim relief in the meantime because I do not consider that there is any urgency or need for the applicants to have any relief pending determination of the respondents' application to set aside Mr. Justice Fancourt's order, having regard to the undertakings that have been offered to protect the position in the meantime."

32. Arnold J went on to give directions for evidence and for the listing of the hearing that came before me in late November.

RELEVANT STATUTORY PROVISIONS

33. Before considering the various applications, it is convenient to set out the statutory provisions which are relevant to them. Section 108 of the 1986 Act provides for the court's power to remove a liquidator:

> "(1) If from any cause whatever there is no liquidator acting, the court may appoint a liquidator.

(2) The court may, on cause shown, remove a liquidator and appoint another."

34. As for the court's power to order that there be a meeting of a company's members, s171 of the 1986 Act provides that:

> "(1) This section applies with respect to the removal from office and vacation of office of the liquidator of a company which is being wound up voluntarily.
> (2) Subject to the next subsection, the liquidator may be removed from office only by an order of the court or—
> (a) in the case of a members' voluntary winding up, by a general meeting of the company summoned specially for that purpose, or
> (b) in the case of a creditors' voluntary winding up, by a decision of the company's creditors made by a qualifying decision procedure instigated specially for that purpose in accordance with the rules.
> (3) Where the liquidator in a members' voluntary winding up was appointed by the court under section 108, a meeting such as is mentioned in subsection (2)(a) shall be summoned only if—
> (a) the liquidator thinks fit,
> (b) the court so directs, or
> (c) the meeting is requested in accordance with the rules by members representing not less than one-half of the total voting rights of all the members having at the date of the request a right to vote at the meeting.
> (3A) Where the liquidator in a creditors' voluntary winding up was appointed by the court under section 108, a qualifying decision procedure such as is mentioned in subsection (2)(b) is to be instigated only if—
> (a) the liquidator thinks fit,
> (b) the court so directs, or
> (c) it is requested in accordance with the rules by not less than one-half in value of the company's creditors.
> (4) A liquidator shall vacate office if he ceases to be a person who is qualified to act as an insolvency practitioner in relation to the company.
> (5) A liquidator may, in the prescribed circumstances, resign his office by giving notice of his resignation to the registrar of companies.
>
> (6) In the case of a members' voluntary winding up where the liquidator has produced an account of the winding up under section 94 (final account), the liquidator vacates office as soon as the liquidator has complied with section 94(3) (requirement to send final account to registrar).
> (7) In the case of a creditors' voluntary winding up where the liquidator has produced an account of the winding up under section 106 (final account), the liquidator vacates office as soon as the liquidator has

complied with section 106(3) (requirement to send final account etc. to registrar)."

35. Section 173 makes provision for the release of a liquidator:

> "(1) This section applies with respect to the release of the liquidator of a company which is being wound up voluntarily.
> (2) A person who has ceased to be a liquidator shall have his release with effect from the following time, that is to say—
> (a) in the following cases, the time at which notice is given to the registrar of companies in accordance with the rules that the person has ceased to hold office—
> (i) the person has been removed from office by a general meeting of the company,
> (ii) the person has been removed from office by a decision of the company's creditors and the company's creditors have not decided against his release,
> (iii) the person has died;
> (b) in the following cases, such time as the Secretary of State may, on the application of the person, determine—
> (i) the person has been removed from office by a decision of the company's creditors and the company's creditors have decided against his release,
> (ii) the person has been removed from office by the court,
> (iii) the person has vacated office under section 171(4);
> (c) in the case of a person who has resigned, such time as may be prescribed;
> (d) in the case of a person who has vacated office under [subsection (6) of section 171], the time at which he vacated office;
> (e) in the case of a person who has vacated office under section 171(7)—
> (i) if any of the company's creditors objected to the person's release before the end of the period for so objecting prescribed by the rules, such time as the Secretary of State may, on an application by that person, determine, and
> (ii) otherwise, the time at which the person vacated office.
> (2A) Where the person is removed from office by a decision of the company's creditors, any decision of the company's creditors as to whether the person should have his release must be made by a qualifying decision procedure.
> (3) In the application of subsection (2) to the winding up of a company registered in Scotland, the references to a determination by the Secretary of State as to the time from which a person who has ceased to be liquidator shall have his release are to be read as references to such a determination by the Accountant of Court.
> (4) Where a liquidator has his release under subsection (2), he is, with effect from the time specified in that subsection, discharged from all

liability both in respect of acts or omissions of his in the winding up and otherwise in relation to his conduct as liquidator.
But nothing in this section prevents the exercise, in relation to a person who has had his release under subsection (2), of the court's powers under section 212 of this Act (summary remedy against delinquent directors, liquidators, etc.)."

36. Section 212 of the Act provides as follows for a summary remedy against liquidators and others:

"(1) This section applies if in the course of the winding up of a company it appears that a person who—
…
(b) has acted as liquidator … of the company, or
…
has misapplied or retained, or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company.
(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty in relation to the company includes, in the case of a person who has acted as liquidator … of the company, any misfeasance or breach of any fiduciary or other duty in connection with the carrying out of his functions as liquidator … of the company.
(3) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him—
(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks just, or
(b) to contribute such sum to the company's assets by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.
(4) The power to make an application under subsection (3) in relation to a person who has acted as liquidator … of the company is not exercisable, except with the leave of the court, after he has had his release."
… ."

THE REMOVAL APPLICATION

The submissions for Mr Fry and Mr Fakhry

(i) The overarching submission

37. Underpinning Mr Curl's submissions in respect of his various applications is what he called his overarching objection which, in his written submissions, was the starting point for his analysis. He developed this objection powerfully in his oral submissions. The objection is that the Restoration Application was made on a misconceived basis because it is a basic principle of company law that decision-making in a solvent company is for the members and the majority can bind the minority. He referred, in support of this proposition, to *Hollington on Shareholders' Rights*, 8th ed., para 2-11:

> "The shareholders, who are the owners of the company and therefore in ultimate control of its affairs, exercise their powers in general meeting, and the will of the shareholders is expressed by a simple majority of votes, or such other majority as may be prescribed by the bargain between the shareholders."

38. Mr Curl submitted that the attempt to use MVL procedure in the manner in which Mr Hussey, Mr Grattan and the Liquidators have done would effectively subvert the principle of majority rule, or that, at the very least, it would represent a substantial inroad into it. The present attempt so to use MVL procedure, submitted Mr Curl, was unprecedented, though he acknowledged that merely because it has not happened before cannot in itself be a fatal objection. The procedure adopted, submitted Mr Curl, would introduce a usurpation of majority rule by a small minority of shareholders who are, in substance, abusing MVL procedure to procure, as he put it "a wide-ranging investigation [by] using the extraordinary powers in the Act into the business of solvent companies and their solvent liquidations". The reference to "extraordinary powers" was to those under s236 of the 1986 Act; it is how they were described by Lord Slynn in in *British and Commonwealth Holdings plc v Spicer & Oppenheimer* [1993] AC 426, 439D. It puts the MVL process to a use to which it has not been put in any reported case. To tolerate this would change the scope of MVL practice and procedure; it would no longer be restricted to achieving the orderly winding-up of solvent companies

under the control of their members; instead it would become a new tool enabling disaffected minority shareholders to challenge majority decisions, but in the process would equip that minority with the far-reaching coercive statutory powers (reflected in the Investigation Application) to be deployed against directors and former liquidators of long-dissolved companies.

39. In developing his point, Mr Curl acknowledged the paucity of case law on the subject-matter of MVLs. This very paucity necessitated, he explained, reference to several of the leading texts, by extremely experienced authors and practitioners in the field, who speak, Mr Curl urged, in harmony on the subject to the effect that an MVL is a process under the control of the members and the majority of them are the persons who decide what happens. First, Mr Curl cited *Gore-Browne on Companies*, issue 143, at 49[13]:

> "Where the company is solvent it may enter into a members' voluntary liquidation (MVL). The important difference between this and a creditors' voluntary liquidation rests in the control over the procedure; the shareholders rather than the creditors appoint the liquidator and have ultimate control of the process."

40. Next, he cited *McPherson & Keay on The Law of Company Liquidation*, 4th ed., para. 2-007:

> "Where the members of a solvent company wish to put it into liquidation the appropriate way of doing so is by members' voluntary winding up…Control of affairs in this form of liquidation is vested in the company in general meeting, which appoints the liquidator, determines his or her remuneration, and exercises a general power of supervision over the performance of the liquidator's powers and duties."

41. I will cite from just one more leading text to which Mr Curl referred me on the subject, namely, *Tolley's Insolvency Law*, issue 122, October 2018, at L5102:

> "The distinction in winding up between a solvent and an insolvent company is obvious…The members alone decide the course to be

> followed. It is they who appoint the liquidator (IA 1986, s 91) and fill any vacancy in the office of liquidation"

For completeness I mention that he also relied upon *Loose & Griffiths on Liquidators*, 8th ed., at paras. 9.1 to 9.2, and *Bailey and Groves on Corporate Insolvency Law and Practice*, 5th ed., at para.13.45. As Mr Curl fairly described the position, the texts speak with one voice.

42. Mr Curl maintained that against this background, purpose, and established culture in relation to MVLs, it was wholly inappropriate that the Liquidators should rely on their appointment by the court, an appointment that was procured, he contended, by arrangements which excluded the Former Liquidators from even having the opportunity to argue against that course, yet which enabled the Liquidators now to maintain that cause must be shown to displace them. They should never have been appointed in the first instance. Moreover, Mr Curl pointed out, they positively resist the proposal that the members should decide who the liquidator should be, and reject the compromise suggestion that a meeting of members be convened. This attitude, said Mr Curl, was reflected in Mr Pagden's second witness statement at para 14, as well as in correspondence of 6th September 2018 from the Liquidators' solicitors:

> "For the avoidance of doubt, our clients intend to provide information to the members in due course but only at a time that is appropriate in the context of the investigations. They will not be calling meetings prematurely, simply to enable your clients to seek to foreclose any investigation of the underlying issues."

