Neutral Citation Number: [2018] EWHC 30 (Ch)

Case No: HC-2009-00405

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12-01-2018

Before :

TIMOTHY FANCOURT QC
(sitting as a Deputy Judge of the High Court)

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Between:

Recall Support Services Limited (and others)	**Claimants**
- and -	
Secretary of State for Business Innovation and Skills (and another)	**Defendants**

In the matter of applications
Between :

Tom McCabe	**Applicant**
-and-	
Jeremy Frost (as liquidator of VIP Communications Limited)	**Respondent**

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- -

Mr Jonathan McNae (instructed by **Jury O'Shea LLP**) for the **Respondent**
Mr McCabe in person

Hearing dates: 11, 12 December 2017

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JUDGMENT

Mr Fancourt QC :

1. On 11 and 12 December 2017 I heard 3 applications issued by Mr Tom McCabe, which were stood over by Warren J on 3 November 2017 to allow the parties to adduce further evidence.

2. Mr McCabe was a director of VIP Communications Ltd ("the Company") before it went into liquidation in February 2010. He was also a shareholder of the Company and its largest creditor. The Company had been in administration from 2005 until 2010.

3. Mr McCabe applies for:

   (1) An order that £90,000 paid into court as security for costs of litigation involving the Company be paid out to him;
   (2) Various orders against the liquidator of the Company, Mr Frost ("the Liquidator");
   (3) An order that the Liquidator's solicitor, Mr Mercer, be disqualified from acting further for the Liquidator.

4. Mr McCabe has acted in person on the hearing of these applications, supported and for the most part prompted by his McKenzie Friend, Mr Senna. Mr Frost has been represented by Mr Jonathan McNae of Counsel.

5. Mr McCabe drew to the Court's attention the fact that he is subject to an Extended Civil Restraint Order ("ECRO") made in proceedings against his trustees in bankruptcy. He described this as restricting proceedings against his trustees in bankruptcy. Copies of the ECRO, made on 17 February 2017, were only produced at the end of the hearing. The ECRO was made in the following terms:

   > "It is ordered that you be restrained from issuing claims or making applications in the High Court or any County Court concerning any matter involving or relating to or touching upon or leading to the proceedings in which this order is made without first obtaining the permission of Mrs Justice Rose ….."

6. It is understood that the proceedings in which the order was made were the bankruptcy proceedings, though this is not evident on the face of the ECRO.

7. In order to deal with the substance of the applications it is necessary to set out some of the complex history of the Company and Mr McCabe.

Factual background

8. The Company's business was in telecommunications; specifically, it was one of a number of companies that sold to commercial users access to mobile networks through "GSM Gateways", enabling commercial landline users to access cheaper telephone charges available to mobile customers. In about 2003 the mobile phone operators took steps to close down the use of such GSM Gateways, thereby effectively taking away the Company's business.

9. In 2004, a number of companies with businesses similar to that of the Company started competition law proceedings in the Competition Appeals Tribunal, on appeal from the rejection by Ofcom of their complaints against the operators. The Company joined in those proceedings ("the CAT proceedings").

10. But in 2005 the Company became insolvent and Mr Frost was appointed as one of two joint administrators of the Company. The continued participation of the Company in the CAT proceedings was funded by Mr McCabe. He considered that the Company had, as its only substantial asset, a valuable claim against the operators for abuse of a dominant position. Mr McCabe asserts that Mr Frost as administrator made an oral agreement with him that he would work on the basis that he would only be remunerated out of any proceeds of the litigation: what Mr McCabe referred to as a 'no win no fee' basis of remuneration. Mr Frost denies that any such agreement was made.

11. A company called Floe Telecom Limited led the CAT proceedings; others (including the Company) agreed to be bound by the outcome. Eventually Floe lost in the CAT and in the Court of Appeal. But the Court of Appeal judgment was in such terms that the administrators of the Company and Mr McCabe were advised that the Company had a strong so-called 'Francovich claim' against the Government and Ofcom for failure effectively to implement EU law.

12. Accordingly, the Company and a number of other companies started proceedings against the Secretary of State for Business Innovation and Skills and Ofcom ("the Francovich Proceedings"). The Company's part in those proceedings was funded by Mr McCabe. Other co-claimants were non-party funded by Harbour Litigation Services Limited ("Harbour"), a well-known commercial funder.

13. The (then) administrators of the Company retained a Mr Edward Mercer, a partner of Taylor Wessing LLP (who subsequently moved to Edwin Coe LLP and then to Matthew Arnold & Baldwin LLP), to act on behalf of the Company in both claims. Mr Mercer is now a partner of Jury O'Shea LLP. At one stage, in 2006, a different firm, called Bankside, was retained at Mr McCabe's request, but its involvement was short-lived.

