



Neutral Citation Number: [2020] EWCA Civ 759

Case No: A3/2019/0831

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (ChD)**  
**Mr Stuart Isaacs QC (sitting as a Deputy Judge of the Chancery Division)**  
**[2019] EWHC 675 (Ch)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/06/2020

**Before:**

**LORD JUSTICE NEWEY**  
**LORD JUSTICE MALES**  
and  
**LORD JUSTICE PHILLIPS**

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**Between:**

**BRIDGEHOUSE (BRADFORD NO. 2) LIMITED**  
**- and -**  
**BAE SYSTEMS PLC**

**Appellant**

**Respondent**

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**Mr David Lord QC and Mr Sebastian Kokelaar (instructed by Richard Slade and Company PLC) for the Appellant**  
**Miss Fiona Parkin QC and Mr Patrick Harty (instructed by Ashurst LLP) for the Respondent**

Hearing date: 6 May 2020  
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**Approved Judgment**

## **Lord Justice Newey:**

1. In a judgment dated 21 March 2019, Mr Stuart Isaacs QC (“the Judge”), sitting as a Deputy Judge of the Chancery Division, concluded that an application by the appellant, Bridgehouse (Bradford No.2) Limited (“BB2”), for relief pursuant to section 1028(3) of the Companies Act 2006 (“the 2006 Act”) should be stayed pursuant to section 9 of the Arbitration Act 1996 (“the 1996 Act”). BB2 now challenges that decision on the basis that, first, the relevant arbitration clause does not extend to its claim for relief under section 1028(3) and, secondly, such matters are not in any event susceptible to arbitration.

## **Basic facts**

2. On 20 December 2012, the respondent, BAE Systems plc (“BAE”), entered into a contract (“the Contract”) with BB2 under which BAE was to procure the sale to BB2 of two parcels of land for sums totalling £93 million. Completion was to take place between 21 January 2020 and 1 July 2022. BB2 was incorporated specifically for the purpose of entering into the Contract and has no other business or assets.
3. Clause 19.1(a) of the Contract was to apply if “any dispute arises between the parties to this agreement arising out of the provisions of this agreement”. Where such a dispute remained unresolved, either party could ask that it be referred to an “Independent Person”. By clause 19.2:

“Unless expressly stated otherwise in this agreement or agreed otherwise by the parties the Independent Person is to act as arbitrator in accordance with the Arbitration Act 1996 ....”

4. Clause 20.1 of the Contract stated that, if BB2 suffered an “Event of Default”, BAE was to be able to determine the Contract by notice in writing to BB2. By clause 20.2, an “Event of Default” would occur if BB2 suffered, among other things, “being struck off the Register of Companies or being dissolved or ceasing for any reason to retain its corporate existence”. Clause 20.3 provided for the Contract to determine immediately if notice was served pursuant to clause 20.1.
5. Clause 27 addressed “Governing law and jurisdiction”. Clause 27.1 provided for the agreement and any dispute to be governed by and construed in accordance with English law. Clause 27.2 stated:

“Each party to this agreement irrevocably agrees that the courts of England shall have exclusive jurisdiction to hear and decide any suit action or proceedings and/or to settle any disputes which may arise out of or in any way relate to this agreement or its formation (including any non-contractual disputes or claims) and for these purposes each party irrevocably submits to the exclusive jurisdiction of the courts of England.”

6. On 15 March 2016, the Registrar of Companies sent a notice to BB2 pursuant to section 1000(3) of the 2006 Act informing it that, unless cause was shown to the contrary, the company would be struck off the register and dissolved after two

months. At the time, BB2 was late in filing its accounts and annual return for the year ended 31 December 2015.

7. The notice was sent to BB2's registered office, which, however, was the address of a firm of solicitors which had ceased to act for BB2. For this reason, it seems, the notice did not come to BB2's attention and the company was struck off the register and dissolved on 31 May 2016. On 2 June, BAE gave notice to determine the Contract under clause 20.1.
8. On 24 June 2016, an application for "administrative restoration" of BB2 to the register was made to the Registrar of Companies pursuant to section 1024 of the 2006 Act. The application was successful, with the result that BB2 was restored to the register on 28 July.
9. On 1 November 2016, BAE issued proceedings in the Chancery Division in which it sought a declaration that the Contract had been validly terminated. BB2 having, however, applied for a stay pursuant to section 9 of the 1996 Act, BAE instead initiated arbitration proceedings under clause 19 of the Contract. Mr John V. Redmond ("the Arbitrator") was appointed as the sole arbitrator by the President of the Law Society.
10. In an award dated 14 June 2018, the Arbitrator determined that the Contract had been validly terminated by the notice of 2 June 2016. In arriving at that conclusion, the Arbitrator rejected, among others, a contention by BB2 that any effective termination had to be reassessed retrospectively as a result of BB2's restoration to the register by virtue of section 1028(1) of the 2006 Act. The Arbitrator considered that section 1028(1) did not serve to undo an action taken by a party to the Contract in the period between striking off and restoration.
11. BB2 did not seek to invoke section 1028(3) of the 2006 Act in the arbitration. It stated in its statement of rejoinder that if, contrary to its primary position, section 1028(1) did not have the effect of automatically reviving the Contract, it reserved the right to make an application to the Court for relief under section 1028(3). In a similar vein, its written opening submissions for the arbitration contained this:

"If, contrary to the submissions above, (a) it were permissible to contract out of the deeming provisions of section 1028(1) and (b) it is held that the parties have done so, BB2 reserves the right to make an application pursuant to section 1028(3) for directions that they and BAE be placed in the same position as if the company had not been dissolved or struck off the register."
12. On 11 July 2018, BB2 issued an appeal against the Arbitrator's award. One of the grounds of appeal was that the Arbitrator was mistaken as to the effect of section 1028(1) of the 2006 Act. On 11 July 2019, however, Cockerill J dismissed the appeal. She concluded that the Arbitrator had been correct to conclude that BAE's termination of the Contract did not fall to be reassessed retrospectively as a result of section 1028(1).

