Neutral Citation Number: [2019] EWHC 224 (Ch)

Case No: No 6394 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
COMPANY AND INSOLVENCY LIST (CHD)

IN THE MATTER OF DIAMOND HANGAR LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Birmingham Civil Justice Centre
The Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 6 February 2019

Before:

HHJ WORSTER
(sitting as a Judge of the High Court)

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Between:

(1) Diamond Hangar Limited	**Applicant**
(2) Michael Patrick Foley	
- and -	
(1) Abacus Lighting Limited	**Respondents**
(2) Andrew Villis	
- and -	
(1) Stansted Airport Limited	
(2) The Manchester Airport Group plc	
	Interested Parties

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Hilary Stonefrost (instructed by **Lewis Onions**) for the **1st Applicant**
Shakil Najib (instructed by **Lewis Onions**) for the **2nd Applicant**
Hannah Laithwaite (instructed by **Coltman Warner Cranston**) for the **1st Respondent**
Yasmin Yasseri (instructed by **Ashtons Legal**) for the **2nd Respondent**
Christopher Maynard (instructed by **Eversheds Sutherland**) for the **Interested Parties**
Martyn Rawbone on behalf of the **Official Receiver**

Hearing date: 17 January 2019
Draft Judgment: 24 January 2019

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Approved Judgment

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

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HHJ WORSTER

HHJ WORSTER:

Introduction

1. On 3 October 2018 Abacus Lighting Limited presented a Petition to the Court for the winding up of Diamond Hangar Limited ("Diamond") on the basis that Diamond was insolvent and unable to pay its debts. The petition relied on an unpaid invoice for £34,800 from April 2018. The Petition was ordered to be heard on 4 December 2018. It was served on Diamond at its registered office at "The Diamond Hangar" at Stansted Airport on 11 October 2018 and advertised in the Gazette on 21 November 2018. Mr Villis gave notice of his intention to support the Petition, relying upon a debt of £16,640.

2. The Petition came before District Judge Ingram on 4 December 2018. Diamond was represented by Counsel instructed on a direct access basis and made an application to adjourn the hearing of the Petition. No evidence was filed in support of that application, and it was refused. A winding up order was made [3].

3. The Directors of Diamond then instructed their present solicitors, and on 10 December 2018 an application was made for the rescission of the winding up order pursuant to rule 12.59 of the Insolvency Rules [1]. That application was made in time. It also sought orders for the dismissal of the Petition and that Diamond pay the costs of Abacus, Mr Villis and the Official Receiver. It was supported by the first witness statements of Allen Blattner [33] and Michael Foley [67]. Mr Blattner is a Director of Diamond, and Mr Foley a former Director. Mr Foley was also a creditor of Diamond's in the sum of £33,500. This was for services he had provided to the company as an aviation consultant. The application to rescind was made jointly by the company and by Mr Foley as a creditor pursuant to paragraph 9.10.3 of the Practice Direction. The Respondents were Abacus and Mr Villis.

4. The application was first listed for hearing on 12 December 2018 before HHJ Cooke. On the day of the hearing a witness statement from Andrew Blackshaw was filed on behalf of Manchester Airport Group plc and Stansted Airport Limited (together "the MAG companies") [166]. MAG had attended the hearing of the winding up petition but had not asked to be heard nor to support the Petition. There is no issue as to their standing in relation to this application. On 12 December 2018 the application was adjourned to 19 December 2018.

5. The position by 19 December 2018 was that Mr Blattner had made a second witness statement in support of the application [69], and the Applicants' solicitors held the sum of £523,988 from which it could discharge Diamond's liabilities. Subject to the

usual undertakings, agreements had been reached with the petitioning creditor and the supporting creditor to discharge all debts due to them and to pay their costs if and when the winding up order was rescinded. The OR's costs had been agreed and would be discharged if and when the order was rescinded. Diamond had also reached agreements with the other known creditors to discharge their debts from the funds held by its solicitors on a similar basis, and had hoped to do the same with MAG. However, on 18 December 2018 MAG served a further witness statement from Mr Blackshaw [182]. This statement contained a detailed critique of Diamond's evidence and financial position. Whilst MAG's solicitors indicated that for the purpose of the hearing on 19 December 2018 it was "*not for us (or any individual creditor) to support or oppose the rescission application"* it was apparent from the witness statement from Mr Blackshaw and from Mr Maynard's skeleton argument that MAG opposed the application.

6. Diamond had to answer the points raised by Mr Blackshaw's evidence, and the application was adjourned to 17 January 2019. The order made on 19 December 2018 [4] included provision for Diamond to give notice of the application *to all persons whom they know or believe to claim to be a creditor of the company* and upon request to provide any such person with a copy of the application and evidence in support. A Mr Abbott alleged that he was such a creditor who had not been so notified, but whilst he had initially intended to oppose the application, he withdrew his evidence and his opposition.

