Neutral Citation Number: [2020] EWHC 1780 (Ch)

Case No: 2007 of 2020

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 6th July 2020

In the Matter of Secure Mortgage Corporation Limited
And in the Matter of the Insolvency Act 1986

Before:

Before His Honour Judge Halliwell sitting as a Judge of the High Court at Manchester

- -

Between :

(1) Secure Mortgage Corporation Limited
(2) H Commercial Capital Limited

Applicants

- and -

(1) Peter John Harold
(2) Gregory Paul Tierney
(3) Thomas Merlin Bamber

Respondents

- -
- -

Mark Harper QC (instructed by **Rallis Solicitors LLP**) for the Applicants
David Mohyuddin QC and Victoria Roberts (instructed by **Bishop & Co**) for the Respondents

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APPROVED JUDGMENT (2)

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

His Honour Judge Halliwell:

(1) Introduction

1. This is my judgment on consequential matters following my main judgment handed down remotely on 28th May 2020, *[2020] EWHC 1364 (Ch)* ("the Main Judgment"). At the same

time, I made an order with further directions ("the Order"). This judgment should be read together with the Main Judgment and the Order. In it, I shall use the same nomenclature as the Main Judgment.

2. Following the Main Judgment and the Order, there has been a significant development. On 3rd June 2020, the Applicants' solicitors filed Notice of appointment of new administrators in respect of SMC. The Notice was filed in this Court under Case No CR-2020-MAN-000584 ("the New Proceedings") and it records the appointment of new administrators, this time by Mr Henesy in his capacity as SMC's director. The new administrators are Mr Edward Avery-Gee and Mr Daniel Richardson of CG&Co, Manchester.

3. Following the new appointment, SMC circulated a draft order ("the Draft Order") and the parties delivered written submissions dated 5th June and 15th June 2020 in relation to the Draft Order and, more generally, on all matters consequential upon the Main Judgement and the Order. In subsequent correspondence, the parties, through their solicitors, have also sought to make additional submissions with reference, in part, to developments following the hearing.

4. I shall now make an order ("the New Order") in the terms appended to this judgment. It involves significant amendments to the Draft Order and takes effect immediately.

(2) The appointment of the new administrators

5. In their written closing submissions, the Respondents disclose that the recent appointment of Messrs Avery-Gee and Richardson "will be the subject of challenge, most likely following the Set Aside Application" (ie following the application of Messrs Tierney and Bamber to set aside the 12th June 2019 Order). However, the recent appointment has not yet been formally challenged in the New Proceedings – certainly I am not advised that it has - and it is at least implicit in the Respondents' submissions that, if they have standing to present such a challenge themselves, Messrs Tierney and Bamber intend to await the outcome of the application to set aside the 12th June 2019 Order.

6. At this stage, I am not invited to pronounce on the validity of the new appointment and I shall not do so. Until the new appointment, Mr Harper QC was instructed by Mr Henesy in his capacity as a director of SCM. He was also instructed by HCC. I shall assume that he is still instructed by Mr Henesy. However, in his written submissions on behalf of the Applicants dated 5th June 2020, Mr Harper QC has confirmed that Messrs Avery-Gee and Richardson have themselves now instructed him to make the submissions on SMC's behalf.

I shall thus assume he was and is authorised to make submissions on behalf of SMC and HCC, regardless of the status of the recent appointment.

(3) HCC's standing in the proceedings

7. When I handed down the Main Judgment, the question about HCC's standing was left for determination later. On behalf of the Respondents, Mr Mohyuddin QC and Ms Roberts take a number of points in their written submissions dated 15th June 2020.

8. Firstly, they rely on clause 5.1 of the 1998 Charge in which SMC, as mortgagor, was prohibited "without the consent in writing of the Lender" from creating "any mortgage or charge ranking in priority to or *pari passu* with…" the 1998 Charge itself. They submit that "there has been no determination as to the validity of the 1998 Debenture" and "consequently HCC cannot assert that it is a first-ranking charge holder" (Para 25).