43. Mr Curl submitted that this attitude was reflective of a fundamental misunderstanding of the *rôle* of a liquidator in an MVL; first, because such a procedure is for the members to control, and not for the liquidator to dictate by means that he considers to be appropriate. It is not for him to keep the members in the dark until he is ready to shed some light. Secondly, an MVL liquidator ought not to be able to avoid having his appointment approved by the members. To adopt such a stance demonstrated that the procedure was being inappropriately used. The Liquidators, said Mr Curl, when advancing his

oral submissions, had taken it upon themselves to decide what was in the interests of the members of the Companies, without asking those members.

44. Towards the end of his written submissions, Mr Curl addressed the availability of the alternative course of a derivative action for aggrieved minority shareholders. I mention it at this stage, because in my judgment it serves to reinforce Mr Curl's overarching point as to majority control. I was referred to the following passage in *Joffe on Minority Shareholders*, 5th ed. at para 2.03:

> "…where the shareholder seeks to enforce a right vested not in himself but in the company of which he is a member, for example, a claim to the company's property fraudulently misappropriated by the directors, he can only do so (if at all) by means of a derivative claim."

45. Given that a company can be restored to the register solely for the purpose of bringing a derivative claim (for an example, see the history narrated by His Honour Judge Behrens, sitting as a judge of the Chancery Division, in *Parry v Bartlett* [2012] BCC 700 at para 59), Mr Curl submitted that the pursuit of such a course would have been available to any of the aggrieved shareholders in this case. Not only was it available, but it offered an advantage over a liquidation in that all recoveries would have accrued to the members without the need first for someone to answer for the fees, costs, and expenses of the liquidation. Mr Curl acknowledged that there would be a disadvantage in that by pursuing a derivative action, the aggrieved minority would not have access to the "extraordinary power" arising under s236 of the 1986 Act. But this, he contended, was beside the point, because the power did not exist to facilitate a fishing expedition by such minority, who, like other litigants, can to the extent permissible, seek assistance by means of pre-action disclosure.

(ii) The application to set aside Fancourt J's order

46. Mr Curl turned then specifically to his application to set aside Fancourt J's order of 20th July 2018. This, he submitted, was not regularly obtained because, said Mr Curl, the learned judge had been led mistakenly to believe both that (i) it had been "made…clear" to the Registrar that it was proposed

not to comply with paragraph 3.5 of the Practice Note, and (ii) the Registrar had agreed to that course.

47. Mr Curl submitted that had Fancourt J been properly informed that, in fact, (i) the Registrar had not been told of the intended non-compliance with the Practice Note, and (ii) the Treasury Solicitor had referred to the need for compliance with paragraph 3 of the Practice Note in the usual way, then the judge's order would have not been made. In this connection, Mr Curl took me to the decision of Burton J in *Network Telecon (Europe) Ltd v Telephone Systems International Inc* [2004] 1 All ER (Comm) 418. He submitted that the decision was authority for the proposition that even in the absence of any misconduct by the party concerned, or his legal advisers, if the court has been misled upon an *ex parte* application, and if the relevant information of which the court was deprived is material to the point so that the original judge might well not have made the order had the relevant information been before the court, then the court should discharge the order concerned. Such are the circumstances of the present case, Mr Curl maintained, that they call for such an approach.

48. As for the decision of the Court of Appeal in *Pablo Star*, Mr Curl submitted that this reinforced his earlier submissions because it makes clear that (i) there is jurisdiction under CPR 19.2(2) to join a third party to an application to restore a company to the register (not that such joinder in itself was a course that the Former Liquidators were seeking to pursue), and (ii) such an application is effectively an *ex parte* application at which the duty as to full and frank disclosure applies.

49. There was, Mr Curl argued, also another fundamental point: it was unjust to deny the Former Liquidators the opportunity to respond to the Restoration Application, or the evidence of Mr Hussey and Mr Grattan. In reply, Mr Curl disputed that the non-disclosure had no material impact. He submitted that Fancourt J was not told (i) of the fact that the Former Liquidators had been released in the process of an MVL with the approval of the Companies' members, (ii) that there had not been compliance with the Treasury Solicitor's

correspondence set out in a Bona Vacantia letter to the effect that it was necessary to file at court all other documents required by the Practice Note, or (iii) that para 6 the Practice Note required an explanation as to why a different liquidator was to be appointed in place of those who held office previously. These matters were, he submitted, material, and at least could have affected the outcome. A real substantive right was lost because of lack of notice. Also in reply he sought to reinforce this point by reference to the Privy Council decision in *Pricewaterhouse Coopers v Saad Investments Co Limited* [2014] 1 WLR 4482, especially at paras 32 and 33, where the Board made observations as to the standing that auditors, who were the targets of a winding up order, would have enjoyed to make representations to the court.

50. Mr Curl argued that the *status quo ante* should be restored by setting aside Fancourt J's Order. It was open to the court to take this course, Mr Curl submitted, although neither Mr Fry nor Mr Fakhry were parties to the restoration order, because CPR 40.9 provides that a person who is not a party, but who is directly affected by a judgment or order, may apply to have the same set aside or varied. He also drew my attention to the commentary in the 2018 *White Book* at the foot of page 1276, dealing with rule 40.9:

> "In some situations, procedural rules require that certain persons must be made respondents or defendants to applications or claims, or that at least notice of the proceedings must be given to them, thereby enabling them to make a decision as to whether or not they wish to be joined as parties or to make representations; e.g r.19.8A (Power to make judgment binding on non-parties) (implementing Administration of Justice Act 1985 s.47), Practice Direction 55A (Possession Claims), paras 2.4 and 2.5(1) (see para.55APD.1 below), Practice Direction 56 (Landlord and Tenant Claims and Miscellaneous Provisions About Land), paras 3.3, 3.4, 5.4, 5.5, 8.4 and 9.3 (see para.56PD.1 below). Where these requirements are not followed, and such persons are not joined as parties or given notice, as the case may be, then any judgment or order made in the proceedings may be irregular and liable to be set aside or varied on that ground and no recourse to r.40.9 would be necessary."

(iii) Removal and replacement

51. As for the removal of the Liquidators under the provisions of s108 of the 1986 Act, Mr Curl's starting point was that the court's powers are very wide, and the discretion conferred upon it is very broad. It is "left to the court to decide" who may make the application "and the court may entertain an application under that section by anyone whom the court considers proper"; *per* Warner J in *Re A J Adams (Builders) Ltd* [1991] BCLC 359, 364b-c. Mr Curl referred me to the decision of Millett J, as he then was, in *Re Keypack Homecare Ltd* [1987] BCLC 409, 415e-f, 416e-f for the proposition that the court is authorised to remove a liquidator "on cause shown"; there is no need to show misconduct or personal unfitness on the part of the incumbent.

52. The justification for removing the present Liquidators, submitted Mr Curl, is that there are good grounds to suppose that they do not enjoy the support of a majority of the members of the Companies respectively, and for this reason they are an unsuitable choice as the Companies' MVL liquidators, whatever may be their personal qualities. He sought to demonstrate this point by saying that their purpose in office is solely to revisit decisions taken in 2011 and 2016 which were supported by "an overwhelming majority of the voting members". Since the final meeting on 10th August 2016, at which the evidence discloses that concerns as to the conduct of the liquidations were raised, but when nevertheless the members voted decisively to approve the Former Liquidators' final report and grant their release, there has been no material change in circumstances. This being the case, Mr Curl submitted that there was no proper justification for revisiting the decisions which were taken in those meetings.

53. Whilst Mr Curl's primary submission throughout remained that the best course was simply to set aside Fancourt J's order, short of that course, he maintained, the appropriate way to restore the *status quo ante*, before that order was made without notice to the Former Liquidators, was to remove the Liquidators and reappoint Mr Fry as liquidator.

(iv) Direction for a members' meeting

54. Mr Curl reminded me of the proposal, which he described as a compromise, that had been put forward in correspondence on behalf of Mr Fry and Mr Fakhry, whereby the Liquidators should call a meeting of members, so that it could be left to them to decide upon the course to be taken. That course, as I have explained above, was rejected by the Liquidators. In these circumstances, Mr Curl submitted that in the event that I should decline (i) simply to set aside Fancourt J's order, or (ii) to remove the Liquidators under s108 and replace them with Mr Fry, then it would be appropriate for me to order that a meeting be held exercising my powers under s171(3)(b) of the Act. Such a conclusion was driven, he suggested, when regard is had to the principle of majority control by the members in respect of an MVL. It was, he argued, inappropriate for the court to appoint, or leave in office, an MVL liquidator where there is real reason to doubt that such a liquidator would not, or does not, command the support of the majority of the members. Mr Curl acknowledged the evidence from Mr Goodfellow and Mr Somerville, who express themselves as supporting the continuation in office of the Liquidators. Mr Curl questioned the basis for any suggestion that their views are representative of the majority.

The submissions for the Liquidators

55. For the Liquidators, Mr Sutcliffe QC began his oral submissions with the observation that in respect of each of the three heads of relief which the Former Liquidators seek (that is setting aside Fancourt J's order, removal of the Liquidators, or ordering a meeting of members), in reality they all pursue the same objective, namely, to bring to an end any independent investigation in relation to the Companies' affairs.

56. This observation, Mr Sutcliffe submitted, applied just as much to Mr Fry and Mr Fakhry's invitation to order a meeting because if any order were to be made the consequence of which was that meetings of the Companies should be left to decide what course should be taken, Mr Fakhry was in a position to vote down, and would do so, any course which would lead to an independent investigation. To demonstrate the voting power of the Manager, he pointed out that a Begbies' e-mail to Mr Hussey, sent on 8th August 2016, two days before

the final meetings, advised that "Indicative proxy voting suggests that all proposed resolutions will be passed on Wednesday"; as to the then concerns of Mr Hussey and Mr Grattan, no circular about these had been issued before the meetings, and that the majority of shareholders had been unaware of them; those concerns had not, therefore been rejected by a majority of members. As to the significance of the Manager's vote, Mr Sutcliffe referred to three analyses of voting provided by Mr Fakhry as exhibit 3 to his third witness statement. (This was provided in answer to an earlier written request from the Liquidators' solicitors.) The respective analyses deal with each of the Meetings for July 2011, April 2015, and August 2016. Mr Sutcliffe acknowledged that the Manager had abstained in voting, in July 2011, on the 2011 Transfer because of a conflict of interest, but drew attention to the fact that the Manager did not so abstain, at the Meeting of April 2015, on the Liquidations, despite being equally affected by conflict as to the 2015 Transfer. Using that same source, Mr Sutcliffe submitted that it demonstrated that "Manager-related" votes amounted to about a fifth of all votes cast to open the Liquidations in Core and Core IV, although less than one per cent in the case of Core V. However, whilst the Manager cast respectively no, or negligible, votes in the August meeting at the end of the Liquidations for Core and Core V, the Manager did cast 55 per cent of all votes cast in respect of Core IV in order to approve the final progress report and release the Former Liquidators from office, which was decisive in the closing of its liquidation.

