Neutral Citation Number: [2020] EWHC 2649 (Ch)

Case No: CR-2018-011020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST (ChD)

IN THE MATTER OF HAT & MITRE PLC (In Administration)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/10/2020

Before :

MR JUSTICE TROWER

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Between :

(1) MR MARTYN KEBBELL	**Applicants**
(2) MR RICHARD KITCHEN	
- and –	
(1) HAT & MITRE PLC	**Respondents**
(2) RICHARD TOONE	
(3) JASON MALONEY	
(AS JOINT ADMINISTRATORS OF HAT & MITRE PLC)	

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ANDREW SHAW (instructed by **Stephens Scown LLP**) for the **Applicants**
JOSEPH CURL (instructed by **Ashfords LLP**) for the **Respondents/Administrators**

Hearing dates: 8th and 9th July 2020. Further written submissions: 16th July 2020.

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Approved Judgment

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

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MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be Thursday 8 October 2020 at 10:00.

Mr Justice Trower :

1. This is an application by two shareholders and directors of Hat & Mitre Plc (the "Company"), the principal purpose of which is to obtain a determination that the Company is not, or no longer should be, in administration. The Second and Third Respondents (the "Administrators") were appointed as administrators of the Company by its directors on 19 December 2018.

2. The application notice, which was issued over a year after the Company entered administration, sought several different heads of relief. In the event, the Applicants limited their application to relief in the form of a declaration that the appointment of the Administrators pursuant to paragraph 22 of Schedule B1 to Insolvency Act 1986 ("Schedule B1" and "IA 1986" respectively) was invalid, an order terminating the appointment of the Administrators with immediate effect and an order that the Administrators be personally liable for their costs and expenses and be debarred from recouping them from the Company's assets.

3. The application notice itself did not specify the grounds on which invalidity was alleged, nor did the witness statements which were eventually made by the Applicants in support of the application on 12 June 2020 and 19 June 2020. The grounds were first articulated in the skeleton argument prepared on the Applicants' behalf by Mr Andrew Shaw on 2 July 2020. The way that he put the Applicants' case was that the appointment of the Administrators was a nullity because it was made by the directors for an improper purpose contrary to s.171(b) of Companies Act 2006 ("CA 2006"). He submitted that:

> "*The resolution passed at the board meeting on 19 December 2018 was thus passed for the improper purpose of furthering the interests of the Company's minority shareholders at the expense of the majority shareholders and is consequently void. Accordingly, the appointment of the Administrators is a nullity*."

4. The majority of the Company's shares are held by the First Applicant ("Mr Kebbell") (52%), his two children (1% each) and the Second Applicant ("Mr Kitchen") (17%). The remaining shares are held by 6 other shareholders or groups of shareholders, the most relevant of whom for present purposes are the two other directors of the Company, Mr Keith Young who holds 10% and Mr Richard Thoburn who holds or controls a smaller stake.

5. The improper purpose is said by the Applicants to be attributable to Mr Young (who at the relevant time had become the chairman with a casting vote at meetings of the board) and Mr Thoburn, although Mr Shaw accepted that their case against Mr Thoburn was thin. For reasons which were never explained, and which caused substantial difficulties in getting to the bottom of what occurred, Mr Young and Mr Thoburn were not joined as parties to this application and they did not appear as witnesses.

6. It may be that the difficulties caused by the absence of Mr Young and Mr Thoburn would have been flushed out if the application had been listed for directions at the outset in the normal way. Again, for reasons which were not entirely clear, the parties did not take steps to ensure that this happened. At the beginning of the hearing I made clear to Mr Shaw that they were proper parties, not least because the Applicants sought an order

that they indemnify the Administrators pursuant to paragraph 34 of Schedule B1 if I were to declare it to have been a nullity on the grounds alleged. It was also clear from the outset that the fact that the Applicants had chosen not to join them might affect the approach that I was able to take to the evidence.

