RE CIRO CITTERIO MENSWEAR PLC; THAKRAR v JOHAL [2002] EWHC 897 (CH)

Chancery Division

Pumfrey J

3 May 2002

Administration – Hostile litigation – Administrators' prospective costs of appeal – Direction for payment of prospective costs out of estate as first fixed charge – Order made in absence of other party – Order prejudicing other party – Application to set aside order – Insolvency Act 1986, s 19(4)

As a result of various orders made against CCM plc, K was a creditor for approximately £7 million and a secured creditor for £2.795 million. CCM plc went into administration and the administrators sought leave to appeal the orders out of time. On 20 December 2001, on an application by the administrators without notice to K, the deputy judge directed the administrators to seek permission to appeal out of time and to appeal against the orders and that the costs and expenses of so doing should be paid out of the estate of the company in administration and treated as the costs of the administration in priority to the claims of creditors (the costs order). The administrators contended that the effect of the costs order was that such prospective costs would thereby become expenses properly incurred by the administrators under s 19(4) of the Insolvency Act 1986 and therefore chargeable in priority to any security, including that asserted by K in the litigation. K applied to discharge the costs order on the grounds that it had been made against his interests in his absence and had the effect of permitting the administrators to litigate against him at his expense, regardless of the outcome of the litigation.

Held – discharging the costs order –

(1) It would require exceptional circumstances to prevent a party whose interests were directly affected by an order made in his absence and without notice from seeking to advance reasons why the order should not have been made or be continued and no such exceptional circumstances were present.

(2) The purpose of giving directions to administrators was not normally to provide them with a 'bomb shelter' from future claims and it would require a very strong case before the court would make a pre-emptive decision that the administrators' future costs of hostile litigation should be given in advance the priority afforded by s 19(4).

(3) Given the more than negligible risk that the administrators might fail to obtain permission to appeal out of time or that any subsequent appeal might fail and that it had not been demonstrated that there was no other source of funding available to the administrators, it was appropriate to discharge the costs order.

Statutory provisions considered

Companies Act 1985, ss 143, 164, 178, 459
Insolvency Act 1986, ss 14, 17, 23, 27, 19(4), Sch 1
Insolvency Rules 1986 (SI 1986/1925), rr 4.218, 7.47(1)

Cases referred to in judgment

Buckton, In re; Buckton v Buckton [1907] 2 Ch 406, ChD
Duomatic Ltd, Re [1969] 2 Ch 365, [1969] 2 WLR 114, [1969] 1 All ER 161, ChD
Eaton (Deceased), Re; Shaw v Midland Bank Executor and Trustee Co Ltd and Others [1964] 1 WLR 1269, [1964] 3 All ER 229, ChD
Exchange Securities & Commodities Ltd (No 2), Re [1985] BCLC 392, ChD
First Guarantee Trust Co Ltd, Re (unreported) 14 February 1985

MC Bacon Ltd (No 2), Re; Company (No 005009 of 1987) (No 2), Re a [1991] Ch 127, [1990] 3 WLR 646, [1990] BCLC 607, ChD
McDonald and Others v Horn and Others [1995] 1 All ER 961, [1995] ICR 685, ChD
Mond and Another v Hammond Suddards (A Firm) and Another [2000] Ch 40, [1999] 3 WLR 697, [1999] 2 BCLC 485, CA
Montin Ltd, Re [1999] 1 BCLC 663, ChD
Moritz (Deceased), In re [1960] Ch 251, [1959] 3 WLR 939, sub nom *Moritz (Deceased), Re; Midland Bank Executor and Trustee Co Ltd v Forbes and Others* [1959] 3 All ER 767, ChD
Osmosis Group Ltd, Re [1999] 2 BCLC 329, ChD
T & D Industries plc and Another, Re [2000] 1 WLR 646, sub nom *T & D Industries plc and Another, Re; T & D Automotive Ltd (In Administration), Re* [2000] 1 All ER 333, ChD
Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2) [1975] QB 373, [1975] 2 WLR 389, [1975] 1 All ER 849, CA
Westdock Realisations Ltd and Another, Re [1988] BCLC 354, [1988] BCC 192, ChD