13. Cockerill J refused permission to appeal from her decision. As the proceedings before her were an appeal under section 69 of the 1996 Act, that refusal was final unless BB2 could satisfy the heavy burden of showing that the refusal “has come about as a result of unfair or improper process such that the decision to refuse permission cannot be categorised as a refusal at all” (*Bunge SA v Kyla Shipping Co Ltd* [2013] EWCA Civ 734, [2013] 2 Lloyd’s Rep 463). BB2 attempted to do so but Hamblen LJ refused permission to appeal on 14 November 2019, finding that the application was totally without merit.
14. In the meantime, BB2 had on 3 August 2018 issued a claim in the Chancery Division seeking relief under section 1028(3) of the 2006 Act. The claim form asked for an order that BAE’s termination of the Contract “is of no effect” or, in the alternative, “an order that [BAE] enter into a new agreement with [BB2] on the same terms as those contained in the [Contract]” and “Such further or other relief as the Court considers just for placing [BB2] and [BAE] in the same position as if [BB2] had not been struck off the register of companies and dissolved on 31 May 2016”.
15. On 4 September 2018, BAE applied for BB2’s claim to be stayed and it was this application which came before the Judge. Although BAE had put forward other justifications for a stay in its application notice, it relied at the hearing solely on section 9 of the 1996 Act.
16. Giving judgment on 21 March 2019, the Judge acceded to BAE’s application. BB2 had argued that its claim is not within the scope of clause 19.1(a) of the Contract and that, were that wrong, “the arbitration agreement is ‘inoperative’ within the meaning of section 9(4) of the 1996 Act on the grounds that the parties’ dispute is not capable of being settled by arbitration, because the Act impliedly prohibits or English public policy prohibits the reference to arbitration of such matters, and that BAE is estopped from relying on the arbitration agreement” (paragraph 14 of the judgment). The Judge, however, rejected those contentions and stayed the claim. He held, first, that the claim involves a dispute between the parties which arises out of the provisions of the Contract and so is a matter which falls to be referred to arbitration under clause 19.1(a) of the Contract (see paragraph 19 of the judgment); secondly, that the arbitration agreement is not “inoperative” within the meaning of section 9(4) of the 1996 Act on the basis that the parties’ dispute is not capable of being settled by arbitration (see paragraphs 30-34 of the judgment); and, thirdly, that BAE is not estopped from relying on clause 19.1(a) (see paragraph 42 of the judgment).
17. BB2 now appeals against the stay ordered by the Judge. It challenges the Judge’s conclusions as to, first, the applicability of clause 19.1(a) of the Contract and, secondly, whether the parties’ dispute is capable of being settled by arbitration. It was refused permission to appeal on the estoppel point.

### **Restoration to the register and its consequences**

18. A company may be removed from the register either following liquidation/administration or because the Registrar of Companies has struck it off. Since 1995, a company has itself been able to make a formal application for its name to be struck off the register. Striking off may also occur at the instigation of the Registrar. If the Registrar has reasonable cause to believe that a company is not carrying on business or in operation (notably, as a result of failure to file requisite

documentation with the Registrar), he may send the company a letter inquiring whether it is carrying on business or in operation and, in the absence of an answer, a further letter warning of striking off. If the company fails to reply or agrees that it is not carrying on business or in operation, the Registrar may issue a notice stating that, unless cause is shown to the contrary, the company's name will be struck off the register after two months.

19. Before 2006, there were two routes to restoration. First, section 651 of the Companies Act 1985 ("the 1985 Act") empowered the Court to make an order, on such terms as it thought fit, declaring a company's dissolution to have been void. Secondly, section 653 of the 1985 Act allowed the Court to order the name of a company which had been struck off the register to be restored if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it was just that the company should be restored to the register. By virtue of section 653(3), where a company was restored to the register under section 653 it was "deemed to have continued in existence as if its name had not been struck off" and the Court could "give such directions and make such provisions as seem just for placing the company and all other persons in the same position (as nearly as may be) as if the company's name had not been struck off".
20. Case law established that restoration under section 651 of the 1985 Act had significantly different consequences from restoration under section 653. In *Morris v Harris* [1927] AC 252, the House of Lords held by a majority that an order made under a predecessor of section 651 did not affect the validity of proceedings taken during the interval between dissolution and restoration. Lord Blanesburgh, one of the majority, said at 269:

"The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity."

In contrast, restoration under section 653 operated retrospectively. In *Tyman's Ltd v Craven* [1952] 2 QB 100, Hodson LJ concluded at 126 that the words of section 353(6) of the Companies Act 1948 (the second half of which corresponded to the later section 653(3) of the 1985 Act) were "clearly designed to produce an 'as you were' position, and ... that the latter part of the subsection is complementary and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost". He continued:

"An example of this would be a case where a company had lost an opportunity of obtaining a concession or renewing a lease during the interval between its dissolution and an order under the subsection. A provision in the order could deal with such a case. That the last four lines of the subsection do not cut down the retroactive effect of that which precedes them is, to my mind, indicated by the introductory words 'and the court may by the order.' The directions and provisions to be made by the order would naturally be supposed to make good what had

previously been stated, namely, that the company should be deemed to have continued in existence as if the name had not been struck off.”

Taking the same view, Evershed MR, the other Judge in the majority, said at 111 that, “If on the power contained in the final words of the subsection in question to insert special directions in the order of resuscitation depended the validation of all the multifarious engagements into which the dissolved company might have entered during the period of its statutory suspense”, “Prima facie, all the third parties concerned would have to be given an opportunity of making representations to the court, a proceeding which I find it well-nigh impossible to contemplate”.