7. Notwithstanding these considerations, both Mr Shaw and Mr Joseph Curl, who appeared for the Administrators, urged me to proceed with the hearing in any event. With some reluctance I agreed to do so. This was in part because the Applicants had an alternative application to which Mr Young and Mr Thoburn did not appear to be proper respondents, but also because Mr Shaw accepted that he could not seek relief under paragraph 34 of Schedule B1 at this stage. It may of course be an abuse of process for the Applicants to proceed to seek such relief on a further application in due course if it is established that they could and should have sought that relief at this hearing in an application to which Mr Young and Mr Thoburn were parties. However, that is a matter which I cannot decided without a better understanding of why these proceedings were not properly constituted in the first place.

8. The alternative claim is for an order pursuant to paragraph 74(2)(d) of Schedule B1 that "*on payment by the Applicants to the creditors of the Company of all amounts claimed, the appointment of the Administrators ceases to have effect*". In support of that claim it is said that the Administrators have been acting and are continuing to act in a way which will unfairly harm the interests of the Applicants as members of the Company, and in the case of Mr Kebbell as a creditor.

9. During the course of the hearing, it became apparent that the Applicants also sought to advance a claim based on paragraph 81 of Schedule B1. This empowers the court, on the application of a creditor, to provide for the appointment of an administrator to cease to have effect where an applicant is able to allege (and so it seems to me to prove) an improper motive on the part of the person who made the appointment.

10. This way of putting his case is only available to Mr Kebbell, because Mr Kitchen is not a creditor of the Company. It is similar in form to the way in which the Applicants made their claim based on a breach of s.171(b), but there are differences. It was not foreshadowed in the application notice and the way in which it came to be advanced was said by the Administrators to be procedurally unfair.

The Background

11. The Company's only business is its ownership of two linked properties at Abbot's Court, 34 Farringdon Lane and 22-23 Clerkenwell Close (the "Property"). The accounts for the year ended 31 March 2018 recorded that the Property was then valued at £6,549,410. At the time of the administration, the Property was let to an associated company, Maxwell Stamp Plc ("MSP").

12. The shares in MSP are held by the Company's shareholders in the same proportions as they hold their shares in the Company. Prior to its own administration, which commenced on 24 January 2019, MSP carried on business as an international aid consultancy. The Applicants were (and continue to be) directors of MSP. Mr Young

and Mr Thoburn had also been directors of MSP but were no longer directors at the time with which these proceedings are concerned.

13. By the beginning of 2017, MSP had run into financial difficulties. One of the consequences of these difficulties was that it stopped paying rent to the Company for its occupation of the Property. At the same time, the Company's directors were being told that there were significant buildings works required to be done at the Property and that the payment of dividends may have an adverse impact on MSP's own overdraft and guarantee facilities. As at 30 June 2018, rent for six quarters totalling £450,000 was outstanding. The existence of this outstanding indebtedness, and disagreements as to the steps that should be taken to enable it to be discharged, were amongst the circumstances which ultimately gave rise to the Company going into administration.

14. At a board meeting held on 15 August 2018, the Company's directors considered a proposal by Mr Young that the Company should either find a new tenant or sell the Property. Concern about how to proceed in circumstances in which MSP was not paying the sums it owed the Company was not a new issue. I was shown material which indicated that it was a topic at board meetings as from the time at which MSP stopped paying rent at the beginning of 2017.

15. The Company's directors cannot have been much comforted by what they were told at the August board meeting about the prospect of receiving payment from MSP, because Mr Kitchen said that there was no prospect of any rent being received from MSP in that calendar year. He also said that, although he and Mr Kebbell would propose to MSP's directors that they should lend MSP c.£200,000 to ease its current cash crisis, it would be for MSP's own board to decide how the proceeds of that loan should be used.

16. In his witness statement Mr Kitchen said that the funding the Applicants had in mind was an offer "*to put forward personal funds to either enable MSP to meet its obligations to the Company, or to the Company to meet its own obligations pending MSP's fortunes improving*". However, this intention was not reflected in the minutes of the meeting and he accepted that, although some small amounts were apparently lent to MSP, none of this money was used to pay any of the outstanding arrears due to the Company.