14. Invoices were sent from time to time by Mr Mercer to Mr Frost and these were paid by Mr McCabe. From October 2006 to July 2010 a total of £163,250 is recorded as having been paid by Mr McCabe and £165,118.18 paid out by Mr Frost to Bankside or Taylor Wessing, or in other legal disbursements, including the payment of adverse costs orders in favour of T-Mobile and Ofcom. This record is in a reconciliation statement dated 4 August 2010 originally complied by the Liquidator ("the Reconciliation Statement").

15. In February 2010, the Company entered creditors voluntary liquidation. At that stage, the proceeds of the right of action were sold and assigned by the Liquidator to Mr McCabe personally, in consideration of a promise to pay 5% of the proceeds to the Company. But the liquidators continued to have charge of the litigation, subject to a new funding agreement made with Mr McCabe. This provided that in the event that Mr McCabe did not meet his liability to pay legal fees the Liquidator could terminate the assignment and the funding agreement. The funding agreement does not say anything specific about the Liquidator's time costs, as opposed to the legal fees, and

Mr McCabe's case is that there was an oral agreement that the Liquidator would only be paid for his time out of any proceeds of the claims. The Liquidator disputes this.

16. To protect the Liquidator, Mr and Mrs McCabe charged their home with payments due from Mr McCabe in any capacity to the Liquidator "relating to costs incurred by the Company or the Liquidator in the prosecution of [the CAT proceedings and the Francovich proceedings]".

17. There is no record showing exactly what further invoices for legal services were submitted or what further sums were paid by Mr McCabe after July 2010, but in an annual progress report to the creditors prepared by the Liquidator in 2015, the total amount of shareholder contributions since the start of the winding-up is shows as £203,077.42. Mr McCabe nevertheless estimates that the total amount so paid by him before his bankruptcy was in the region of £250,000.

18. In August 2010, the Company in liquidation was ordered by Deputy Master Lloyd to provide security for the defendants' costs in the Francovich proceedings in the amount of £90,000. The security was provided. It is now common ground that £86,400 of the monies were provided to the Liquidator's firm by a BVI company called Agape Ventures Limited ("Agape"), and that the Liquidator's firm then paid the £90,000 security into court. The provenance of the other £3,600 is unclear. Mr McCabe told me that Agape is unconnected with him or with the Company. Mr McCabe also accepted that the money from Agape was not by way of loan to him, though that is contradicted by para 25 of his third witness statement.

19. The action continued and, up to early 2011, funding of work on the litigation proceeded as before.

20. However, in early 2011 Mr McCabe encountered substantial financial difficulties. First, on 31 January 2011 a freezing order was made against him in other litigation. Second, in March 2011 he was adjudicated bankrupt, as was his wife. In those circumstances, he could not continue himself to fund the litigation.

21. It is common ground that Mr McCabe and the Liquidator had discussions after March 2011 about the future of the litigation and that by May 2011 Harbour had agreed to fund the Company's future part in the litigation, with the benefit of ATE insurance against adverse costs orders. The litigation continued, being funded by Harbour rather than by Mr McCabe.

22. Unhappily for Mr McCabe, the claims eventually failed.

23. What happened between Mr McCabe and the Liquidator in those discussions is in one important respect disputed. The Liquidator exhibited to his first witness statement a letter from (and apparently signed by) Mr McCabe to him, which bears the date 1 April 2011. This letter confirms that Mr McCabe no longer had any interest in the proceeds of the Francovich litigation, as a result of termination of the funding agreement and the assignment, but that any sums owing under the funding agreement would remain owing and subject to the legal charge over his home.

24. A draft of that letter was enclosed with a letter from the Liquidator dated 1 April 2011, explaining that he was terminating the funding agreement and the assignment

agreement for non-payment of fees by Mr McCabe, and asking Mr McCabe to sign and return the enclosed draft in order to facilitate obtaining commercial funding for the Francovich proceedings. The Liquidator's letter referred to an earlier letter of his dated 15 March 2011, making a demand for payment of fees, which letter in turn referred to a yet earlier letter of 22 February 2011 about the difficulties of funding in light of the freezing injunction.

25. Mr McCabe's case is that he did not receive any of the 3 letters just referred to, and that the signature on the letter dated 1 April 2011 from him to the Liquidator is not his signature; that the letter was forged by the Liquidator, and that Mr Mercer has lied in a witness statement in stating that he drafted the letter for Mr McCabe to sign. Mr McCabe has recently issued a further application (which has not yet been heard) seeking permission to start committal proceedings against the Liquidator and Mr Mercer for perjury and conspiracy to produce false evidence.

