Secretary of State for Trade and Industry v North West Holdings plc & Anor.

Chancery Division (Companies Court) and Court of Appeal (Civil Division).
Hart J; Morritt and Chadwick L JJ.
Judgments delivered 3 September 1998 and 15 October 1998.

Winding-up petition – Public interest – Provisional liquidator appointed – Department of Trade and Industry issued press notices – Notices stated petitions presented and provisional liquidator appointed – Petitions formally advertised in Gazette – Application for dismissal of petitions – Whether press notices contravened advertisement rules – Whether prosecution of petitions abuse of process – Insolvency Act 1986, s. 124A; Insolvency Rules 1986 (SI 1986/1925), r. 4.11.

This was an appeal against a decision of Hart J dismissing applications by two companies that the issue of press notices by the Department of Trade and Industry ('DTI') stating that winding-up petitions had been presented in the public interest under s. 124A of the Insolvency Act 1986 and a provisional liquidator appointed in relation to the companies were in breach of the advertisement rules in r. 4.11 of the Insolvency Rules 1986 or alternatively that the continued prosecution of the petitions was an abuse of the process of the court.

The winding-up petitions were presented by the Secretary of State for Trade and Industry on 21 April 1998 and a provisional liquidator appointed to the companies on the following day. The DTI in accordance with its usual practice and with the agreement of the provisional liquidator issued press notices on 23 April 1998 describing the presentation of the petitions and the fact of the appointment of the provisional liquidator. Although it was not suggested that there had not been proper advertisement of the petitions in the London Gazette in accordance with r. 4.11(2)(b) of the 1986 Rules, the companies argued that issue of the press notices constituted advertisements for the purposes of r. 4.11 sufficient to found jurisdiction under r. 4.11(5) to dismiss the petitions as not duly advertised in accordance with r. 4.11.

At first instance Hart J rejected the companies' argument that the word 'advertised' in r. 4.11(5) was not a reference to 'advertised' and 'advertisement' in r. 4.11(1), (2) or (3), i.e. to an advertisement in the London Gazette, but a use of the word 'advertised' in its wider or ordinary meaning simply of notified. Although there were authorities that advertisement included notifying a person of the existence of a petition by letter (Re a Company (No. 00687 of 1991) [1991] BCC 210; Re a Company (No. 001127 of 1992) [1992] BCC 477), the judge preferred the reasoning of Jonathan Parker J in S N Group plc v Barclays Bank plc [1993] BCC 506 that for the purposes of r. 4.11 'advertisement' meant advertisement in the London Gazette. A further argument by the companies, that this result would mean that there was nothing to prevent a creditor from issuing a press notice whenever he presented a petition so long as he took care also in due course to advertise in accordance with r. 4.11, was also rejected since such a creditor ran the risk of being committed for contempt of court by attempting by publicity to prejudice the hearing the petition or of being seen as using the winding-up jurisdiction for an improper purpose. The judge was fortified in his construction of r. 4.11 by the fact that the press notices were issued in the context of a provisional liquidator being appointed, with the agreement of the provisional liquidator, and that was the way that the public could be protected. If r. 4.11 were to be construed as the companies contended, it would be impossible for a provisional liquidator to cause notice of his appointment to be made until the expiration of seven days after service of the petition (in accordance with r. 4.11(2)) without that being a breach of the rules and thereby incurring the risk that the court would dismiss the petition under r. 4.11(5).

The companies appealed to the Court of Appeal. The allegation of abuse of the process of the court was not pursued.

Held, dismissing the appeal:

1. Rule 4.11 had two objectives: (a) to ensure advertisement of a petition in sufficient time in a prescribed publication and containing the relevant information so that those entitled to appear and be heard had the proper opportunity to do so; and (b) to ensure that the requirements as to advertisement did not of themselves operate oppressively as the seven-day period gave the company time to apply for an order restraining advertisement.

2. It was plain from the language that r. 4.11(2)(b) was concerned, and concerned only, with advertisement which was required by the rule itself, i.e. in the London Gazette. There was no way of reading r. 4.11(2) so as to achieve the result that advertisement (other than in accordance with r. 4.11(1)) in advance of the prescribed seven-day period was prohibited but advertisement after that period was not. The issue of press notices, although open to objection perhaps on other grounds, could not sensibly be regarded as a breach of r. 4.11.