17. In the event, the board was split on Mr Young's proposal. Mr Young and Mr Thoburn voted in favour while Mr Kebbell and Mr Kitchen voted against. The proposal was defeated on the casting vote of the chairman (then Mr Kebbell) in accordance with article 88 of the Company's Articles of Association.

18. By the time of the next board meeting held on 16 November 2018, the amount outstanding from MSP to the Company had increased to approximately £620,000 of which £600,000 was in respect of unpaid rent. The minutes record that at that meeting Mr Kebbell proposed that he retire as chairman and be replaced by Mr Young. Although Mr Kitchen said that the proposal came from Mr Young, it is common ground that during that meeting Mr Young became the Company's chairman.

19. The consequence of this development was that Mr Young became entitled to exercise a casting vote where meetings of the board were otherwise deadlocked. Mr Kebbell proposed and voted in favour of this resolution, even though he remained the majority shareholder of the Company and disagreed with Mr Young about the future of the Company and its continued ownership of the Property. Mr Kebbell's explanation of

why he gave up his casting vote at a time when the disagreements between the directors meant that it had particular value was not wholly clear, although I understood it was to the effect that he wanted to concentrate on MSP. The Applicants said that Mr Young agreed to step down as chairman immediately if Mr Kebbell asked him to do so.

20. The disagreements between the Applicants and the minority continued to be reflected in correspondence during the latter part of November and early December 2018. Mr Kitchen and Mr Kebbell were looking at ways of raising sufficient funds to assist in the refinancing of MSP. To that end, on 27 November, Mr Kebbell obtained a conditional offer from a third-party funder, M T Finance Ltd ("MTF"), for the Company to take out a 12-month bridging loan of approximately £500,000 to be secured over Abbots Court. So far as Mr Kitchen and Mr Kebbell were concerned, the purpose of this loan was to enable the Company to on-lend the proceeds to MSP to help finance its cash shortfall. They stressed that it was in the interests of all shareholders of the Company (in their capacity as shareholders of MSP) for the Company to mortgage the Property and on-lend the proceeds to MSP.

21. This bridging finance seems to have been intended to cover the position pending putting in place longer term debt secured by a mortgage over the Property. This was proposed as an alternative to the advance of funding by the Applicants and Mr Young. I am satisfied, however, that so far as the Applicants were concerned the clear focus of these fund-raising discussions was to use the Company as a vehicle for raising funds to be injected into MSP. There was no focus on the raising of funds to enable the Company to discharge its own liabilities.

22. I should add that at one stage there was also a proposal to look at selling the much smaller Clerkenwell Close part of the Property in order to raise funds to cover the Company's cash requirements, including in particular its corporation tax. Mr Kebbell's response to this was that there was no justification for the sale of Clerkenwell Close, and that if it was to be given serious consideration, further investigation was required.

23. Mr Young refused to agree to the proposal for a loan from MTF and in particular expressed the view that the fact that the Company had an identical shareholding structure to MSP was an unsatisfactory basis for the Company to assist MSP any further and he pointed out that the two companies had different objectives and differently constituted boards. At this stage, Mr Young's main concern was that the Company needed to find what he described as "*assured income*" which in his view meant "*funding independent of MSP*". The opposite view was taken by Mr Kebbell and Mr Kitchen.

24. However, it was also clear that Mr Young was not averse to the Company advancing money to MSP so long as it did so on what he saw as a proper commercial basis. He also made proposals for a broader restructuring of the relationship between the Company and MSP, and said that if terms could be reached he would be ready to fund personally the on-loan from the Company to MSP on better terms than those offered by MTF. Mr Kebbell has subsequently said that the approach adopted by Mr Young in making these proposals demonstrated that he had confidence that a solution could be found to MSP's difficulties.