7. Further witness statements were filed on behalf of Diamond on 10 January 2019 from:

   (i) Mr Blattner [86];

   (ii) Michael Okoro, who had been appointed as an Administrative Officer by Diamond on 29 August 2018 [122];

   (iii) Robert Appleton [126] who had been appointed Liquidator on 21 December 2018;

   (iv) Martin Lord [143] of Lewis Onions, Diamond's solicitors, who had contacted creditors; and

   (v) Prince Arthur Eze ("Mr Eze") [159] a Director of Diamond, the ultimate owner of the company and the source of the funds upon which it depends.

8. Finally, late on 15 January 2019 MAG filed a 3rd and substantial witness statement from Mr Blackshaw [248]. This time there were no applications to adjourn. The Respondents supported the application and no other creditors appeared. I review the evidence below, but it appears that all or virtually all the company's creditors are identified and have been contacted. The opposition to the order sought by Diamond comes from MAG.

The relevant law

9. Rule 12.59 provides as follows:

> *12.59(1) Every court having jurisdiction for the purposes of Parts 1 to 7 of the Act and the corresponding Parts of these Rules, may review, rescind or vary any order made by it in the exercise of that jurisdiction…*
>
> *12.59(3) Any application for the rescission of a winding-up order must be made within five business days after the date on which the order was made."*

10. There is no real issue between Diamond and MAG as to the general principles which govern the exercise of the court's discretion to rescind a winding-up order. Both Miss Stonefrost and Mr Maynard referred me to the judgment of Barling J in *Credit Lucky Ltd v National Crime Agency* [2014] EWHC 83 (Ch) [31]. Barling J adopted the summary set out by Mr Phillip Marshall QC sitting as a DHCJ in his judgment in *Re Metrocab Ltd* [2010] B.P.I.R. 1368 [36].

> *(1) The power to rescind is discretionary and is only to be exercised with caution.*
>
> *(2) The onus is on the applicant to satisfy the court that it is an appropriate case in which to exercise discretion.*
>
> *(3) It will only be appropriate in cases where the circumstances are exceptional and those circumstances must involve a material difference from those before the court that made the original order.*
>
> *(4) There is no limit to the factors that the court can take into account, and they may include changes since the original order was made, and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time; but where that evidence could have been made available, any explanation the applicant gives for the failure to produce it then or any lack of such explanation, are factors to be taken into account.*
>
> *(5) The circumstances in which the court's power will be exercised will vary but generally where the rescission involves dismissal of the winding up petition, so that the company is free to resume trading, the court will wish to be satisfied:*
>
> > *(a) that the debt of the petitioning creditor has been paid, or will be paid, that the cost of the Official Receiver or any liquidator can be paid, and that the company is solvent at least on the basis that it can pay its debts as they fall due;*
> >
> > *(b) the application has not been presented in a misleading way and the court is in possession of all the material facts and has not been left in doubt.*
> >
> > *(c) that the trading operations of the company have been fair and above board, and there is nothing that requires investigation of the affairs of the company.*

11. Quite understandably, much of the focus of the evidence filed on behalf of Diamond was on the issue of solvency and the ability of Diamond to pay its debts with the assistance of its backer, Mr Eze. For the purposes of this application I accept that the real issue is not whether Diamond is balance sheet insolvent, but whether it can pay

its debts as they fall due; or as Miss Stonefrost put it, whether it is commercially solvent.

12. In his judgment in *Re a Company (No. 006794 of 1983)* [1986] BCLC 261 Nourse J said this at 262:

> *One thing which is perfectly clear in this case is that the company is being propped up by loans made to it by associated companies and possibly by others. Counsel for the petitioner's first submission is that in those circumstances the company is unable to pay its debts, since it can only pay them by recourse to loans made to it by others. I do not think that that is what s223(d) means. I think that if a company can pay its debts only with the help of loans made by others, it is nevertheless prima facie able to pay its debts for the purposes of that subsection.*

13. One further and important point. In *Metrocab* at [4] the Deputy Judge recognised that:

> *It is important for the court to take into account the view of creditors in an application of this kind; see Dollar Land (Feltham) Ltd [1995] 2 BCLC 370…*

In her brief submission Miss Laithwaite for the Petitioning Creditor emphasised this point, and Mr Maynard's position is that the law of insolvency provides a class remedy, and that the court should have regard to the interests of all creditors.

Diamond

14. Diamond was incorporated in 2007. Mr Blattner was appointed a Director on 3 November 2014. In the returns to Companies House he is said to be an Israeli national living in the USA, but in his witness statements he gives an address in London and his evidence is that he was in regular attendance at the company's business premises until mid-2017. Since 2015 the ultimate owner of Diamond has been the Triax Company Nigeria Limited, which itself is owned and controlled by a Mr Eze. Mr Eze is a Nigerian national and by common consent a very wealthy man - he apparently owns an oil production company in West Africa. On 10 January 2018 he and four other members of the Eze family were appointed as Directors of Diamond [90] although given that they all live in Nigeria the extent to which they can exercise any day to day control of the management of Diamond is limited. Mr Eze appears to have played some part in the management of Diamond, but there is no suggestion that the other members of his family have done so.

