Neutral Citation Number: [2025] EWHC 54 (Ch)

Case No:CR-2024-005483

Rolls Building
London
EC4A 1NL

Date: 17 January 2025

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF NOVALPINA CAPITAL LLP

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BEFORE DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL AGNELLO KC

BETWEEN:

(1) NOAL SCSp
(a Luxemburg private equity fund)(formerly called Novalpina Capital Partners 1 SCSp)
(2) OEGH HOLDINGS SARL
(3) NOAL LUXCO SARL

Applciants

-and-

(1) NOVALPINA CAPITAL LLP(in members' voluntary liquidation)
(2) ROBERT HORTON
(3) ANTHONY MURPHY (as liquidator of Novalpina Capital LLP)
(4) STEPHEN GODERSKI (as former liquidator of Novalpina Capital LLP)
(5) OB PARALLEL VII (BVI) LIMITED

Respondents

Mr Stephen Davies KC (instructed by Mc Dermott Will and Emery LLP) for the Applicants
Mr Matthew Weaver KC (instructed by Cripps LLP) for the First and Third Respondents
Mr James Morgan KC and **Ms Sri Carmichael** (instructed by Humphries Kerstetter) for Mr Stefan Kowski, a third party subsequently joined as a respondent to the proceedings

Hearing dates: 28 November 2024

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JUDGMENT

Introduction

1. The issue which I have to determine can be stated simply, being, whether the court has jurisdiction to appoint an additional liquidator in a members' voluntary liquidation (MVL). I heard that issue on 28 November 2024 on an urgent basis. On 2 December 2024, I gave my decision which is that the court does have jurisdiction to appoint an additional liquidator. This has resulted in Mr Robert Horton being appointed as an additional liquidator of Novalpina Capital LLP (the company). The terms of the division in relation to the tasks and responsibilities as between Mr Horton and the current liquidator, Mr Murphy, have been determined by me and are set out in a memorandum of understanding attached to the order dated Tuesday 3 December 2024. This is the judgment of my reasons for determining that the court does have jurisdiction to appoint an additional liquidator in a MVL. I am grateful to all counsel for their submissions.

Background

2. On 15 November 2024, Chief Insolvency and Companies Court Judge Briggs heard the application dated 15 November 2024 brought by the Applicants. There have been, since the issue of the application, various amendments and joinders of parties. None of those matters concern the issue I need to determine. The part of the application which concerns the issue before me is the application to remove and replace Mr Murphy as liquidator of the company which entered into MVL on 10 May 2023. Closely related and integral to the application is the assertion by the Applicants that the company is insolvent and either should not have entered a members' voluntary

liquidation when it did on 10 May 2023 or alternatively, that the MVL should have been converted into a creditors' voluntary liquidation (CVL) at the latest by 2 September 2024, when the former liquidator, Mr Steven Goderski, was removed and replaced by the members with Mr Murphy as his replacement on 20 September 2024.

3. There are some very serious allegations made against Mr Murphy relating to his conduct as liquidator including (1) the company, acting through Mr Murphy, entered into a debenture on 7 October 2024 with the Fifth Respondent (OBP) whereby all the company's assets, including its documents and records were charged to OBP by way of security , 'for monies advanced to Mr Murphy in accordance with the deed of indemnity', (2) a failure to convert the MVL into a CVL by reason of the insolvent position of the company and (3) copying the books and records and providing them to Mr Kowski; (4) Mr Murphy entering into a confidential funding agreement with OBP which stated as its purpose that it was to enable Mr Murphy to conclude the liquidation before it could be converted into a creditors' voluntary liquidation (CVL). I should add that the Applicants assert that OBP is a vehicle owned and controlled by Mr Kowski. The Applicants also assert that in view of the actions of Mr Murphy, he has placed himself in a position of serious conflict and this is part of the application seeking his removal. Mr Murphy has not responded at this stage by way of evidence filed from him to the serious allegations, but he denies any wrongdoing and is defending the application to remove him.

4. These allegations are important in the context of understanding the determination of Chief ICC Judge Briggs that, subject to the jurisdiction question, an additional liquidator needed to be appointed by the court. It is also important to note that the issue of insolvency pursuant to section 95 IA 86 is key to this case. The Applicants assert that they are creditors of the company. They are parties to litigation in Luxembourg as set out in the evidence filed in support of their application. After hearing submissions from Mr Davies KC on behalf of the Applicants and Mr Weaver KC acting on behalf of the First and Third Respondents, Chief ICC Judge Briggs directed that the application be listed for hearing of the preliminary issues agreed as follows:-

'(1) Whether NCL was insolvent when it went into members' voluntary liquidation ("MVL") on 10 May 2023 and if so whether the declaration under Section 89

of the Insolvency Act 1986 ("IA") was correctly made.
(2) Whether NCL was insolvent or had become insolvent for the purposes of IA Section 95 by 2 September 2024 (being the date of Mr Goderski's removal from office).
(3) Whether NCL was insolvent for the purposes of IA Section 95 as at the date of the hearing on 15 November 2024.
(4) If the answer to (1) and/or (2) and/or (3) is yes, with what consequence? In particular, whether NCL's MVL should be converted into a creditors' voluntary liquidation in accordance with IA Section 95 and 96 and/or whether Sections 95 and 96 have been triggered.
(5) If the answer to (4) is "yes", who should be appointed as liquidator and/or who should nominate the liquidator.'