57. Another point raised concerning voting rights related to B shares in Core. Mr Hussey's evidence is that an allocation of B shares was made to the Manager as a performance incentive. These represent a very large block of more than 21m shares. Mr Pagden's third witness statement at para 82 suggests that the performance incentive was not contractually triggered, which in turn brings into question the matter of voting rights in respect of the B shares. This was clearly not something that could be determined upon the present Applications, but Mr Sutcliffe suggested that the fact that there was a question over those voting rights supported the general thrust of his case that the right order of things was to investigate the claims first, and if the Liquidators think it appropriate, then, to have a meeting, rather than to have a meeting before the

investigation. In reply Mr Curl disputed that there was even a question that affected the voting rights as to the B shares. To avoid returning to the point later, I reiterate, this is not something I can now resolve, and for present purposes I shall not take into account even the suggested "question" over the voting rights.

58. Mr Sutcliffe submitted that whilst Mr Fakhry and Mr Edwards commanded very considerable voting power that would be exercised adversely to an investigation, there was evidence that suggested that there was real support amongst many retail investors for an investigation, but that the retail investors would have great practical difficulty in mobilising the diverse retail investors and obtaining proxy votes. He made reference to Mr Hussey's second witness statement which described responses to enquiry made of some 35 shareholders, holding retail investments of more than £7 million (of a total of approximately £66 million) invested in the Companies. These responses were said to have demonstrated support for an investigation. Against this, however, Mr Fakhry explained in his second witness statement that he and Mr Edwards, through nominees, are beneficial owners of around 30 per cent of shares in Core. In that same statement, Mr Fakhry makes it very clear that he and Mr Edwards "strongly oppose the steps taken by Mr Hussey and Mr Grattan with the Restoration Application and the appointment of …. the Liquidators", whilst at the same time maintaining that there is "no merit at all to the investigations that they are trying to pursue".

59. Moving on to the main body of his submissions, Mr Sutcliffe developed them in a different order from that adopted by Mr Curl, which I have followed above when describing the case advanced by him. For convenience, and ease of comprehension, I shall, in my review of Mr Sutcliffe's submissions, and later in my analysis, adopt the same sequence that I have used above, though I appreciate that Mr Sutcliffe's submissions as to setting aside Fancourt J's order cannot ultimately be considered in isolation from his submissions in relation to the applications made by the Former Liquidators under ss108 and 171 of the 1986 Act, both of which topics involve consideration of what he has described as the "Adverse Interests Principle". However, three of Mr

Sutcliffe's submissions contain themes that are relevant to each of the applications advanced by Mr Curl, and so I shall outline each of them before turning to his submissions on the individual applications. Their subject-matter is (i) whether there are serious issues that deserve investigation, (ii) the Adverse Interests Principle, and (iii) whether the fact that the liquidations are MVLs should preclude relief of the kind pursued by the Liquidators.

(i) Serious issue to be investigated

60. Mr Sutcliffe submitted that it was not for the court at this stage to attempt to decide the merits of the allegations that have been raised by the shareholders or the Liquidators. The question to be addressed for present purposes was, he argued, only whether the material before me raised a serious issue for investigation. He relied upon the decision of David Richards J, as he then was, in *Clydesdale Financial Services Ltd v Smailes* [2009] BCC 810, especially paras 26 and 30, and the decision of Mr Registrar Jones in *Ve Vegas Investors IV LLC and others v Shinners and others* [2018] EWHC 186 (Ch), especially paras 18 and 21.

(ii) The Adverse Interest Principle

61. This was a cornerstone of Mr Sutcliffe's argument. At its heart is the point that "the liquidator should not be the nominee of a person: (a) against whom the company has hostile or conflicting claims … or (b) whose conduct in relation to the affairs of the company is under investigation …"; *per* His Honour Judge Maddocks sitting as a High Court Judge in *Fielding v Seery* [2004] BCC 315 (Ch), at para 33(5). Specifically, in the context of s108, Mr Sutcliffe relied upon the Privy Council decision in *Deloitte & Touche v Johnson and another* [1999] 1 WLR 1605, which concerned an application under the equivalent section, s106, in the Cayman Islands Companies Law (1995 rev.), which he contended demonstrated that an application under the section by a person with an interest adverse to the liquidation would not be entertained; such a person had no legitimate interest to make it. The same approach, Mr Sutcliffe argued, was to be adopted as to any application under s171; he relied upon *Deloitte*, which considered s171 authority, *Re Corbenstoke Ltd (No 2)* [1989] BCC 767 (Ch), a decision of Harman J, and *Raithata and Raikundalia v Arnold Holstein*

GmbH and others [2017] EWHC 3069 (Ch), a decision of Marcus Smith J, where his lordship also adopted an approach (at para 51) that whilst merits could not be judged, an application was to be assessed in terms of whether it raised proper issues for investigation. These cases, Mr Sutcliffe submitted, demonstrated the need for alignment of interest between persons making such applications with those of the liquidation. Whilst Mr Fakhry might be a shareholder in the Companies, there was a lack of alignment with the interests of the liquidation because of the issues raised concerning his stewardship of the Companies' investments. The same observation applies to Mr Fry because of his part in the 2015 Transfer.

(iii) The suggested significance of the Liquidations' being MVLs

62. Mr Sutcliffe submitted that Mr Curl's overarching point was ill-founded. He encapsulated his point in this regard in his oral submissions when he said that the policy in an MVL is not for members to be in control, but, as with a CVL, for the liquidator to be in control, but he must act in the interests of the members as a whole, much in the way that a director must. He advanced a number of points in seeking to demonstrate this:

(i) An MVL is not radically different from a Creditors' Voluntary Liquidation ("CVL"), or compulsory liquidation; in any form of liquidation, the investigation and pursuit of claims is a matter for the liquidator. He relied upon a number of well-known sources for this proposition, including Bailey and Groves, *Corporate Insolvency: Law and Practice* 5th ed. (LexisNexis, 2017) para 13.52, *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558) (better known as the "Cork Report") at paras 48 – 49, and Totty, Moss & Segal's *Insolvency* (Sweet & Maxwell, loose-leaf) at paras D1/11. To demonstrate the point, I need cite only from the last-mentioned text:

> "the principles relating to the realisation of assets in a members' voluntary liquidation are similar to those applying to insolvency procedures generally".

(ii) The only difference between an MVL and a CVL is that in a CVL losses fall on the debt holders, whereas in an MVL the value of the

estate "breaks", as he put it, amongst the equity investors. It is that financial interest that causes members rather than creditors to be enfranchised in an MVL; as explained in McPherson & Keay's *Law of Company Liquidation* 4th ed. (Sweet & Maxwell 2018), at para 2-007, an arrangement justified by the creditors' absence of financial interest in the outcome, reflecting an assumption of the ability of the company to pay its debts in full.

(iii) The fact of a release of a liquidator, in accordance with the provisions of s173 of the 1986 Act, does not prevent investigation of a company's affairs subsequently.

(iv) Nothing in the content, or structure of the 1986 Act, or the Insolvency Rules, suggests that members' sanction is a pre-condition of the use of powers of investigation, or institution of proceedings. In support of this proposition I was also referred to both the current, and previous, provisions of s165 of the 1986 Act, which specifically envisages the exercise of relevant powers without sanction. This is to be contrasted with rule 18.19 of the Rules which does require a general meeting to determine a liquidator's remuneration in an MVL.

(v) Now that the Liquidators are in place, cause must be shown to remove them under s108, and this before the court will direct a meeting. The onus is upon those seeking to remove the Liquidators to demonstrate that they are not acting in the members' interests.

(vi) There is no demonstrated detriment to members from the proposed investigations. The members are not responsible for the costs incurred. If the Liquidators, following investigation, conclude that claims should be brought, then either they would need to arrange litigation funding, or obtain funding from members, who can decline to provide it if they so choose.

(vii) The majority view of members is something to be taken into account, but it is not determinative. It is for the court to decide upon the weight to attach to competing arguments; see the decision of Snowden J in *In re Maud* [2016] Bus LR 1243, a bankruptcy case, at para 97. See also *Sisu Capital Fund Limited v Tucker* [2006] BCC 463 (Warren J), at

paras 86-88, where the learned judge equated the approach to removal under s108 with that under s171.

(viii) For the removal of a liquidator in any situation, cause must be shown, and so it must be for the Liquidators now in office.

63. I now turn to consider the specific responses that Mr Sutcliffe advanced for the Liquidators in respect of the three limbs of the Removal Application as developed by Mr Curl.

(i) Response to the application to set aside Fancourt J's order

64. Mr Sutcliffe submitted that this application is fatally flawed, both procedurally and substantively.

65. Dealing with the procedural point first, Mr Sutcliffe submitted that neither Mr Fry nor Mr Fakhry were parties to the Companies' the restoration order. Further, Messrs Hussey and Grattan have been joined, but only for costs related purposes, and the Registrar has not been joined, or notified of the application.

66. As to substantive grounds, dealing first with CPR 40.9, Mr Sutcliffe submitted that Fancourt J's order was not irregular because the judge had expressly agreed to proceed in knowledge of the fact that the requirement of service on the Former Liquidators had not been complied with. I was referred to CPR 3.10 in this regard as to non-invalidation of steps taken in proceedings by reason of procedural errors, and the court's power to make an order to remedy such error. He reminded me of the passages in the exchanges between himself and Fancourt J to which I have referred above that demonstrated the judge's awareness. Any deficiency was thereby cured by the order actually made which expressly provided for service of the order on the Former Liquidators within 21 days of 20th July 2018.