15. Diamond operates a purpose built 250,000 square foot hangar at Stansted Airport. The site is big enough to accommodate two Boeing 747s inside the hangar and another four on the tarmac outside. The hangar has workshops, storage and office accommodation and the site has facilities for parking aircraft. Diamond's case is that when it took on the site it was not a functioning hangar and that the investment Diamond has made in it has changed that [101]. The freehold of this site is owned by Stansted Airport Limited, which in turn is controlled by Manchester Airport Group plc. In 2013 Diamond took assignments of three leases of this site: the principal lease relating to the hangar itself and two further leases which relate to the adjacent land. The principal lease runs to 2063. The assignor was a company in which Mr Foley had been involved.

16. Diamond has sub-let parts of the site to other businesses, some with the consent of the landlord, and some apparently without it. MAG allege that in doing so Diamond has breached the covenants in the leases which prohibit sub-letting, and a section 146 notice was served on 18 December 2018. Mr Blackshaw also refers to a schedule of dilapidations which its surveyors (Smith Hampton) have provisionally valued at £4.9M. There is a dispute on the evidence as to whether Diamond's surveyors (Knight Frank) have agreed the works, or whether (as Mr Blattner says) the claim is disputed.

Diamond's creditors

17. There was some considerable dispute about whether or not Diamond had been able to identify its creditors. In the event I am satisfied that Diamond has identified and contacted all or virtually all of its creditors, and that there will be ample funds available to pay them all in full immediately if the winding up order is rescinded. But the issue remains of relevance to the considerations identified at 5(b) and (c) of the *Credit Lucky* principles. The evidence Diamond adduced was shown to be inaccurate in a number of respects. Some errors were noticed by Diamond, but some had to be pointed out by MAG.

18. The initial evidence came from Mr Blattner who exhibited a ledger to his first witness statement showing a total of £905,282 due to creditors [57-62]. His evidence was that this included £359,280 for rent which was not due until January 2019, and a further £213,975 should be deducted, being a discount negotiated with Watson Farley and Williams ("WFW"). That left a total of £332,027. In his second witness statement of 18 December 2018 Mr Blackshaw pointed out a serious error in the adding up of the sub totals in the ledger [186]. Instead of £905,282 the total should have been £1,363,714, which left a sum due after the deductions of £790,459.

19. By that time however Mr Blattner had already drawn the Court's attention to the fact that the ledger he had relied upon in his first witness statement was inaccurate. He blamed failures on the part of Diamond's management team to keep the records up to date. The new management team had provided a current list of creditors who were owed a total of £516,007 [85]. This new list removed 45 creditors who had appeared on the ledger, added 5 who had not been, and reduced the level of a number of the other debts. It included the sum of £80,000 which was claimed by Mr Abbott but which Diamond disputed on the basis that his claim was against an associated company and not against Diamond. In his second witness statement [187] Mr Blackshaw pointed out that the list did not include a claim for £36,717 by Veola (a collection agent for Stansted) for electricity charges for November 2018, invoiced on 4 December 2018 by MAG, or a debt due to Uttlesford DC of £18,420.

20. Some of those creditors were then paid; see the list exhibited to Mr Okoro's witness statement at [125]. Mr Maynard makes the point that there is no evidence as to why these creditors were paid (as opposed to the remainder) or by whom. Mr Lord of Lewis Onions Solicitors then reviewed the creditor position. He telephoned the creditors identified by Mr Blattner in both the ledger he had first produced and in the new list, save for those on Mr Okoro's list of paid creditors. By that stage his firm held sufficient funds to discharge all these debts if the winding up was rescinded.

21. Mr Lord's evidence is to the effect that of all the creditors he contacted, twenty six to a value of £252,064 did not oppose the application to rescind [150]. Two did not state their positions - Uttlesford Council who are owed £18,420 and Hamlins LLP who are owed £3,437. The other creditors are the Respondents (and their solicitors) who will be paid, MAG, Mr Abbott, and 3 creditors who did not return Mr Lord's call. Their claims were for £750, £70 and £390. Miss Stonefrost calculates the total amount currently owed at £914,255.90, a substantial part of which has accrued since the Petition was presented.

22. Mr Maynard submits that the reliability of the evidence before the court as to Diamond's creditors – even now – must be questionable. I understand why he makes that point. The lack of reliable records kept by Diamond and the errors in the evidence is a troubling feature. But I am greatly reassured by the work that Mr Lord has done. The ledger Mr Blattner originally produced was plainly out of date, but that meant that it included a lot of creditors who had been paid. I am satisfied that the court now has a reliable picture of Diamond's creditors, and that only the MAG companies oppose the order sought.