21. Munby LJ referred to the differing implications of restoration under section 651 of the 1985 Act, on the one hand, and section 653, on the other, in *Joddrell v Peaktone Ltd* [2012] EWCA Civ 1035, [2013] 1 WLR 784. He said in paragraph 29:

“What emerges is the clear distinction between the consequences of the order depending upon whether the order was made pursuant to section 651 of the 1985 Act or its statutory predecessors or pursuant to section 653 of the 1985 Act or its statutory predecessors. In the first case, the order had no retrospective effect except to restore the company’s corporate existence. It did not validate any actions or activities that had taken place during the period of dissolution. In particular it did not restore to life an action which, having been commenced before the company was dissolved, had abated on the company’s dissolution, nor did it bring to life an action which, purportedly commenced while the company was dissolved, was a nullity. In the other case, by contrast, the effect of the deeming provision was to validate retrospectively what had happened while the company was dissolved, so that once the restoration order was made the company was to be regarded as never having been dissolved.”

22. In its *Modern Company Law: For a Competitive Economy - Final Report* (2001), the Company Law Review Steering Group proposed that the two routes for restoring companies to the register (under sections 651 and 653 of the 1985 Act respectively) should be combined and that “the resultant single statutory procedure for restoration should produce a result similar to that currently provided in section 653(3) where ‘the company is deemed to have continued in existence as if its name had not been struck off’” with, in addition, “a discretion to the court to make appropriate orders ‘as seem just’ to put the company and all other parties involved as nearly as possible in the same position as if the company’s name had not been struck off” (see paragraph 11.17). The report further recommended “a new procedure of ‘administrative restoration’” under which a company which had been struck off by the Registrar of Companies could be restored by the Registrar without any Court order.
23. In keeping with the Company Law Review Steering Group’s recommendations, the 2006 Act both introduced “administrative restoration” and provided for a single route to restoration by the Court. With regard to the former, section 1024 of the 2006 Act allows a former director or member of a company that has been struck off the register

to apply to the Registrar of Companies for the company to be restored if the company was carrying on business or in operation at the time of its striking off, the Crown's representative has signified consent and filing deficiencies have been remedied (see section 1025). The effect of administrative restoration is explained in section 1028, which states:

“(1) The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.

...

(3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.

(4) An application to the court for such directions or provision may be made any time within three years after the date of restoration of the company to the register.”

24. Section 1029 of the 2006 Act provides for applications to the Court for restoration to the register. The section applies both where the company was dissolved (or deemed to be dissolved) after winding up or administration and where it was struck off. An application can be made by a wide range of people, including “any other person appearing to the court to have an interest in the matter” (see section 1029(2)). Under section 1031, the Court may order restoration if, among other things, the company was carrying on business or in operation when it was struck off or “the court considers it just to do so”. Section 1030 stipulates that an application may not generally be made more than six years after the date of dissolution.

25. Section 1032 of the 2006 Act deals with the effect of a Court order for restoration to the register. So far as material, it reads:

“(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.

...

(3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.

....”

26. Section 1032(3) and its predecessors have been used, in particular, to make “limitation directions” providing for the running of time for limitation purposes to be suspended for all or part of the period during which a company was dissolved. The

first reported case in which such a direction was made was *Re Donald Kenyon Ltd* [1956] 1 WLR 1397. *Hawkes v County Leasing Asset Management Ltd* [2015] EWCA Civ 1251, [2016] 2 BCLC 427 confirms that a limitation direction can potentially be given in favour of a restored company, but such directions are more commonly made at the behest of companies' creditors.

27. As is noted in paragraph 1620 of *Buckley on the Companies Acts*, "Persons whose rights may be affected by a special direction should be added as parties to the proceedings". In *Regent Leisuretime Ltd v NatWest Finance* [2003] EWCA Civ 391, [2003] BCC 587, the Court of Appeal held that third parties who would be prejudiced by a limitation direction sought by a company under section 653(3) of the 1985 Act were entitled to be heard. Jonathan Parker LJ said in paragraph 87:

"just as the company (in its capacity as the applicant for the restoration order) is entitled to be heard in opposition to the imposition of a limitation direction in favour of third party creditors, by the same token third parties who would be prejudiced by a limitation direction sought by the company must also be entitled to be heard in opposition to it".

### **The Arbitration Act 1996**

28. The order now under appeal was made pursuant to section 9 of the 1996 Act. Section 9(1) allows a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration to apply to the Court in which the proceedings have been brought for the proceedings to be stayed so far as they concern that matter. Section 9(4) stipulates that the Court is to accede to such an application "unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed".
29. There was reference in argument to three further provisions of the 1996 Act: sections 1, 46 and 48.
30. So far as relevant, section 1 of the 1996 Act provides:

"The provisions of this Part are founded on the following principles, and shall be construed accordingly—

...

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

...."

31. By section 46(1) of the 1996 Act, an arbitral panel is to decide a dispute:
- "(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or



(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.”

32. Section 48 of the 1996 Act deals with remedies. It provides:

“(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.

(2) Unless otherwise agreed by the parties, the tribunal has the following powers.

(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.

(4) The tribunal may order the payment of a sum of money, in any currency.

(5) The tribunal has the same powers as the court—

(a) to order a party to do or refrain from doing anything;

(b) to order specific performance of a contract (other than a contract relating to land);

(c) to order the rectification, setting aside or cancellation of a deed or other document.”

### The issues

33. The present appeal gives rise to two issues:

- i) Does clause 19.1(a) of the Contract apply to BB2’s claim for relief under section 1028(3) of the 2006 Act?
- ii) Is that application in any event incapable of being settled by arbitration?

34. I shall take these issues in turn.

### Issue (i): Applicability of clause 19.1(a)

35. Clause 19.1(a) of the Contract is expressed to apply if “any dispute arises between the parties to this agreement arising out of the provisions of this agreement”.