9. It is correct that, in giving judgment, I did not determine whether the 1998 Debenture is enforceable. Nor, indeed, did I determine any question of priority. It thus remains open to the holders of the 1998 Debenture to argue that they have priority over the holders of other security. However, it does not follow that HCC has no standing in these proceedings. If HCC has contractual rights in respect of the Property under the 2019 Charge, it was and is potentially affected by the outcome of these proceedings. This is particularly so if, as the Respondents no doubt contend, the 1998 Charge has priority. On that basis, HCC was thus entitled to be joined as a party.

10. Secondly, the Respondents raise issues about HCC's contractual rights under the 2019 Charge itself. This includes issues about the Memorandum of Agreement under which SMC's alleged indebtedness to HCC was incurred and the authenticity of Mr Henesy's signature on the Memorandum. The point is also taken that HCC appears to have paid £15,000 to Ralli solicitors on 15th January 2020. It would be procedurally unfair to allow the Respondents to advance these issues without giving HCC an opportunity to respond to them. However, whilst it would be open to me to make directions for this purpose, it is likely they would ultimately lead to the delivery of further evidence on satellite issues for the narrow purpose of determining HCC's standing as an additional party. I decline to do so on the basis that, at this stage of the litigation, such a course would be disproportionate and contrary to the Overriding Objective.

11. I am thus satisfied that HCC can be treated as having been properly joined as a party to the proceedings.

(4) The Recitals

12. There were originally seven recitals to the Draft Order. I have removed or modified some of the recitals so that they more accurately reflect the stage that has been reached. However, these changes do not affect the substance of the order.

13. Subject to a minor drafting issue, the Respondents challenge only the third and fourth recitals in the Draft Order itself, namely the recitals (1) recording the hearing, on 12-13th May 2020, of their own applications; and (2) confirming the appointment of Messrs Avery-Gee and Richardson as administrators of SMC.

14. The Respondents contend that the third recital is un-necessary because it replicates, albeit in narrower terms, a recital in the Order about the hearing of the Respondents' applications. This point is correctly taken and I have thus deleted it.

15. The sixth recital is in the following form.

> "AND UPON the Court noting that the Company (defined below) was placed into administration by its director on 02 June 2020 and it being confirmed that the Company, acting by its administrators has, insofar as is necessary, consented to and authorised the making and submission of the Company's written submissions herein".

16. The Respondents take issue with this recital on the basis that they have not seen any document nor otherwise been notified that SMC has consented to such submissions. They also point out that the appointment will be the subject of challenge.

17. In my judgment, the appointment of Messrs Avery-Gee and Richardson as administrators should be recorded in a recital to the order. Since it appears they have instructed Messrs Ralli Solicitors LLP to act as their solicitors in these proceedings, this should also be recorded. However, this does not, in itself, preclude Messrs Tierney and Bamber from challenging the appointment. I shall incorporate recitals in the following form.

> "AND UPON Nicholas Henesy, the sole director of the Company filing, under Claim No CR-2020-MAN-000584, Notice appointing as administrators of the Company, Edward Avery-Gee and Daniel Richardson of CG&Co, Greg's Building, 1 Booth Street, Manchester M2 4DU.
>
> AND UPON the solicitors for the Applicants, namely Ralli Solicitors LLP of Greg's Building, 1 Booth Street, Manchester M2 4DU, advising the Court that Messrs Avery-

Gee and Daniel Richardson authorised them to file, on their behalf, the Applicant's written submissions dated 5th June 2020.

(5) Declarations

18. I have already declared that the appointment of the First Respondent, on 30th August 2019, as administrator of the Company was and is void and of no effect. In addition, the Applicants invite me to declare that:

    18.1. "the Second and Third Respondents had and have no entitlement to appoint the First Respondent (or any other qualified person) as an Administrator of Secure Mortgage Corporation Limited..; and

    18.2. the Second and Third Respondents do not hold the benefit of the Debenture over the Company or the Legal Charge over the property…"

19. The Respondents challenge both declarations. They contend that neither declaration was sought at the hearing before me. They also contend that the first declaration is superfluous and I have made no determination on which the second declaration can be founded.