Mr Eze's financial support

23. It is apparent that since he became involved with Diamond, the company has relied heavily on the financial support of Mr Eze. The unaudited accounts to 30 April 2017 signed by Mr Eze on 3 October 2018 record loans from Mr Eze and companies under his control of £7,244,586, up from £2,914,749 in 2016. The loans are said to be interest free and on no formal terms. The notes to the accounts under "Going concern" record the expectation that the company will be continuing to rely on Mr Eze's support "*in that he will be providing funds when they are needed".*

24. Significant sums have been paid into the company or to creditors on the company's behalf, including Stansted and the Manchester Airport Group. That support has continued since the winding up order. Mr Eze discharged the cost of insurance and security for the hangar on 11 December 2018 – a total of nearly £150,000. He exhibits a list of the payments made at [164]. They total some £11,493,162. In addition, as of 15 January 2019 Diamond's solicitors held a total of £2,406,365 in its client account for Diamond. That money represents the funds which Mr Eze has deposited for Diamond's use in connection with the payment of creditors and costs if the winding up order were to be rescinded, together with monies to assist the company's trading in the future.

25. The basis upon which that money is provided is dealt with firstly in a letter signed by Mr Eze on 10 December 2018 [23]. There he says that if the winding up order is rescinded he will not take any steps to recover any of the sums due to him by Diamond until such time as he is advised by a professional accountant based in England and Wales that there are sufficient sums to do so. He says this:

> *"I will not seek repayment ahead of the Company's other unsecured creditors. All loans made by me to the Company are unsecured and are intended to be long term loans without a repayment date"*

26. In a witness statement made on 10 January 2019 he repeats those promises and says that he is currently seeking advice with the intention of capitalising his loans [161]. Miss Stonefrost told me that this money would not go back to Mr Eze if the winding up order was rescinded and that it had been provided to pay the existing creditors and to provide the court with some comfort that the company would have funds to operate into the future. During the hearing she obtained instructions to the effect that these matters could form the basis of a recital to any order for rescission. That provides some comfort, although upon reflection the better way would be for Mr Eze to give an undertaking as to the use of these funds and the limits to the repayment of his loans.

27. Whilst Diamond is able to pay its debts with Mr Eze's continued support, without that support it is insolvent. The called up share capital is £10, and the net current liabilities as at 30 April 2018 were £5.4M. The balance sheet in the accounts to 30 April 2017 shows a bottom line "total equity" of £11.1M, but that is only made possible by the revaluation of the lease of the hangar. The value in the accounts as at May 2016 is £7.75M, which is said to have been based upon an independent valuation. The value in the accounts as at 30 April 2017 is given as £20.25M [48]. That is a very considerable increase. Mr Blattner attempts to explain this revaluation at paragraph 14 of his second witness statement [73] saying that it was based on advice and calculations provided by the company's auditors who filed the accounts. But the note in the accounts says simply that "*the investment property was revalued based on directors estimate*" [53]. I can have no confidence in the figure of £20.25M. Without that revaluation the 2017 accounts would show net liabilities of something over £1M.

28. Miss Stonefrost's submission is that in the circumstances of this case the balance sheet is not the determinative feature. This is a company with access to the funds provided by Mr Eze. His commitment to the company is a reality and has been demonstrated by the regularity and level of payments he has made over the last three years. That is the context for his promise of continued support. There is further comfort to be had from the deposit of substantial sums with the company's solicitors and the willingness to record the basis of that deposit in an order of the court. With that support Diamond can pay its debts as they fall due.

29. Miss Stonefrost accepts that the company is not profitable. Mr Blattner initially produced forecast management accounts which included some inexplicable arithmetical errors. The revised forecast produced on 15 January 2019 shows an annual loss of about £420,000. MAG's case is that even this forecast figure relies on income received from unauthorised sublets of part of Diamond's site and is unrealistic. The best Diamond can say is that the Directors agreed in 2017 that there would be a 3 year development plan to turn the company into a profit making entity, and that there were plans to re-capitalise. Half way through that period the business is still forecast to make a loss. Diamond would no doubt blame its old management team for failing to manage the business properly and point to the recent hiring of a new management team.

30. Despite those problems, the level of available funding from Mr Eze and the basis upon which he puts it forward, taken with his very considerable financial commitment to Diamond since 2015, is such that I am satisfied that this financial support will continue as promised, and that Diamond will be able to pay its debts as they fall due.

The Management of Diamond

31. The difficulties for this application stem principally from the poor management of Diamond over the period from 2016 to the presentation of the Petition. In Aril 2016 Mr Blattner suffered kidney failure and was taken seriously ill. On 1 October 2018 he underwent a kidney transplant and remains very ill. Until Mr Eze's appointment in January 2018 Mr Blattner was the only de jure Director. It is apparent that the management of Diamond suffered.