3. If the issue of press notices was not otherwise a breach of r. 4.11, then r. 4.11(5) could have no application. The words 'not duly advertised in accordance with this Rule' in r. 4.11(5) were plainly directed to a failure to advertise in accordance with the earlier provisions of r. 4.11, i.e. where there had been a breach of the rule. Rule 4.11(5) was not apt to deal with excessive advertisement.

4. Decision of Harman J in Re a Company (No. 00687 of 1991) [1991] BCC 210 distinguished as not relating to r. 4.11. Decision of Mummery J in Re a Company (No. 001127 of 1992) [1992] BCC 477 disapproved in so far as the judge regarded letters by the petitioning creditor's solicitors to a bank and suppliers of the debtor company in advance of formal advertisement to be a clear breach of r. 4.11(2)(b); there was no doubt that the finding by that judge of an abuse of process was a power to control proceedings by striking out a petition that could be exercised independently of r. 4.11(5). Decision of Jonathan Parker J in S N Group plc v Barclays Bank plc [1993] BCC 506 approved.

5. The real objection in this case was to the issue of press notices, or any other form of publicity, as an attempt to pre-empt the decision of the court on the hearing of the winding-up petition or on any interim application to restrain advertisement of the petition. That would have been a powerful objection but for the fact that the court had already appointed a provisional liquidator before the press notices were issued. (Re a Company (No. 007923 of 1994) [1995] BCC 634; [1995] 1 WLR 953 distinguished.)

6. The consequences of the appointment of a provisional liquidator here contained a clear example of the need to communicate to others – including employees, bankers and those dealing with the company – the fact that there was a provisional liquidator and therefore, necessarily, the fact that the petitions had been presented.

7. The DTI's practice was not to publicise a winding-up petition until after the advertisement of the petition in the Gazette unless a provisional liquidator had been appointed, in which event the practice was to issue a press notice describing the action taken as soon as the provisional liquidator agreed to this being done. This practice was based on several grounds connected to protection of the public and those were grounds which would usually justify the issue of a press notice in accordance with the stated practice. A further ground might be added, that where the petition was presented under s. 124A in the public interest that the company should be wound up, it was desirable that there should be no uncertainty as to the position once a provisional liquidator had been appointed. The public was entitled to know that the Secretary of State had taken the view that it was expedient in the public interest to present a petition and that the court had been satisfied that the case was a proper case in which to appoint a provisional liquidator. For those reasons, the objections which might otherwise have force in relation to the issue of press notices would usually fall away.

A **Per curiam**

In any case where the Secretary of State for Trade and Industry or the provisional liquidator were uncertain whether it was appropriate to issue an immediate press notice, directions could be sought from the court, either on the hearing of an ex parte application or by the provisional liquidator following his or her appointment. It would be open to the court in a suitable case to restrain the issue of a press notice for a short period so as to give
B **the company an opportunity to make representations as to why no advertisement should take place. Whether or not the court would think it right to do so would depend on the circumstances. Those advising the Secretary of State would need to bear in mind that if there was no compelling reason to issue an immediate press notice without seeking the directions of the court at the time of the appointment of the provisional liquidator the court might subsequently be concerned to enquire why directions were not sought.**

C The following cases were referred to in the judgments:

Cheltenham and Swansea Railway Carriage and Wagon Co Ltd, Re (1869) 8 LR Eq 580.

Company (No. 00687 of 1991), Re a [1991] BCC 210.

Company (No. 001127 of 1992), Re a [1992] BCC 477.

Company (No. 007923 of 1994), Re a [1995] BCC 634; [1995] 1 WLR 953.

Doreen Boards Ltd, Re [1996] 1 BCLC 501.

D *Hennessey (Bill) Associates Ltd, Re (Re a Company No. 13925 of 1991)* [1992] BCC 386.

Signland Ltd, Re [1982] 2 All ER 609 (note).

S N Group plc v Barclays Bank plc [1993] BCC 506.

Nigel Ginniff (in the Companies Court), Victor Joffe (in the Court of Appeal) and Daniel Lightman (instructed by Bell Lax Litigation, Sutton Coldfield) for the appellants.

E Robert Hildyard QC and Bridget Lucas (instructed by the Treasury Solicitor) for the respondent.