20. It is correct that the Application provides simply for a declaration that the appointment of Mr Harold as administrator is invalid or, in the alternative, an order removing him from office. Although there was also a claim for "such other directions as the court sees fit", wider declaratory relief was not sought. At the hearing before me, the argument was focused on the validity of Mr Harold's appointment and I concluded he had not been validly appointed. On the evidence before me, I was not satisfied that the 1998 Charge was comprised in Mr Nolan's estate or, indeed, that Mr Nolan's estate had become vested in Messrs Tierney and Bamber as his personal representatives and my decision about the validity of Mr Harold's appointment was founded, in part, on my conclusions on these issues. However, the additional declarations go beyond the relief sought in the Application itself and the legal basis for such relief is ascertainable from the judgment itself. I have thus decided not to include the additional declarations.

(6) Injunctive relief, inquiries and accounts

21. There are provisions, in the Draft Order, for:

    21.1. Mr Harold to be prohibited from continuing to hold himself out as administrator (Para 1);

21.2. "an inquiry into the liabilities of the Respondents consequent upon the declarations…" (Para 3);

21.3. the Respondents to provide a "written statement of account of the monies…received whilst [Mr Harold] purported to act…as administrator" (Para 4(a)), "payment of the receipts stated in the account" (Para 4(a)(ii)); and

21.4. delivery up of SMC's books, records and property" (Para 4(a)(iii)).

22. In my judgment, it would be inappropriate for me to grant such relief at this stage. The Application Notice did not encompass a specific claim for such relief. No such claim was canvassed before me at the hearing on 12-13th May 2020 and the Respondents have not been given the opportunity to file evidence in opposition notwithstanding that it has significant mandatory and injunctive elements.

23. Nevertheless, after providing for the appointment of Mr Harold to be declared invalid or, in the alternative, for him to be removed from office, the Application Notice does contain a general claim for "such other directions as the court thinks fit". This is more than a claim for procedural directions and, if SMC is entitled to advance claims against the Respondents which arise from the Main Judgment, it would make sense for them to be determined in these proceedings rather than to require the Applicants to issue separate proceedings. Moreover, if SMC can establish the factual propositions on which the claims are based, it has reasonable prospects of establishing that it ought to be granted a measure of relief.

24. I shall thus adjourn the Applicants' claims for additional relief subject to specific provision for both parties to file further evidence. However, in the New Order, I have modified the range of such relief to incorporate:

24.1. an injunction restraining Mr Harold from purporting to act or hold himself out as SMC's administrator;

24.2. an order requiring the Respondents to deliver up SMC's books, records and property within their possession; and

24.3. such other relief as the Applicants claim to be entitled.

25. I have done this for the following reasons.

25.1. As currently formulated, the Draft Order pre-empts the issue of whether the Respondents are liable to the Applicants and, if so, for what, by providing simply that there shall be "an inquiry into the liabilities of the Respondent". This inquiry is open-

ended although there are directions for specific action to take place pursuant to the inquiries. It would be inappropriate for me to direct such an inquiry in the absence of explanatory evidence and without providing the Respondents the opportunity to state their case and file evidence in response.

25.2. Conversely, the applications for an injunction and delivery up are for discrete relief founded on rights established by the declaration. It appears from emails exchanged between the parties since 28th May 2020, that Mr Harold has, indeed, sought to hold himself out as SMC's administrator contrary to the Main Judgment and Order (see below). Moreover, if Mr Harold has sought to retain SMC's books and records, there can be no good reason for him to have done so. Nevertheless, the Respondents should be given the opportunity to answer or file evidence in response to these allegations, to explain their stance and set out their intentions in advance of a substantive court order.

26. Mr Harold will thus be given an opportunity to file evidence in relation to these issues, including his conduct since the Main Judgment and Order. However, I shall make the following observations.