David Richards QC, Philip Marshall *and* Daniel Lightman *for the applicant*
John Randall QC *and* Lance Ashworth *for the respondents*

PUMFREY J:

[1] This is an application by Kirat Thakrar to set aside an order made by Mr Peter Leaver QC on 20 December 2001. The hearing before me took place over 3 days in March 2002 and involved a detailed examination of the course of the various proceedings arising out of the dispute between the three brothers, Kirat Thakrar, Rasik Lalji Thakrar, Vinod Thakrar and Vinod's son, Nilesh, who own Ciro Citterio plc. I shall refer to them by the names used throughout this litigation as Kirat, Rasik, Vinod and Nilesh. The respondents to this application are the administrators to the company who were appointed by the order of Hart J on 12 March 2001 on a petition presented by Rasik on behalf of the directors of the company.

[2] The statutory purposes of the administration order were the approval of the voluntary arrangement and more advantageous realisations of the company's assets than would have been effected on a winding-up.

[3] Mr Leaver QC's order was made after a hearing of an application similar to a Beddoe application by the administrators. It was made in the absence of Kirat, who did not receive notice of it. It was supported by an affidavit of one of the joint administrators, Gurpal Singh Johal. The order as made was as follows. After the usual recitals:

> 'Upon the applicants [the joint administrators] by their counsel undertaking to supply a copy of this order to each member of the creditors' committee of the company as soon as practicable it is ordered and directed that:
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> 1. The applicants should seek permission on behalf of the company to amend two notices of appeal served on its behalf in the proceedings of the High Court of Justice Chancery Division, Birmingham District Registry Action Number [and the action numbers are set out] and seek permission to appeal out of time and thereafter pursue appeals in the said proceedings so as to seek to reverse the following decisions of His Honour Judge Boggis QC sitting as a Judge of the High Court, dated [and the various orders

of Judge Boggis QC are listed; I believe there are 10 of them] in so far as the same concerned the company.

2. The costs and expenses of this application and of taking the steps set out in paragraph 1 above on behalf of the company should be paid out of the estate of the company in administration and should be treated as the costs of the administration in priority of the claims of creditors.'

[4] Then there is a provision for maintaining Mr Johal's witness statement and the exhibits to it 'confidential upon the court file, not open to inspection without the permission of the court'.

[5] In effect the order approves the application of the administrators to appeal out of time from the specified orders of His Honour Judge Boggis and to charge the costs and expenses of these actions and the appeals, if permission is granted, as expenses of the administration to be paid in priority to the claimant's creditors. In summary, Kirat objects to this order on the ground that all the decisions of His Honour Judge Boggis against which it is sought to appeal out of time are decisions in his favour, in consequence of which he is a creditor of the company for some £7 million and interest. He further says that he is, as a result of certain charging orders made in the course of the proceedings by certain of the orders from which it is sought to appeal, a secured creditor of the company to the extent of £2.795 million. His contention in this regard depends upon the application of the principles of marshalling to his securities and those of the company's bankers, but it is not said to be unarguable. His complaint is that the effect of Mr Leaver's order is to permit the administrators to litigate against him at his expense and that this is unjust. If the administrators are unsuccessful he contends that he should not in effect pay for their proceedings.

The background

[6] The company traded in retail clothing through a number of shops. Kirat owns 21.78% of the company, Rasik 42.6%, Vinod 26.79% and Nilesh 8.62%. Immediately before the events leading to Kirat's exclusion from the management of the company Rasik was the managing director. Kirat was responsible for buying, manufacture and design. Kirat and Rasik fell out, it is not necessary to discuss why, and on 8 February 1999 Kirat was excluded from the management of the company by the others. On 10 June 1999 Kirat presented a petition under s 459 of the Companies Act 1985. As is usual, the relief sought included an order requiring the others to buy him out. The respondents to the petition were Rasik, Vinod and Nilesh. The company was also required to be a respondent to the petition, but as is well known, as a purely nominal party.