32. In July 2016 Uttlesford DC obtained a liability order in relation to the business rates on the hangar. Mr Blattner says that the valuation was disputed, but the company failed to avoid a liability order, and then failed to comply with it. The consequence was that the Council presented a winding up petition on 7 October 2016 (006398 of 2016). The debt was about £900,000. It was paid, and the Petition was dismissed in November 2016. Despite that the payment of rates remained an issue, and a second petition was issued by the Council on 5 January 2017 (000074 of 2017) for about £700,000. That was dismissed in the April of 2017.

33. Mr Blattner explains his position in his third witness statement [96]. He says that these Petitions were presented after he became ill, but that he and Mr Foley wished to dispute the debt and had not realised the difficulty of doing so once a liability order had been obtained. The petitions were not advertised and having taken legal advice the debts were paid and the petitions dismissed. Diamond were then successful in having the property revalued and obtained a rebate.

34. In May 2017 Mr Blattner and Mr Eze employed Mr Villis as General Manager. Mr Villis had been recommended to them by a potential customer, and there is no reason to think that they (Mr Blattner and Mr Eze that is) acted other than in good faith. Mr Eze continued to make substantial payments into Diamond and Mr Blattner refers to the 3 year development plan which was agreed in the first quarter of 2017, aimed at bringing the company to profitability in 2019. Mr Blattner's evidence is that Mr Villis was not authorised to enter into contracts on the company's behalf, or to make payments or any commitments without the board's approval. He was not a signatory on the company's bank account.

35. However, it is apparent that no proper checks were carried out as to Mr Villis's suitability to manage a limited liability company. Had they been then Diamond would have discovered that Mr Villis was the subject of a Directors Disqualification Order. The usual form of order prohibits the disqualified director from being concerned in the management of a company. Mr Villis failed to disclose that fact, which was only brought to Diamond's attention by solicitors (WFW) in the Spring of 2018 [16].

36. On 20 July 2017 a third petition was presented (005317 of 2017) by Dong Energy Sales for £20,619. That appears to be a creditor's petition and was dismissed on 4 September 2017. A fourth petition was presented on 31 October 2017 (008102 of 2017) by Stanstead Airport in relation to a debt of £250,934. That was dismissed on 18 December 2017. Then on 31 January 2018 a fifth petition was presented by Guarding UK Ltd relying upon a debt of £104,086 (000830 of 2018). That petition was supported by a further 8 creditors who were owed over £800,000 between them [19]. The petition

was dismissed on 22 August 2018. This petition, the sixth, was presented on 3 October 2018.

37. Mr Blattner's evidence is that from May 2017 his health was increasingly suffering, that consequently he was rarely on site, and that he had to rely on Mr Villis and trust that he was undertaking the role he had been given. He says that he had no reason to question his conduct, that Mr Villis came to him with queries in relation to invoices and to seek their payment in the ordinary course of business. He says that Mr Villis failed to notify him of these winding up petitions until he could conceal matters no longer, inevitably after advertisement. At that stage solicitors and/or insolvency practitioners were appointed [20] and steps taken to pay the petition debt.

38. In the spring of 2018, when it was discovered that Mr Villis had been disqualified, Diamond appointed a Mike Humphries to work alongside him and produce a report on the company's performance. On 29 August 2018, when it became apparent that Mr Blattner was to have a kidney transplant, Michael Okoro was appointed as an Administrative Officer, and on 10 September 2018 Aro Thorodson was engaged as acting Managing Director. Mr Okoro came across a questionable invoice which Mr Villis accepted he had raised as "cover". On 15 October 2018 Mr Villis was dismissed. At that stage Mr Blattner says they did not know that this petition had been issued. Mr Okoro found it in Mr Villis's desk within days of his dismissal and notified Mr Blattner and Mr Eze. They instructed Mr Okoro to investigate whether this invoice was genuine. It seems that it was the highest of the quotes the company had received for the work it related to. Diamond seems to have assumed that the hearing of the petition would be adjourned on 4 December 2018, even though no evidence was put to the court to justify that course, and that (if necessary) it could then pay off the debt if satisfied that it was genuine.

39. Mr Blattner's evidence is that the full extent of the failings of Mr Villis and his team were only realised after he had been dismissed. Whilst I accept that someone suffering from kidney failure will be unable to attend to the day to day management of a business as he would wish, and may act entirely responsibly by engaging someone to undertake that management, the duties of a Director require that there is at the very least some effective supervision. I can accept that Mr Villis kept matters from Mr Blattner, but there appear to have been a number of warning signs – not least learning that Mr Villis had been disqualified and of the existence of three petitions which had been kept from the Directors and had to be paid off after advertisement, the last with 8 supporting creditors.

40. Miss Stonefrost does not seek to excuse these shortcomings in the management of Diamond; indeed they form part of the explanation for the fact that Diamond was wound up even though it could have paid its debts. She emphasises the fact that there is now a new team in place. Mr Foley is retained as a consultant to deal with technical aviation matters, there is Mr Okoro, Mr Thorodson and (shortly) a Mr Cousins who is to be appointed as acting Chief Executive Officer. Diamond produced CVs of these gentlemen referring to their experience and reputations. MAG question whether Mr Okoro and Mr Thorodson have the track record or skills necessary and point out that Mr Cousins is apparently resident in Switzerland and has experience of managing small businesses in the UK and golf courses on the Algarve.