5. Chief ICC Judge Briggs determined that the hearing of the preliminary issues be listed urgently and listed it for 10 and 11 February 2025. I have extended that hearing time to three days, with the first day being a pre-reading day for the Judge. After reading the evidence and hearing the submissions from those who were respondents before the Judge on that day, Chief ICC Judge Briggs determined that it was appropriate to appoint an additional liquidator up to and including the hearing of the preliminary issue. As the question of jurisdiction was raised, the Judge gave directions that the parties were to file short two page submissions as to jurisdiction to appoint an additional liquidator, to be agreed, if possible. No agreement was possible so instead I have before me two pages of submissions filed by the Applicants and First and Third Respondents respectively. I also have a longer note filed on behalf of Mr Kowski who declined to be joined as a party to these proceedings when the application was before the Judge on 15 November 2024, but who was represented by Counsel on that day. As is set out in paragraph 5 of the draft agreed order dated 15 November 2024 being the order of the hearing before Chief ICC Judge Briggs,
'Subject to this court being satisfied on the jurisdiction point [whether the court has jurisdiction and power to appoint an additional liquidator], until determination of the preliminary issues or further order of the court, Mr Horton is appointed as additional liquidator, jointly with Mr Murphy on the following basis:
(1) Mr Horton's appointment will take effect forthwith upon Chief ICC Judge Briggs confirming that the Court is satisfied on the Jurisdiction Point…'

6. I approved the draft order of 15 November 2024 which had been agreed between the parties with some minor amendments. The jurisdiction point referred to in paragraph

5 of the order is the one which was before me and determined by me, with the written reasons set out in this judgment.

The position of Mr Kowski

7. Mr Kowski was represented by Ms Carmichael at the hearing before the Judge on 15 November 2024. According to evidence on his subsequent joinder application filed on his behalf by his solicitor, Ms Pearson, he is one of the two remaining members of the company. As is clear from the order dated 15 November 2024 which was agreed between the parties (and the transcript of the hearing itself) Ms Carmichael, acting on behalf of Mr Kowski, declined to make an application for Mr Kowski to be joined to the proceedings. The Judge determined the issues before him on the basis of the submissions made by counsel for the Applicants and counsel for the First and Third Respondents. After the hearing, on 21 November 2024, Mr Kowski issued an application applying to be joined to these proceedings. That application was listed before this court for Friday 29 November 2024. Using my case management powers, I dealt with that application before me on 28 November 2024 and the parties agreed a consent order which was approved by me. I allowed Mr Morgan KC to make submission before me relating to jurisdiction even though Mr Kowski was effectively joined on the day. I also read the long note which had been filed by Ms Carmichael as well as having read the evidence filed by Ms Pearson in support of the application for joinder.

8. Mr Morgan, on behalf of his client, (1) sought to make submissions on the issue of jurisdiction to make the order; (2) sought to make submissions relating to why such an order should not be made on the basis that the Applicants were not creditors of the company and therefore did not have standing to make the application, and/or had no legitimate interest in the order sought to be made (being both the application for removal and application for an additional liquidator) and (3) the Judge had not considered the issues arising and in particular section 112 (2) IA 86 , being ,' *the court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just'.* Effectively Mr Morgan asserted that Chief ICC Judge Briggs did not deal with section 112(2) IA 86. After an interchange between myself

and Mr Morgan, Mr Morgan sensibly did not pursue points (2) and (3) above before me. His submissions focussed, alongside Mr Weaver KC, as to why the Court did not have jurisdiction to appoint an additional liquidator. However, I will set out the reasons why it seemed to me that submissions relating to (2) and (3) above were not appropriate before me.

9. Mr Kowski was represented before Chief ICC Judge Briggs on 15 November 2024. The agreed approved order makes it clear that Mr Kowski was represented at the hearing by Ms Carmichael but he declined to apply to be joined. The Judge therefore heard submissions from Mr Davies for the Applicants and Mr Weaver in relation to the application being made. Mr Weaver did take me to parts of the transcript of that hearing where he referred to the issue of standing of the Applicants as creditors to make the application. Mr Weaver did not argue the point but, in my judgment, it is clear that the issue was raised and it would have been clear to the Judge in making his determination to make the order, subject to jurisdiction. It is also clear, in my judgment, from the evidence filed on behalf of the Applicants that their status as a creditor was that of a contingent creditor. Mr Davies submitted as much before me, but it was in my judgment, clear from the Applicants' evidence. I should add that this is my view based on the evidence which was filed before the court and considered by the Judge on 15 November 2024. It is not intended in any way to bind the Judge hearing the preliminary issues on February 2025 where there will be submissions and further evidence to consider.

10. In her evidence in relation to the joinder application, Ms Pearson, the solicitor acting for Mr Kowski, challenges the status of the Applicants as a contingent creditor or in fact as a creditor. As I observed during the hearing, that type of a challenge should have been made before Chief ICC Judge Briggs. It was not because effectively Mr Kowski declined to be joined. Again, as I observed to Mr Morgan, it was open to Mr Kowski to seek permission to appeal (in so far as a non-party had some entitlement to make such an application) the decision of Chief ICC Judge Briggs. Additionally, as I observed to Mr Morgan, section 375 IA 86 provides, under stringent conditions, to those who seek to set aside or vary a decision the jurisdiction to apply to the court. No such application was before me from Mr Kowski. The same points made above in relation to the creditor issue are equally applicable in relation to the point relating to

section 112(2) IA 86. Sensibly, Mr Morgan decided not to pursue these arguments and restricted himself to the issue of jurisdiction.