[7] On 20 January 2000 an agreement was reached in relation to Kirat's petition. This agreement is scheduled to an order of His Honour Judge Boggis of 20 January 2000, which is the first of the orders against which it is sought to appeal. This is a consent order and by the order the further consideration of Kirat's petition under s 459 was adjourned upon the parties having reached terms as set out in the schedule to the order. The schedule to the order provided a mechanism for the valuation of Kirat's shareholding and set out certain aspects of the basis of the valuation. The company was obliged under the terms of the agreement to provide access to its records and accounts such as might be reasonably required by each party's expert to determine the value

of the shares, and there was an obligation upon the respondents to co-operate with Kirat with a view to mitigating his liability to tax.

[8] The agreement contained a fallback position in the event that the parties had not agreed a evaluation by 30 April 2000. The basis for the default valuation, which was to be carried out by a Fellow of the Institute of Chartered Accountants appointed by the President from the time being of the institute acting as expert, is set out. Clause 7 of the agreement provided for the purchase by the respondents of the petitioner's shares at the value so agreed or determined, together with interest on such sum for such period and at such rate as is agreed or determined by the court to be reasonable. Then by cl 8:

> 'The petitioner shall co-operate with all the respondents and shall make no objection if the purchase of the sale shares is effected by the company purchasing its own shares, or by a third party purchasing the shares, subject to the respondents' indemnifying the petitioner in respect of all and any liability whatsoever, whether directly or indirectly arising out of such method or purchase, whether under the Companies Act 1985 or relevant taxation legislation in force or howsoever arising.'

It is essentially out of the provisions of cl 8 that all the ensuing problems of this litigation have proceeded.

[9] I think that it is clear that cls 7 and 8 of the agreement plainly contemplated that one possible result would be the purchase by the company of Kirat's shareholding. It may well be that the better view of the correct construction of cl 8 is that its language is purely permissive and that it does not place any obligation upon the company to purchase the shares. However, I do not, deliberately, wish to come to any concluded view as to the meaning of that provision.

[10] Were the company to undertake the purchase of the shares then it would, of course, have to satisfy the statutory requirements and the payment for the purchase would have to be made out of distributable profits. The agreement was signed by counsel on behalf of Kirat and on behalf of the original respondents. There is no signature on behalf of the company.

[11] The machinery established by the agreement annexed to the order of 20 January 2000 broke down.

[12] On 27 July 2000 an order for specific performance of the agreement scheduled to the order of 20 January 2000 was made. This order reserved the question of interim payment of part of the purchase price to be considered at a subsequent hearing. It also contained detailed provisions for proceedings relating to the valuation of Kirat's shareholding.

[13] On 5 September 2000 the question of an interim payment of part of the purchase price was considered. An order for the payment of £500,000 was made against all the respondents. At the hearing on 5 September 2000 leading counsel for the respondents (there was no separate representation of the company) sought to argue the question whether the company was bound by the order to make the payment. He contended that on a true construction of the agreement scheduled to the order of 20 January 2000 the company was plainly obliged to make the payment in question. This much appears from the skeleton argument advanced on behalf of the respondents and particularly

paras 5, 8, 9, 11 and 12 thereof. Paragraph 5 criticises the inclusion of the words 'first to third respondents only' in the draft order. But para 8 says this:

> 'In no part of the petitioner's written or oral argument advanced to the judge during the trial or on 17 October was it suggested that the purchase obligation fell only upon the individual respondents. In this respect the court is reminded of the terms of paragraphs 1 to 13 of the written arguments submitted on behalf of the petitioner for the hearing on 17 October. Should it be suggested that in some way the petitioner's written argument was unclear or did not accurately reflect the stance taken on the petitioner's side, the court is reminded of the terms of an attendance note [which is referred to, picking up the quoted contents of the attendance note]:
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> > "In passing the respondent's solicitors also said that another issue related to the construction of 20 January 2000 order and whether the intention behind that was for the individual respondents to purchase the petitioner's shares because the order then goes on to deal with the company separately. The petitioner's solicitor explained that it was her understanding and intention all along that it was the four respondents on a joint and several basis who had the obligation to ensure purchase of the shares".'