HIGH COURT JUDGMENT
(Delivered 3 September 1998)

Hart J: There are before me petitions presented by the Secretary of State for Trade and Industry on 21 April 1998 seeking the winding up of North West Holdings plc and
F North West Holdings Ltd on public interest grounds pursuant to s. 124A of the *Insolvency Act* 1986. I also have before me applications on the part of the companies to discharge the appointment of a provisional liquidator of each company which appointment was made on the ex-parte application of the Secretary of State on 22 April 1998 pursuant to an order of Lightman J.

Counsel on behalf of the companies on the first day of the hearing of these petitions
G and those applications before me has invited me to take the course of hearing as a preliminary point the question whether the petitions should be dismissed in limine as a result of their alleged advertisement otherwise than pursuant to the provisions of the insolvency rules.

The matter arises in this way: following the making of the orders for the appointment of the provisional liquidators on 22 April 1998 the Department of Trade and Industry in accordance with its usual practice and with the agreement of the provisional liquidator
H issued press notices describing the presentation of the petitions and the fact of the appointment of the provisional liquidator and also going on to summarise the basis upon which the petition had been presented.

That description took the form of a description of certain matters as matters of fact which are, of course, matters which are in dispute before me, in particular in relation to Holdings, amongst other things, the press release stated:

'PLC represented that it was not trading, but the enquiry found that although the company's audited accounts stated that the principal activity of the company was to "act as a licence holder and a holding company" it was collecting premiums from its clients and charging excessive fees for the services it provided through a bank account operated under the style of "Premium Collection Services" from which substantial sums had been withdrawn for the benefit of the officers of the company.'

Similar statements were made in relation to 'LTD' in the press notice issued in respect of the orders made in relation to 'LTD'.

The question whether or not I should hear this application as a preliminary point has been somewhat overtaken by the fact that in the course of his submissions to me on that matter Mr Lightman, who presented the argument in this respect on behalf of the companies, has in fact given me the whole of his submissions on the point. Since I have formed a clear view as to the merits of the point, I propose to decide it at this stage of the trial, although otherwise I think my inclination would have been to defer it until there had been further exploration of the merits of the matter – the underlying merits of the petition.

The point turns primarily on the true construction of r. 4.11 of the *Insolvency Rules* 1986 (SI 1986/1925). That rule, so far as material provides as follows:

'(1) Unless the court otherwise directs, the petition shall be advertised once in the Gazette.

(2) The advertisement must be made to appear–

(a) if the petitioner is the company itself, not less than 7 business days before the day appointed for the hearing, and

(b) otherwise, not less than 7 business days after service of the petition on the company, nor less than 7 business days before the day so appointed.

(3) The court may, if compliance with para. (2) is not reasonably practicable, direct that the advertisement of the petition be made to appear in a specified London morning newspaper, or other newspaper, instead of in the Gazette.'

Rule 4.11(4) sets out the required contents of the advertisement and subr. (5) provides and I quote:

'If the petition is not duly advertised in accordance with this Rule, the court may dismiss it.'

In the present case it is not suggested that there has not been an advertisement of the petition in accordance with the rule. That is to say, it is not suggested that the petition had not been advertised once in the Gazette during the course of the time frame posited by r. 4.11(2)(b).

The submission made on behalf of the companies is that although there has been such advertisement, nevertheless the issue of the press release also constitutes an advertisement for the purposes of the rule and since the issue of that press release was not in accordance with the rule there has been a breach of the rule sufficient to found the jurisdiction of the court under subr. (5) to dismiss the petition.

In my judgment as a matter of construction of the rule that is not correct. It is accepted, on behalf of the companies that the words 'The advertisement' in subr. (2) is a reference back to the advertisement referred to in subr. (1) in the London Gazette. It is said however, that the word 'advertised' in subr. (5) of r. 4.11 is not similarly a reference back to the earlier advertisements referred to either in subr. (2) or in subr. (3), but a use of the word 'advertised' in its wider and ordinary meaning simply of notified. Thus, on behalf of the companies, Mr Lightman would have me read r. 4.11(5) as if it provided that if the

A petition is advertised in that wide sense in any way other than as prescribed by the rule, then the court may dismiss it.