11. The issue as to whether the company is insolvent will depend upon the position of the Applicants as creditors pursuant to section 95 IA 86. On that basis and based on the evidence which was before the Court on 15 November 2024, it is clear that the Applicants are contingent creditors. Of course, I did not hear Mr Morgan on this issue but the evidence which was before the court from the Applicants satisfies, in my judgment, the status of contingent creditor. As a creditor, the Applicants clearly have a legitimate interest because the application to remove the liquidator also seeks a direction that the company is converted into a CVL. The issue of the solvency or insolvency of the company is therefore important as to whether Mr Kowski has himself any legitimate interest entitling him to oppose the current application. Accordingly, the decision of the Judge is entirely sensible and appropriate so as to protect the position until the court determines the preliminary issues. In making the above observations, I do not intend to question in any way the decision made on 15 November 2024, but the above is set out to make it clear that before me, there is nothing which would cause me to interfere in any way with what has occurred and the decisions made to date.

12. Accordingly, as agreed by counsel for the Applicants and counsel for the first and third Respondents, the only issue for me to determine is whether this court has jurisdiction to make the appointment. Chief ICC Judge Briggs made the order on the basis that it takes effect once the Court confirms that the jurisdiction exists. All parties also agreed before me that in so far as I determined that the court did not have jurisdiction to appoint an additional liquidator, then I would give directions to the current liquidator in order to 'hold the ring' between now and the hearing in February 2025. All agreed that I have jurisdiction to give such directions. For the avoidance of doubt, the issue of jurisdiction does not require me to consider whether it is appropriate for that jurisdiction to be exercised. That has already been decided by the judge on 15 November 2024.

Legal background

13. The relevant provisions of the IA 86 are sections 108 and 112. Both of these provisions are located in Chapter V of the IA 86, being provisions which apply to both kinds of voluntary winding up.

'Section 108— Appointment or removal of liquidator by the court

(1) If from any cause whatever there is no liquidator acting, the court may appoint a liquidator.

(2) The court may, on cause shown, remove a liquidator and appoint another.'

'Section 112— Reference of questions to court

(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court.

(2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

(3) A copy of an order made by virtue of this section staying the proceedings in the winding up shall forthwith be forwarded by the company, or otherwise as may be prescribed, to the registrar of companies, who shall enter it in his records relating to the company.'

14. Case law has established that an application pursuant to section 108 IA 86 can be made by anyone who the court considers proper (*Re AJ Adams (Builders) Ltd [1991] BCC 62*). This includes a recognised professional body of which a person was once a member (*Re Stella Metals Ltd (in Liq) [1997] BCC 626*), at least on the case of filling a vacancy pursuant to section 108(1) IA 86. In *Deloitte & Touche AG v Johnson [1999] BCC 992*, the court stated that a liquidator of an insolvent company would not be removed on the application of a contributory. The appellants in that case were neither creditors nor contributories of the company. That was not an issue in dispute in that case and it was accepted by the appellants to be the case. Their status was that of a debtor or alleged debtor of the company. In exercising a statutory power, the court has to be satisfied that the applicant is a person qualified to make the application and also that he is a proper person to make the application. This means

that he has a legitimate interest in the relief sought. Lord Millett stated that the company was insolvent and that the only persons who could have any legitimate interest of their own in having the liquidator removed from office were the persons entitled to participate in the ultimate distribution of the company's assets, that is to say, the creditors. That would include, in my judgment, those who claim to be contingent creditors.

15. In the case before me, the Applicants make their application on the basis that they are creditors of the company. As I have set out above, this is disputed by Mr Kowski. There is also the further issue that the parties are at odds as to whether the company is solvent or insolvent for the purposes of section 95 IA 1986. The Applicants assert that it is insolvent and therefore they are entitled to remove and replace the liquidator and also apply for interim relief by way of the appointment of an additional liquidator. As the Applicants assert that they are creditors, then they have a legitimate interest, based on the evidence before the court on 15 November 2024.

16. Section 112 IA 86 enables the liquidator, creditor or contributory to apply to the court for directions. As the case law in this area establishes, the matters which have been determined under this provision are wide and varied. This provision includes the ability for the court to direct a stay of proceedings brought against a company even though no such stay is provided for under a different part of the IA 86. Effectively, the court has jurisdiction to stay proceedings even though the statutory power for staying proceedings in section 147 IA 86 relates to compulsory liquidations. In some instances, the court has refused to give directions because it considers the issue is one that the insolvency practitioner should determine, for example whether to sell the business and undertaking. The wide and varied use of section 112 IA 86 can be seen in the cases which are discussed below.

17. As set out by Lord Justice David Richards in *Fakhry v Pagden [2021] 2 BCLC 35*, there are well known differences between the various forms of liquidations and related insolvency processes. In relation to compulsory liquidations and administrations, the office holder is an officer of the court, but the court does retain the statutory power to give directions to liquidators and also the power to remove and replace those appointed as liquidators. Section 108 IA 86 applies to both forms of

voluntary liquidations, solvent or insolvent. In relation to members' and creditors' voluntary liquidations, the office holders are not officers of the court. As explained at paragraphs 27 to 31:-

'27.A winding up by the court, or compulsory liquidation, is commenced by an order of the court, made on a petition presented by a creditor or a contributory (who for practical purposes is a member of the company concerned) or by a public authority on public interest grounds. The liquidation is conducted by the official receiver or by a liquidator as an officer of the court. Although the court will not generally interfere with the conduct of the liquidation, it remains a liquidation by the court which retains a supervisory function over the liquidator. There are some provisions for creditors or members to make decisions on certain matters.