Then para 11 of the skeleton argument:

> 'The issue on 5 September was whether the respondent should be ordered to make an interim payment pursuant to CPR 25.7. The argument for the respondents was that the court had no jurisdiction, and, if it had jurisdiction, should not exercise it. This argument was rejected and the court made an interim payment order. This order rested on the foundation that the persons ordered to make the interim payment were defendants who would in due course be ordered to make a payment. One question which was plainly relevant to the interim payment was whether only the individual respondents were liable to the petitioner under the 20 January 2000 order or whether all four respondents were liable. As to this, the petitioner submitted in para 25 on p 13 of the petitioner's written argument: "It was provided at para 7 that the respondent should purchase the petitioner's shares. This was an obligation agreed to by all four respondents. It is an implied term of the agreement that the price has to be paid within a reasonable time".'

Then para 13:

> 'The petitioner, having successfully invited the court to make the ruling which it did on 5 September 2000, cannot now assert before this court that the 20 January 2000 contract was to different effect. He is estopped by the order of 5 December 2000 from claiming that the 20 January 2000 order did not place any obligation on the company. If the petitioner wishes to take this point he must appeal from the order of 5 September 2000.'

[14] It is quite plain, at least to a superficial and ex post facto analysis, that the petitioner was becoming concerned about the legality of the payment proposed to be made by the company and that the respondents were equally anxious that the company should carry as much of their obligation to pay in respect of the petitioner's shareholding as possible. The petitioner's written skeleton argument for 13 November 2000 – a subsequent hearing – makes this quite clear, where the petitioner advances extensive reasons for supposing that the company was not bound to make the payment and could not lawfully make it.

[15] On this point His Honour Judge Boggis ruled that the company was bound to make the relevant payment, and this was ultimately reflected in the order determining the price made on 17 October 2000, to which I shall return. During the course of that hearing the individual respondents gave certain undertakings with a view to preserving their assets having regard to the order for payment to Kirat which would be made. Permission to appeal against the valuation arrived at by His Honour Judge Boggis has been refused, although permission to appeal was granted in respect of the order for interim payment to which I have referred. This is one of the notices of appeal which Mr Leaver QC's order requires to be amended.

[16] On 13 November 2000 interim payment was ordered of £3.5 million to include the £500,000, the interim payment to be made by 29 December 2000. Permission to appeal was sought and refused in relation to this order. This order underpins certain charging orders which were subsequently obtained by Kirat. At the hearing resulting in the order for interim payment the petitioner raised the question whether the order of 17 October bound the company in the skeleton submissions to which I have referred above. The objections were elaborated in the third witness statement of Davinia Dorothy Gransbury, which was made on 7 December 2000.

[17] On 7 December 2000 new solicitors for the respondents informed the petitioner's solicitors that if the company had to pay all sums due and owing to Kirat under the various orders it would be insolvent. On 13 December 2000 the judge declared that the company was bound to purchase and pay, notwithstanding the provisions of s 143(1) of the Companies Act 1985 by virtue of the provisions of s 143(3)(c) of that Act. This order again is one of the orders against which permission is sought to appeal.

[18] The alternative basis upon which the judge determined that the company was liable to pay appears to have been upon an understanding of the decision in *Re Duomatic Ltd* [1969] 2 Ch 365, that all the members agreed to and participated in the original agreement exhibited to the order of 20 January 2000.

[19] Charging orders were obtained by Kirat, relying upon the order of 13 November, over some 33 properties of the company. The charging order absolute was eventually made on 28 February 2001 to secure the payment of £6,488,123.77. The final order for sale and purchase of the shares had by then been made on 7 February 2001. The purchase price as determined by the judge was stated to be £6.14 million, plus interest thereon.

[20] Rasik and Nilesh proceeded to be bankrupted upon their own petition. The administrators have claimed in these bankruptcies. Kirat has also obtained a charging order absolute over Nilesh's house. At a hearing before His Honour Judge Boggis QC the judge determined that Nilesh's wife had a 22% interest in the house and made an order for sale. The administrators intervened in those proceedings to claim that the company was entitled to the

house, which was said to be held on constructive trust for the company. This claim was dismissed by the judge, who ordered that the administrators pay the costs personally.

[21] In June 2001 the business of the company was sold. Kirat released his charges for that purpose, it being agreed that for all other purposes the security provided by the charging orders continued. Thus, the principal purpose of the administration has been discharged. What is left is substantially the question of Kirat's claims against the company.