26. The final event of considerable controversy, so far as Mr McCabe is concerned, is that in September 2015 Mr McCabe's trustee in bankruptcy agreed to pay the Liquidator £250,000 in order to release the charge over the McCabes' house. The Liquidator had been seeking something more than £500,000 by way of costs under that security, but Mr Hyde, one of the joint trustees in bankruptcy, by email of 19 May 2015 stated:

> "…I am happy to meet to discuss the matter, but the advice that I have received is very clear, that the maximum amount that is due under the charge is the amount that is ring fenced. I am happy to discuss with you what part of the costs for the relevant period do or do not relate to the conduct of the litigation (as opposed to any other aspect of the liquidation) but the amount of the costs for that period is the upper limit to the parameters".

27. In context, it is very clear that the Liquidator was contending that all his time costs were secured by the legal charge and the trustees were arguing that only costs incurred in connection with the litigation were secured by the charge.

28. That led Mr Frost to claim payment of about £273,000 and in the event the matter was compromised between the Liquidator and the trustees at a payment of £250,000 in return for the release of the charge. Mr Frost says that he accepted this lower sum in the interests of being paid promptly, without the need for court proceedings to resolve the disagreement between the trustee and him.

29. Companies House returns filed by the Liquidator for the period up to 17 February 2015 appear to show the following:

(1) that as administrator of the Company he and his assistants had done 713 hours of work at a cost of £200,722 on the administration generally;

(2) that as liquidator of the Company he and his assistants had done 773 hours work at a cost of £182,606 on the liquidation generally.

The First Application

30. The first application issued by Mr McCabe on 10 October 2017 is for payment out to him of the £90,000 paid into court in August 2010, on the basis that he paid the money into court. The basis on which the application was made is incorrect. Although Mr McCabe, as the litigation funder, was closely involved with the application for security and the raising of the necessary £90,000, the order for security was only made against the Company and the security was paid into court by the Company in liquidation, using (for the most part) funds that were sent by Agape to the Liquidator's firm.

31. This was probably arranged by Mr McCabe, though he does not disclose any detail about why and how Agape provided funds. He may well have told the Liquidator that Agape would be sending in the money. That could explain why, in the Company's statutory reports, it is stated that Mr McCabe provided the money. But it is not now in dispute that Agape did, and that the security was in fact paid into court by the Company, after having been put in funds by Agape.

32. Whether any – and if so what – arrangement was made between Agape and the Company is unknown. Agape has not provided any evidence, nor made any claim for repayment.

33. It is clear that the right person to apply for release of the £90,000 once the costs of the Francovich Proceedings have been paid is the Company in liquidation. How the funds can then be used by the Liquidator is another question, depending on what terms were agreed between Agape and the Liquidator, or what agreement is to be inferred. In fact, the Liquidator contends that he will be free to use the funds for the general purposes of the liquidation. That question is not before me for determination, and the Liquidator has given Mr McCabe an assurance (repeated in court) that he will not issue any application for payment out without giving him 7 days prior notice.

34. It cannot be right that, on the application of Mr McCabe (not Agape or the Company in liquidation), the funds can be paid out now to Mr McCabe, which is what the application seeks. Mr McCabe said at the hearing that the funds should be paid out to J. Boddington Law Associates, but he accepts that a paralegal from that firm is advising him, so payment to that firm will simply amount to payment to Mr McCabe.

35. I would add that it is not clear that Ofcom, as a potentially interested party, was served with notice of the First Application. Mr McCabe says that BIS was notified, but only on 20 November this year. Both defendants should properly be given reasonable notice of any further application, unless they have previously indicated that they have no further claim for unpaid costs of the proceedings.

36. I therefore dismiss Mr McCabe's first application. This application was wholly without merit. I emphasise that I am only deciding that no order should be made for payment out to Mr McCabe. I make no decision on where the beneficial interest in the monies in court lies.

Second Application – jurisdiction and standing

37. This application dated 30 October 2017 is on the face of it for injunctive relief against the Liquidator in relation to his conduct of the liquidation of the Company. In substance, however, it is an application for the Court to give directions to the Liquidator, such as might be made by a contributory or creditor of a company pursuant to section 112 of the Insolvency Act 1986. Under that section, the Court can exercise any powers that it could exercise if the company were being compulsorily wound up by the court.

38. At the start of the hearing, I ordered that the application be treated as an application made in the matter of the liquidation of the Company. It is clearly not an application in the Francovich Proceedings, where it was issued, and the subject-matter of the application is the conduct of and disclosure of documents held by the Liquidator of the Company. It is not an application where the relief sought is relief against the trustees in bankruptcy, though part of the relief claimed does relate to dealings in 2015 between the trustees and the Liquidator.