67. As to the suggestion that there was an injustice in not notifying Mr Fry or Mr Fakhry of the restoration application, Mr Sutcliffe acknowledged the basic principle of fairness, described in para 8-001 in Gee's *Commercial Injunctions*

6th ed., that an order should not be made *against a party* without giving him an opportunity to be heard, but this was not engaged in the present case, he submitted, because no relief was sought against the individuals concerned. It was an application to restore the Companies, of which the Registrar had been given notice, and she had consented. As for Mr Fakhry, he did not even enjoy the status of a former liquidator. In any event, no application was made to remove the Former Liquidators. They had ceased to hold office on 10-11 August 2016, before the Companies were dissolved on 18th November that year. Their appointment was not revived by the restoration order. As to the non-notification of the Former Liquidators in accordance with the Practice Note, this was something of which the judge was aware for the reasons described already. Further, as to the Registrar's position, the Government Legal Department's letter of 17th July 2018 expressly stated that the Registrar would not adopt any position in relation to the appointment of any particular liquidators.

68. Mr Sutcliffe submitted that the mistake that was made in relation to the Registrar's being informed as to non-notification of the Former Liquidators would not have caused Fancourt J to decide the application before him differently. The judge clearly knew what the intentions were as to notification and was satisfied with them. There is no requirement that an applicant in respect of a restoration order gives notice to the Registrar as to compliance with the Practice Note, and the Registrar does not have power to waive non-compliance.

69. In respect of the Court of Appeal's decision in *Pablo Star*, Mr Sutcliffe maintained that this reinforced earlier Court of Appeal authority to the effect that neither Mr Fry nor Mr Fakhry are, within the meaning of CPR 40.9, "directly affected" by the restoration order because they merely wished to argue that the proceedings which the revived company wished to pursue had no prospects of success.

(ii) Response in respect of removal and replacement

70. Mr Sutcliffe summarised, and then developed, three reasons for which he contended that both the applications under ss108 and 171 should be dismissed:

(i) The sections can only be invoked in the interests of the liquidations; *In re Adam Eyton Limited* (1887) LR 36 Ch D, CA, *per* Cotton LJ at 303, and *per* Bowen LJ at 306. Since Mr Fry and Mr Fakhry are subjects of the investigations, their interests are not aligned with those of the liquidations. Mr Sutcliffe relied on his Adverse Interests Principle.

(ii) Mr Fry and Mr Fakhry have not discharged the burden of showing "cause" as required whether the case is considered under ss108 or 171; *In re Adam Eyton*, and *Re Edennote* [1996] BCC 718, CA, *per* Nourse LJ at 725, *Sisu* at para 87. The bar is set high for the removal of a liquidator; *AMP Music Box Enterprises v Hoffman* [2002] BCC 996, *per* Neuberger J, as he then was, at 1001.

(iii) The Liquidators cannot be removed without being replaced, so as to leave the liquidations without a liquidator. Mr Fry is ineligible for appointment because of inherent conflict; once again, the Adverse Interests Principle.

71. As to the facts in relation to showing cause, Mr Sutcliffe submitted that whilst Mr Fry and Mr Fakhry complain that the investigation to date has been conducted by the Liquidators in an unnecessarily aggressive fashion, there is actually no material advanced for doubting their professional integrity and their competence to conduct the Liquidations. Mr Pagden, in his third witness statement provided evidence of his and Mr Underwood's very considerable experience as insolvency practitioners, and of their independence from any of the shareholders, confirming that they have no prior relationship with any of them.

(iii) Response as to an order for a meeting

72. Quite apart from an absence of cause to remove the Liquidators, Mr Sutcliffe reiterated his contentions which I have described above, that the reality is that if any meeting of the Companies were to be called, Mr Fakhry and Mr

Edwards would do their best, using their acknowledged voting power, to vote down any proposal for an investigation, which would cause it to be defeated.

(iv) Response in respect of suggested remedy by derivative action

73. Mr Sutcliffe maintained that the availability of pursuing matters by a derivative action was not a proper alternative course. Any well-founded claims should be brought by the Liquidators; *Fielding v Seery*, at paras 33(7) – 34, *Cinematic Finance Ltd v Ryder*, [2012] BCC 797 [22] (Roth J), and *Gore-Browne on Companies* (LexisNexis, loose-leaf) at para 18.37.

DISCUSSION

Assessing the factual background, and the approach to be adopted

74. It is appropriate to begin by determining the approach to be adopted in respect of the assessment of the factual disputes as they appear in the evidence before me. In the *Clydesdale Financial Services* case upon which Mr Sutcliffe relied, an application was made to remove administrators from office. Against them it was alleged, amongst other things, that they had colluded in pushing through the completion of the sale of a business, failed properly to consult creditors, whilst pretending that they were consulting them, and facilitated a sale at a gross undervalue; see para 16 of the judgment of David Richards J. The learned judge noted, at para 17 of his judgment, that the grounds for removal, and the evidence in support, had been expressed in "very strong terms" and that it was unsurprising that the administrators had taken great exception to both the grounds as well as the manner in which they had been expressed. David Richards J outlined the evidence and the submissions raised in relation to it, and continued:

> "26 It is impossible on this application to resolve the issue as to whether the sale was at a significant under value, still less to decide whether legal responsibility for any value lies with any of the participants. I do, however, consider that the evidence raises a serious issue for investigation. The question of undervalue is relevant to the claims made against [the purchaser] in the proceedings brought against it and for the purposes of the application for interim relief against Jiva it was prepared to accept,

rightly in my view, that it raised a seriously arguable issue. I should mention that the administrators contend that on the proper construction of the sale agreement [the purchaser] took the work in progress and disbursements subject to security rights in favour of CFS [a claimant creditor]. If this is right the price paid was a substantial over value. It is of course rejected by Jiva and it is not, as yet anyway, embraced as a proposition by CFS. It is not a point which can be decided at this stage.

…

29 The conclusion on this is that the terms and circumstances of the sale are a legitimate matter for consideration and perhaps investigation by an office-holder acting in the interests of the creditors. …

30 This is not of course to say that any consideration or investigation would finally disclose that there was anything untoward in relation to the sale. It simply cannot be determined at this stage. What is, however, clear is that [the administrator] and his firm were so closely involved in the negotiations that he cannot be expected now to conduct an independent review. …"

75. David Richards J went on, at para 39, to order the removal of the existing administrators and the appointment of a replacement, having emphasised that the basis on which he did so, as described in para 30 of his judgment, which had also taken into account the wishes of the majority of creditors by value, did not involve "any imputation against the integrity of the administrators."

76. Mr Curl sought to distinguish *Clydesdale*, and *Ve Vegas*, the other case relied upon by Mr Sutcliffe on this point. Mr Curl said that both were pre-pack administration cases in which the body of creditors did not know what was happening, until it had happened, whereas in the present case, the majority of shareholders had consented to the actions taken, so that there had been no question of conflict between their position and that of the Former Liquidators. Further, representatives of the minority shareholders were at the relevant meetings.

77. Mr Curl has properly identified the factual differences between *Clydesdale* and the present case, but in my judgment the case for application of the principle and approach adopted by David Richards J in that case is not affected. That approach was informed, at least in part, by the long line of authority (dating back at least to *Re Adam Eyton* (see above), and *Ex parte*

Sayer, In Re Mansel (1887) 19 QBD 679), the thread of which runs through many of the points which I have to consider, and which stems from the unimpeachable notion that those interested in a matter will not have confidence in another person's conducting an enquiry which relates to his own alleged wrongdoing which concerns that matter.

78. The approach in *Clydesdale* was also based upon a practical consideration which has to be taken into account at the present early stage in any case of this kind. Where there is some evidence which might justify an investigation, it is inevitable that the court being asked to grant relief will not, at that stage, have the benefit of having heard all the evidence that could be relevant and collated in relation to points in dispute, or which might be in dispute following proper investigation. All that a court can do is to form a view as to whether there is a serious question for consideration, or as David Richards J put it "a legitimate matter for consideration and perhaps investigation". This involves a recognition that ultimately it may be determined that nothing improper or untoward has occurred. But because the court cannot determine the issues at an early stage (indeed, it would be a denial of the opportunity of a proper hearing were it to try to do so), the scope of the court's enquiry must necessarily be limited to deciding whether issues worthy of investigation have been raised. That approach holds just as good in a case such as the present concerned with a liquidation as it does in relation to an administration. That approach does not necessarily dictate the outcome of the remainder of the applications before me, including the setting aside application, and the Removal Application, because other considerations, such as the effect of the release of the Former Liquidators, and features of ss108 and 171 come into play. However, I consider that the approach does shape how I should make my assessment as to (i) whether there is sufficient material to justify the investigations that the Liquidators now seek to pursue, and (ii) the whole process which was started when Mr Hussey and Mr Grattan made the application for the restoration of the Companies and the appointment of new liquidators.

79. In the circumstances, I consider that Mr Sutcliffe was right in the test which he formulated. I have to ask myself whether the material that is now relied upon by the Liquidators raises serious issues to be investigated. This means that the evidence needs to raise a case worthy of investigation.

80. I have identified above the nature of the allegations that have been raised in this case, in particular in the witness statements of Mr Hussey and Mr Pagden, and which the Liquidators rely upon in saying that they raise serious questions to be investigated. I need not repeat it here. When Mr Curl carefully opened his case, he did not advance arguments to the effect that the evidence did not suggest that there were such serious issues; I noted this at the time, and commented upon it in the course of Mr Sutcliffe's submissions, because it seemed to me unnecessary for him to address me at length on that fact related question. I added, so as to invite Mr Curl to address me upon the matter in reply in the event that I had been under any misapprehension, my understanding of the position. Mr Curl did not seek to develop a case to the effect that there were no such issues to be investigated. I consider that this was a realistic and correct position for him to have adopted, in light of the state of the evidence, and because an application of this kind is not a suitable forum for resolving such disputes once there is credible testimony as to the existence of such issues, even though should the investigations ultimately lead to further proceedings, and a trial, the issues might ultimately be resolved in favour of those persons against whom the allegations have been raised. I am satisfied that the evidence before me, though disputed in the witness statements of Mr Fry, Mr Fakhry, and Mr Edwards, does raise serious issues to be investigated in respect of the SME, and both the 2011 and 2015 Transfer Issues.