[22] I was shown a draft account, which indicated that, if Kirat is correct in his contentions as to the extent of his secured interest, there will be nothing for any unsecured creditor. As I indicated at the beginning of this judgment, Kirat's security is of central importance to him and if the administrators fail, the effect of Mr Leaver QC's order will ensure that Kirat will pay both his own and the administrator's costs of the proceedings directed by Mr Leaver QC's order.

[23] The basis for the appeal and the principal arguments in its support are now set out in the notice of appeal and skeleton argument in support. When the matter was before Mr Leaver QC he had drafts of these documents, but he also had sight of privileged material relating to the merits of the proposed appeal. Rather than consider that privileged material, I have been addressed on this hearing by Mr Richards QC for the joint administrators to demonstrate the merits of the proposed proceedings. The argument to be advanced by the administrators is summarised in para 40 of their skeleton submissions to the Court of Appeal:

> 'The foundation of all of the orders imposing liability on the companies is an assumptional determination on the part of His Honour Judge Boggis that it was party to the settlement agreement and bound by its terms to purchase Kirat's shares. There was no basis for that assumption or determination.
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> 41. However, even if, contrary to the above, the company was a party to the settlement agreement and under its terms bound to purchase Kirat's shares, there was still no basis for making orders against the company since:
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> 1. Any such agreement was in breach of the provisions of section 143 of the 1985 Act, so rendering it void and the obligation unenforceable;
> 2. Any such agreement was unenforceable by reason of a failure to comply with section 164 of the 1985 Act; and/or
> 3. Any such agreement could not be enforced against the company save by an order for specific performance, which, by virtue of section 178 of the 1985 Act, could not be made unless the company was able to purchase the shares out of distributable profits, and since the company did not have sufficient distributable profits, no order for specific performance could or should have been made against the company.
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> 42. There was also no basis for the various costs orders made against the company given the matters set out above and having regard to the company's neutral stance in the proceedings, which stance Kirat not only accepted but actually demanded in his points of reply.'

[24] Mr Peter Leaver QC made his order to all intents and purposes in respect of a notice of appeal and skeleton argument to which I have referred. It is accepted that the order is prejudicial to Kirat's interests and it was not contended by Mr Richards QC that Mr Leaver's order could not or should not be reviewed in the light of submissions advanced on behalf of Kirat, who was not given notice of the application to Mr Leaver. It seems to me to be clear on ordinary principles that where the interests of a party directly affected by an order made in his absence and without notice it would require exceptional circumstances to prevent him from seeking to advance his reasons why the order should not be made. That is, of course, irrespective of whether all the material upon which the judge acted in making the order could or should be made available to that party. This consideration would certainly be sufficient in any event to justify review under r 7.47(1) of the Insolvency Rules 1986 (see on this point *Mond and Another v Hammond Suddards (A Firm) and Another* [2000] Ch 40).

[25] In the case of an order of the present type made on an application which resembles a Beddoe application (see *In re Moritz (Deceased)* [1960] Ch 251, as explained in *Re Eaton (Deceased); Shaw v Midland Bank Executor and Trustee Co Ltd and Others* [1964] 1 WLR 1269) the court must adapt its procedure so as, so far as possible, to be fair to the respondent. The normal purpose of a Beddoe application is to predetermine as between trustee and beneficiaries the question of recovery of costs of principal proceedings regardless of the actual order for costs made in the principal proceedings. It is distinct from other preemptive costs decisions as between trustees and beneficiaries who are parties to the principal proceedings, as, for example, in proceedings to construe the settlement, or cases in the beneficiaries is the same for the beneficiaries for the fund. The whole basis of the jurisdiction as described in *In re Buckton; Buckton v Buckton* [1907] 2 Ch 406, is explained by Hoffmann LJ in *McDonald and Others v Horn and Others* [1995] 1 All ER 961. I am not in this application concerned with the extension of this principle to persons analogous to beneficiaries in the shape of minority shareholders (see *Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2)* [1975] QB 373) nor to beneficiaries of pension funds, with which *McDonald v Horn* was itself concerned. The question here is the use of the procedure where the person seeking the order occupies a position said to be analogous to that of a trustee, here the administrators of a company.