In my judgment that is not a correct reading of r. 4.11(5) on the ordinary use of language. The matter is not free from authority and the authorities are not wholly reconcilable. In *Re a Company No. 001127 of 1992* [1992] BCC 477, Mummery J had to consider the consequences of letters having been sent by a petitioning creditor to the B company's bank and a number of its suppliers informing the recipients of the fact of the presentation and the service of the petition. That was a case in which the petitioner had undertaken not to advertise the petition before a certain date and the company argued that the sending of the letters constituted an abuse of the process of the court. For the petitioner it was argued that there had not been any formal advertisement. In the course of a judgment which he delivered in favour of the company, Mummery J referred to an earlier decision of Harman J in *Re a Company No. 00687 of 1991* [1991] BCC 210, where C Harman J had held in the context of an order restraining advertisement that 'advertisement' included notifying a person or persons of the existence of the petition by letter and was not confined to the formal advertisement and the existence of the winding-up petition. Mummery J applied that reasoning in the case before him and held that 'There had been', as he put it at p. 478E, 'a clear breach of the rules.'

The point has also been considered more recently by Jonathan Parker J in *S N Group* D *plc v Barclays Bank plc* [1993] BCC 506. In that case, in which Mummery J's decision was not cited, Jonathan Parker J, having set out subr. (1) and (2) of r. 4.11, said this (at p. 509F):

> 'In my judgment, reading the expression "The advertisement" at the beginning of subr. (2) in the context of r. 4.11 as a whole, and in particular in the context of subr. (1), it refers to the advertisement in the *Gazette*. Moreover, if that were not the case it would (as it seems to me) follow that notification of the Natwest, not E being advertisement in the *London Gazette*, would be a breach of the rule whenever it took place, that is to say, whether it took place within seven days after the presentation of the petition or thereafter. That, in my judgment, cannot be right.
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> I have been referred in this connection to the decision of Harman J in *Re a Company No. 00687 of 1991* [1991] BCC 210, where a similar, although by no means identical question, arose in the context of a contributory's petition, to which F different rules apply, and in the context not of the Insolvency Rules but of an order made by the court restraining advertisement of a petition without further order.
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> Harman J held in that case that the word "advertised", in r. 4.23(1)(c), meant "advertised" in its ordinary English sense – that is, primarily a paid announcement in a general publication, but also notifying the existence of the matter. On that basis he held that notification of the bank did constitute a breach of the order G made in that case. That, however, is a different case, and I am concerned, as I see it, to construe the relevant provisions of r. 4.11, which applies to creditors' winding-up petitions.
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> Construing r. 4.11 in that context, I reach the conclusion that "advertisement" means, as I have said, advertisement in the *London Gazette*. Accordingly, in my judgment, Mr Thompson has not made out on behalf of the company any prima facie case for breach of r. 4.11.'

H So far as that reasoning and conclusion differs from that of Mummery J, I respectfully prefer the reasoning of Jonathan Parker J. It is said on behalf the companies that Jonathan Parker J's attention was not drawn either to the decision of Mummery J, which is undoubtedly correct, or to the precise wording of subr. (5) of r. 4.11, and that his attention (in the passage that I have quoted) was focused simply on the meaning of the 'advertisement' in r. 4.11(2). That however, cannot in my judgment be correct. It appears

to me clear from his judgment that he was precisely considering the question of the exercise of his jurisdiction under r. 4.11(5). A

Mr Lightman on behalf of the companies forcefully submitted that if that construction of r. 4.11(5) be correct then there would be nothing to prevent a creditor in any case from issuing a press release whenever he presented a petition so long only as he took care also in due course to advertise in accordance with the provisions of r. 4.11(1). I do not think that that submission is correct. The reason why that course cannot be taken by a creditor has, in my judgment, nothing directly to do with the requirements of r. 4.11. Where a creditor takes the course suggested by Mr Lightman he is likely to run into one or other or both of two difficulties; first, it may well be that he will run the risk of an application to commit him for contempt of court on the basis of his attempting by the publicity to prejudice the proper hearing of the petition. I have not heard the full argument on this, although I have been referred to *Re Cheltenham and Swansea Railway Carriage and Wagon Co Ltd* (1869) 8 LR Eq 580. B C

The second deterrent to the creditor seeking to take that course is that it is likely to be seen as an attempt to use the winding-up jurisdiction of the court for an improper purpose and is likely to be seen as evidence of such an improper purpose. A number of cases have been referred to in argument before me which illustrate that proposition. The case decided by Mummery J, to which I have already referred, may well illustrate that as does the case of *Re Bill Hennessey Associates Ltd (Re a Company No. 13925 of 1991)* [1992] BCC 386. D

In the present case there is no suggestion that the winding-up procedure has been employed by the Secretary of State for an improper purpose. Indeed, although theoretically possible to imagine a case in which that might be alleged that would be a rare case indeed in the context of a public interest winding up.