36. Mr David Lord QC, who appeared for BB2 with Mr Sebastian Kokelaar, argued that there is no longer such a dispute in the present case. BB2’s appeal from the Arbitrator’s award having been dismissed, it has been definitively decided that the Contract was validly terminated according to its terms. What is now at issue between the parties does not arise out of the provisions of the Contract but is rather a question of whether relief should be granted pursuant to statute. Mr Lord pointed out that directions under section 1028(3) of the 2006 Act are in principle capable of affecting third parties. That, he said, makes it inherently unlikely that clause 19.1(a) was

intended to apply to matters relating to the grant of relief under section 1028(3). Mr Lord relied, too, on clause 27.2 of the Contract. That clause, he noted, adopted a wider formulation than clause 19.1(a), providing for the English Courts to have jurisdiction in relation to “any disputes which may arise out of or in any way relate to this agreement or its formation (including any non-contractual disputes or claims)”. The contrast with clause 19.1(a) confirms, Mr Lord suggested, that clause 19.1(a) should not be construed so widely as to encompass relief under section 1028(3): it can be seen that the parties envisaged that some matters, including issues as to the grant of section 1028(3) relief, would fall outside the scope of clause 19.1(a) and be determined not by arbitration, but by the Courts.

37. In *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, however, the House of Lords deprecated distinctions that had been drawn in earlier cases when considering arbitration clauses. Lord Hoffmann observed in paragraph 12 that such distinctions “reflect no credit upon English commercial law” and went on to say this in paragraph 13:

“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction. As Longmore LJ remarked, at [17]: ‘[i]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.’”

Agreeing, Lord Walker said in paragraph 37 that Lord Hoffmann’s opinion “marks a fresh start, leaving behind some fine verbal distinctions (on the language of particular arbitration clauses) which few commercial men would regard as significant”.

38. Mr Lord argued that *Fiona Trust* is of little relevance to the present case since clause 27.2 of the Contract shows that the parties did not intend *every* dispute arising out of their relationship to be decided by an arbitrator. To my mind, however, it cannot be inferred from the existence of clause 27.2 that clause 19.1(a) should be understood to be of more limited application than it would otherwise be taken to have. Construing clause 19.1(a) in accordance with the presumption which Lord Hoffmann identified does not deprive clause 27.2 of a role. Apart from anything else, it ensures that the English Courts have jurisdiction over issues arising from an arbitration or expert determination. (An “Independent Person” can potentially act as an expert rather than an arbitrator under clause 20 of the Contract.)
39. Nor do I consider that the possibility of directions under section 1028(3) of the 2006 Act affecting third parties lends any real support to Mr Lord’s case. Very often, an application under section 1028(3) will be of no significance to anyone but the immediate parties. If in a particular case third party interests are engaged, that may have implications for the relief that an arbitrator can grant. I do not think, however, that the fact that relief under section 1028(3) can potentially have an impact on third

parties indicates that disputes as to the application of section 1028(3) do not fall within clause 19.1(a) at all.

40. In my view, the Judge was right that clause 19.1(a) applies to BB2's claim for relief under section 1028(3). The dispute between BB2 and BAE as to whether relief should be granted under section 1028(3) can aptly be described as "arising out of the provisions of" the Contract. After all, BB2 needs such relief only because BAE has invoked clause 20 of the Contract and the question whether there should be such relief is intimately connected with, for example, the effect of section 1028(1), which was admittedly within the arbitrator's remit. True it is that it has been now established that the Contract was validly terminated according to its terms, but that cannot be determinative. In fact, it is common for arbitrations to be concerned with contracts that have already been brought to an end, for example by accepted repudiation or frustration (and see also section 7 of the 1996 Act providing for the separability of an arbitration clause). The fact, moreover, that the present dispute relates to whether relief should be given pursuant to a statute does not mean that it does not also "aris[e] out of the provisions of" the Contract. Further, there is no question of the Contract "mak[ing] it clear" that questions as to relief under section 1028(3) were intended to be excluded from the arbitrator's jurisdiction, which suggests that clause 19.1(a) should be presumed to apply in accordance with the guidance given in the *Fiona Trust* case.
41. In short, it seems to me that the first ground of appeal fails.

### **Issue (ii): Arbitrability**

#### *The parties' submissions in brief outline*

42. Mr Lord submitted that applications for relief under section 1028(3) of the 2006 Act are not arbitrable. They engage public interest factors which render them unsuited to arbitration. Section 1028(3), like its counterpart section 1032(3), mirrors predecessor powers which have long existed to protect the public interest. That the public interest is involved is reflected in the fact that, under section 1028(3) and section 1032(3), it is "the court" which Parliament has tasked with granting relief and doing so, moreover, having regard to the position of the company and "all other persons". No one could suggest that an application to restore a company to the register under section 1029 could be determined by arbitration and the grant of relief under section 1032(3) is clearly ancillary to such an application and so must equally fall to be decided by the Court. Likewise, an application under section 1028(3) is not susceptible to arbitration. It cannot be supposed that the grant of relief under section 1032(3) cannot be the subject of arbitration but the grant of relief under section 1028(3) can be. There is no sensible basis for treating the two provisions differently.
43. For her part, Miss Fiona Parkin QC, who appeared with Mr Patrick Harty for BAE, supported the Judge's conclusion. The modern approach is to respect party autonomy and so to give effect to an arbitration clause unless there is a very strong reason not to do so. There is no such reason in the present case. Arbitration is prohibited neither by the terms of section 1028(3) of the 2006 Act nor by public policy. There is a close analogy to *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] Ch 333, where arbitration was held to be available in the context of a petition for relief under section 994 of the 2006 Act. That case shows that the fact that a

statutory power is given to “the court” does not mean that an arbitrator does not have a similar power and public policy has a role only as a “safeguard ... necessary in the public interest”, which represents a “demanding test”. If (which would be rare) a direction under section 1028(3) could affect a third party, that might limit the relief available in an arbitration. However, the present case involves a private dispute about whether a contract does, or should, exist, affecting no one other than the parties. There is every reason for any issue as to the grant of relief under section 1028(3) to be determined by the same tribunal as other issues relating to BAE’s purported termination of the Contract, and it is not disputed that the arbitrator has power to grant the heads of relief which BB2 seeks. An issue as to the grant of relief under section 1032(3) could similarly be the subject of arbitration.