28.The other types of liquidation are creditors' and members' voluntary liquidations. They are not under the control of the court and the liquidators are not officers of the court, although the court has a statutory power to give directions to liquidators, on the application of the liquidator or a creditor or member. The essential difference between the two is the solvency of the company. If the company is and remains solvent, creditors will be paid and the persons with the real economic interest in the liquidation are the members. It is a process for their benefit. They do not, however, become the beneficial owners of the assets vested in the company. In all types of liquidation, the beneficial interest in the assets is suspended and they are held on a statutory trust to be dealt with in accordance with the statutory scheme: see Ayerst (Inspector of Taxes) v C&K Construction Ltd [1976] A.C. 167; [1975] 3 W.L.R. 16. Nonetheless, the liquidations are processes for the benefit of those entitled to the assets, which in the case of a members' voluntary liquidation in effect means the members.

29. These differences are reflected in the legislation. Both types of voluntary liquidation are commenced by a resolution of the company in general meeting, but, by virtue of s.90 of the Act, the liquidation will be a members' voluntary liquidation if a declaration of solvency is made by the directors in accordance with s.89 before the resolution to wind up is passed.

30. In a members' voluntary liquidation, it is the members who appoint the liquidator(s) (s.91) whereas it is the creditors who have the right to control the appointment in a creditors' voluntary liquidation (s.100). If a vacancy occurs in a members' voluntary liquidation, the members are entitled to fill it: s.92. Annual progress reports must be sent to the members (s.92A). The members determine

the basis of remuneration of the liquidators: r.18.19 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024). The members may remove a liquidator in a members' voluntary liquidation, at a meeting summoned specially for that purpose: s.171(2).

31. The court also has powers in relation to the appointment and removal of liquidators in a members' voluntary liquidation. Under s.108(1), the court may appoint a liquidator if, from any cause whatever, there is no liquidator acting. This provision supplements the power of the members to fill a vacancy under s.92. Under s.108(2), the court may, on cause shown, remove a liquidator and appoint another, so supplementing both s.171 and s.92. If a liquidator is appointed by the court, his or her position is to an extent entrenched by s.171(3) which provides that a meeting under s.171(2) to remove such a liquidator may be summoned only if (a) the liquidator thinks fit, or (b) the court so directs, or (c) the meeting is requested in accordance with the rules by members representing not less than one-half of the total voting rights of all the members having at the date of the request a right to vote at the meeting.'

18. Those paragraphs are a very useful summary of the general principles of law, but they do not, in my judgment, actually deal with the issues relating to jurisdiction to appoint in this case, being whether the court has jurisdiction to appoint an additional liquidator in a MVL. Moreover, in the case before me, there is a serious issue as to whether the company is solvent or insolvent for the purposes of section 95 IA 86. It is therefore not possible to consider the interests of the members or the creditors to the exclusion of one or the other. In my judgment, the power of the court to remove and replace or appoint an additional liquidator in so far as the jurisdiction exists, does not depend upon whether the company is in a MVL or CVL. Nothing in the passages above which all of the counsel referred me to alters this position. The facts of each case will be important for the exercise of the power as will be the issue as to whether the company is solvent or insolvent, but these issues are not relevant in relation to whether such a power exists for the purposes of both types of voluntary liquidations. They are to be treated, in my judgment, in the same way in relation to whether the jurisdiction to appoint an additional liquidator exists under statute or under the court's inherent jurisdiction.

19. The jurisdiction to appoint an additional liquidator must arise either under statute, being sections 108 or 112 IA 1986, or under the court's inherent jurisdiction. I turn now to consider the cases which are relevant for current purposes.

20. In *Clements v Udal [2001] BCC 658*, the court considered a case where an application had been made for a block transfer of insolvency appointments including a number of voluntary liquidations and whether it had the power to appoint an additional liquidator for a short period of time pending notice of the application being given to the retiring office holder (the respondent). The application had been made without notice to the respondent and the court determined that it needed to be adjourned so as to give to the respondent an opportunity to consider his position. The court then considered carefully its jurisdiction to appoint an additional office holder. in relation to the various appointments. In relation to voluntary liquidations, the Judge, Mr Justice Neuberger (as he then was) stated as follows at p 660 F-H :-

'So far as voluntary liquidations are concerned, s. 108(I) of the Insolvency Act 1986 provides:
'If from any cause whatever there is no liquidator acting, the court may appoint a liquidator.'
When compared with other provisions elsewhere in the Act, to which I will refer, which identify vacancies, it seems to me that 'no liquidator acting' are words which extend to a liquidator who may not be performing his function. If the court has power at a final hearing to appoint a liquidator where it is satisfied that there is no liquidator acting, it seems to me that the court must have power on an interlocutory basis to appoint additional liquidators, possibly for a short time, where it is arguable that no liquidator may be capable of acting. Given that Mr Udal is no longer in the office, I think there must at least be an arguable case for saying that that is the position.'

21. In that case, the court was satisfied that it had jurisdiction to appoint an additional liquidator because the words, 'no liquidator acting' were words which extended to a liquidator who may not be performing his functions. On the facts of the case, it appears from the short judgment that the respondent had agreed to be replaced and had retired from the practice, but it is not clear that there was an actual refusal by him to deal with matters as and when they would arise in the various liquidations. The Judge also stated that if the court had the power at a final hearing to appoint a liquidator, then it appears that the

court likewise must have the power to appoint on an interlocutory basis, where it is arguable that no liquidator is capable of acting.