39. This gives rise to two initial questions: what standing does Mr McCabe have to make the Second Application, and if he does have standing is the Second Application a breach of the ECRO?

40. Upon Mr McCabe's bankruptcy, the debt owed to him by the Company and the beneficial interest in his shares in the Company vested in his trustees in bankruptcy. Mr McCabe accepted that no property forming part of his estate has been re-transferred to him by his trustees. He is therefore not a creditor of the Company. The fact that earlier in 2017 the trustees were released from office makes no difference in that regard.

41. Mr McCabe is technically a contributory, being at least a past member of the Company. (It may be that title to the shares is still vested in him, though the beneficial ownership vested in his trustees.) But pursuant to section 82(2) of the Insolvency Act 1986, his trustees in bankruptcy are to represent his interest as a contributory for all purposes of the winding up. Those purposes must include the right of a contributory to apply under section 112 for the court to exercise powers in relation to the conduct of the winding up. In any event, Mr McCabe cannot now have any liability to contribute to or share in the assets of the Company.

42. A liquidator in a voluntary winding up is technically not an officer of the Court and therefore is not generally subject to the Court's supervisory jurisdiction: see Re T.H. Knitwear (Wholesale) Limited [1988] Ch 275 at 288-289. In that case, Slade LJ accepted the argument of Mr Michael Todd for the liquidator that a liquidator in a voluntary winding up is not subject to the control of the court "unless or until he or some other interested party chooses to bring questions relating to [the exercise of his powers] before the court for its directions or other relief".

43. It is therefore very doubtful that Mr McCabe had the standing necessary to seek the Court's directions in the first place, much less any claim for an injunction against the Liquidator.

44. As to the ECRO, it is clearly the main purpose of Mr McCabe's application to obtain documentary information from the Liquidator that will enable him to establish that the Liquidator's claim in the bankrupt estate for costs was improperly made and that the trustees in bankruptcy wrongly paid £250,000 to the Liquidator in respect of such costs.

45. The Second Application therefore does relate, in a broad sense, to something done by the trustees in bankruptcy in 2015, but the documents sought are documents that the Liquidator has that relate to his own claim to be a secured creditor. Although the fruits of the Second Application, if it succeeds, may lead to a claim relating to the bankruptcy proceedings, it appears to me that the Second Application can be said to be just (but only just) on the right side of the ECRO line, as being an application in relation to the conduct of the liquidation, for directions to be given to the Liquidator. One indication that this application is on the right side of the line is that I did not feel that it was necessary to hear from the trustees in order to dispose of the application.

46. In any event, Mr McNae on behalf of the Respondent liquidator did not (except after the substance of the Second Application had been heard) seek to persuade me that it was contrary to the ECRO, nor did he seek to argue that as such it stood dismissed without any further order of the court.

47. Further, the Respondent did not, in his skeleton argument (for the hearing before Warren J or the hearing before me), or at the start of the hearing, seek to strike out the Second Application on the ground that Mr McCabe had no standing to bring it or that the court had no jurisdiction otherwise to entertain it. Instead, the Respondent took the opportunity given by Warren J to put in detailed evidence on the merits, disclosed certain documents voluntarily in response to the Second Application, offered to disclose more documents when available and did so the week before the hearing, and then applied at the hearing for permission to put in further evidence in reply on the merits. I indicated at the end of Mr McCabe's submissions that I would welcome submissions from the Respondent on the questions of jurisdiction and standing.

48. In those perhaps rather unusual circumstances, it seems to me that, having heard the application on its merits for the best part of two days, the appropriate course is for me to deal with the matter on its merits, and if Mr McCabe's case justifies it and it is otherwise just and convenient to do so, to give such limited directions for disclosure as may be appropriate.

49. I bear in mind too that if I do not deal with this matter on its merits now it will only reappear in a different guise (possibly after the ECRO expires on 16 February 2018), and could then be formulated as an application for pre-action disclosure. It was evident at the hearing that Mr McCabe rightly or wrongly has a strong sense that an injustice has been done to him; that this perception is supported and encouraged by his McKenzie friend, Mr Senna, and that disposing of this application on a procedural basis would only be likely to give rise to further costs and further court time being expended on the matter in due course.