Case law

44. V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, said this about the “presumption of arbitrability” and its limits in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21, [2011] 3 SLR 414:

“44. The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute’s text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

45. A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company’s creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company’s pre-insolvency management had the ability to restrict the avenues by which the company’s creditors could enforce the very statutory remedies which were meant to protect them against the company’s management. It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.

46. We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."

45. In *Fulham Football Club (1987) Ltd v Richards*, the Court of Appeal (Rix, Longmore and Patten LJ) upheld an order staying an unfair prejudice petition presented under section 994 of the 2006 Act. The petition sought an injunction restraining the first respondent from acting as an unauthorised agent or from participating in negotiations regarding the transfer of players or, in the alternative, an order that the first respondent should cease to be the chairman of the second respondent. It was not disputed that an arbitrator would have power to grant such relief, but the petitioner maintained that unfair prejudice disputes were not arbitrable. The petitioner's position was essentially that "any unfair prejudice claim under section 994 attracts a degree of state intervention and public interest such as to make it inappropriate for disposal by anything other than judicial process" (see paragraph 50). When considering the point, Patten LJ explained at paragraph 27:

"one has to be looking for a statutory provision or a rule of public policy which has the effect of rendering the arbitration agreement either void or unenforceable in so far as it purports to bind the parties to an arbitral determination of the section 994 issues".

46. Patten LJ noted in paragraphs 74 and 76 that "many aspects" of the statutory regime governing companies "are immune from interference by the members of the company whether by contract or otherwise" and, in particular, that a winding up order "lies within the exclusive jurisdiction of the court and the discretion as to whether or not to make that order is for the court, not the arbitrator to exercise". However, section 994 of the 2006 Act does not afford a class remedy but is "designed to resolve issues of unfair prejudice without the winding up of the company" and deals with "essentially internal disputes about alleged breaches of the terms or understandings upon which the parties were intended to co-exist as members of the company" (paragraph 58). Moreover, "the limitation which the contractual basis of arbitration necessarily imposes on the power of the arbitrator to make orders affecting non-parties is not necessarily determinative of whether the subject matter of the dispute is itself arbitrable" (paragraph 40). In paragraph 61, Patten LJ said:

"I accept, of course, that some of the relief which can be granted under section 996 is capable of affecting third parties: eg orders for the regulation of the company's affairs or restraints upon its power to make alterations in its articles. Orders of this kind will inevitably impact on other shareholders who can be joined to court proceedings for the purpose of being bound by any order. But that does not make a section 994

petition an application for a class remedy. What it may, however, do is to impose limitations on the scope of relief obtainable in arbitral proceedings.”

47. Patten LJ’s conclusions can be seen from this passage from his judgment:

“77. The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA rules would have the power to grant the specific relief sought by Fulham in its section 994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. Nor does the determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders’ agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties. The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL rules in relation to the transfer of a Premier League player.

78. ... The statutory provisions about unfair prejudice contained in section 994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted.”

48. In his judgment, Longmore LJ concluded, first, that the 2006 Act does not either expressly or impliedly prohibit reference to arbitration of matters arising on an unfair prejudice petition and, secondly, that public policy does not prohibit or invalidate an agreement to refer such matters to arbitration. With regard to the former, Longmore LJ said this in paragraph 96:

“It is true that section 994(1) empowers a company member ‘to apply to the court by petition’ and section 996(1) provides that ‘if the court is satisfied that a petition ... is well-founded, it may make such order as it thinks fit for giving relief’. But the fact that a statutory power, which a court would not have at

common law apart from the statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power.”

In relation to the second point, Longmore LJ said:

“98. It is this question that is at the heart of the appeal and I would, for my part, derive some guidance from the principle set out in section 1(b) of the 1996 Act namely ‘the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest’. To the extent therefore that public policy has a part to play it can only be as a ‘safeguard ... necessary in the public interest’.

99. This is a demanding test and I cannot see that it is necessary in the public interest that agreements to refer disputes about the internal management of a company should in general be prohibited; nor can I see any reason why it is necessary to prohibit arbitration agreements to the extent that they, in particular, apply to disputes whether a company’s affairs are being (or have been) conducted in a manner unfairly prejudicial to the interests of its members.”

Longmore LJ also said this in paragraph 103:

“It is well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect: see *Société Commerciale de Réassurance v Eras International Ltd (formerly Eras (UK))* [1992] 1 Lloyd's Rep 570, 610. The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved.”

49. The third member of the Court, Rix LJ, expressed agreement with both Patten LJ and Longmore LJ and, discounting doubts about the point that had been voiced by Patten LJ, shared Longmore LJ’s view as to the significance of section 1(b) of the 1996 Act. Rix LJ said in paragraph 107:

“I do not myself see why the autonomy of the parties to which the subsection gives primacy (subject to such safeguards as are necessary in the public interest) should not apply to the choice to arbitrate, ie to resolve their disputes by arbitration, as well as to the manner in which an arbitration is conducted. It seems to me that ‘how the disputes are resolved’ involves the former as well as the latter.”