Mr Curl's "overarching point"

81. Mr Curl's overarching point stems from the principle that, in a solvent company, decision making is for the members, and that a majority can bind the minority; a principle which he contended survived going into an MVL, though with safeguards, before, during, or even after (by way of restoration and a derivative action) any MVL, for the protection of a minority. I do not doubt the correctness of the principles described by Mr Curl as a starting point for

the consideration of issues in relation to corporate governance in the case of a solvent company, or indeed, for the conduct of an MVL. It is, however, a starting point, and many inroads can be identified which affect the operation of those principles. Thus, as Mr Curl's submissions acknowledged, a disaffected minority can seek relief by way of a derivative action, provided, of course, that the necessary permission is obtained in accordance with CPR 19.9, and related rules of court. Further, whilst the members of a company may, in the case of an MVL, by a majority, resolve that a company should be wound up, and it is for them to appoint a liquidator under s91 of the 1986 Act, that liquidator's tenure is subject to the court's powers under ss108 and 171 of the Act, such that the majority's preferences may not prevail. This is demonstrated in Warren J's judgment in *Sisu* at paras 86-87:

> "86 In considering the interests of the insolvency proceedings, the court may well be concerned only with the future and not with the past as was the case in *AMP Music Box Enterprises Ltd v Hoffman*: see per Neuberger J. at p.1,003F. It will have regard to (but will certainly not be bound by) the wishes of the majority of those interested in deciding whether to remove an office-holder. It should not lightly remove its own officer and must pay due regard to the impact of any removal on his professional standing and reputation: see *Re Edennote Ltd* [1996] B.C.C. 718 (CA) per Nourse L.J. at p.725H.
>
> 87 The cases I have referred to relate to removal under s.108(2) (or its predecessors). The same approach applies to removal under s.172(2) : see *Re Edennote Ltd* at p.725C–D, Nourse L.J. saying that the difference in language between s.108(2) and s.172(2) is immaterial, adding that "it is not easy to think of any circumstances in which the court would remove a liquidator without cause being shown". I see no reason to apply a different approach in relation to s.171(2)."

82. On an application for removal, whether under s108 or 171, the wishes of the majority are a factor to which the court will have regard, but those wishes are not determinative. A similar approach was adopted by Snowden J in bankruptcy proceedings in *Maud*. He said at para 97:

> "In that regard, it is significant that none of the authorities relied upon by Aabar and Edgeworth were cases where the petition was being opposed by other creditors. In such a case, for the reasons that I have already given, and as explained in cases such as the *Crigglestone* case

> [1906] 2 Ch 327, *In re P & J Macrae* [1961] 1 WLR 229 and *In re Leigh Estates (UK) Ltd* [1994] BCC 292, the collective nature of bankruptcy proceedings requires the court to evaluate the wishes of the creditors and to attribute weight to the views of individual creditors in deciding whether to grant the relief sought in the interests of the class. As Upjohn LJ made clear in *In re P & J Macrae* [1961] 1 WLR 229, this will require consideration of all the circumstances. Accordingly, in the same way as he pointed out that the court might have suspicions about the motives of creditors who oppose a winding up order (eg because of their connections to the company) and might require them to explain their reasons for doing so, in an appropriate case the court may also question the motives of the petitioners and supporting creditors and investigate whether they have any ulterior purpose(s) in seeking a winding up order or bankruptcy order. Or as Mr Richard Sykes QC put it in *In re Leigh Estates (UK) Ltd* [1994] BCC 292, 294 "it is for the court to decide as a matter of judicial discretion, what weight to attribute to the voices *on each side of the contest* " (Emphasis added)."

83. As I shall explain later rather more fully, the exercise of the powers to remove a liquidator will be driven by the interests of the liquidation, in which a very significant factor will be the necessity to ensure that the interests of the liquidator are not in conflict with the duties that he will be called upon to perform.

84. In just the same way, a decision by the majority of members which gives rise to the release of a liquidator under s173, is not conclusive. This is a point also relevant to the Former Liquidators' complaint that the fact of release was not drawn to the attention of Fancourt J upon the Restoration Application; it is convenient to deal with the substance of it now. Under s173(4) whilst a liquidator's release takes effect from the time specified in s 173(2), and he is "discharged from all liability both in respect of acts or omissions of his in the winding up and otherwise in relation to his conduct as liquidator", such discharge is not absolute but, by s174(4), remains subject to the "court's powers under section 212 of this Act". The power to make an application against a liquidator who has been released is not exercisable save with the leave of the court under s212(4). Thus, the release, despite what any majority of members might have resolved, is always subject to the court's powers under s212 in respect of misfeasance or breach of fiduciary duty, although there is the safeguard for the liquidator that the court's leave for those powers to be

invoked must first be obtained. I remind myself of Mr Sutcliffe's point, in these circumstances, that there is no basis in the evidence at present for supposing that the members generally were advised by circular, or otherwise, of concerns that Mr Hussey and Mr Grattan had raised with Begbies in advance of the last of the Meetings. They cannot therefore be taken to have rejected those concerns.

85. These considerations lead me to the conclusion that whilst the law will respect principles of corporate autonomy in relation to majority decision making, those principles have to accommodate wider concerns such as minority protection (long recognised at common law since before the decision in *Foss v Harbottle* (1843) 2 Hare 461, as the judgment of the Vice Chancellor, Sir James Wigram in that case demonstrated), or ensuring that a suitable liquidator holds office (ss108 and 171), or that a liquidator may be held to account even after he has been released (s173). The court may also order the winding up of a company under s122(1)(g) of the 1986 Act on the basis that it is just and equitable to do so, and it may make wide ranging orders granting relief in respect of the conduct of a company whose affairs have been conducted in a manner that is unfairly prejudicial to the interests of members generally under ss994-996 of the Companies Act 2006. In the circumstances, I reject Mr Curl's submissions, attractively advanced as they were, as to the incompatibility of principles developed in what he described as an overarching objection with the procedure that has thus far been adopted by Mr Hussey, Mr Grattan, or the Liquidators in this case. The individual steps that have been taken, or which the Liquidators wish to take, have to be considered against the background relevant to each of them.

The application to set aside Fancourt J's order

86. I have already described the history in respect of the application to Fancourt J in some detail above. My findings are that:

    (i) Fancourt J was incorrectly informed that the Registrar had been advised of the intention as to giving notice to the Former

Liquidators within 21 days of the hearing, and agreed to that course.

(ii) The judge was aware that the Former Liquidators had not been notified, and he had been expressly alerted to the requirements of the Practice Note at para 3.5. He was told why there was proposed to be delayed notification of the Former Liquidators, and himself observed that there could potentially be a claim against them. Given that he went on to make the order as sought, this was because he considered that to be an acceptable reason.

(iii) He was aware that he was dealing with a case of an MVL; it was referred to in the application skeleton argument, and even in the order that he made.

(iv) Fancourt J was not told of the fact that the Former Liquidators had been released as a result of the resolutions passed at the Meetings of the Companies in August 2016.

(v) The judge was taken to para 6 of the Practice Note, and it was evident from what was said to him by Mr Sutcliffe, and the judge's responses thereto, that he appreciated that new liquidators were proposed to be appointed in place of those who had held office formerly, and why that was proposed, not least that a claim against them might be made.

(vi) He was not taken to all the correspondence with the Treasury Solicitor concerning the filing of correspondence with the court, although such correspondence had indicated that this was expected to be done, and had made express reference to para 3 of the Practice Note which included reference to serving former liquidators.

(vii) The misstatement at (i) above resulted from some uncorrected, and unappreciated, misapprehension amongst the legal team of which Mr Sutcliffe was part.

(viii) I am entirely satisfied that the other oversights in terms of what was not drawn to Fancourt J's attention were just oversights, and that no-one had set out to mislead the judge. My

impression is that Mr Sutcliffe had been at pains fairly to draw to the judge's attention matters that might be considered relevant.

87. I turn to consider the significance of the matters that Mr Curl has emphasised were not drawn to Fancourt J's attention, but which should have been. I have already referred to Mr Curl's reliance upon the decision of Burton J in *Network Telecom*, and his reliance, in his written, post-hearing submissions, to the decision of the Court of Appeal in *Pablo Star*. The latter decision I consider to be particularly important, arising as it does in the very context of company restoration, and because it is very recent appellate guidance on the issue of the consequences of absence of full disclosure on the obtaining of *ex parte* relief. In that case, Mr Haydn Price applied to the court for a company, of which he had been the director and sole shareholder, to be restored to the Register. He gave undertakings, contained in his witness statement, that the company would not carry on business other than to pursue copyright claims relating to a photograph against three identified potential defendants, including the Welsh Ministers. Registrar Derrett made the order for restoration as sought. Mr Price purported to assign the copyright in the photograph to a second company owned and controlled by him. Subsequently, he applied to amend the undertakings to mention the second company which would pursue the claims against the defendants and other potential defendants, reserving to the original company the right to sue the defendants. Registrar Derrett granted the application and varied the restoration order accordingly and released Mr Price from his previous undertakings. Both companies pursued claims against defendants in several jurisdictions. The Welsh Ministers applied to be joined in the restoration proceedings, pursuant to CPR r 19.2. Registrar Barber granted that application on the basis that the Welsh Ministers' submissions, evidence and analysis would assist the court in determining whether it had been misled. Judge Behrens, sitting as a judge of the Chancery Division ([2017] 1 WLR 299) allowed Mr Price's appeal. He held (i) that the right to be joined in restoration proceedings was a limited exception to the ordinary practice of the Companies Court, and a third party's desire to be joined to assist the court in determining whether it had been misled was not a proper

basis for joinder, and (ii) that it was for the Registrar of Companies, who had been entrusted with the policing of restoration applications, to raise with the court issues of breach of an undertaking and/or misleading witness statements if he chose to do so, and (iii) that, if he chose not to raise such issues, a third party could not raise it with the court except by way of a claim for judicial review of the Registrar's decision, and (iv) that, since the Welsh Ministers' rights were not directly affected by the restoration order, the order for their joinder was contrary to principle.