25. The proposal made by Mr Young seems to have caused Mr Kebbell and Mr Kitchen to form the view that it was advanced by Mr Young to protect his own interests. By an e-mail sent on 8 December, Mr Kebbell called on Mr Young to resign as chairman of the

Company in accordance with what he said was an assurance that Mr Young gave when he was appointed, i.e. that he would always relinquish the position on request. While it seems quite likely that, in formulating his alternative proposal, Mr Young was driven by a desire to protect his own interests as a shareholder, I do not accept that the Applicants have established that he was motivated by a collateral personal interest at odds with what he genuinely perceived to be in the best interests of the Company and its shareholders as whole.

26. Mr Young's response to the 8 December e-mail was to summon what he described as an emergency board meeting for Monday 10 December. Mr Kitchen was absent although he was able to join by telephone for part of the discussion. Three resolutions were considered and passed, each of which was opposed by Mr Kebbell. By those resolutions:

    i) no director other than the chairman (i.e. by now Mr Young) was authorised to instruct lawyers or insolvency practitioners on behalf of the Company;

    ii) the chairman was authorised to "*take such action as is necessary and convenient*" to protect Abbots Court from any proposals by Mr Kebbell or others to borrow or secure any borrowings on Abbots Court; and

    iii) the chairman was directed to "*urgently communicate all matters"* to the Company's bankers, solicitors and accountants "*so that they are each informed*".

27. The minutes recorded that Mr Kebbell reminded the meeting that he and Mr Kitchen owned 69% of the Company, while Mr Young said that this did not give him the right to act as a sole trader. At the heart of the dispute was a fundamental disagreement about whether the Company should be requested or permitted to incur further obligations for the benefit of MSP when MSP was already substantially indebted to the Company and repayment was in doubt.

28. I did not have the advantage of evidence from Mr Young, but by this stage he had formed the view that insolvency advice for the Company was desirable. The possibility that the appointment of some form of insolvency office holder to the Company was a way forward is apparent from the fact that the resolution that Mr Young proposed at the 10 December board meeting referred to the instruction of insolvency practitioners on behalf of the Company.

29. After the board meeting, Mr Young had a meeting with Isadore Goldman, who he described as "*our insolvency lawyer*". He told the other members of the board (including therefore Mr Kitchen and Mr Kebbell) that Isadore Goldman had advised that the provision by the Company of security over the Property for an on-loan to MSP would be a "*a clear breach of our fiduciary duties*". He said that no such loan would therefore be made and that a Company board meeting would therefore be held as soon as possible to consider legal action against MSP to recover the sums outstanding.

30. At or about the same time (on 13 December), Mr Young had a meeting with one of the Administrators, Mr Richard Toone, who said in his evidence that he was introduced to Mr Young, via Ashfords LLP ("Ashfords"). Mr Toone said that Ashfords had been instructed to prepare appointment documents as a contingency to the Company going

into administration. Mr Toone was told, amongst other things that, whilst the Company was without a source of income there was no appetite on the part of Mr Young or others to settle these liabilities. This statement was criticised by the Applicants as being inaccurate and they pointed to the fact that not long into the administration they gave Eversheds sufficient to pay all creditors in full and also to meet the Company's outgoings pending obtaining a new tenant.

31. I will come to that offer in due course, but I am not satisfied that what Mr Young said was inaccurate at the time it was said. He himself had changed his mind about putting more money into the Company, and the Applicants had not at that stage done anything other than explore the availability of bridging finance from MTF, which was an altogether different proposition.

32. Mr Toone was shown a list of liabilities, a copy of the minutes from the 10 December board meeting and a Tenon creditors' report. He was not, however, shown a number of documents which the Applicants contended were relevant to the Company's solvency, including those relevant to the debate between the parties about the finance that might be raised on the security of the Property. Mr Toone's position was that these were not particularly relevant to his determination to accept appointment. He said that he was entitled to rely on the directors' assessment as to the likelihood of the Company being unable to pay its debts and anyway in theory, he was right to take that view. The legislation provides that the question of the Company's inability to pay its debts is a matter for the directors, not the putative administrator.