50. The Singapore Court of Appeal arrived at similar conclusions in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, [2016] 1 SLR 373, holding that a dispute as to whether relief should be granted under section 216 of the Singapore Companies Act for oppressive or unfairly prejudicial conduct was arbitrable. Giving the judgment

of the Court, Sundaresh Menon CJ said at paragraph 103 that “an arbitral tribunal’s inability to grant certain reliefs which may be sought would not in itself render the subject matter of the dispute non-arbitrable”. Sundaresh Menon CJ noted in paragraph 97 that “[t]here are, of course, boundaries to an arbitral tribunal’s power to grant relief even if the parties agree to it”, including “public policy considerations and situations which engage the rights of third parties who are not bound by the arbitration agreement in question”. He considered, however, that “[t]he fact that the relief sought might be beyond the power of the tribunal to grant does not in and of itself make the subject matter of the dispute non-arbitrable” (paragraph 98) and went on to say in paragraph 100:

“Conceptually, there is nothing to preclude the underlying dispute from being resolved by an arbitral tribunal, with the parties remaining free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal to award. In so far as any findings have been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court.”

51. The Court was undeterred by concerns that had been expressed about procedural complexity. Sundaresh Menon CJ noted in paragraph 105 that “there will be a measure of procedural complexity whenever a dispute involving some common parties and issues has to be resolved before two different fora by virtue of the fact that only part of the dispute falls within the scope of the applicable arbitration clause”, but said that such procedural difficulties did not render the dispute non-arbitrable. He concluded paragraph 105 with this:

“To put it simply, procedural difficulties fall short of the statutory criterion for non-arbitrability, which is a finding that to enforce the obligation to arbitrate would be contrary to public policy in view of the subject matter of the dispute in question.”

52. It is also relevant to mention *Wealands v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30. In that case, a contractor against whom proceedings had been brought issued third party proceedings seeking indemnity or contribution from a sub-contractor. The Court of Appeal held that the claim against the sub-contractor had been rightly stayed under section 9 of the 1996 Act. One of the issues which the Court had to consider was whether the arbitration clause in question covered the contractor’s claim for contribution under the Civil Liability (Contribution) Act 1978, which provides for the amount of the contribution recoverable from any person to be “such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question”. It was argued on behalf of the contractor that “the power to award contribution was confined by the 1978 Act to the court” and so “it would not be open to parties, even by agreement, to confer on an arbitration tribunal power to award contribution in circumstances in which a court would have such power under the 1978 Act” (see paragraph 17). Mance LJ, with whom Nourse and Mantell LJJ agreed, rejected that suggestion “unequivocally” in paragraph 17, commenting that it “runs contrary to the principles of party autonomy enshrined in the 1996 Act” and continuing in paragraph 18:



“It is true that the 1978 Act refers only to the court, but there is nothing in it to prevent parties to an arbitration agreement agreeing between themselves upon the application of the principles of the 1978 Act.”

53. Mance LJ did not accept, either, that jurisdiction to award contribution could be conferred on an arbitrator only by clear words. He cited in this connection *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 and *President of India v La Pintada Compania Navigacion SA* [1985] AC 104. In *Chandris*, an arbitrator was held to have power to award interest notwithstanding the fact that section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 spoke of “the court” having such a power in proceedings tried in a “court of record” on the basis that an arbitrator is impliedly given power to exercise “every right and discretionary remedy given to a court of law” (see *Wealands*, at paragraph 22). In *President of India*, Lord Brandon said at 119 that, where parties refer a dispute to arbitration in England, “they impliedly agree that the arbitration is to be conducted in accordance in all respects with the law of England, unless, which seldom occurs, the agreement of reference provides otherwise”, referring to *Chandris* as a case where it was held that arbitrators were “empowered, by the agreement of reference, to apply English law, including so much of that law as is to be found in section 3(1) of the Act of 1934”. Mance LJ considered that “the analysis must also apply with reference to the statutory right to contribution under the 1978 Act” (see paragraph 24).
54. That said, Mance LJ considered that, were it the case that the arbitrator lacked power to award contribution, that would not preclude the grant of a stay. He said in paragraph 21:

“There is nothing in the 1978 Act to prevent parties foregoing by agreement any right which they might otherwise have to seek contribution. If (as the defendant, in the present forensic context, submits) an arbitrator appointed under cl 18(1) would lack the power to award contribution, that is the consequence of the parties having agreed to submit their disputes to arbitration. It is not a reason for refusing a stay. Nor does it provide any basis for treating one aspect of their dispute, that involving any claim for contribution which the defendant wishes to pursue, as falling outside the scope of the arbitration clause or reserved to the court.”

### Analysis

55. When considering the arbitrability of applications for relief under section 1028(3) of the 2006 Act, it is necessary to consider both whether the 2006 Act prohibits the reference to arbitration of such matters and whether arbitration is precluded by public policy considerations.
56. So far as the former is concerned, it is clear, I think, that the 2006 Act does not itself, either expressly or by implication, prohibit reference to arbitration of matters arising on an application for relief under section 1028(3) of the 2006 Act. The fact that section 1028(3) speaks of “the court” granting relief does not carry that implication. Echoing Mance LJ in *Wealands v CLC Contractors Ltd*, Longmore LJ pointed out in

*Fulham Football Club (1987) Ltd v Richards* that “the fact that a statutory power, which a court would not have at common law apart from the statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power”.