The Second Application – the merits

50. The relief sought in the Second Application comes under several paragraphs of the draft order attached to it, as follows:

> "5. The Respondent is restrained from interfering with the sum of £90,000 which the Applicant, on the order of Master Bowles on 04 August 2010, paid into Court as security for Cots in case number HC0900405.
>
> 6. Until the Return Date or further Order of the Court, Respondent by himself, his officers or civil employees, must preserve and not in any way dispose of or remove from England & Wales, any documents or material in the insolvency investigation and liquidation proceedings relating to the VIP Communications Ltd and the Applicant, either directly or indirectly under his control, and not deal with any document or material howsoever so as to diminish, degrade, deface or devalue any document or material.
>
> 7. By 4pm on 08 November 2017, the Respondent shall swear, file and serve an affidavit in person or, confirming a list of the creditors in the liquidation of VIP Communications Ltd.
>
> 8. By 4pm on 08 November 2017, the Respondent shall deliver up to the Court and to the Applicant/Claimant, the Bill of Costs in the sum of £250,000 which the Respondent provided to the Applicant's Trustee in bankruptcy
>
> 9. By 4pm on 08 November 2017, the Respondent shall deliver up to the Court and to the Applicant/Claimant, any and all paperwork and records, digital or hardcopy, of any and all payments totalling circa £250,000, made by the Applicant to the Respondent during the period 2003 to 2011"

51. On day 2 of the hearing, having made submissions to me on day 1, Mr McCabe applied to amend the Second Application to introduce a claim for new and different relief and to broaden the categories of documents of which disclosure was sought. I rejected that application. I did however indicate that, having regard to Mr McCabe's acting in person, I was prepared to read paragraphs 8 and 9 of the draft order as extending to remuneration returns made in accordance with Statement of Insolvency Practice 9 and underlying time sheets of the Liquidator (para 8), and invoices or bills of lawyers detailing work done by the Respondent's solicitors up to April 2011 (para 9).

52. As to para 5 of the draft order, in the light of my decision on the First Application and the assurance given by Mr Frost, it is not appropriate to make any order in relation to the monies in court.

53. The same is true in my judgment in relation to para 6. As liquidator of the Company in creditors voluntary liquidation, the Liquidator is technically not acting as an officer of the court, but he is a licensed insolvency practitioner who, I am told, frequently does act as liquidator in compulsory liquidations. He is an experienced liquidator who fully understands the rules and his responsibilities.

54. Mr McCabe has levelled numerous accusations of fraud, forgery, conspiracy and theft against the Liquidator and complained that documents about his and his lawyers' fees have not been provided. I am in no position to decide on this application whether or not any allegations of malfeasance are proven. They are very serious allegations that, if pursued, would have to be tried. What I have to consider is whether, at this stage, they provide cogent evidence (that is to say, a strong prima facie case of wrongdoing) to justify the grant of an order against the Liquidator to preserve and protect the liquidation documents.

55. Mr McCabe relies in particular on two matters in support of this part of his application. First, he says that the Liquidator resigned as liquidator of Easy Air Limited (another Francovich claimant) in circumstances of an allegation of the fabrication of a proof of debt. Second, he relies on the alleged forgery of Mr McCabe's letter dated 1 April 2011 relating to the funding of the Francovich Proceedings.

56. As to the Easy Air allegation, there is some evidence of allegations of wrongdoing having been made, but there is nothing that amounts to a specific allegation against Mr Frost. A Mr Lloyd Weston, a former director of Easy Air, has made a statement claiming that a proof of evidence bearing the signature of his former co-director did not appear to be an authentic signature; that the proof was rejected, and that Mr Frost later resigned as liquidator of Easy Air. But there is nothing that links any wrongdoing (if any) with Mr Frost's conduct of the liquidation. Mr Frost has explained, in his evidence, that he resigned as liquidator for reasons unconnected with any wrongdoing. A Mr Whittell, a solicitor, has confirmed to Mr McCabe in a short email dated 17 November 2017 that there were issues over the authenticity of a signature on a document used by Mr Frost to support a proxy form in connection with a Mr Happy, but the email states that he is making enquiries and will revert further. No further evidence was provided.

57. In relation to the 1 April 2011 alleged forgery, the evidence relied on by Mr McCabe was not even at face value such as to raise a strong prima facie case of forgery: it depended on, first, assertion by Mr McCabe 6½ years after the event that he did not see or sign any such letter, and, second, the fact that the letter appears to have been drafted by the Liquidator, whereas Mr Mercer in his witness statement said that he prepared the letter.