27. Owing to administrative burdens following the Covid-19 pandemic, there have been delays in the process for sealing court judgments and orders. It is thus important to remind the parties that, by virtue of *Rule 12.1* of the *Insolvency (England and Wales) Rules 2016*, the provisions of the *CPR* apply and a judgment or order takes effect when given or made or on such later date as the Court may specify under *CPR 40.7*. This is consistent with historically established principles, *Holtby v Hodgson (1890) LR 24 QBD.* Although *CPR 47.2(2)(b)* provides that every judgment or order must be sealed by the court and, until sealed, the judge has power to alter the judgment, *re Barrell Enterprises [1973] 1 WLR 19*, this does not derogate from the general principle as to the date on which the order takes effect.

28. In the present case, the Main Judgment and the Order were handed down remotely by email to the parties' respective counsel at 2pm on 28th May 2020. In the Main Judgement, I concluded that Messrs Tierney and Bamber had failed to establish that the 1998 Charge was comprised in Mr Nolan's estate or become vested in them as personal representatives (Para 25) and, had it been otherwise, the appointment of Mr Harold as administrator could not have taken effect owing to non-compliance with the *Insolvency (England and Wales)*

Rules 2016 (Para 34.2). I thus stated that I was minded to declare the appointment was void. In the Order, I dismissed the Respondents' applications and declared the appointment was void and invalid but adjourned all other matters for further consideration.

29. In counsel's written submissions, it is not suggested that the Respondents' solicitors, Bishop & Co, failed to provide Mr Harold with a copy of the Main Judgment or the Order. However, by an email timed at 18:21 on 2nd June 2020, Mr Sharpe of Ralli solicitors advised Mr Harold in the following terms.

> "…kindly note that there is an extant order of the High Court pursuant to which you are not the Administrator of SMC at all, and so please ensure that you do not hold yourself out as such. You were represented by Leading and Junior Counsel at trial on 12/13 May 2020, and by Counsel in advance of the handing down of judgment. You must be aware of the issues in the case and of the Order made by HHJ Halliwell declaring your appointment void: the terms of that Order are crystal clear.
>
> Please confirm by return of email that you will not hold yourself out as the Administrator of SMC as to do so would be a misrepresentation, an abuse and would at the lowest be disrespectful to the Court".

30. This email was copied to Mr Harold's solicitors, Bishop & Co. If, at that stage, Mr Harold had not yet seen a copy of the Main Judgment and the Order or he was uncertain about their legal effect, this email ought to have prompted him to request copies or obtain clarification.

31. Notwithstanding Mr Sharpe's email, it appears Mr Harold chose not to confirm that he would not hold himself out as administrator. At least at that stage, it also appears he did not request or obtain a copy of the Order. By an email dated 8th June 2020 from Mr Harold to the joint administrators' in-house solicitor, Ms Crighton, Mr Harold stated that he had viewed a copy of the Main Judgment having "read the Law Reports". Notwithstanding Mr Sharpe's email, he stated that he understood "that an Order has not yet been made". It is conceivable that, in this email, he was confirming only that he had not seen a *sealed* copy of the Order. However, Mr Harold has not yet been asked to clarify when he was first provided with a copy of the Order and, at this stage, I shall thus assume, in his favour, that he had not seen the Order when he sent the 8th June 2020 email.

32. In any event, the stance taken by Mr Harold in the 8th June 2020 email is unsatisfactory. Having referred to the Main Judgment and quoted from Paragraph 36, he made the following observations when challenging the rights of the new administrators.

"My understanding is that my appointment remains in force until the Order is received. If my understanding is correct then I am still in office and therefore this raises the issue whether the director had the power to appoint the joint administrators prior to my removal from office. In addition, there is an extant application to the court in London seeking to set aside/vary the Restoration Order that restored the Company to the Register. Obviously if the restoration is deemed invalid then both our appointments are invalid. Further there is the statutory right of appeal which would include the right to request a stay of the Order(s) whilst an appeal in (sic) being considered".