[26] There is no doubt on the authorities that there is jurisdiction to make such an order (see *Re Westdock Realisations Ltd and Another* [1988] BCLC 354). In that case Sir Nicholas Browne-Wilkinson VC (as he then was) stated the principle as follows at 359–360:

> 'The other jurisdictional point relates to the question whether the court has jurisdiction to make an order for payment out of moneys which at the end of the day are found to belong to some other person. If a trustee, liquidator of receiver, or any other person in a neutral capacity is holding moneys which belong to others but it is not known who is beneficially entitled, the court frequently makes orders that the costs of determining who is beneficially entitled to those moneys are to be paid out of the moneys held. The ordinary order for costs in the case of an express trust fund is one example. In addition, orders are frequently made in the Companies Court where there are issues as to beneficial ownership that the costs come out of the fund: see for example *Re*

Exchange Securities & Commodities Ltd (No 2) [1985] BCLC 392 and the remarks of Nourse J in *Re First Guarantee Trust Co Ltd* (unreported) 14 February 1985 . It is in my judgment much too late to put forward a contention that there is no jurisdiction to make such order. However, of course, in considering whether such an order should be made the fact that in one event the fund will be held not to belong to the liquidators is a most relevant matter to take into account.

There being in my judgment jurisdiction to make the orders sought, is this an appropriate case in which to make such order? In my judgment this depends on what would be the appropriate order for costs to be made at the trial. Unless satisfied that after trial a judge would be likely to make an order that the costs of all parties are to come out of the fund it cannot in general be right to make such an order at this stage. I was initially surprised to discover that there is no general practice in the Companies Court as to the correct order for costs in cases where receivers or liquidators have taken out summonses to determine questions arising in the course of their administration. In some cases the order is made that the costs follow the event and the unsuccessful claimant pays, in others the costs come out of the fund.

After hearing the argument I am satisfied that there is no fixed practice relating to all cases. I am also satisfied that there cannot be any practice applicable as a rule of thumb to all types of cases. The range of summonses which can be issued and are heard raise such a wide range of issues that there can be no fixed rule. However, in my judgment the proper approach is as follows. In general, claims arising for determination in such cases are, as counsel for ECGD submits, hostile claims in which one or more parties are in dispute as to the ownership of property. It is litigation between rival claimants. In those circumstances one would expect that the costs would normally follow the event, the unsuccessful claimant paying not only his own costs but also the other side's. However, there are many cases in which it is essential for the due administration of the liquidator's or receiver's duties to obtain a decision from the court. In such cases there are often large classes of creditors, contributories or other claimants, the exact membership of which class is often not easily established or even known, who will be affected by such decision. In such a case the liquidator or receiver joins a representative respondent to argue the point on behalf of the class. Frequently the sum at stake for the individual respondent joined does not justify him incurring the costs involved in litigating the matter. As a result, in order to ensure that the matter is properly determined the costs of the representative respondents are frequently paid out of the fund. An agreement to that effect is often made before the proceedings are heard; indeed on occasion the court orders it before trial. But in my judgment those are special cases in which it is necessary for the proper execution of the duties of the receiver or liquidator to have the matter determined and a pre-emptive order as to costs is a necessary prerequisite to that determination being obtained. This is not a rule applicable in all cases; it is simply in my judgment the right general approach to costs in these cases.

[27] I should just draw particular attention to the passage at 359 between letters D and G. On the face of it, this is hostile litigation, indeed I think it could fairly be said that it could hardly be more hostile. Given the bankruptcies of Rasik and Nilesh, Kirat's only hope of substantial recovery may lie in his attempt to enforce his securities against the company.

[28] What is submitted is that the administrators will in any event be entitled to their costs of this litigation, even if unsuccessful, and that there is no harm and some good in making that clear at this stage. The argument proceeds as follows. First, it is said that Mr Leaver QC gave the administrators the court's sanction for the proceedings and that I should do the same. It is said that the direction of the court under s 14 of the Insolvency Act 1986 in effect decides that the costs are incurred in proceedings which the administrators should take. The argument proceeds that such costs of proceedings sanctioned by the court are expenses properly incurred by the administrator under s 19(4) and are therefore chargeable in priority to any security. Accordingly, the second part of Mr Leaver QC's order would necessarily follow.