It is also relevant, and fortifies the construction at which I have arrived on the meaning of r. 4.11, and in particular r. 4.11(5), that the press notice here was issued in the context of a provisional liquidator having been appointed and indeed was issued with the agreement of that provisional liquidator. Given the purpose for which a provisional liquidator is appointed, it is inevitable that communication of the fact of that appointment is going to have to be made to a number of people who will differ depending on the nature of the case and the disclosure of the appointment will necessarily disclose the existence of the presentation of the petition. That is why, as I am informed by counsel for the Department, the Department had adopted the practice in cases where a provisional liquidator has been appointed of issuing a press notice describing the action taken as soon as the provisional liquidator has agreed to that course of action. E F

In more detail than I have so far given the rationale behind that practice from the Department's point of view is threefold, and I quote from a document that has been prepared for the purposes of the court: G

> '(i) A wide variety of persons connected with the company must inevitably be informed by the provisional liquidator of the action taken. These include the company's bankers, employees, customers, suppliers, creditors and debtors. Any attempts at secrecy would be pointless and undesirable.
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> (ii) The provisional liquidator himself needs to ensure that the public are informed of his appointment so that anyone proposing to have dealings with the company will know that they have to deal with him. H
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> (iii) The purpose of the appointment of a provisional liquidator is to protect the public and usually brings to an end the company's business pending the trial of the Petition . . . It is important to bring the action taken to the notice of the public in order to warn them of the company and to try to ensure that the business really is stopped. The directors of companies against which such proceedings are

commenced are usually those who have been responsible for the conduct complained of in the Petition and may often be regarded as untrustworthy and may attempt to carry on the business or deal with assets without the knowledge of the provisional liquidator.'

If r. 4.11 were to be construed in the way in which the companies say it should be construed it would be impossible for a provisional liquidator to cause notice of his appointment to be made until the expiration of seven days after the service of the petition on the company without that being a breach of the rules and thereby incurring the risk that the court would exercise the jurisdiction given to it, on that construction, by r. 4.11(5).

As I have indicated that fortifies my conclusion that the companies' submissions as to the true construction of r. 4.11 cannot be correct.

(Applications dismissed)

COURT OF APPEAL JUDGMENT
(Delivered 15 October 1998)

Chadwick LJ: These appellants are two companies against which winding-up petitions were presented by the Secretary of State for Trade and Industry on 21 April 1998 in the exercise of the powers conferred on him by s. 124A of the *Insolvency Act* 1986. On the next day, on the application of the Secretary of State, ex parte, the official receiver was appointed provisional liquidator of each company.

The substantive hearing of those two petitions was fixed to commence on 3 September 1998 before Hart J. At the commencement of the hearing on that day the companies applied for the petitions to be dismissed on the ground that there had been a breach of r. 4.11 of the *Insolvency Rules* 1986 (SI 1986/1925); alternatively, that the continued prosecution of the petitions was an abuse of the process of the court. Hart J dismissed those applications. It is from that decision that the companies now appeal.

The circumstances in which the appeals come before this court cannot be regarded as satisfactory. On the dismissal of the applications before Hart J, the companies did not (as they might have done) seek leave to appeal or an adjournment pending an appeal. I should make it clear that neither of the counsel who appeared before this court were party to any decision taken by the companies at that stage. The substantive hearing of the petitions commenced, and continued until 11 September 1998. On 11 September, for reasons unconnected to the judge's decision to dismiss the applications made on 3 September, the further hearing of the petitions was adjourned until 19 October 1998.

It appears that, on 1 October 1998, junior counsel was instructed to prepare draft notices of appeal, challenging the decision which had been made almost one month earlier. No application for leave to appeal was made until 12 October. The application for leave was made to the judge who granted it with, as he said, considerable reluctance. The judge expressed 'the very gravest suspicion' that the application for leave – made within a week of the date set for the further hearing of the trial – was 'nothing more than an attempt to set the scene for a yet further application to adjourn the hearing of the petition.' In the result it has been necessary for this court to make arrangements for the appeals to be heard at very short notice; so that, if they are without merit, the trial can continue without further interruption.