33. For reasons I have already given in relation to the date on which a judgment or order takes effect, Mr Harold's observations about the effect of the Main Judgment were misconceived. In the Main Judgment itself, I concluded that Mr Harold had not been statutorily appointed as administrator and stated that I was minded to declare the appointment void. On this basis, Mr Harold has never held office as administrator of SMC. The suggestion in his email that there is room in my judgment for him to hold office and continue as such until served with a Court order is misconceived. By the Order itself, I declared that the appointment was void and invalid. It was envisaged I would make further directions in relation to consequential matters and costs following the main Judgment. However, it has never been envisaged I would revisit the issue about the validity of Mr Harold's appointment and I have not been invited to do so. Mr Harold has rights of appeal. However, until the Main Judgment is reversed, it remains in effect.

34. Elsewhere in his 8th June 2020 email, Mr Harold referred to the Court's jurisdiction to remove an administrator from office under *Paragraph 88* of *Schedule B1* and the comments in his email could be interpreted as an observation the Court had not yet made an order removing him under this statutory jurisdiction. In the event Mr Harold was being removed under Paragraph 88, he would remain in office until removal and the administration would continue following removal. However, it will remain necessary for Mr Harold to explain his conduct given that, by then, Mr Sharpe had already warned him that there was an extant High Court order confirming that he was not the administrator. Although the Application provided – in the alternative – for Mr Harold to be removed under *Paragraph 88*, my conclusions in the Main Judgment were not based on *Paragraph 88* and this ought to have been obvious to Mr Harold.

35. In these circumstances, I expect a clear explanation from Mr Harold. He should also provide an unequivocal statement about his future intentions.

(7) The provision for the Respondents' Applications to be dismissed

36. The Applicants formally seek an order providing for the Respondents' Applications to be dismissed. The Respondents challenge this on the basis that I have already dismissed the Respondents' Applications when I made the Order.

37. At the hearing on 12-13th May 2020, I dealt with the Respondents' two preliminary applications, namely their applications for a stay and their application for relief from sanction, before dealing with the Applicants' substantive application for a declaration that Mr Harold's appointment was "invalid". The Respondents' outstanding applications to exclude the evidence and vary an order for disclosure were not pursued following the dismissal of the two preliminary applications. On that basis, I dismissed each application.

38. It is thus un-necessary to incorporate further provision for the Respondents' applications to be dismissed.

(8) Removal of entries from the register of companies in respect of SMC

39. To reflect my conclusions in the Main Judgment, the Applicants have incorporated provision in the Draft Order for the Registrar to remove, from the register of companies, entries confirming the appointment of Mr Harold as administrator, the statement of his proposal dated 30th October 2019, the notice of deemed approval of proposals dated 20th November 2019 and the administrator's progress report dated 7th April 2020.

40. I have jurisdiction to make such an order under *Section 1096 (1) of the Companies Act 2006* which provides, in terms, that the registrar shall remove from the register material derived from anything which the court has declared to be invalid or ineffective. This is primarily a matter for the Registrar of Companies rather than the Respondents and it is inherently unlikely that the delivery of further evidence will assist in relation to the issue, in principle, of whether I should make such an order.

41. The Respondents challenge such provision on the grounds that it was not specifically sought in the Application Notice and the Registrar of Companies has not been made a party to the proceedings. It is factually correct that the Applicants did not specifically seek, in their Application, directions providing for the removal of the entries. However, such directions are plainly consequential upon the Main Judgment in which there was a claim for "such other directions as the court thinks fit" and there can be no sound or legitimate reason to retain misleading entries on the register of companies. Moreover, in my judgment, there is nothing in *Section 1096* to require the Registrar of Companies to be

joined as a party to proceedings before the Court exercises its discretion to rectify the register.

42. Unfortunately, however, I have not yet been provided with sufficient information to make the order sought. *Section 1096(2)* provides, in terms, that the court order must specify what is to be removed from the register and indicate precisely where on the register it is. The Draft Order contains information, in general terms, about the relevant entries but that is not enough.