[29] Plainly the issuing of the appeal notices seeking permission to appeal out of time, and, if successful, in obtaining permission the prosecution of the various appeals, is within the administrator's powers under Sch 1 to the 1986 Act. The first question is, therefore, whether Mr Leaver's order directs the administrators to present those appeal notices and, if it does, whether that amounts to an approval of their course and whether this is an exercise of the discretion which I should reconsider having heard the submissions advanced on Kirat's behalf.

[30] As a matter of construction it seems to me likely that Mr Leaver QC's order could be argued to direct the administrators to take the proceedings in question. It would be difficult in those circumstances for it subsequently to be contended that the expenses of taking those proceedings were not expenses properly incurred within s 19(4). The order uses the words 'it is ordered and directed', and the words of para 1 state that the administrators should seek permission to amend the two appeal notices et cetera.

[31] It is no doubt arguable that, notwithstanding these words, no positive duty to litigate is placed on the administrators. It would be surprising if the administrators could not, after obtaining the order, conduct the appeal and if need be compromise it or abandon it without obtaining the sanction of the court for such further steps. But I am not satisfied that s 14 of the 1986 Act contemplates a direction of this sort in these circumstances when it confers on the administrator by subs (3) the power to apply to the court for directions in relation to any particular matter arising in the course of the carrying out of his functions.

[32] Prior to the approval of his proposals by the creditors' meeting the administrator must act in accordance with any directions given by the court (see s 17). The decision of Neuberger J in *Re T & D Industries plc and Another* [2000] 1 WLR 646 identifies the inherent limitation on the court's powers to give directions in respect of the period prior to the s 23 meeting in terms which are applicable equally to the period after the creditors' approval for the administrator's proposals has been obtained. In considering the position of administrators prior to s 23 meeting, Neuberger J said this at 652:

> 'I would also question whether there is any real benefit in the great majority of cases for anyone if administrators have to apply for

> directions under s 17(2)(a) on the basis of the second interpretation [advanced before him, which was that the administrators had no power prior to the creditors' meeting]. The application will normally be made by the administrator without notice, and the court will be told what action the administrator wants to take and why he wants to take it. Save where the issue is whether he has power to take that action as a matter of law, it will normally be an administrative or commercial decision. The court almost always will conclude that the answer is either obviously favourable, or that the decision is a commercial or administrative one for the administrator on which the court has nothing useful to say.'

[33] Neuberger J concluded in that case that the powers under s 14 were exercisable without leave prior to the s 23 meeting. He said that the administrator might be wise in certain circumstances to approach the court, but he made a number of concluding observations which seem to me to be of assistance. These are summarised in Lightman and Moss, *The Law of Receivers and Administrators of Companies* (Sweet & Maxwell, 3rd edn, 2000), p 462:

> 'Relevant to the present discussion are the two principles pithily summarised by Lightman and Moss in these terms. First, administrators are responsible for their own decisions and the court is not a bomb shelter from the consequences; and second, it would be a very unusual case in which the court could give real assistance on the commercial decision without a hearing at which interested parties had an opportunity to be heard.'

Finally, as Neuberger J observed at 658:

> 'It is right to add this. If I had taken a different view and had concluded that the administrators in this case could not take the course that they wished to take without a direction from the court, then, in light of the evidence of Mr Marsh, I would have thought it right in my discretion to make the direction they seek, while emphasising, as I did in *Re Montin Ltd* [1999] 1 BCLC 663 and as I think Rimer J did in *Re Osmosis Group Ltd* [1999] 2 BCLC 329, that this does not mean that the court is approving the proposed course in the sense that the administrator is thereby absolved of any liability if it turns out to have been negligent in some way. It is simply to enable the administrator to take that course where otherwise he could not do so.'