22. The next case is *Re York Gas [2010] EWHC 227*. The court considered an appeal from the Registrar whereby he refused to appoint an additional liquidator to a company in creditors' voluntary liquidation pursuant to section 108 IA 86. The background was that certain companies in the group had been placed into creditors' voluntary liquidation. The two office holders who had been appointed to York Gas were also appointed as liquidators to IEH, an associated company in the group. The perceived conflict which arose related to those office holders being in the position to adjudicate a claim on behalf of York Gas against IEH. The Applicants (being the two office holders) therefore sought an order that another partner in their firm be appointed as an additional liquidator to deal with the claim being made. The Applicants submitted that the additional liquidator could obtain independent legal advice and set up 'Chinese walls' to ensure the independence of the additional liquidator.

23. The Registrar had refused to make the appointment on the grounds that he was not satisfied that appointing a third liquidator from the same firm fully addressed the risk of prejudice to either company in relation to conflict. On appeal by the office holders, the Judge (Mr Justice Newey as he then was) allowed the appeal and appointed the additional liquidator from the same firm, relying on *SISU Capital Fund v Tucker [2005] EWHC 2170* and *Re Arrows Ltd [1992] BCC 121*. Those cases established that the appointment of an additional liquidator was potentially an acceptable way of managing the conflicts which arose.

24. The judgment discusses those two cases and the reason as to why it was not necessary to consult the creditors. The Judge made the appointment under section 108 IA 86 and there is no discussion set out in the judgment as to the jurisdiction of the court to make such an appointment pursuant to section 108 IA 86. The facts of the case do not demonstrate that the two office holders

were not capable of carrying out their functions. It may of course be arguable (along the line in *Udal*) that the two office holders would be incapable of exercising their functions in relation to the adjudication of the claim and this was sufficient for the jurisdiction to exist. However, the judgment does not deal with this.

25. The next relevant case is *Re Comet Group Limited, Khan and other v Institute of Chartered Accountants in England and Wales [2018] EWHC 1378 (Ch).* This is a decision of Mr Justice Warren where he considered an application issued by the liquidator of the company (in a creditors' voluntary liquidation) pursuant to section 112 IA 86 seeking directions as to what (if any) further investigations they ought to undertake in relation to certain matters which had been raised in a letter from the ICAEW and in an opinion from Leading Counsel. Before the Judge, there was evidence that the liquidators had taken advice from Mr David Allison KC as to whether a debenture held by HAL Acquisitions Limited was valid and the advice received was that the debenture was valid. The ICAEW, relying on its counsel's opinion reached the opposing view, namely that the liquidators had failed to make the enquiries appropriate to discover whether there were any valid grounds for challenging the validity of the HAL debenture. It is important to note that Mr Justice Warren did not determine the issues before him relating to whether or not the ICAEW's criticisms were justified or whether the liquidators were correct.

26. The judge also considered the serious concerns of the ICAEW that the prior relationship of the Administrators/Liquidators (and in particular Mr Khan) with HAL and the ultimate owners had compromised their objectivity. This, according to the ICAEW, resulted in the failure of the liquidators to investigate properly the lending and security arrangements entered into by Comet on 3 February 2012 and the conduct of the directors who committed Comet to those arrangements.

27. The position of the ICAEW was therefore that the liquidators had a clear conflict of interest created by the extensive involvement of Deloitte and Mr Khan and the ultimate owners shortly before the HAL acquisition up to the commencement of the administration. The Liquidators did not accept the criticisms made by the ICAEW and maintained that they should be permitted to continue with the conduct of the liquidation without having to pursue the claims raised and which the ICAEW considered should be investigated, which included whether the HAL debenture was caught by section 245 IA 86 and whether the directors of Comet breached their fiduciary duties when they committed Comet to the HAL debenture.

28. The Judge ultimately held that there were matters which required investigation and that the current liquidators must not be the persons to carry out that investigation. The Judge held that an independent third party needed to be appointed as an additional liquidator so as to investigate the potential claims as against the directors and whose powers and duties were restricted to that particular task. I note in passing that the Judge did not consider that the current liquidators were incapable of performing their functions as office holders. At paragraph 186, the Judge directed the current liquidators to apply to the court for the appointment of a 'conflict' liquidator.

29. Paragraph 118 of the judgment sets out the power of the court to make such an order in the following terms :-

'118.I interpose here to say something about my own powers. There is no application before me to appoint an additional independent conflict liquidator, still less any application to replace the Liquidators themselves. It may be, as the Liquidators suggest, that the ICAEW itself has no standing to make such an application although I think it is strongly arguable that they do. I do not need to decide that point because what is clear is that I have jurisdiction to direct the Liquidators to apply for the appointment of an additional liquidator, and to make other directions, since the Liquidators themselves have brought the matter to court. However, I cannot decide, on this application, whether the

Liquidators are compromised in the way suggested. But what I can decide is whether there is a perception that that might be so. There is an analogy here with bias, the paradigm being judicial bias. It is, I hope, a rarity that a judge in our courts is actually biased. But sometimes judges are put in a position where, however objective they actually are, the circumstances give rise to a perception of bias, in which case the judge will normally recuse himself or herself. In the present case, if I were to be satisfied that a reasonable person could have serious concerns about the objectivity of the Liquidators, it would be open to me to take a number of different courses, including at one end of the spectrum of possible and reasonable courses of action, to achieve the appointment of an additional independent conflict liquidator. I do not need to decide that the Liquidators in fact lack objectivity or that an independent liquidator would be likely to reach a different decision on whether to proceed with the Protective Claim from the course which the Liquidators wish to adopt; and nor do I thereby need to reach decisions which might touch upon the disciplinary proceedings. What I have to bring about is a situation where the interests of unsecured creditors are most effectively vindicated. The ICAEW contend, in effect, that those interests can only be effectively vindicated by a proper investigation by officeholders who are independent of the Liquidators. If that is right then, in considering how that can best be achieved I will have to take into account, of course, the cost involved and how it is to be borne.'