The point is a short one. Rule 4.11 of the *Insolvency Rules* 1986 prescribes the manner in which, and the time at which, a winding-up petition is to be advertised. The rule is in these terms, so far as material:

'4.11(1) Unless the court otherwise directs, the petition shall be advertised once in the Gazette.

(2) The advertisement must be made to appear– A

(a) if the petitioner is the company itself, not less than 7 business days before the day appointed for the hearing, and

(b) otherwise, not less than 7 business days after service of the petition on the company, nor less than 7 business days before the day so appointed.

. . . B

(4) The advertisement of the petition must state' [and there are then set out under (a) to (g) seven particulars to be included in the advertisement].

'(5) If the petition is not duly advertised in accordance with this Rule, the court may dismiss it.'

It is common ground that the petitions were, in fact, advertised in the Gazette within the time period prescribed by para. (b) of r. 4.11(2) and that the advertisements contained C the matters required by r. 4.11(4). The complaint is not that there was no advertisement in the Gazette in accordance with the rule; but that the petitions were also the subject of press notices issued by the Department of Trade and Industry on 23 April 1998 – that is to say, on the day on which service was effected on the company. It is said that, in the circumstances that the Secretary of State caused the petitions to become public knowledge in advance of the period prescribed by para. (b) of r. 4.11(2), the petitions were not 'duly advertised' within the meaning of r. 4.11(5). D

The press notices referred to the presentation of the petitions and the appointment of provisional liquidators on the previous day; and set out, in summary, the allegations made in the petitions as if they were established facts. By way of example, it was stated in the press notice issued in relation to North West Holdings Plc that:

> '[North West Holdings Plc] represented that it was not trading, but the enquiry found that although that company's audited accounts stated that the principal E activity of the company was to "act as a licence holder and a holding company" it was collecting premiums from its clients and charging excessive fees for the services it provided through a bank account operated under the style of "Premium Collections Services" from which substantial sums had been withdrawn for the benefit of the officers of the company.'

It was submitted before the judge that the issue of the press notices in that form was F calculated to bring the businesses of the companies to an end in advance of the hearing of the petitions and before the companies had had any opportunity to challenge at a hearing in court the allegations made against them. That, it was said, amounted to an abuse of the process of the court which itself ought to lead the court to dismiss the petitions in limine. Although that submission was reflected in the notice of appeal, it was not pursued at the hearing of the appeal.

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The judge held that the provisions of r. 4.11(5) of the *Insolvency Rules* 1986 were not intended to cover circumstances such as those in the present case. In my judgment he was correct to take that view.

It is clear that r. 4.11 has two objectives. First, to ensure the advertisement of a petition (i) in sufficient time (being not less than seven days before the hearing date), (ii) in a prescribed publication (the Gazette) and (iii) in a form which contains the relevant H information; so that those, other than the petitioner and the company, who are entitled to appear and be heard on the petition have a proper opportunity to do so. The requirements designed to achieve that objective are set out in subr. (1), (2)(a) and (b) and (4). These requirements must be met where the petitioner is the company itself as well as in the more usual case where the petition is presented by someone other than the company.

If those requirements are not satisfied, it may well be appropriate for the court to adjourn the petition to enable proper advertisement to take place. But it is not difficult to imagine circumstances in which it would be oppressive to the company, or otherwise unsatisfactory, to take that course. In such cases the proper course is for the court to dismiss the petition; not because its process is being abused, but because it would be wrong to adjourn for proper advertisement and wrong to proceed with a hearing in circumstances in which all those entitled to attend and be heard had not had a proper opportunity to do so. Sub-rule (5) of r. 4.11 gives the court the power which it needs to dismiss a petition in those circumstances.