57. Turning to public policy considerations, it is of significance that the parties chose to enter into an arbitration agreement which, as I have said, I consider to apply to BB2’s claim for relief under section 1028(3) of the 2006 Act. Section 1(b) of the 1996 Act explains that the Act is founded on, among others, the principle that “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest” and in the *Fulham* case Rix LJ, agreeing with Longmore LJ, could “not ... see why the autonomy of the parties to which the subsection gives primacy (subject to such safeguards as are necessary in the public interest) should not apply to the choice to arbitrate, ie to resolve their disputes by arbitration, as well as to the manner in which an arbitration is conducted”. Mance LJ had likewise noted “the principles of party autonomy enshrined in the 1996 Act” in *Wealands*. Party autonomy is “subject to such safeguards as are necessary in the public interest”, but that is a “demanding test”, in Longmore LJ’s words in *Fulham*.
58. It remains the case, as Patten LJ noted in *Fulham*, that “many aspects” of the statutory regime governing companies “are immune from interference by the members of the company whether by contract or otherwise”. Patten LJ observed that a winding up order “lies within the exclusive jurisdiction of the court”. There can be no question, either, of an application for restoration to the register under section 1029 of the 2006 Act being susceptible to arbitration. Such matters do not merely involve private disputes but status and potentially have implications far beyond the company and any particular counterparty. There may be room for argument, too, as to whether, as the Singapore Court of Appeal considered in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*, “The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement”. In that regard, the views expressed by V K Rajah JA in *Larsen* can be contrasted with those voiced by Males LJ in *Nori Holding Ltd v PJSC ‘Bank Otkritie Financial Corpn’* [2018] EWHC 1343 (Comm), [2019] Bus LR 146.
59. However, no similar issues arise in relation to relief under either section 1028(3) or section 1032(3) of the 2006 Act. Like other legislation, these provisions can doubtless be said to have been motivated by public policy considerations, but that is not to say that the grant of relief under them engages the public interest in such a way as to demand determination by the Court rather than an arbitrator. Unlike a winding up order or restoration to the register, relief pursuant to section 1028(3) or section 1032(3) does not affect status and an application for such relief will normally be an essentially private matter, affecting nobody but the company and one or more specific individuals or entities. Disputes as to whether there should be relief under section 1028(3) or section 1032(3) can be compared with the “essentially internal disputes” which are the subject of unfair prejudice petitions under section 994 and which were held in the *Fulham* case to be arbitrable. Relief under section 1028(3) or section 1032(3) is no more a class remedy than is relief pursuant to an unfair prejudice petition. Further, section 994 will, like sections 1028(3) and 1032(3), surely have been thought to further public policy, but that did not mean that it was necessary in the

public interest for matters arising on an unfair prejudice petition to be the subject of Court proceedings instead of arbitration.

60. Nor can it be said that the issues raised by applications under section 1028(3) and 1032(3) of the 2006 Act are obviously unsuited to an arbitrator. An application for relief under section 1028(3) or section 1032(3) requires consideration of what (if any) directions and provision are “just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register”. Arbitrators might be called on to decide comparable questions in the context of, for example, unfair prejudice or partnership disputes or a contribution claim. An unfair prejudice dispute might require an arbitrator to decide whether a company’s affairs “are being or have been conducted in a manner that is unfairly prejudicial to the interests of members” and, if so, what (if any) relief should be given (see sections 994 and 996 of the 2006 Act). Arbitration clauses in partnership agreements will “[i]n most instances ... authorise the arbitrator to order a dissolution of the firm under section 35 of the Partnership Act 1890” (Lindley & Banks on Partnership, 20<sup>th</sup> ed., at chapter 10, and also *Phoenix v Pope* [1974] 1 WLR 719), and that provision allows dissolution to be decreed where, among other things, “circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved”. Under the Civil Liability (Contribution) Act 1978, contribution is to be “such as may be found ... to be just and equitable having regard to the extent of that person’s responsibility for the damage in question”.
61. It is true that applications for relief under sections 1028(3) and 1032(3) of the 2006 Act can potentially have implications for third parties who could not be bound by the outcome of an arbitration. In practice, such cases must, I think, be the exception rather than the rule and there is no reason to think that any third party would be affected by the grant of the relief which BB2 seeks in the present claim. To the contrary, Miss Parkin confirmed that no contract to re-sell any of the land comprised in the Contract has been concluded. Be that as it may, however, the possibility of relief under section 1028(3) or section 1032(3) having an impact on third parties does not, as it seems to me, mean that applications for such relief are not susceptible to arbitration. As Patten LJ said in *Fulham*, “the limitation which the contractual basis of arbitration necessarily imposes on the power of the arbitrator to make orders affecting non-parties is not necessarily determinative of whether the subject matter of the dispute is itself arbitrable”, albeit that the potential for relief to impinge on third parties may “impose limitations on the scope of relief obtainable in arbitral proceedings”. In a similar vein, Longmore LJ observed in *Fulham* that it is “well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect” and Sundaresh Menon CJ explained in *Tomolugen Holdings Ltd v Silica Investors Ltd* that “[t]he fact that the relief sought might be beyond the power of the tribunal to grant does not in and of itself make the subject matter of the dispute non-arbitrable”.
62. Mr Lord stressed that sections 1028(3) and 1032(3) of the 2006 Act speak of placing the company “and all other persons” in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register. To my mind, however, the reference to “all other persons” does not assist Mr Lord. If an application for relief under section 1028(3) or 1032(3) affects only the parties to an arbitration agreement, there will be no relevant “other persons” beyond those parties.

63. It is fair to say, as Mr Lord did, that it would be odd if an application for relief under section 1028(3) of the 2006 Act were arbitrable but one under section 1032(3) were not. I accept, too, that referring to arbitration matters under section 1032(3) could produce procedural complexity. Section 1032(3) applies only where an order for restoration is made by the Court. The company in question would necessarily, therefore, have been the subject of an application to the Court. That being so, it might be thought simpler to leave the Court to deal with any consequential relief under section 1032(3). If needs be, however, the Court proceedings could be stayed to allow for arbitration and, like Sundaresh Menon CJ in *Tomolugen Holdings Ltd v Silica Investors Ltd*, I do not consider that procedural complexity will of itself generally be capable of giving rise to non-arbitrability.
64. A final point is that, in the present case, no difficulty arises as to the nature of the relief sought under section 1028(3) of the 2006 Act. As I have mentioned, BB2 asks for an order that BAE's termination of the Contract "is of no effect" or, in the alternative, "an order that [BAE] enter into a new agreement with [BB2] on the same terms as those contained in the [Contract]". Mr Lord accepted that the grant of such relief would be within the powers of an arbitrator. It is to be noted that section 48 of the 1996 Act provides for an arbitrator to have "the same powers as the court ... to order a party to do or refrain from doing anything".
65. In all the circumstances, it seems to me that the second ground of appeal fails. I agree with the Judge that applications for relief under section 1028(3) of the 2006 Act are susceptible to arbitration. I also consider applications under section 1032(3) to be arbitrable.