41. I expressed my concern that, whilst there was to be a new management team, it seemed that none of them were to be appointed as a Director. The current directors were either very ill or abroad, and none of them appeared to have been able to provide effective management for this company in the recent past. Whilst Mr Thorodson's title was acting Managing Director he was expressly said not to be a de facto or a shadow director [15] and the evidence about Mr Cousins did not suggest that he was to be a Director. In response to that inquiry Miss Stonefrost was able to say on instruction that her clients would ask Mr Cousins to look at the appointment of a new board.

MAG's position

42. I have already referred to the level of debt owed to the MAG companies. Much of that has accrued since the Petition and may well have been paid but for the winding up. Diamond has offered to pay those debts and is in a position to do so if the order is rescinded. It is also worth noting that Diamond provided a £300,000 rent deposit and that on assignment of the lease in 2013 the sum of £500,000 was deposited by way of security for the performance of the former tenant's covenants and the guarantor's obligations [134]. Despite the fact that it would have its debts paid, MAG oppose rescission, identifying the errors and gaps in Diamond's evidence and going to some lengths to cast doubt on the suitability of those who have been or will be responsible for the management of the company.

43. It is apparent that both Diamond and MAG regard the hangar as a valuable and important piece of property. In 2016 Diamond made an offer to buy the freehold (or more accurately to take a 250 year lease) for £17M. Stansted declined the offer. Mr Blackshaw explains that it was not because the offer was too low but that the MAG companies would not cede control of (what he describes as) "*our beachfront property*"; see paragraph 35 of his 3rd witness statement. Diamond's position is that this is what really lies behind MAG's opposition to the rescission of the winding up order. Miss Stonefrost submits that this opposition can only be because as landlord MAG have a commercial interest in Diamond's forfeiture of this valuable lease.

44. MAG's position is that regardless of the winding up of Diamond, it may pursue forfeiture on the basis of the breach of the covenants against sub-letting. That said, the winding up of Diamond must make the process of recovering possession of the hangar simpler, and the commercial interest as a landlord distinguishes it from the general body of creditors. It is important to take account of the views of the creditors on an application such as this, and the view of the majority is one of non-opposition, and in some cases active support. That is motivated no doubt by the fact that if the winding up petition is rescinded they will be paid, and if it is not then they probably won't. MAG has a remedy other than winding up, and that is to pursue a claim for forfeiture, and whilst it also has an interest as a creditor, I give greater weight to the views of the other creditors. In other words, their voice counts in favour of rescission.

Conclusion

45. Having heard how Miss Stonefrost put her case, Mr Maynard did not really press the question of Diamond's solvency. His arguments can be grouped into three:

    (i) this is not an exceptional case;

(ii) there is no material change in the circumstances before the court that made the original order; and

(iii) there are matters which "excite suspicion" (a reference to principle 5(b) and (c) in *Credit Lucky*).

46. This company has a history of facing winding up Petitions over the last two years, but there is no doubting that it has access to substantial funds from which its debts are paid. The fact that Diamond's solicitors hold £2.4M to pay off the creditors (including substantial debts which have arisen since presentation) leaving something approaching £1.5M as working capital is striking. This is not a start up company as was *Metrocab.*

47. I also agree with Miss Stonefrost that this is a case where there is a material change in the circumstances. The court on 4 December 2018 had no evidence whatsoever of the reasons for the position Diamond found itself in, or as to its ability to fund its business. All of that is new, and plainly material. I accept Miss Stonefrost's submission that if those matters had been before the Court in a proper form, it is highly unlikely that the order would have been made. The fact that Diamond did not put those matters before the Court in December counts against it, but should not prevent the exercise of the discretion in its favour. To my mind this is an exceptional case.

48. It is the third group of arguments where the more difficult issues arise. The particular points are these:

- the errors in the creditors' ledger;
- the errors in the trading forecasts;
- the payment of some creditors (and not others) since 4 December 2018;
- the revaluation of the lease in the 2017 accounts;
- the breaches of the covenant prohibiting sub-letting;
- the mismanagement in 2017 -18 and the history of winding up petitions;
- the failure to constitute a board able to exercise control over the company;

49. Whilst the failure to present the court with accurate evidence about the level of creditors is an important failing, it is really symptomatic of the absence of proper management over the previous two years. Some of those errors were corrected by the company itself, and relatively quickly. Some were pointed out by MAG. In the end, as I have indicated, the evidence of Mr Lord has satisfied me that the court has the full picture so far as the company's creditors are concerned. I do not regard the company's failures here as a deliberate attempt to misrepresent the position to the court.