43. I shall thus make a direction requiring the Applicants to specify, with particularity, what is to be removed and where on the register it is. One way of achieving this would be to extract copies of the relevant entries, identifying where on the register they appear, and to strike through the passage or passages which the Applicants wish to have removed.

44. Having provided for the register to be rectified, the Applicants seek a direction providing for them to serve a copy of the order on the Registrar of Companies. The Respondents challenge this on the basis that the order is "of no interest to the Registrar". However, once I provide for the Registrar to be rectified, this objection can be taken to have fallen away. In the event I am provided with sufficient information to make the order sought, I am thus minded to make a direction for service on the registrar of companies.

(9) The additional provisions

45. The Draft Order contains additional provisions for the Respondents to "to do all things necessarily required of them to give effect to and implement the…Order" and for the Applicants to have permission to apply. It is conceivable that, in implementing the order, further guidance will be required. I have thus provided for both parties to have permission to apply. The parties can reasonably be expected to make such applications sparingly. However, in advance of any such applications, I shall not impose a blanket obligation on the parties to do all things required to implement the order.

(10) Costs

46. The Applicants seek an order requiring the Respondents to pay their costs of the proceedings subject to assessment on the indemnity basis. They also seek an interim payment on account.

47. In their written Closing Submissions, the Respondents submit that "costs…should be reserved". They also submit that "it would be premature to make any determination about

the principle of costs…until the Set Aside Application is determined". However, I can see no good reason to postpone or adjourn the determination of costs. The present proceedings were issued for the purpose of establishing that the appointment of Mr Harold was invalid. Whilst the Applicants seek other relief, such relief is entirely consequential upon my determination of this issue. The "Set Aside Application" is a separate set of proceedings – recently issued in the County Court in London - to set aside the 12th June 2019 Order under which SMC was restored to the Register of Companies. I have not been invited to transfer the present proceedings to the County Court in London so that the two sets of proceedings can be heard together. In any event, I can see no good reason to do so. Having determined the main issue in the present proceedings, I shall now determine the parties' liabilities for costs.

48. Having successfully obtained a declaration that the appointment of Mr Harold as administrator was and is void and invalid, the Applicants are plainly the successful parties within the meaning of *CPR 44.2(2).* Having concluded that HCC has standing in these proceedings, I am satisfied that it is to be treated as one of the successful parties.

49. If adjudged liable to pay the Applicants' costs, the Respondents invite me to order them to pay only a proportion of the Applicants' costs, namely 50%, in the exercise of my jurisdiction under *CPR 44.2(6)(a).* This is on the grounds that, although the proceedings included an alternative claim for an order removing Mr Harold as administrator, the alternative claim was "not pressed and in any event would not have succeeded", and the proceedings "succeeded on grounds which were different to those 'pleaded'".

50. I am not persuaded by the Respondents' written submissions on this aspect. It is true that, although the Application Notice encompassed an alternative claim for Mr Harold to be removed as administrator, this was not pursued at the substantive hearing. However, the explanation for this is that, having failed on their applications for a stay and relief from sanction, the Respondents did not mount a serious challenge to the Applicants' case on the validity of Mr Harold's appointment. They are not to be criticised for this; indeed, the approach taken by their counsel at the hearing was sensible and measured. However, counsel for the Applicants was thus entitled to proceed on the basis that it was un-necessary to pursue the alternative claim further. In any event the alternative claim was only applicable in the event that Mr Harold was in office as administrator at the time of the hearing. Moreover, I am not content to assume simply that, had it arisen for argument, the alternative claim would not have succeeded.

51. In my judgment, the Respondents' submission that the proceedings succeeded otherwise than on grounds 'pleaded' is misconceived. The proceedings were commenced by Application Notice under the *Insolvency Act Rules 2016*. In the present case, there were no statements of case. The Application Notice was not analogous to a pleading; it merely set out the relief claimed and referred to the supporting evidence. The Main Judgment was based on the evidence filed in accordance with the court's directions.