The second objective of r. 4.11 is to ensure that the requirements as to advertisement do not, themselves, operate oppressively. It is for this reason that, where the company itself is not the petitioner, subr. (2)(b) requires that the advertisement in the Gazette is to appear not less than seven business days after service of the petition on the company. The company is given that period of seven days between service and advertisement so that it can consider its position and, if thought fit, apply to the court for an order restraining advertisement – see the observations of Slade J in *Re Signland Ltd* [1982] 2 All ER 609 (note) at p. 609G–H. But it is plain from the language – and it is not in dispute – that paragraph 2(b) of r. 4.11 is concerned, and concerned only, with the advertisement which the rule itself requires to be made – that is to say, concerned only with the advertisement which, subject to a contrary direction by the court under subr. (3), is to appear in the Gazette. In context the opening words of subr. (2) – 'The advertisement' – can refer only to the advertisement which subr. (1) requires. There is no justification for reading the word 'the' as if it were 'any'. To do so would lead to the conclusion that any further advertisement of the petition after the end of the periods prescribed in para. (a) and (b) of subr. (2) – whether in the Gazette or any other publication – would be a breach of r. 4.11. That cannot have been intended. There is no sensible explanation why, once the petition has been advertised in the Gazette, the rule-making body should have thought it necessary or appropriate to restrain further advertisement; and there is no way of reading subr. (2) so as to achieve the result that advertisement (other than the advertisement required by subr. (1)) in advance of the period prescribed in para. (b) is prohibited but advertisement after that period is not. The issue of press notices, as in the present case – although open to objection, perhaps, on other grounds – cannot sensibly be regarded as a breach of r. 4.11.

If the issue of the press notices was not otherwise a breach of r. 4.11, then subr. (5) can have no application. The expression 'not duly advertised in accordance with this Rule' in subr. (5) is plainly directed to a failure to advertise in accordance with the earlier provisions of r. 4.11; that is to say where there has been a breach of the rule. Sub-rule (5) is not apt to deal with excessive advertisement.

We were referred to a number of decisions at first instance bearing upon the point in question. The first was a decision of Harman J in *Re a Company (No. 00687 of 1991)* [1991] BCC 210. The judge was dealing there with a notification to the company's bank which was said to be in breach of an order made under r. 4.23 restraining advertisement. Rule 4.23 applies to contributories' petitions. The regime under that rule differs from that under r. 4.11. Rule 4.23(1)(c) gives to the court power to give such directions as to whether (and if so by what means) the petition is to be advertised. An order, in that context, that the petition shall not be advertised is plainly capable of being construed (and normally would be construed) as prohibiting advertisement or publication in any form. It was in that context that Harman J decided that the notification in that case constituted a breach of the order. He was not concerned with r. 4.11; and his decision is of no assistance in the present case.

Some 12 months later, the point came before Mummery J in *Re a Company (No. 001127 of 1992)* [1992] BCC 477. The petitioning creditor's solicitors had sent to

the company's bank and to a number of its suppliers in advance of the formal advertisement letters notifying them of the presentation of the petition. Mummery J took the view that that course of action was in breach of r. 4.11(2)(b). But he also took the view, expressed at p. 479A–B, that he was dealing with,

> 'such a serious a case of abuse of the Insolvency Rules and of the processes of the winding-up court that [he] should mark the court's strong disapproval of [the course of action adopted] by striking out the petition without investigating the merits of the petitioning creditor's argument that the points raised by the company in defence to the petition [were] specious.'

For the reasons which I have given, I think that Mummery J was wrong to describe what had happened in his case as a clear breach of r. 4.11(2)(b). But on the facts before him he took the view that there had been an abuse of process which merited the sanction of striking out. There is no doubt that the power of the court to control its proceedings by striking out a petition which is abusive can be exercised independently of any power conferred by r. 4.11(5).

The point arose, again, before Jonathan Parker J in *S N Group plc v Barclays Bank plc* [1993] BCC 506. Jonathan Parker J was not referred to the decision of Mummery J. He came to the conclusion that r. 4.11 had no application to an informal notification of the petition to the company's bank. He held that, in the context of the rule as a whole, it was directed towards advertisement in the Gazette as required by the rule itself. For the reasons which I have already given, I agree with that conclusion. Jonathan Parker J went on to deal specifically with the inherent jurisdiction of the court as a power separate and distinct from the power conferred by r. 4.11(5). That power is not now in question in the present case; and nothing in this judgment should be taken as an indication that it is not to be used in appropriate cases of premature advertisement. It is a necessary and salutary power; but it is not the power on which the appellants rely in this appeal. For a further example of the exercise of the inherent power, see the decision of Laddie J in *Re Doreen Boards Ltd* [1996] 1 BCLC 501.