30. The Judge did not refer to or rely upon any cases in relation to what he set out in paragraph 118. The Judge clearly considered that he could give directions to the current liquidators to apply for the appointment of an additional liquidator (the conflict liquidator). This accords with what is set out in the passage above from *Fakhry v Padgen*, namely that the court can give directions to the liquidator. Equally it also accords with the accepted position before me that the court has the power to give directions to the current liquidator, in the event that I determine that there was no jurisdiction to appoint an additional liquidator.

31. In *Microcredit Ltd v Andrew Rosler [2021] EWHC 1627*, Deputy ICC Judge Baister considered the position of appointing an additional liquidator in a compulsory liquidation. Whilst the application was therefore made pursuant to section 172(2) IA 86, as observed by the Judge, this statutory provision is similar to section 108 IA 86 (on cause shown etc). Having considered the evidence and the case law about the test and principles to apply to determine whether an office holder should be removed, the Judge declined to remove the liquidator. However, the Judge did consider that the issues relating to the possible tax appeal were such that a 'conflict liquidator' should be appointed who was to be funded by the Applicant. In reaching this decision, the Judge expressly relied upon *Clements v Udal* and *Re Comet Group Ltd* , referring to those two cases, '…for the mechanics of an appointment..' The conflict liquidator was, according to the Judge, to be appointed for limited purposes and for a limited time. On the basis of this case, the existence of a power to appoint an additional liquidator in compulsory liquidation cases does not appear to differ from the power said to exist in relation to voluntary liquidations.

Discussion

32. The above cases demonstrate that (1) the court has accepted that it has jurisdiction to appoint a 'conflict liquidator', as an additional liquidator in both compulsory and voluntary liquidations (*Clements v Udal*, *Microcredit* and *Re York Gas*) relying upon section 108 IA 86; (2) the exercise of that jurisdiction can also arise under section 112 where directions were given to the liquidator to apply for the appointment of an additional liquidator (a conflict liquidator) (*Re Comet Group)*, and (3) that appointment is capable of being for a short period of time (*Clements v Udal*) for a specified purpose (*Comet Group*, *York Gas* and *Microcredit*) or for longer duration (*Comet Group*, *Re York Gas* and *Microcredit*).

33. Mr Davies submits that the court has jurisdiction to appoint an additional liquidator either (1) pursuant to section 108 IA 86, (2) in addition, pursuant to section 112 IA 86 and (3) under its inherent jurisdiction. This is disputed by

Mr Weaver and Mr Morgan, who raised before me various reasons as to why, despite the cases referred to above, no such jurisdiction exists. I have already made the point above (as I did during the hearing) that most of these cases did not involve argument on both sides. However, that does not, in my judgment, enable me to ignore the cases or distinguish them. It is in my judgment, a question of the weight to be placed on them.

34. In my judgment, the starting point is to consider the wording set out in the two provisions and any observations made in the above cases in relation thereto. The wording in section 108 IA 86 states that if there is no liquidator acting, the court can appoint a liquidator to fill the vacancy. *Clements v Udal* is relevant here, where the Judge made two equally valid points. Firstly, he stated that due to some perceived potential inability of the office holder to carry out his functions, the court was effectively able to appoint an additional liquidator as there was arguably no liquidator capable of acting. This extended to the scenario where a liquidator may not be performing his functions. Secondly, the Judge recognised that the court must have power on an interlocutory basis to appoint additional liquidators possibly for a short time where it is arguable that there is no liquidator acting.

35. Mr Davies submitted that this clearly covered the case before me. He submitted that Mr Murphy was clearly conflicted and therefore unable to carry out his functions and therefore this fell squarely into *Clements v Udal*. I did raise with him the issue, as is well documented in *Re York Gas* as well as the earlier case of *SISU Capital Fund v Tucker [2006] BCC 463,* that a conflict or alleged conflict does not in itself invalidate the actions of the conflicted liquidator thereby making it impossible for him to carry out his functions. Mr Davies argued that some conflicts would have that effect.

36. Mr Weaver submitted that there was no power (jurisdiction) to make such an appointment because Mr Murphy was capable of carrying out his functions and therefore he sought to distinguish the current case from *Clements v Udal*. I

raised with him and with Mr Morgan the following example. Suppose an applicant, as a creditor of a voluntary liquidation, made an application to the court seeking the removal of the liquidator on the basis of serious allegations that the liquidator had misappropriated significant sums belonging to the liquidation estate. The liquidator strenuously denied the misappropriation and also objected to being removed and replaced before he had the opportunity to put his defence before the court. It seems to me that this example demonstrates the wisdom of the second statement made by the Judge in *Clements v Udal*. The court must be able to provide relief on an interlocutory basis in a case where the court would be able to remove and replace for cause shown at the final hearing. It is difficult to imagine, on my example, that the court would remove and replace the liquidator on an interim basis without a full hearing. Logically, the court would be minded to appoint an additional liquidator to 'hold the position' until the full hearing. Mr Weaver submitted that no such power existed which led to his submission that, on the facts of the example I gave, the court had no jurisdiction to grant any interlocutory relief prior to the full hearing of the application to remove and replace the liquidator. This also led to his submission that a liquidator facing serious allegations of misconduct was still capable of carrying out his functions as liquidator. Mr Morgan did not seek to argue against this analysis of Mr Weaver.