88. The Court of Appeal dismissed the Welsh Ministers' appeal. The leading judgment was given by Sir Terence Etherton MR, with whom both Longmore and Irwin LJJ agreed. The Master of the Rolls referred at para 26 to the terms of CPR 19.2 which are as follows:

> "The court may order a person to be added as a new party if— (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

89. He then referred also to a number of authorities that had been relied upon by Judge Behrens: *Stanhope Pension Trust Ltd v Registrar of Companies* [1994] BCC 84 (" *Stanhope* "), CA, *In re Blenheim Leisure (Restaurants) Ltd* [2000] BCC 554 (" *Blenheim* "), CA, and *In re Spring Salmon & Seafood Ltd* [2010] CSOH 82 Outer House of the Court of Session. The Master of the Rolls later continued:

> "60 In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1 . There are important practical considerations for strictly limiting the circumstances in which third parties are joined to applications to restore a company to the register, and they apply equally to applications to set aside an order for restoration. There may be many third parties who perceive that their interests may be indirectly affected by restoration and who may wish to advance all manner of reasons for seeking to prevent or reverse an order for restoration rather than wait to

face and, where appropriate, resist actions of the company against them or others which the company perceives to be in its best interests. That is particularly true, in a case like the present, when it is sought to restore a company to the Register of Companies in order to resurrect an asset in the form of a cause of action against third parties.
61 In such a case, it is well established that the court will not allow the intervention in proceedings for restoration by a third party who merely wishes to argue that the proceedings which the revived company proposes to bring against the third party have no prospect of success: *Stanhope* ... 90.
62 By contrast, the court will allow intervention by a third party whose interests will be directly affected by the restoration and who would otherwise have no opportunity to be heard on the issue of whether, in the light of that direct effect, restoration is just: *Blenheim* ..., 574.
63 I agree with Judge Behrens QC that the Welsh Ministers do not fall within that category of third party. On the assumption that Pablo Star owned the copyright in the photograph before it was dissolved and was entitled to sue for any infringement of that copyright, third-party infringers, such as the Welsh Ministers are alleged to be, are in no worse position after restoration than before. The fact that the Restoration Order retrospectively validated the assignment to Media (under the 2006 Act, section 1032) does not affect this analysis. It merely had the consequence that, instead of being exposed to proceedings by Pablo Star, the Welsh Ministers might (always subject to the reservation to Pablo Star of its rights in the assignment) be exposed to proceedings by Media. It did not bring into existence a new asset or a new liability but merely changed the identity of the person who could enforce the copyright.
64 The contrast with a case where a third party is directly affected is clear. *In re Servers of the Blind League* [1960] 1 WLR 564 , *Stanhope* and *Blenheim* are all good examples.
65 *In re Servers of the Blind League* was a decision of Pennycuick J, which was approved by the Court of Appeal in *Stanhope*. In that case a charitable company had gone into voluntary liquidation. After dissolution of the company a woman died who bequeathed to the company a quarter of her residuary estate. The effect of the company having ceased to exist was that the gift lapsed and accrued to the other residuary beneficiaries. The liquidator applied for an order declaring the dissolution void in order retrospectively to validate the legacy. Pennycuick J refused the order on the ground (stated at p 565) that the order would "dispossess other persons who obtained a vested interest in the asset under a title not derived from the company".

90. The Master of the Rolls then considered both *Stanhope* and *Blenheim* before continuing:

"68 The contrast with the present case is clear. So far as concerns the interests of the Welsh Ministers, restoration of Pablo Star to the Register of Companies did not create a new asset of the company

which had not previously existed nor did it create a new or substantively different liability of the Welsh Ministers which had not existed immediately prior to Pablo Star's dissolution. On the assumption that the copyright in the photograph was owned by Pablo Star immediately prior to dissolution, the liability of the Welsh Minsters for its infringement existed both before dissolution and after restoration, irrespective of whether it is Pablo Star or Media which can now enforce that liability and irrespective of whether or not the precise amount of that liability is now greater than it was prior to dissolution because of continued acts of infringement in the meantime."

91. The Master of the Rolls, in a passage particularly relied upon by Mr Curl, disagreed with the second reason given by Judge Behrens, as to the function of the Registrar of Companies:

"73 No statutory provision has been identified to support the judge's proposition. Part 35 of the Companies Act 2006 sets out the functions of the Registrar of Companies. Other than the requirement to keep the Register of Companies, no role in respect of restoration applications, including their policing, is assigned by that Part to the registrar. Part 31 of the 2006 Act addresses dissolution and restoration of a company to the register. It does not confer any role on the registrar in respect of applications to the court under section 1029 for restoration, other than administrative roles such as the requirement under section 1031(3) to publish notice of the restoration.

74 As a matter of practice the Registrar of Companies is always made a respondent to restoration applications: see *Practice Note (Companies Court: Claims for an Order Restoring the Name of a Company to the Register)* [2012] BCC 880. The registrar assists the court as to whether all relevant papers have been served and the requirements of section 1029 of the 2006 Act are satisfied. …

75 … Nor does the registrar monitor compliance with undertakings or refer any breach of undertakings to the court. Mr Buckley [counsel for the Registrar of Companies] has emphasised that the registrar does not have the in-house legal and other expertise and resources to investigate and, if appropriate, to pursue complaints such as those in the present case.

76 The Registrar of Companies, therefore, while adopting a neutral position as to the outcome of this appeal, would in principle be in favour, in an appropriate case, of joinder to enable a third party to bring before the court a complaint that the court was misled when making the restoration order or that there has been a breach of undertakings given to the court when the order was made.

77 I consider that the court does have power under CPR r 19.2(2) to join a third party to restoration proceedings for such a purpose in an appropriate case."

92. The conclusion reached by the Master of the Rolls was, however, that the case was not an appropriate one for such joinder. Materially, for present purposes, his lordship continued at para 79:

> "Close consideration of the complaints about Mr Price's conduct shows that the Welsh Ministers, if joined, would not have any real prospect of succeeding in persuading the court that the Restoration Order or the Variation Order should be set aside. As Lord Brandon of Oakbrook said in *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424, 445–446:
>
> > "It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund." "

93. There is another important passage at the very end of the Master of the Rolls' judgment in para 91:

> "Finally, I would emphasise that nothing in this judgment should detract from the importance of full and frank disclosure to the court of all material facts on applications for restoration of a company to the register and any subsequent variations to the restoration order where, as here, they are effectively ex parte applications in view of the limited involvement of the Registrar of Companies. As I have made clear, in an appropriate case, where it is desirable for the purposes of CPR r 19.2(2) and consistent with the overriding objective, there is jurisdiction to permit a third party to be joined to bring such matters before the court."

94. The passages to which I have referred in *Pablo Star*, in my judgment, amply support Mr Curl's submission that because restoration applications are "effectively *ex parte*", there is a duty of full and frank disclosure upon an

applicant for restoration of a company to the register in respect of all material facts. What I have to consider, however, is, first, whether any *material* facts were not disclosed. For that purpose, I include any matters such as the requirements of a relevant rule of court, or an authority, which might materially affect the court's mind as to the exercise of its powers. Secondly, if satisfied that there has been a failure of full and frank disclosure, I must then consider whether it led to the court to make an order which is substantially different from the order which it would have made if such disclosure had taken place; see the passage in Lord Brandon's speech in *Jenkins v Livesey* cited by the Master of the Rolls in *Pablo Star*.

95. In my judgment, the application to set aside fails on both of those points in respect of the suggestion that there was a failure of full and frank disclosure. It seems to me that what really mattered was that Fancourt J should be alerted to (i) the requirements of the Practice Note as to service upon the Former Liquidators (para 3.5), (ii) the fact that this requirement had not been complied with, (iii) the fact that the proposed liquidator was different from the Former Liquidators, and evidence as to why (para 6 of the Practice Note). As to these points, (i) Fancourt J's attention was drawn to the relevant passages in the Practice Note, (ii) it was made clear to him that the Former Liquidators had not been served, and his order expressly provided for service of his order within 21 days. As to (iii) the exchanges between Mr Sutcliffe and Fancourt J recorded in the transcript, and illuminated by the note prepared by Stewarts' senior paralegal in attendance, also put beyond any doubt that the judge appreciated that a claim might be made against the Former Liquidators. The transcript also shows that Mr Sutcliffe submitted that there had been compliance with the requirement for evidence explaining why a different liquidator had been proposed, and that the judge accepted that this was the case. The issue as to new liquidators had been expressly addressed in paras 16-20 of Mr Grattan's first witness statement, in which Mr Grattan explained in terms that there might be claims against the Manager and the Former Liquidators, and that therefore the liquidators to be appointed should not be connected with them. The judge confirmed that he had read the evidence. In these circumstances, I find that all material matters were put before the judge.

96. As to the other matters about which the judge may have been misled inadvertently, or which were not mentioned:

(i) The misstatement as to what had been communicated to the Registrar was not material because the judge himself was made fully aware of the position as to non-service upon the Former Liquidators. For equivalent reasons, it does not seem to me that the absence of reference to all of the correspondence with the Treasury Solicitors was material.

(ii) Fancourt J was not told of the fact that the Former Liquidators had been released as a result of the resolutions passed at the Meetings of the Companies in August 2016. I do not consider that this was material because, as explained above, the release does not operate as a complete bar in respect of proceedings against anyone. Section 212 proceedings can be brought, although the leave of the court is required in the case of a claim against a liquidator. Moreover, this was merely an application to restore the Companies. The court was not being asked to approve further proceedings against anyone, or to grant leave as might be necessary under s212.