### **Conclusion**

66. I would dismiss the appeal.

### **Lord Justice Males:**

67. I agree that this appeal must be dismissed for the reasons given by Newey LJ. In view of the interesting arguments addressed to us, I add some further comments of my own.

#### *The scope of the arbitration clause*

68. The first issue is whether the legal proceedings in which BB2's claim is brought are "in respect of a matter which under the agreement is to be referred to arbitration". That depends on whether the parties' dispute is within the scope of the arbitration clause in the agreement which provides for disputes "arising out of the provisions of the agreement" to be referred to arbitration.
69. BB2 seeks an order under section 1028(3) of the 2006 Act that the termination of the Contract by BAE is of no effect; or alternatively an order that BAE must enter into a new contract with it on the same terms as those contained in the Contract which has been terminated. It says that one or other of these orders is what justice requires. BAE contends that no such order should be made, as it would be unjust to deprive BAE of its contractual right to terminate the agreement in the event of BB2 being struck off.

70. To accede to BB2's submission that the arbitration clause is in relatively narrow terms which do not extend to the current dispute would take us back to the days before the House of Lords in the *Fiona Trust* case swept away the verbal distinctions between clauses which provided for disputes "arising in connection with", "arising out of" and "arising under" an agreement to be arbitrated. While some of us made a good living from arguing about these arcane distinctions, they reflected no credit on English law and it would be a retrograde step to go back.
71. But even taking a narrow view of the arbitration clause, the parties' dispute does arise out of the provisions of the agreement. It arises out of the express contractual right for which BAE bargained to terminate the agreement by notice in the event of BB2 being struck off the register. If successful, BB2's claim would (as Mr David Lord QC for BB2 accepted) deprive BAE of the benefit of that contractual right.
72. In these circumstances the argument that these legal proceedings are not "in respect of a matter which under the agreement is to be referred to arbitration" is in my judgment hopeless.

### *Arbitrability*

73. In considering whether a dispute is arbitrable, the fact that the parties have agreed that it should be arbitrated is an important starting point. What that means is that they have agreed, not only that it should be arbitrated, but also that it should *not* be decided by a court. The law permits commercial parties to choose arbitration and should respect their choice unless there are compelling reasons not to do so. As I said in *Nori Holding Ltd v PJSC 'Bank Otkritie Financial Corpn'* [2018] EWHC 1343 (Comm), [2019] Bus LR 146 at [66], "Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain".
74. Compelling reasons to the contrary might be found in statutory provisions making clear that certain kinds of dispute are not capable of being determined by arbitration or in principles of public policy. In the present case, however, there is nothing in the 2006 Act to suggest that a claim for an order under section 1028(3) is inherently incapable of being arbitrated and there is no principle of public policy capable of outweighing what is already an important principle of public policy that the parties' agreement to arbitrate should be respected.
75. Nor is there anything in the specific features of the parties' dispute to suggest that arbitration will give rise to any difficulty. For this purpose it is worth examining briefly the issues which will arise.
76. As explained by Mr Lord, it will be BB2's case that:
- (1) The striking off was the result of an unfortunate oversight;
  - (2) BB2 was not in breach of its substantive obligations to BAE under the Contract when the striking off occurred on 31 May 2016;
  - (3) It is more likely than not that striking off would have been avoided if BAE had contacted BB2 upon being aware of the proposal to strike off on 25 May 2016;
  - (4) BB2 was promptly restored to the register; and

(5) BAE has suffered no prejudice as a result of the striking off.

77. An arbitrator would be well capable of deciding whether BB2 is able to make good these propositions and, to the extent that it is, whether justice requires that BAE's contractual right to terminate the Contract in the event of BB2 being struck off should be overridden. No issue of any wider public interest arises. Nor is it suggested that any third party rights would be affected.
78. Because BB2 chose not to advance its claim for relief under section 1028(3) in the arbitration before Mr Redmond, it may be that it will face some further obstacles if it now has to pursue its claim in arbitration. These arise out of the fact that the proceedings before Mr Redmond are now concluded (save perhaps for the limited purpose of assessing the costs payable to BAE); that it is now too late for BB2 to commence an arbitration within the three-year period referred to in section 1028(4); and that Mr Redmond's award that the Contract was validly terminated by BAE is now final and binding on the parties (see section 58 of the 1996 Act). It is unnecessary and it would be wrong to determine these issues now. But if these do prove to be insuperable obstacles for BB2, that will merely mean that its claim will fail and not that it is not an arbitrable claim.
79. As Mr Lord was unable to point to anything specific to this dispute which would render it incapable of being arbitrated, he was driven to submit that an application for relief under section 1028(3) could never be arbitrated in any circumstances. While I would accept that there are some kinds of application which are incapable of being arbitrated, of which an application to wind up a company is an example, this should in my judgment be a conclusion of last resort. Even then it may be appropriate, as illustrated by *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575, [2015] Ch 589, for particular issues falling within the scope of an arbitration clause to be referred to arbitration before the court decides whether to make an order which only the court can make.
80. An application for relief under section 1028(3), however, is not such a case.

**Lord Justice Phillips:**

81. I agree that this appeal should be dismissed for the reasons given by Newey LJ. I also agree with Males LJ's further comments.