37. In my judgment, the court would have the jurisdiction to appoint an additional liquidator in the example which I gave above. A liquidator who is alleged to have misappropriated liquidation sums is arguably not performing his functions or using the words of the Judge in *Clements v Udal*, 'may not be performing his functions'. It is no part of a liquidator's functions to misappropriate sums belonging to the liquidation estate. It seems to me that the power to remove and replace in those circumstances enables there to also be the power to grant the necessary interlocutory relief as appropriate. In my judgment, there is jurisdiction for the appointment of an additional liquidator either along the lines set out in *Udal* or additionally under the court's inherent jurisdiction. So the question which then arises is whether in a case such as the one before me, Mr Davies is correct in arguing that a liquidator who is,

according to him, conflicted is equally incapable of acting or may not be performing his functions.

38. In *Re York Gas,* Mr Justice Newey appointed a conflict liquidator pursuant to section 108 IA 86. The facts before him were that a conflict was perceived and the additional liquidator would deal with that specific issue. There was, as I have already indicated, no discussion in the judgment of the jurisdiction to appoint an additional liquidator pursuant to section 108 IA 86, but it is difficult to ignore the case despite the lack of argument apparent from the written judgment. The Judge clearly considered that the appointment of an additional liquidator pursuant to section 108 IA 86 was something that was appropriate on the facts of that case. Mr Morgan submits that the Judge was wrong and no such jurisdiction exists to appoint an additional liquidator.

39. Mr Morgan and Mr Weaver invite me to place little weight on both these cases on the grounds that there was no opposing argument and no reasoning in the judgments relating to the points raised. In my judgment there was reasoning in *Udal* although I accept that there were no opposing arguments. Even if I place less weight on *Re York Gas*, it seems to me that this does not lead to there being no jurisdiction. The Judge clearly considered in *Re York Gas* that section 108 IA 86 provided him with the jurisdiction to appoint an additional liquidator. It is certainly arguable that the Judge in *Re York Gas* adopted the pragmatic and sensible approach adopted by the Judge in *Udal* relating to a liquidator who may not be performing his functions. It does seem to me that a liquidator who is conflicted or potentially conflicted is arguably not performing his functions because it is no part of his functions to act in a way which creates a conflict. That is not the same point as that made by the Respondents, that the conflicted liquidator can still carry out his functions. In my example, the alleged dishonest liquidator can also still carry out his functions, but the court would clearly seek to appoint an additional liquidator to protect the position of the creditors and their interests pending the full hearing. I accept that the Judge in *Re York Gas* did not state the above analysis based on *Udal*, but that does not prevent me from considering whether the

Judge's acceptance in *Re York Gas* that such a jurisdiction exists is correct. As I have already stated above, there would be jurisdiction for the court to appoint an additional liquidator on the facts of the example which I gave. The issue is therefore whether no such jurisdiction exists in relation to the appointment of a conflict liquidator such as in *Re York Gas*. Section 112 IA 86 is relevant in this context.

40. In *Comet Group Limited,* the Judge, Sir Nicholas Warren, was clear in his judgment that he had the power to direct the liquidator to make an application for the appointment of an additional liquidator pursuant to section 112 IA 86. Mr Weaver submits that the court has no such power arising pursuant to section 112 IA 86 because he submits, section 112 is restricted to the exercise of statutory powers and not powers arising under the court's inherent jurisdiction. Mr Weaver could point to no authority which supported this construction of section 112. In my judgment, this restriction in relation to the powers of the court pursuant to section 112 is not supported by the clear language of section 112. There is no support for imposing such a restriction.

41. Mr Morgan's submission in this respect was that section 112 was restricted to exercising powers which did not necessarily conflict with powers which existed already. His submission was therefore that in some way, the power to appoint an additional liquidator was not available because of the wording of section 108 which precluded the ability to appoint an additional liquidator and/or there was no jurisdiction to appoint arising under the court's inherent jurisdiction. The difficulty with that submission is that the wording of section 112 is very wide. It has enabled the court for example, to stay proceedings along the same lines as compulsory liquidations. There is also no statutory provision which prevents the appointment of an additional liquidator. Section 108 provides the power to remove and replace and to appoint where there is a vacancy, but *Udal* states that this also enables the appointment of an additional liquidator. I have already rejected Mr Weaver's argument that the exercise of section 112 is restricted to statutory powers and not to the exercise of the court's inherent jurisdiction. Essentially, Mr Morgan's submission relies upon

me being persuaded that both *Udal* and *Re York Gas* are incorrectly decided and furthermore, that no inherent jurisdiction to appoint an additional liquidator exists.

42. Additionally, according to Mr Morgan, the direction given by the Judge in *Re Comet Group* served no purpose because whilst the court had jurisdiction to give the directions to the current liquidators, it had no jurisdiction to order the appointment of an additional liquidator. This submission was also based on Mr Morgan's earlier submission that both *Udal* and *Re York Gas* were wrongly decided and that there was no section 108 jurisdiction to appoint an additional liquidator and that no such jurisdiction existed pursuant to section 112 IA 86 either. I do not accept this analysis. I do not accept that the Judge in *Comet Group Limite*d, in a careful and measured judgment directed the liquidator to issue an application for something which the court lacked jurisdiction to grant. *Comet Group* was a contested application. The liquidators had already asserted that the ICAEW had no standing to make an application seeking the appointment of an additional liquidator. In those circumstances, in my judgment, *Comet Group* stands as authority that the court has jurisdiction to appoint an additional liquidator. In that case, the Judge directed that the liquidators make the application for the appointment, but I do not consider that makes a difference as to the existence of the jurisdiction. I reject the suggestion that there are any grounds for me not to follow *Comet Group* as an authority in this area.