58. Last week, the Respondent was able to extract from the Liquidator's DocuSave document management system the correspondence between him and Mr Mercer at the time, which shows that (unsurprisingly) Mr Mercer had advised the Liquidator in relation to obtaining funding from Harbour and had drafted and sent to the Liquidator the wording of letters that he should send to Mr McCabe. The Liquidator then got his assistant to produce the letters on Frost Group notepaper and sent them out to Mr McCabe. The document system also records the despatch of the letters and, 6 days later, the receipt of the letter back (with a copy of it), apparently bearing the signature

of Mr McCabe. Mr McCabe says that he has had no opportunity to examine the data recorded by the system or the original documents, and I make no finding as to whether matters were as the Respondent explains them. However, as the basis for seeking an order against Mr Frost in terms of para 6, the evidence of forgery is currently weak.

59. I am not persuaded that there is any strong prima facie evidence of wrongdoing on the part of Mr Frost that would justify making an order requiring him to preserve and protect documentary evidence. He is aware of his responsibilities in that regard. The liquidation has not concluded. Mr Frost will continue to act, so he remains subject to a degree of control through the creditors and, on application, the court, and he must comply with the statutory requirements to file reports and conduct the liquidation in accordance with the Rules.

60. The next order sought against the Liquidator is para 7, but this was complied with by him on 10 November 2017. The list of creditors supplied to the Applicant caused him some surprise, as he believed that only he (or his trustees in bankruptcy) and HMRC were creditors of the Company. However, the Liquidator has complied with the request made of him and no further order is necessary. During the course of argument, Mr McCabe suggested that he required the underlying proofs of debt from the other creditors, but I will not make that order: they have nothing to do with the issues that directly concern Mr McCabe. Mr McCabe (prompted by Mr Senna) displayed a strong and regrettable tendency to ask for everything that interested him from time to time, or that might reveal something that could be used to advance a different criticism of the liquidator. The court will not assist Mr McCabe to conduct a roving inquiry of that kind.

61. The real substance of the Second Application lies in the relief sought in paras 8 and 9. Pursuant to the funding agreements, Mr McCabe believes that he paid the Liquidator in the region of £250,000 in response to requests for money. Some of those payments are identified on the Reconciliation Schedule, but only up to 4 August 2010. There is additional time from then to March 2011, when Mr McCabe was made bankrupt, during which further payments could have been made. The liquidator's Companies House returns show a total of £203,000 as having been received from shareholders (presumably Mr McCabe). Mr McCabe says that there are other payments: £4,000 (which Mr Frost explains in his witness statement), £15,000 (which Mr Frost says was paid by VIP Online Limited - the original assignee of the CAT claim), and a disputed £20,000 item in some way connected with BT plc.

62. In response to the Second Application, Mr Frost's solicitors wrote to Mr McCabe on 2 November 2017 explaining that they were content to produce such documents as had been sent to the trustees in bankruptcy and other documents, as long as that did not involve the Liquidator breaching his professional obligations. By letter dated 10 November 2017, the Liquidator's solicitors sent to Mr McCabe such documents as were available at that time, and stated unequivocally that there was no "Bill of Costs" as sought in para 8 of the draft order. They said that further documents might be forthcoming from Mr Mercer's previous firm, Matthew Arnold Baldwin LLP, and would be sent when received. All the payments in the Reconciliation Statement are explained in Mr Frost's second witness statement, at paras 83-95.

63. By letter dated 7 December 2017, the Liquidator's solicitors sent Mr McCabe further documents, including numerous invoices from Taylor Wessing LLP, with supporting narratives, for the period up to May 2010; numerous invoices from Edwin Coe LLP (without narrative) for the period from July 2010 to up to about November 2011, and then invoices from Matthew Arnold & Baldwin LLP from January 2012 onwards. Reconciliations of invoices from each firm were also provided. The letter also enclosed some invoices from the Liquidator's firm to the Company in liquidation for the period from May 2011 to June 2016 for payments on account of remuneration. These invoices are wholly unspecific: by way of example, an invoice dated 1 October 2015 is simply for "administrators [sic] remuneration on account" in the sum of £150,000 plus VAT.

64. In this context, the original application for the Bill of Costs in the sum of £250,000 sent to the trustees in bankruptcy cannot succeed. There is no such Bill of Costs. However, the Liquidator has now disclosed voluntarily the documents that he sent to the trustees in bankruptcy in relation to the claim for payment of his remuneration. He has explained in his second witness statement that his initial claim was in excess of £500,000, but that the trustees took the position that they were only prepared to make a payment (in order to release the security) in relation to litigation time costs of the Liquidator, not his general liquidation costs. Those unpaid litigation costs were quantified by the Liquidator in the sum of £273,929.75. The breakdown of this figure is provided in Mr Frost's witness statement in the bankruptcy proceedings, which was disclosed to Mr McCabe with the letter of 10 November 2017. Summaries of the Liquidator's time spent to support the breakdowns are also provided. The total figure of £273,929.75 includes £47,072 in fees owed to Taylor Wessing LLP.