97. If, contrary to my conclusion just stated, I had been satisfied that there was a failure of full and frank disclosure, I do not consider that it led to the court to make an order which is substantially different from the order which it otherwise would have made. The judge clearly considered that the right thing to do was to restore the company and notify the Former Liquidators of that after the event. I do not consider that his judgment would have been affected had he been told that the Registrar had not been informed of that proposed course. Similarly, I do not consider that being informed of the Former Liquidators' release would have affected his judgment, for the reasons that I have given in the preceding paragraph.

98. If indeed the non-compliance with the Practice Note requirements in the circumstances which I have described did amount to an error of procedure, then I consider, as Mr Sutcliffe submitted, that, the provisions of CPR 3.10 are relevant:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction—
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error."

Any error was remedied by the order which the judge actually made providing for later service of his order.

99. I reject Mr Curl's submission that there was an injustice, and denial of rights to the Former Liquidators, in denying them the opportunity to attend and be heard upon the Restoration Application. This is because, as the Master of the Rolls explained at para 61 of his judgment in *Pablo Star*, it is well established by Court of Appeal authority (in particular *Stanhope*) that the court upon such an application will not allow the intervention by a third party who merely wishes to argue that the proceedings which the revived company proposes to bring against that party have no prospect of success. It is, I consider, worth citing the actual passage in Hoffmann LJ's judgment in *Stanhope* which the Master of the Rolls had in mind, and which had been set out in full by Judge Behrens at para 32 of his judgment at first instance:

> "The making of the order [to declare dissolution of a company void under s 651 of the Companies Act 1985] does not determine whether the applicant has a claim against the company or the company has a claim against a third party. As I have already said, all that is required is that the claim should not be 'merely shadowy'. It therefore seems to me that a third party who merely wants to say that the applicant has no claim against the company or that the proceedings which the revived company proposes to bring against him have no prospect of success should not be entitled to intervene in the application."

100. In short, the Former Liquidators did not have the entitlement to participate in the Restoration Applications, and so they have not been denied it. This

approach must apply all the more to a situation such as the present where proceedings against that party are not even proposed but merely under consideration. If the Former Liquidators, or indeed Mr Fakhry, had been notified of the Restoration Application, and if they had attended and submitted, as might apply to them respectively, that the claims against them were unmeritorious, that they had been released, that their conduct had been approved by very substantial majorities of members voting, and that there should be no change of liquidators, in my view, having regard to *Stanhope*, Fancourt J would not have been persuaded to take any course different from that which he actually took. In particular, he would not have been persuaded that it was inappropriate to appoint new liquidators, because he would have been of the view that it was impossible for the Former Liquidators to resume office when a pressing task would have been to investigate the merits of claims into their own conduct, a point which I shall develop more fully below.

101. For completeness, I must add in respect of Mr Curl's point as to the *PricewaterhouseCoopers* case as to the standing of the Former Liquidators to make representations, that the observations of the Privy Council in that case at paras 32-34, were made in very different circumstances. The Board was addressing a situation in which the very jurisdiction of the court to make an order of which the auditors were a target was in question. This is clear from para 32, in which Lord Neuberger, delivering the opinion of the Board, said:

> "As to the first point, a contention that a winding up order should not have been made will rarely be entertained sympathetically or at much length by a court if it is raised by a party at the receiving end of an application under a provision such as section 195, unless the contention is supported by the company, the official receiver, the liquidator, a creditor or a contributory. However, if, as in this case, the contention raises a well arguable point that, on the face of the court papers, there was no jurisdiction to make the order, it would have to be seriously addressed, and if the contention was made out, the court would have to consider what the interests of justice require."

No such consideration would have arisen in the present case.

102. As for Mr Curl's submission concerning the notes to CPR 40.9 in the *White Book*, first of all, it seems to me that the rule itself is inapplicable to the present circumstances as the Former Liquidators were not directly affected by the order made. They were not removed as liquidators as they had ceased to be in office, and they were not otherwise directly affected for the reasons given in paras 62 and 63 in the Master of the Rolls' judgment in *Pablo Star*. But Mr Curl has a wider point that he takes from the note in the *White Book* as to irregularity because of non-compliance with the Practice Note and the requirement that they be notified. In my judgment, this point can be answered shortly by what I have said above in relation to CPR 3.10, and the order made by Fancourt J. If I am wrong about that, it does not seem to me that the position of the Former Liquidators can be equated with that of the various categories of persons mentioned in the note concerned, or the examples given. They would not be entitled to be joined as parties for the reasons given in *Pablo Star*, nor would the representations that they would have wished to make have been able to affect the outcome for the same reasons. The examples given in the note relate to parties whose rights might be directly affected by an order – a third party who becomes bound by a judgment, under CPR 19.8A; a person entitled to claim relief against forfeiture or a mortgagee's possession claim, under 55APD; landlords who might be affected by a tenant's claim for a new tenancy under the Landlord and Tenant Act 1954, or claims for compensation for improvements and goodwill on termination of tenancies of business premises under Part I of the Landlord and Tenant Act 1927, under 56PD.

103. I am therefore wholly unpersuaded that Fancourt J's order, to which the Former Liquidators were not parties, should be set aside for any of the reasons which have been advanced on their behalf.

The application to remove the Liquidators

104. I accept Mr Curl's submission as to the width of the court's discretion under s108 of the 1986 Act, and that it is demonstrated by the authorities to which he referred. What I cannot accept is that cause for the removal of the Liquidators has been shown. When Fancourt J made an order for restoration, he inevitably

had to consider the question of appointing a liquidator, as envisaged by para 6 of the Practice Note. He could not, in my view, properly have reappointed the Former Liquidators because of their conflicting interests and the need for their conduct to be investigated; I refer to the passage in Judge Maddocks' judgment in *Fielding v Seery* which I have mentioned above when outlining Mr Sutcliffe's Adverse Interests Principle. It would have been "against the interests of the liquidation" in the words of Cotton LJ, at page 304, in *Re Adam Eyton*. In that same case at page 306, Bowen LJ said that "due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed". Fancourt J had evidence before him of the willingness of the Liquidators to act, and that has now been supplemented by evidence of their independence and absence of conflict. As such, they are duly appointed liquidators, and it is necessary for cause to be shown as to why they should be removed, in just the same way as it must in the case of any liquidator.

105. The applications under ss108 and 171 are made by Mr Fry and Mr Fakhry, both of whom, because of their previous functions in relation to the Companies, have clearly been identified as persons in respect of whose conduct there are serious questions which deserve investigation. As the Privy Council's decision in *Deloitte* to which I was referred in the course of Mr Sutcliffe's submissions demonstrates, an important question for consideration on an application under both section 108 and 171, is as Lord Millett put it, "whether the applicant is a proper person to invoke the jurisdiction"; see page 1611B-D. In that case a company in Cayman was placed in voluntary liquidation. The liquidators began proceedings for negligence in respect of an audit of the company. The plaintiff was neither a creditor nor a contributory, but was a defendant to the negligence action. His application, under the Cayman equivalent of s108, was for an order for the removal of the liquidators, or to restrain them from acting, because of their alleged conflicts of interests. Lord Millett explained why the application would not be entertained at page 1611H:

> "The company is insolvent. The liquidation is continuing under the supervision of the court. The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors have taken no step to remove them. *The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators, and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders.*" (Emphasis added)

106. There is another, and perhaps deeper, objection to the application for the removal of the Liquidators, and that is that it could be seen to be an attempt to thwart any investigation into the conduct of those who make it. This is a long-recognised concern in respect of such applications by persons whose interests directly conflict with the purposes of the liquidation. Another early case concerned with such a problem was *Re Mansel* (above) decided just days later than *Adam Eyton* in July 1887. In that case the largest proof in a bankruptcy had been lodged by one Norton. The trustee gave notice of a motion to expunge Norton's debt. Various creditors who had bought up Norton's debt gave notice of a meeting to remove the trustee. Lindley LJ said at pages 682-683:

> "One must indeed be blind if one did not see that the object of this was to prevent the investigation of Norton's claim. The registrar has made an order restraining the holding of this meeting until after the determination of the motion to expunge Norton's proof, and, if there was jurisdiction to make that order, it is abundantly plain that it ought to have been made. I think there was jurisdiction either under s.72, or under s.65, or under both those sections, and that the registrar was right in finding some way of checkmating such dishonest proceedings."

Both Lord Esher MR and Lopes LJ delivered judgments to similar effect.

107. Similar considerations are reflected in numerous cases in the hundred and more years that have intervened since those two late Victorian decisions; many of them were referred to by Mr Sutcliffe when developing his Adverse Interest Principle. They include much more recent cases such as *Fielding v Seery*,

Corbenstoke, and *Raithata.* I need not refer to them further. Such concerns are particularly pronounced in the present case where it is very much part of the case for Mr Fry and Mr Fakhry that the Liquidators should be removed and replaced by Mr Fry himself so as to restore the *status quo ante.*

108. There is no doubt that it is not necessary for the removal of a liquidator that there should be a challenge to his honesty, or his professional qualifications, or his experience; as Millett J's judgment in *Keypak* demonstrates, adopting a relaxed, complacent attitude, and lacking vigour may be sufficient to justify removal. But as was observed by Neuberger J in *AMP* at pages 1001-1002:

> "… if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. So to hold would encourage applications under s. 108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who was appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over his shoulder, and there would be a risk of the court being flooded with applications of this sort. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay."

109. In the present case, there is no evidential basis for criticising the professional integrity, independence, or competence of the Liquidators. Equally there is no basis for saying that they have shown themselves to be complacent or inactive. They have got on with their job since their appointment, and it has only been the process of litigation that has delayed them from making more progress with their tasks. The principal basis advanced for their removal is that there

are good grounds to suppose that they do not have the support for a majority of members. On the other hand, as I have already mentioned, there is material before the court which suggests that they do indeed enjoy significant support. When the Meetings took place in 2011, 2015 and 2016, the members did not have the benefit of the evidence that has now been assembled, and which I have held raises serious issues to be investigated; their views as to the conduct of a liquidation by the Former Liquidators against that background has not been tested.