[34] I take this as an indication that a direction may be given without, as it were, providing a 'bomb shelter' for the administrator. Where, as here, the case is a case of hostile litigation, with, as I shall suggest below, an uncertain outcome the court should be particularly cautious before sanctioning proceedings in the context of an administration. Although there are some parallels with the position of trustees, the analogies are far from complete. It seems to me that a determination at this stage in the proceedings which has the effect of determining now that the expenses of the litigation were properly incurred by the administrator so as to satisfy the requirements of s 19(4) of the Act without further consideration seems to me to require complete confidence

that the administrators will win and that the only possible order is that all the administrator's costs will be properly incurred. I do not believe that in any normal case this is a possible conclusion. Mr Ashworth placed considerable emphasis upon the decision of Millett LJ in the well-known case of *Re MC Bacon Ltd (No 2); Re a Company (No 005009 of 1987) (No 2)* [1991] Ch 127, approved by the Court of Appeal in London, *Mond and Another v Hammond Suddards (A Firm) and Another* [2000] Ch 40. The general considerations are clearly identified by Chadwick LJ in the latter case at 52 in the context of a liquidator:

> 'I agree, also, with [Millett LJ's] conclusion that there is no other subparagraph under r 4.218(1) which could be said to encompass the costs of unsuccessful litigation. I do not find that surprising. It would be remarkable if the Rules did give to the liquidator an unfettered right to recoup his costs of unsuccessful litigation. It must be kept in mind that a liquidator may bring or defend proceedings in his own name without first obtaining sanction; and it is necessary that the court should retain some control over his right to recoup the costs of such proceedings where the liquidator is unsuccessful. It follows also, in my view, that r 4.218(1) can have no application to the costs of an unsuccessful attempt to retain an asset to which another is held to be entitled.'

[35] In my judgment it would be equally surprising if in the context of an administration the administrator should have an unqualified right to recoup his costs by virtue of an order made a priori upon a partial assessment of the merits of the proposed litigation. It does not seem to me that the answer to this particular problem lies in s 27 of the Act, as was suggested. While this gives a creditor and a member a like right to complain of unfair prejudice to that which a member possesses outside the context of an administration, it would nonetheless seem strange if the court would make an order positively approving conduct if it could subsequently be capable of forming the subject matter of a complaint under s 27.

[36] Mr Richards argued that a different approach from that appropriate to liquidators was necessary when the position of administrators was considered. He submitted that the difference between the final and irreversible step of liquidation from the potentially reversible step of administration established different contexts for the exercise of the relevant powers. After all administrators have a continuing duty to manage. This explains the wide and brief provisions of s 19(4) on the one hand, in contrast to the detailed provisions of r 4.218 on the other. Whether or not this is right – and of course the official receiver is entitled to charge management expenses under r 4.218(1)(b) – it does not, in my judgment, justify a court in pre-empting a decision under s 19(4) except on the strongest possible grounds.

[37] That brings me to an assessment of the merits of the proposed proceedings by the administrators. Necessarily there are two parts to the administrators' proposed proceedings. These are, first, an application out of time for permission to appeal, to which the normal considerations affecting applications out of time – and here substantially out of time – apply; and, secondly, there are the substantive merits of the proceedings themselves. It would be both wrong and otiose of me to express my views as to the correct course which the Court of Appeal should take. What I can say is that it is

perfectly plain that there are difficulties in the path of the administrators and equally plain that the administrators may overcome them. Equally, there is a more than negligible possibility that the administrators' proposed applications would fail.

[38] To go further than this seems to me to be unnecessary since once a more than negligible risk of failure is established it is potentially unjust to Kirat to make a preemptive order in relation to the costs of the proceedings. It may well be that at the end of the day the administrators will be able to show, even in the case of an unsuccessful application, that they should be properly able to charge their costs under s 19(4). I say nothing about this. However, it is not demonstrated in the present case that the administrators are entirely devoid of any other source of funding. It is not demonstrated that this order is essential; and having regard to the factors which I have endeavoured to outline above, it seems to me that this is not an order which I should continue.

[39] Accordingly, having regard to the submissions advanced on behalf of Kirat, I am prepared to review the order made by Mr Peter Leaver QC and not to continue it.

[40] I should just add this. In addition to the matters outlined in the appeal notices, Mr Richards outlined to me certain other severe difficulties which he said confronted Kirat. I have deliberately made no mention of these since it seems to me that though it may well be that there are other problems these are not matters which bear directly upon the exercise of this discretion and accordingly I have not considered them in this judgment.

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