65. In this light, the Liquidator has disclosed everything that Mr McCabe could reasonably require in order to understand the basis on which the payment of £250,000 was agreed save for detailed time sheets of the Liquidator (and his staff) that underlie the summaries of time spent exhibited in the bankruptcy witness statement. It is really these that Mr McCabe wants to see, in order to try to identify what time was spent by the Liquidator that might (on one interpretation of the funding agreement) be payable by Mr McCabe and secured by the legal charge.

66. At the hearing, the Liquidator, through Counsel, confirmed that he has the time sheets and that these do differentiate between time spent on the administration and the liquidation generally and time spent on the litigation. He said that – without prejudice to the validity or merits of the application – he was content to provide these to the trustees in bankruptcy and would submit to an order to provide them to Mr McCabe, but would not provide them voluntarily to Mr McCabe in case that put him in breach of his obligations of confidentiality as liquidator.

67. In my judgment, it is just and convenient at this time for copies of those underlying time sheets to be provided to Mr McCabe. They may well allay Mr McCabe's suspicions about what has been charged for, or indeed demonstrate that there is justification for his fears, and to what extent. Instead of assuming that he has been the object of a wide-ranging, unlawful conspiracy, Mr McCabe will then have to focus on the extent to which a proper basis of challenge can be maintained. I wish to make it explicitly clear that the time sheets, copies of which are to be produced, do not extend beyond those that relate to the total number of hours recorded in the three 'time and

chargeout' summaries exhibited at pages 63-65 of exhibit "JF1" to Mr Frost's witness statement dated 10 September 2013 in the bankruptcy proceedings.

68. If copies of those time sheets are not provided, Mr McCabe will inevitably in my judgment – on the basis of what I have seen of him and Mr Senna – either seek to bring unfocussed proceedings against the trustees (subject to the restrictions of the ECRO) and the liquidator, in which the documents in question will be disclosable, or make in due course an application for much more wide-ranging pre-action disclosure. Substantial further cost and court time would be involved in dealing with any such proceedings. I cannot say, on the basis of what I have seen so far, that Mr McCabe's case in any such proceedings would plainly be hopeless. The position is just not sufficiently clear.

69. For these reasons, it is just and convenient at this stage to make a limited order for disclosure of identified time sheets, by way of provision of copies, in the terms that I have indicated.

70. As for documentary records of the payments made by Mr McCabe to the liquidator for legal costs, the Reconciliation Statement records receipt of £165,118.18 and the Liquidator's annual progress report to creditors for the year to 17 February 2015 records a total of £203,077.42 for third party contributions from shareholders. It may well be, therefore, that further sums were paid by Mr McCabe on account of legal costs between 4 August 2010 and the date of his bankruptcy in March 2011. In the invoices disclosed by the Liquidator prior to the hearing, there are invoices from Edwin Coe LLP for services provided to the Company in liquidation between June 2010 and March 2011 amounting to about £56,000 in total (inclusive of VAT). The reconciliation statement does not deal with sums received, but it seems inherently likely that the difference between £203,077.42 and £165,118.18 shown on the reconciliation statement would be attributable to payments for some of those invoices.

71. In my judgment, in order to clarify the position in this regard, the Liquidator should disclose to Mr McCabe, in the form of a letter written by his solicitors and on the basis of his records of the Company's liquidation, what further sums were paid by Mr McCabe to him, as legal costs of the litigation or otherwise, between 4 August 2010 (the date of the Reconciliation Statement) and the end of March 2011.

72. In addition, Mr McCabe contends that further payments over and above the £203,077.42 were made by him that have not been correctly recorded in the progress report, namely sums of £4,000 and £15,275 paid in 2005 and another sum of £20,000 claimed to have been paid "to settle with BT", though no evidence about that was before me. The two 2005 payments are dealt with adequately in Mr Frost's second witness statement. The £4,000 was paid (as two payments of £2,000 each) by Mr McCabe as the costs of an abortive proposed CVA in summer 2005. They are explained in the administrators' progress report dated 14 September 2007. No further clarification or documentation is necessary to explain this payment.

73. The £15,275 was paid by VIP On Line Limited (a company controlled by Mr McCabe) as a non-refundable deposit upon the sale to it of the fruits of the CAT litigation. This is therefore not a payment made by Mr McCabe at all and no further disclosure is appropriate or necessary. In relation to the alleged payment of £20,000,

the evidence is too scant to form the basis of any proper direction for further disclosure.