52. Conversely, there is no reason why Mr Harold should be treated more favourably than Messrs Tierney and Bamber. From an early stage, Mr Harold appears to have elected not to adopt a neutral stance, determinedly defending the claim.

53. I am thus satisfied the Respondents, as unsuccessful parties, must pay the whole of the Applicants' costs such costs to be subject to detailed assessment.

54. However there remains an issue as to whether the Applicants' costs should be assessed on the standard or indemnity basis under *CPR 44.3*.

55. To award costs on the indemnity basis, there must be something in the conduct of the parties or the circumstances of the case to take the case "out of the norm", *Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ 879.* In the present case, I have reached the conclusion that the Respondents' conduct in connection with the litigation itself, before and after the issue of proceedings, satisfies this test.

56. To understand the basis on which I have reached that conclusion it is first necessary to consider the overall context. Parties to litigation, including litigation in insolvency, can generally be expected to co-operate freely in the exchange of relevant information prior to the issue of proceedings. This is consistent with the *Overriding Objective* and the *Practice Direction for Pre-Action Conduct and Protocols* in respect of ordinary actions. However, in my judgment, there were compelling reasons in the present case why, from the outset, the Respondents could each have reasonably been expected to be open with Mr Henesy - SMC's only director - and HCC - a putative creditor and debenture holder - about the basis on which Mr Harold was appointed and to co-operate with them in providing information they reasonably required about the appointment.

57. Firstly, Messrs Tierney and Bamber appointed Mr Harold as administrator after they became aware that, through SMC, Mr Henesy was asserting a claim to the Property following the restoration of the SMC to the register. By the time he was appointed, SMC had been dissolved for some twenty years, a period in which it cannot have traded. The

decision to appoint Mr Harold must thus have inevitably excited the suspicion that he had been appointed for the collateral purpose of enabling Mr Harold to secure control of the Property rather than realising the Property so as to make a distribution to the secured creditors.

58. Secondly, in the Notice of Mr Harold's appointment as administrator, it was provided that he had been appointed as such by "the Estate of the late Mr Peter Nolan…" under a floating charge dated 12th May 1998. This must be taken to have been the 1998 Charge. However, at the time of appointment, the registered proprietor of the 1998 Charge had been struck off and there was nothing to suggest Mr Nolan might somehow have acquired an interest in the 1998 Charge.

59. Thirdly, the extra-judicial procedure for the appointment of administrators in *Schedule B1* of the *Insolvency Act 1986* has potentially far reaching consequences for a company and its creditors. Adherence to the statutory code and compliance with the statutory procedure and its requirements can reasonably be expected. An administrator acts as agent for the company, under *Paragraph 69* of *Schedule B1* and, by *Paragraph 59(3)* a person who deals with the administrator of a company in good faith and for value need not inquire whether the administrator is acting within his powers. By virtue of *Paragraph 5* of *Schedule B1*, he is also an officer of the court.

60. When requested, prior to the commencement of proceedings, to confirm who had appointed Mr Harold and to clarify their title for doing so, it is thus particularly unfortunate that the Respondents declined to provide the information requested. The Applicants were left entirely in the dark as to the basis on which the title to the 1998 Charge might have devolved to Mr Nolan and ultimately to Messrs Tierney and Bamber if, indeed, that is the way in which the Respondents intended to present their case.

61. Following the issue of proceedings, on 27th February 2020 HHJ Hodge QC made an order providing for the Respondents to file and serve their written evidence by 4pm on 24th March 2020 exhibiting any documents establishing *inter alia* that the First and Second Respondents were entitled to appoint Mr Harold as administrator. Mr Harold eventually filed a witness statement dated 18th March 2020 but this did not explain the basis on which the First and Second Respondents might have been entitled to appoint him nor did it exhibit any documents of title or, indeed, any other explanatory documents. Time for the Respondents to provide such documentation was subsequently extended until 14th April

2020 but they declined to do so until 1st May 2020 when they finally issued an application for relief from sanction returnable before me at the hearing on 12th-13th May 2020 seeking to rely on previously undisclosed evidence. This was refused. Had I allowed the application for relief from sanction, the Applicants would have been deprived of the opportunity to file evidence in reply within the period of three weeks provided by HHJ Pearce in his order dated 20th March 2020. As it is, the Respondents did not even produce a copy of Mr Nolan's will until the hearing itself. When they did so, it emerged that they had not obtained a grant of probate.