50. Some of the complaints made about the trading forecast made by MAG are examples of seeing issues where there are none; for example that the rent had been understated when in fact the correct figure had been given net of VAT, rather than the gross figure which MAG were working from. There are other errors in the forecast which have no obvious explanation; for example that whilst £6,000 per month is included for Directors' remuneration and expenses for each of the months on the forecast, and is reflected in the sub total for the first 2 months, it is then left out of the sub totals for the following 11 months. That might seem suspicious until you realise that the £6,000 a month figure is carried through to the annual total, so that the overall forecast reflects

the proper figure. It is hard to explain how that came about; but it is an error and not a deliberate attempt to mislead the court. MAG's other point is that the forecast includes income from unauthorised sub-lets and so is unrealistic. Miss Stonefrost submits that whether or not the forecast turns out to be wrong or right will have little impact on the creditors given Mr Eze's commitment to fund the company.

51. The payment of some creditors and not others - Mr Eze has funded the continued payment of the insurance premiums and security costs for the hangar, both of which are necessary to preserve the business pending the decision of the court. I follow why that was done. The reason for the payment of some of the other creditors (and not the others) is not expressed, but again, in the context of the provision of substantial funds to pay the rest, the point loses much of its force.

52. As to the revaluation of the lease in the 2007 accounts, I have already indicated that I can have no confidence in the figure of £20.25M, and Miss Stonefrost did not rely upon it. Her point was simply that if the valuation had remained as it was the net liabilities would have been at a figure which was not significant given the continued support of Mr Eze.

53. The breaches of covenant are a matter which may have to be litigated elsewhere. Mr Maynard submits that these breaches are a further indication of Diamond's lack of regard for its legal obligations.

54. What has concerned me more is the history of winding up petitions and the failure to appoint a UK based Director physically fit enough to undertake the role. For the purposes of this application I accept that the problems which led to this rash of winding up petitions are in substantial part due to the illness of Mr Blattner and the failings of Mr Villis. But the court needs to be satisfied that these problems will not recur. The commitment Mr Eze has shown to funding the company provides some comfort that the intentions of those who control this company are indeed that it should be properly funded and managed, and the appointments of Mr Thorodson and Mr Cousins are welcome. But there needs to be a new and active board. However belated, the acceptance of that is important.

55. Finally the role of Mr Villis - this is not a matter which requires a liquidator to investigate. Breach of his Directors Disqualification Order would be a criminal offence to be investigated by the relevant authorities.

56. In all the circumstances Diamond has satisfied me that:

> *(b) the application has not been presented in a misleading way and the court is in possession of all the material facts and has not been left in doubt; and.*
>
> *(c) that the trading operations of the company have been fair and above board, and there is nothing that requires investigation of the affairs of the company*.

Albeit with some hesitation as to (c).

57. The rescission of this order is supported by all the creditors save the MAG companies, whose interest in the hangar puts them in a different position from the general body of

creditors. I am satisfied that Diamond can pay its debts and has funds to trade. There is an explanation for the problems of the past, and a new management team. But the current Directors have failed to ensure the company's proper management in recent years, and Diamond needs to appoint at least one further Director to ensure that the problems of the past do not recur. Subject to one matter I have decided that the winding up order is to be rescinded.

58. Diamond intends to ask Mr Cousins to consider the appointment of a new board. In the circumstances the rescission of the winding up order is on the basis that Diamond is to appoint an additional Director within 3 months of the order. That may be done by an undertaking from the current board or by condition. The additional director is to be independent of the shareholders and a UK resident. Someone with a professional qualification such as an accountant would be an appropriate candidate. The intention is that he or she (as a member of the Board) should be in a position to exercise responsibility for the management of Diamond. The precise form of the order and the undertakings will be a matter for further submissions.

59. The current Directors and shareholders of Diamond are no doubt aware of the effects of a winding up order. I have been persuaded to rescind the order of 4 December 2018 on this occasion, in part because of the assurances given as to the future conduct of the company. If it were that the company were to be wound up on some future occasion, much of what Miss Stonefrost was able to say on this application would be unavailable to it.

Postscript

Following receipt of the draft judgment, the parties have agreed a form of order which I have approved.

IN THE HIGH COURT OF JUSTICE No: 6394 of 2018
IN THE BUSINESS AND PROPERTY COURTS AT BIRMINGHAM
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF DIAMOND HANGAR LIMITED (COMPANY NUMBER 06445042)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before His Honour Judge Worster on 6 February 2019

BETWEEN:

(1) DIAMOND HANGAR LIMITED
(2) MICHAEL PATRICK FOLEY

Applicants

and

(1) ABACUS LIGHTING LIMITED
(2) ANDREW VILLIS

Respondents

and

(1) STANSTED AIRPORT LIMITED
(2) THE MANCHESTER AIRPORT GROUP PLC

Interested Parties

ORDER

UPON the application of the above-named Diamond Hanger Limited ("the Company") and of Michael Patrick Foley (a creditor of the Company) by Notice dated 10 December 2018 for an order pursuant to Rule 12.59 of the Insolvency (England and Wales) Rules 2016 rescinding the winding up order made herein on 4 December 2018;