The real objection in the present case is to the issue of press notices, or any other form of publicity, as an attempt to pre-empt the decision of the court on the hearing of the winding-up petition or on any interim application to restrain advertisement of the petition. That would be a powerful objection; but for the fact that in the present case the court had already appointed a provisional liquidator before the press notices were issued. This court explained in *Re a Company (No. 007923 of 1994)* [1995] BCC 634; [1995] 1 WLR 953 why it might be appropriate in relation to petitions brought under s. 124A of the *Insolvency Act* 1986 to depart from the normal practice requiring any advertisement in advance of the substantive hearing. But that was not a case in which a provisional liquidator had been appointed. It may well be that it was a realisation that different considerations apply where such an appointment has been made that led to the decision not to pursue the objection in this court.

Where a provisional liquidator has been appointed, a number of consequences will follow. First, the court will specify in its order the functions which the provisional liquidator is to carry out. Secondly, the provisional liquidator will be required by r. 4.106 to give notice of his appointment to the registrar of companies. Thirdly, it is likely to be impossible for the provisional liquidator to carry out any substantive functions conferred upon him without notifying those with whom he is dealing of the fact of his appointment. The order made in the present case contains a clear example of the need to communicate to others – including employees, bankers and those dealing with the company – the fact that there is a provisional liquidator; and therefore, necessarily, the fact that petitions have been presented.

Further, on appointing a provisional liquidator, the court will have in mind the effect which that appointment will have upon the company's business and good will, and will take that into account in deciding whether to make an appointment. The Companies Court is fully aware that, for practical purposes, the appointment of a provisional liquidator in a case of this nature is likely to bring the company's business to an immediate halt. Indeed, that is usually a powerful reason for making such an appointment on a Secretary of State's petition under s. 124A of the Act.

The Department of Trade's practice in such cases is set out in a note which, as I understand it, is made available on request. In short, the position is that where a petition has been presented but no provisional liquidator has been appointed, the Department will not publicise the fact of the petition until after the advertisement of the petition in the Gazette. But, if the Department is asked what the position is, it will respond by giving details of the petition. That practice, of course, provides a period of seven days prior to advertisement in the Gazette during which the company can, if it thinks fit, seek an order restraining advertisement of the petition.

Where, however, the petition has been presented and a provisional liquidator has been appointed, the Department's practice is to issue a press notice describing the action taken as soon as the provisional liquidator agrees to this being done. The department explains the rationale underlying that practice under three headings. First, that 'A wide variety of persons connected with the company must inevitably be informed by the Provisional Liquidator of the action taken'; secondly, that 'The Provisional Liquidator himself needs to ensure that the public are informed of his appointment so that anyone proposing have dealings with the company will know that they have to deal with him'; and, thirdly, that the purpose of the appointment of the provisional liquidator in an action of this nature is to protect the public and will usually have the effect of bringing the company's business to an end pending trial.

In my view those are grounds which will usually justify the issue of a press notice in accordance with the stated practice. A further ground might be added; namely that in a case of this nature, where the petition is presented under s. 124A and on the premise that the Secretary of State is satisfied that it is expedient in the public interest that the company should be wound up, it is desirable that there should be no uncertainty as to the position once a provisional liquidator has been appointed. The public is entitled to know that the Secretary of State has taken the view that it is expedient in the public interest to present a petition; and that the court, on the application of the Secretary of State, has been satisfied that the case was a proper case in which to appoint a provisional liquidator. For those reasons, the objections which might otherwise have force in relation to the issue of press notices will usually fall away in cases of this nature; as they have in the present case.

I should add this. In any case where the Secretary of State or the provisional liquidator are uncertain whether it is appropriate to issue an immediate press notice directions can be sought from the court, either on the hearing of an ex parte application or by the provisional liquidator following his or her appointment. It would be open to the court in a suitable case to restrain the issue of a press notice for a short period so as to give the company an opportunity to make representations as to why no advertisement should take place. Whether or not the court would think it right to do so will, of course, depend on the circumstances. But those advising the Secretary of State will need to bear in mind that, if there is no compelling reason to issue an immediate press notice without seeking the directions of the court at the time of the appointment of the provisional liquidator, the court may subsequently be concerned to enquire why directions were not sought.

In the present case, I am not persuaded that the press notices were in any way objectionable. In my view the judge was correct in the conclusion which he reached.

Morritt LJ: I agree. The appeal is dismissed.

(*Appeal dismissed with costs*)