The Third Application

74. On 3 November 2017, during the short adjournment of the hearing before Warren J, Mr McCabe issued a further application against the Liquidator (which he indicated should be treated as part of the Second Application), to disqualify Mr Mercer and his firm from further representing him. That was in part on the basis that Mr Mercer had acted for Mr McCabe in 2010 on the grant to the Liquidator of the legal charge over the McCabes' home and that Mr Mercer had an interest in the outcome of the proceedings. Mr McCabe added, in argument, that he was in effect the 'shadow client' of Mr Mercer, as funder of the litigation. This was said to give rise to a conflict of interests. It is also alleged in the evidence in support of the third application that Mr Mercer was implicated in the Liquidator's falsely obtaining £250,000 from the trustees in bankruptcy.

75. If Mr McCabe was a client of Mr Mercer at all it is clear that he is only a past client. It is now more than 7 years since the grant of the legal charge. It is more than 6½ years since Mr McCabe ceased to be the funder of the Company's litigation. Mr Mercer has not acted for Mr McCabe since then. In those circumstances, there is no conflict of interest in Mr Mercer's acting now for the liquidator of the Company.

76. The relevant question is instead whether or not Mr Mercer's acting for the Liquidator gives rise to a reasonable fear on the part of Mr McCabe (assuming him to have been a client of Mr Mercer in 2010) that confidential information imparted to Mr Mercer then may be at risk of being disclosed to the Liquidator: see Prince Jefri Bolkiah v KPMG [1998] 2 A.C. 222, per Lord Millett at pp. 235, 236.

77. In that regard, Mr McCabe relies on the following arguments.

78. First, he says that in numerous emails sent or copied to him in 2010 and 2011 Mr Mercer was giving legal advice to him, such that there was a relationship of client and lawyer in which confidential information was imparted. I consider that to be plainly wrong on the face of the emails. At all relevant times, the Liquidator was Mr Mercer's client and Mr McCabe was the non-party funder of the litigation. As such, the client and the funder had certain common interests; concerns and information relating to the litigation was readily shared between them. When Mr McCabe became bankrupt, the question of who might then fund the litigation was discussed between them. But that did not make Mr McCabe the client, nor is there any evidence of confidential advice or information being passed between Mr McCabe and Mr Mercer.

79. Second, Mr McCabe says that Mr Mercer was aware of Mr McCabe's dealings with Agape, which led to Mr Mercer acting for Agape in relation to another charge over the McCabes' house. The fact that Mr McCabe told Mr Mercer of Agape's willingness to provide funds for the litigation does not mean that Mr McCabe became Mr Mercer's client to any greater extent than in connection with the grant of the legal charge(s). Matters relating to Agape were not imparted to Mr Mercer by Mr McCabe confidentially, as from a client to a solicitor, but as a litigation funder to a litigant's

solicitor in connection with funding the litigation. In general terms, anything that could be said to be confidential (in the sense of commercially sensitive) was shared with the Liquidator at the time. There is no evidence of anything confidential as between Mr McCabe and Mr Mercer having passed in the course of a lawyer-client relationship, or otherwise.

80. Third, Mr McCabe says that in relation to the security for costs application Mr Mercer advised him to come to court with a bank statement, and that he was billed £8,000 by Mr Mercer for the security for costs hearing. There is no evidence to support these assertions, which were made for the first time in the course of the hearing. No such bill for £8,000 has been seen by the Respondent. It is in any event easy to imagine how both such matters might have happened, given that the Company was in liquidation and Mr McCabe was funding the litigation. Neither of them remotely suggests that Mr McCabe was Mr Mercer's client.

81. Even if Mr McCabe had been a client of Mr Mercer up to the date of his bankruptcy, there is no evidence of any conflict of interest arising at that time. Mr McCabe and the Company had aligned interests, so far as the litigation was concerned, and only had potentially different and conflicting interests in relation to the grant of the legal charge. There is no evidence of any confidential information having been given by Mr McCabe to Mr Mercer at the time. After the funding agreement terminated in March or April 2011, Mr Mercer continued to act as the solicitor of the Company in liquidation without any suggestion by Mr McCabe previously that he could not properly do so. It is wholly unexplained by Mr McCabe how a risk of breach of confidence could arise now, when Mr Mercer has been acting for the Liquidator alone since April 2011.

82. In his evidence, Mr Mercer has stated that he has given careful consideration to the question of whether there is anything that could prevent him from properly continuing to act for the Liquidator, having regard to the rules of professional conduct binding him as a solicitor, and that he is satisfied that there is nothing. I similarly cannot see, on the evidence before me, any obligation of confidentiality owed to Mr McCabe that is at risk of being broken if Mr Mercer continues to act.

83. This application too was totally without merit and I dismiss it.