AND UPON Paul Robert Appleton having been appointed as Liquidator of the Company on 21 December 2018;

AND UPON hearing Hilary Stonefrost of Counsel for the Company, Shakil Najib of Counsel for the Second Applicant, Hannah Laithwaite of Counsel for the First Respondent, Yasmin Yasseri of Counsel for the Second Respondent, Christopher Maynard of Counsel for The

Manchester Airport Group PLC and for Stansted Airport Limited ("the Interested Parties"), and Martyn Rawbone on behalf of the Official Receiver on 17 January 2019;

AND UPON the Court having read the witness statements of Allen Blattner dated 10 December 2018, 17 December 2018 and 10 January 2019; of Michael Foley dated 10 December 2018; of Michael Okoro dated 10 January 2019; of Arthur Eze dated 10 January 2019; of Martin John Lord dated 10 January 2019; of Paul Appleton dated 10 January 2019; and of Andrew Rowland Blackshaw 12 December 2018, 18 December 2018 and 15 January 2019 and the documents on the Court file marked as having been read;

AND UPON THE UNDERTAKINGS of the Company and of Arthur Eze to apply the sum of £2,406,365.33 held in the client account of the Applicants' solicitors, Messrs Lewis Onions Solicitors, to discharge

1. the Company's debts listed in the several schedules of creditors exhibited to the witness statement of Martin John Lord dated 10 January 2019 marked "Creditors who do not Oppose Application to Rescind"; "Creditors All Rights Reserved" and "Additional Creditors" within 7 days of receipt by Lewis Onions Solicitors of a sealed copy of this Order; and thereafter
2. the Company's other existing liabilities at the date of this Order and future liabilities;

AND UPON THE UNDERTAKING of Messrs Lewis Onions Solicitors, to discharge the Company's debts listed in the several schedules of creditors exhibited to the witness statement of Martin John Lord dated 10 January 2019 marked "Creditors who do not Oppose Application to Rescind"; "Creditors All Rights Reserved" and "Additional Creditors" within 7 days of receipt by Lewis Onions Solicitors of a sealed copy of this Order;

AND UPON THE UNDERTAKING of Arthur Eze that he will not seek repayment of any of his loans to the Company ahead of the Company's unsecured creditors unless and until he obtains the written opinion of an independent professional chartered accountant that there are sufficient funds to repay the same after all other known liabilities of the Company have been discharged.

AND UPON THE UNDERTAKING of the Company

(1) within 3 calendar months of the date of this Order to appoint at least one further Director who shall be an individual or individuals with appropriate qualifications and experience to exercise responsibility for the management of the Company who are resident in the United Kingdom and who are independent of the Company's shareholders; and

(2) to record the aforesaid undertakings of Arthur Eze in its annual financial statements;

AND UPON READING a letter from Lewis Onions Solicitors acting on behalf of Arthur Eze certifying that they have explained to him the meaning and effect of his aforesaid undertakings and that he understands the same;

AND THE COURT being satisfied that the Company can pay its debts and has funds to trade;

IT IS ORDERED THAT:

1. The winding up order made on 4 December 2018 is rescinded pursuant to the provisions of Rule 12.59 of the Insolvency (England & Wales) Rules 2016.

2. The Winding Up Petition presented to Court on 3 October 2018 is dismissed. The Registrar of Companies do remove the Order to wind up the Company from the records of the Company kept by him and place in such records a note that the Order to wind up the Company has been rescinded by Order of this Court.

3. The First Respondent shall gazette or advertise the dismissal of the Petition within 7 days of receipt of the sum of £36,139.30 being the Petition Debt and £11,567.74 for the First Respondent's costs being discharged in accordance with the undertaking recited above and paragraph 6 of this Order.

4. The Liquidator shall be released with effect from such time as a sealed copy of this Order is served upon him.

5. Within 5 business days of the Company filing the appropriate documents at Companies House to appoint at least one further Director, in compliance with its undertaking to the Court to this effect as detailed in the recitals, the Company shall notify the Court, the Respondents and the Interested Parties, in writing, of the appointment.

6. The Applicants shall pay the First Respondent's costs in the agreed sum of £11,567.74 within 7 days of this Order.

7. The Applicants shall pay the Second Respondent's costs in the agreed sum of £8,208.00 within 7 days of this Order.

8. The Applicants shall pay the Official Receiver's costs in the agreed sum of £11,000.00 within 7 days of this Order.

9. The Applicants shall pay the costs of the Interested Parties, such costs to be the subject of a detailed assessment if not agreed; and the Applicants shall pay within 7 days of this Order the sum of £37,500.00 on account of such costs, pursuant to CPR 44.2(8).

10. This Order shall be served by the Applicants upon the Respondents and upon the Interested Parties and upon the Official Receiver and upon the Liquidator of the Company.