43. Mr Weaver sought to distinguish *Comet Group* on the basis that in *Comet Group,* the liquidators had issued the section 112 IA 86 directions application whilst in the case before me, the creditors were the applicants to a section 108 IA 86 application, although the amended application before me seeks relief pursuant to both section 108 and section 112 IA 86. Additionally, Mr Murphy, as liquidator, is a respondent to the application before me. Mr Weaver's argument would lead to the jurisdiction exercisable by the court being dependent upon who were the applicants to the section 108 and/or the section 112 application and restricting the court's jurisdiction to appoint additional

liquidators to cases where the current liquidators make such an application themselves. In my judgment, that argument fails. It would lead to the jurisdiction of the court to appoint an additional liquidator being dependent upon the identity of the applicant to the application for no logical reason. All parties accepted that I could give directions to Mr Murphy in the event that I determined that the court did not have jurisdiction to appoint an additional liquidator. As I canvassed during the court hearing, I could direct the current liquidator, Mr Murphy, to make an application pursuant to section 112 IA 86 for the appointment of an additional liquidator. Such a direction would be in accordance with *Comet Group*.

44. As is clear from paragraph 118 of the judgment in *Comet Group*, the Judge raised the issue whether the ICAEW was able to be the applicant of an application for the appointment of an additional liquidator pursuant to sections 108/112 IA 86. Whilst the judge considered that they had standing, he determined instead to direct the current liquidators to make that application. The Judge's remark that the current liquidators were the applicants to the section 112 application before the Judge did not mean, in my judgment, that the jurisdiction to make the direction in *Comet Group* was restricted to cases where the liquidators were the applicants before the court rather than cases where the liquidators were before the court as respondents. In *Comet Group*, the liquidators were applicants to a section 112 application brought by them seeking different directions to the one directed by the Judge.

45. No justification appears for such a restriction in the ability to appoint an additional liquidator and I do not read *Comet Group* as making such a distinction. As my example about the alleged dishonest liquidator demonstrates, the applicant to an application to remove and replace is unlikely to be the alleged dishonest liquidator. The appointment of an additional liquidator in all the cases which I have referred to above relates to the court being able to protect those who have an interest in the relevant estate. That protection may well be needed against the current liquidators and their actions

and the jurisdiction therefore cannot be restricted to only those cases where the liquidators are applicants to an application currently before the court.

46. Mr Morgan also sought to draw a distinction between the type of cases where the jurisdiction to appoint an additional liquidator can exist. This would accept that the jurisdiction exists for certain cases, such as in *Comet Group,* and in *Udal* but not on the facts of the case before me. I can see little difference between the conflicts issues raised in *Re York Gas* and *Comet Group* and the conflicts issues raised in the case before me. The difficulty with that type of distinction, in my judgment, is that it is reliant upon the court having to make findings as to the nature of the case before it in order to determine whether the jurisdiction to appoint exists. In many cases, such a fact finding exercise is inappropriate at an interim stage in proceedings. In the case before me, Mr Murphy has yet to reply to the serious allegations made, but on the facts of the case as existed before the Judge on 15 November 2024, the appointment of an additional liquidator was determined to be appropriate as 'holding the ring' until the hearing of the application and/or the preliminary issue. In my judgment, either the jurisdiction to appoint an additional liquidator exists or it does not. The facts are important in order for the court to determine whether to exercise the jurisdiction but not to define whether the jurisdiction exists at all on the facts of a particular case.

47. In conclusion, in my judgment, the court does have jurisdiction to appoint an additional liquidator. This jurisdiction arises pursuant to section 108 IA 86 as set out in *Clements v Udal*. In my judgment, in a case where a serious conflict has been raised, it is arguable that the current liquidator may be unable to carry out his functions. The ability to appoint a 'conflict liquidator' under this provision also appears in *Re York Gas* even though I accept less weight should be given to that case for the reasons set out above. Furthermore, the jurisdiction is also exercisable pursuant to section 112 IA 86 as exemplified in

Comet Group. That was another case relating to what was alleged to be serious conflicts which notably were not determined by the Judge before he gave the directions to the current liquidators to apply for the appointment of an additional liquidator. His reasoning is set out clearly in paragraph 118 of his judgement which I gratefully adopt. This demonstrates that the exercise of the jurisdiction does not require the facts of each case to be determined before the court can exercise the jurisdiction. In my judgment, the court has an inherent jurisdiction to appoint an additional liquidator in so far as particular cases do not fall under section 108 or section 112. It seems to me that the example I gave to counsel is apposite here. The court's inherent jurisdiction enables the court to appoint an additional liquidator in circumstances where such an appointment is necessary and appropriate by way of interlocutory relief in order to protect those with a legitimate interest. On the facts of the case before me, as I have already set out, as a contingent creditor, the Applicants seek relief so as to protect their position as creditors of what they assert is an insolvent company and/or enable their claim to be dealt with in the event that the company is solvent. In other cases, such as *Comet Group*, the appointment of an additional liquidator can also be viewed as being made under the court's inherent jurisdiction for the reasons set out in paragraph 118 of the judgment. I do not consider that the existence of such an inherent jurisdiction is contradicted by section 108 or 112 IA 86. An inherent jurisdiction is not restricted to only cases where the court has a supervisory jurisdiction over the relevant office holders, such as compulsory liquidations. In both compulsory liquidations as well as voluntary liquidations, there is a power to apply to the court to remove and replace a liquidator. In all types of liquidations, the court may well consider that some interlocutory relief is necessary, appropriate and in the interests of justice pending the determination of the application, or as in *Comet Group,* to be able to deal with a conflict issue.

48. For the reasons set out above, the court has jurisdiction to appoint an additional liquidator.