110. I do not consider that any cause has been shown which justifies the removal of the Liquidators.

Whether a meeting should be ordered at this stage

111. In my judgment, it would not be appropriate at this stage to order that a meeting be held pursuant to s171(3)(b) of the 1986 Act for any of the Companies. By definition, a meeting at this stage would not have the benefit of the investigations which the Liquidators wish to undertake. Given the voting power of the Manager related vote there does seem to me to be a real risk that it could be deployed so as to prevent matters from being investigated which I consider to be worthy of investigation.

Relevance of other means of redress by derivative action

112. In my judgment, *Parry v Bartlett* upon which Mr Curl relies, is not of assistance when considering whether a derivative claim can properly be brought in respect of a company in liquidation. It was a decision of His Honour Judge Behrens, sitting as a judge of the Chancery Division. As his lordship explained at para 59 of his judgment, the company concerned was struck off for failing to file accounts; it does not appear to have been a company in liquidation. An order for the restoration of the company to the register had already been made, and a derivative claim had been issued. The matter which Judge Behrens had to consider was whether there should be permission to continue that claim, and he did grant permission for it to be continued. The case did not concern issues as to whether such a claim could be pursued in respect of a company in liquidation, and no reference was made,

hardly surprisingly in those circumstances, to the decisions in *Fargro Limited v Godfroy* [1986] 1 WLR 1134, and *Cinematic Finance* (see reference above) which I mention below. I do not consider that *Parry v Bartlett* deals with the point which arises before me in the present case.

113. At common law, a derivative claim could not be brought by a minority shareholder where the company concerned was in liquidation. This is explained in para 2.157 in *Joffe* where reference is made to *Fargro Limited v Godfroy* [1986] 1 WLR 1134, a decision of Walton J. In that case, his lordship contrasted the situation as to the availability of a minority shareholders' action, following the rule in *Foss v Harbottle*, with the situation where a company has gone into liquidation - "once the company goes into liquidation the situation is completely changed, because one no longer has a board, or indeed a shareholders' meeting, which is in any sense in control of the activities of the company of any description, let alone its litigation. Here, what has happened is that the liquidator is now the person in whom that right is vested." Judge Maddocks adopted the same approach in *Fielding v Seery.* Mr Curl, in reply, sought to distinguish this decision on the basis that in an MVL the shareholders remained the sovereign body of the company and could resolve to confer power to litigate upon the directors pursuant to s91(2) of the 1986 Act. However, he acknowledged in the course of his submissions that at least until such a resolution were to be passed in a general meeting (which, of course, it has not been), the power to litigate rests alone with the liquidator. The course that should be taken, he submitted, would be for the court to stay the liquidation under s147 of the 1986 Act (applicable in a winding up by the court, but available *via* s112), thereby paving the way for a derivative claim.

114. The learned authors of *Joffe* go on to discuss the position in the light of the enactment of ss260-264 of the Companies Act 2006, which make provision for derivative claims; *Fargro* and *Fielding v Seery* pre-dated this. The authors suggest that there is no specific indication in the Act as to whether such a claim can be brought where a company is in liquidation, and they discuss an argument that since the claim under the statute represents a new dispensation it is "possible that the courts in the UK will adopt a different position when

faced with applications by members for permission to bring derivative claims under [Companies Act 2006] when a company is in liquidation to that which existed at common law, although indicators that the statutory derivative claim was not intended to cover companies in liquidation include the lack of any reference to the role of the liquidator, despite the significance of the liquidator where the company is in liquidation, and the fact that creditors, whose interests have priority when a company is in liquidation, have no standing to be (*sic*) a statutory derivative claim. No doubt this issue will in the future need to be addressed by the UK courts. In Australia and New Zealand, it has been held that derivative claims should not be available where the company is in liquidation." They cite authority from both those jurisdictions. They also refer, in a footnote, to the Privy Council decision, on appeal from the Court of Appeal of Jersey, in *Gamlestaden Fastigheter AB v Baltic Partners Limited and Others* [2007] Bus LR 1521. I have looked at that decision. It appears to me that the main issue, identified by Lord Scott in para 3 of the Board's judgment, was whether an unfair prejudice petition could be presented against an insolvent company; there was no argument as to the issue as to whether a derivative claim could be brought in respect of a company in liquidation. *Joffe* suggests that the position as to the latter point will need to be addressed in future in the UK courts.

115. The decision of Roth J in *Cinematic Finance*, I consider, is a case which is of assistance, as his lordship directly addressed the question of whether derivative claims should be permitted in the context of the current provisions of the Companies Act 2006, albeit in the case of insolvent companies not yet in liquidation or administration. He said at para 22:

> "Here, on the claimant's case, the companies are insolvent companies. If they were placed into liquidation or, as may be, administration, then it would be for the liquidator or administrators to decide whether or not to pursue these claims. Derivative claims should not normally be brought on behalf of a company in liquidation or administration (see Gore Brown on Companies (Jordan Publishing.45th edn), para.18(14).) Since here, if the companies were subject to appropriate insolvency procedures—and I emphasise it is the claimant's evidence that the companies are insolvent—it would then be inappropriate for a derivative claim to lie, that is, in my judgment, a further reason why

> the present claim should not be permitted. The controlling shareholder should not seek to circumvent the insolvency regime by starting a derivative claim."

116. I appreciate, in light of the passages to which I have referred in *Joffe*, that there may be contrary arguments, but in my judgment the reasoning of Walton J in *Fargro* still holds good, at least until a general meeting has decided that the power to litigate may be exercised by the board under s91(2) which has not occurred, and I consider that this view is supported by the passage in the judgment of Roth J to which I have referred in the preceding paragraph. At the very least, it cannot be assumed that a derivative claim would be available to members now that the Companies are in liquidation, and I would consider it wholly inappropriate to make any order on the present applications on the basis that such alternative relief would be available. In any event, even if such relief were to be available, it is not an exclusive remedy. The Companies are now in liquidation, and the Liquidators are in place. Proportionality and the balance of convenience firmly favour allowing them to get on with their work, and not disturbing the current arrangements.

SUMMARY AS TO THE REMOVAL APPLICATION

117. I am satisfied that the evidence before me demonstrates that there are serious issues to be investigated in respect of the management of the Companies, and the conduct of their liquidations. It was therefore entirely just that they should be restored to the register. I consider that there was no failure of full and frank disclosure upon the making of the applications that were considered by Fancourt J in July of last year; the misstatement as to what had been mentioned to the Registrar was immaterial, and Fancourt J himself was clearly satisfied that it would be a satisfactory way forward for the Former Liquidators to be served with his order within 21 days from the hearing before him. The appointment of new liquidators was inevitable. The Former Liquidators could not sensibly be reappointed when the pressing task to be undertaken would include investigating their own previous conduct. The investigations need to be undertaken properly, and by someone whose independence is not in doubt. This was achieved by Fancourt J's order. No

good cause to remove the Liquidators has been demonstrated. It would not be appropriate to order a meeting of the Companies at this stage. Such meeting would not have the benefit of the proposed investigations, and there is, because of the voting power available to those whose interests are aligned against investigation, a real danger that proper investigation would be defeated. I am not satisfied that proceeding by way of a derivative claim is an available alternative as has been suggested on behalf of Mr Fry and Mr Fakhry, but even if it were, I would not be minded to conclude that it was an alternative which should be pursued rather than the course originally adopted by Mr Hussey and Mr Grattan and now pursued by the Liquidators.

118. In the circumstances, I shall refuse each of the Applications made by Mr Fry and Mr Fakhry. It remains for me to consider the Non-Party Costs Issue.

THE NON-PARTY COSTS ISSUE

119. Mr Fakhry in his second witness statement explains, at para 171, that although Mr Hussey and Mr Grattan are not direct respondents to the Removal Application, they have been joined to it so that a costs order may be sought against them.

120. Mr McDonald raised what he described as two very short points; first, that Mr Hussey and Mr Grattan should not have been joined to the Removal Application at all, and, secondly, that if they were to be joined at all, that they should not have been joined at the outset but rather at a later stage when costs were being dealt with. In consequence of the stage at which they were joined, it has been necessary for them to become involved in the application, and to prepare for it, not simply on costs issues, but generally. He submitted that it was wholly unnecessary for his clients to be joined to the application at all because there are reputable liquidators who would be able to meet any costs order, in the event that Mr Fry and Mr Fakhry should be successful in their applications. Indeed, he pointed out, the Liquidators had confirmed that through solicitors' correspondence, even before the Removal Application was

issued. He suggested that in the circumstances I should infer "shareholder intimidation" as the motive for the joinder of his clients to the applications concerned. He pointed out that this has been raised in his clients' witness statements, and that these have gone unanswered. He contended that in these circumstances, I should dismiss the costs applications against his clients whatever the outcome of the Removal Application, but that, quite obviously, I should make that order in the event that that application were to be unsuccessful.

121. In my judgment Mr McDonald's points are well made. I can see no justification for the joinder of his clients at the time when they were joined. If the Removal Application had been heard first, when it failed the question of their joinder would never have arisen. I am not prepared to find that when the application against them was issued, shareholder intimidation was the motive. I do not believe that Mr Fry's or Mr Fakhry's legal representatives would have been prepared to become involved in the use of such tactics; but I can readily accept that judged from the perspective of Mr Hussey and Mr Grattan it might have looked as if the object of their joinder was to bully them. I have to add that I really cannot see the sense in having added them given the Liquidators' standing, and the correspondence from their solicitors that preceded issue of the application.

122. I conclude that the application against Mr Hussey and Mr Grattan always was without any proper foundation, that they should not have been joined at all, and it should be dismissed. Given that the application against them has wholly failed, I would have reached the same conclusion using ordinary discretionary factors under CPR 44.

DISPOSAL

123. In the circumstances, I dismiss the Removal Application in its entirety, and I direct that Mr Hussey and Mr Grattan shall have their costs in relation to it. As for outstanding costs issues concerning the Liquidators, and the bases of assessment, I will hear further submissions when I hand down this judgment.

Assuming that the parties are ready to deal with the Investigation Application at the same time, I will also proceed to deal with that on the same occasion.

124. I am grateful to all counsel for their outstandingly well-presented arguments, written and oral, and to solicitors for all parties for agreeing and presenting a very well-prepared bundle for my use.