62. I am satisfied that the Respondents' conduct was out of the norm and the Applicants' costs should thus be assessed on the indemnity basis.

63. I am invited to make an order requiring the Respondents to pay a reasonable sum on account of the Applicants' costs under *CPR 44.2(8).* I am required to do so unless there is good reason to the contrary. I can see no such reason here. However, in the current circumstances, I shall provide for the interim payment to made within 28 days of this judgment. The Applicants have filed a statement of costs amounting to some £83,933.50 plus VAT, in aggregate £100,656.40. The VAT element is only recoverable from the Respondents if the Applicants are not registered for VAT and thus not entitled to input tax credit. The Applicants seek an interim payment in the sum of £75,492.30, ie 75% of the gross amount. Having considered the Applicants' schedule of costs and mindful that I have directed that their costs should be assessed on the indemnity basis, I am satisfied that this is a reasonable amount on the assumption that the Applicants are not registered for VAT. The Respondents must thus make an interim payment to the Applicants in the sum of £75,492.30 on account of their costs.

ORDER

UPON written consideration of all issues and matters consequential upon the judgment and order of this Court dated 28th May 2020.

AND UPON READING the Applicants' written submissions dated 5th June 2020 (together with a draft minute of order), the Respondents' written submissions dated 15th June 2020 and their respective email communications to the Court.

AND UPON Nicholas Henesy, the sole director of Secure Mortgage Corporation Limited ("the Company") filing, under Claim No CR-2020-MAN-000584, Notice appointing, as administrators of the Company, Edward Avery-Gee and Daniel Richardson of CG&Co, Greg's Building, 1 Booth Street, Manchester M2 4DU.

AND UPON the solicitors for the Applicants, namely Ralli Solicitors LLP of Greg's Building, 1 Booth Street, Manchester M2 4DU, advising the Court that Messrs Avery-Gee and Daniel Richardson authorised them to file, on their behalf, the Applicant's written submissions dated 5th June 2020.

IT IS ORDERED that:

1. The Applicants' application for the following relief ("the Additional Relief") is adjourned for further consideration on the first available date on or after 17th August 2020 at a hearing with an estimated length of 3 hours, namely:

   2.1 an injunction restraining the First Respondent from purporting to act or hold himself out as the Company's administrator;

   2.2 an order requiring the Respondents to deliver up all of the Company's books records and property within their possession; and

2.3 such other relief as the Applicants claim to be entitled.

2. The Applicants shall file and serve on or before 4pm on 20th July 2020:

    a. a schedule providing precise particulars of the Additional Relief; and

    b. such witness statement or witness statements upon which they intend to rely in support of the Additional Relief.

3. The Respondents shall file and serve on or before 4pm on 3rd August 2020 all witness statements upon which they intend to rely in response.

4. Pursuant to the Applicants' application under section 1096 of the Companies Act 2006 for an order requiring the Registrar of Companies to remove from the register documents or entries referable to the appointment of the First Respondent and the placing of the Company into administration, the Applicants shall file on or before 4pm on 20th July 2020 a document specifying, with sufficient particularity for an order under Section 1096(2), what is to be removed and where on the register it is. The Court will then deal with the Applicant's application under section 1096 on paper.

5. The parties shall have permission to apply.

6. The Respondents shall pay the Applicants' costs of the proceedings herein (including all costs reserved) and of the Respondents' Applications, such costs to be the subject of a detailed assessment on the indemnity basis.

7. The Respondents shall, by 4pm on 3rd August 2020, pay to the Applicants the sum of £75,492.30 as an interim payment on account of the Applicants' costs.