33. However, to the extent that the Company's financial position and the nature and extent of its insolvency affects the likelihood of the purpose of administration being achieved, which will often be the case, that is a matter for any putative administrator because of the terms of paragraph 29(3)(b) of Schedule B1, rule 3.2(1)(h) of the Insolvency (England Wales) Rules 2016 (the "Rules") and the consent to act which is required from him. The Applicants also said that the failure to show some of these materials to Mr Toone at the 13 December meeting was deliberate and indicated that Mr Young did not wish to give full disclosure to Mr Toone of the Company's true financial position and prospects.

Appointment of the Administrators

34. By an e-mail sent out at 11.50 am on 19 December, Mr Young called a board meeting for 4.30pm on the same day. He said that "*I have given careful consideration to the position of Maxwell Stamp Plc and consider it fit to call a meeting of the board to discuss matters relevant to the Company's survival*". He said that the physical meeting would be held at the offices of Ashfords in New Fetter Lane. He gave no other indication of what was to be discussed, but the tone of the e-mail made clear that it would be serious.

35. Both Mr Kitchen and Mr Kebbell were out of London but were able to attend the meeting by telephone. The minutes of the meeting, which were in a very different style to the minutes previously prepared by the Company secretary and seem to have been drafted by lawyers, recorded that it was reported that the Company could not settle liabilities totalling £182,538 as they fell due and was either insolvent or likely to be

insolvent within the meaning of s.123(1)(a) of IA 1986. They also recorded that, because of MSP's imminent insolvency, it was highly probable that the Company would be without key immediate or short-term funding to settle its liabilities or to fund its future trading on a solvent basis.

36. In these circumstances, Mr Young proposed that the meeting consider whether it was appropriate that administrators be appointed and explained that the Administrators had agreed in principle to act should the meeting determine that administration was appropriate. Although the minutes do not record the nature of the discussion that took place as to whether or not this was an appropriate course of action, they do record that Mr Kebbell's recent request to mortgage Abbots Court for his benefit and thereafter to request the chairman's resignation "*is material to the Company's ongoing balance sheet and trading analysis*".

37. The only part of the minutes which record the purpose of the proposed administration was in the following terms:

> *"Maxwell Stamp PLC is unlikely to be able to pay any of these liabilities, which will require further investigation by an external manager or administrator to understand the nature and scope of any recoveries to be apportioned within the Company and for the benefit of all the Company's creditors and shareholders. It was noted that due to his proximity to Maxwell Stamp PLC, Martyn Kebbell (i) would be unable and conflicted to properly discharge an investigation of this nature; and (ii) given his majority shareholding, could unfairly harm such an investigation, if conducted by anyone other than an external manager or administrator."*

38. In the event a resolution to the effect that it was in the best interests of the Company and its creditors for the directors to place the Company into administration and appoint the Administrators was supported by Mr Young and Mr Thoburn, but was opposed by Mr Kebbell and Mr Kitchen. It was then passed on the casting vote of Mr Young as the chairman. The minutes record that the necessary appointment documents were tabled at the meeting, although Mr Kebbell denied that this happened.

39. In his evidence Mr Kitchen explained that this resolution was passed on the votes of Mr Young and Mr Thoburn despite the fact that the value of the Company's assets exceeded that of its liabilities by over £6 million, that no creditors were chasing for payment, that directors had offered to pay any debts due to HMRC as they arose and that short-term bridging finance (amongst other funding) was available.

40. The evidence did not disclose how long the meeting lasted, but it cannot have been very long because the notice of appointment of the Administrators, given in accordance with paragraph 29 of Schedule B1 and rule 3.25 of the Rules, was endorsed as filed with the court at 5.27pm on 19 December 2018 just under an hour after the time that the meeting commenced. The necessary statutory declaration was made by Mr Young pursuant to the authority given by the resolutions passed at the meeting of the board. He declared that the Company was or was likely to become unable to pay its debts and that the statements made and information given in the notice of appointment were, to the best of his knowledge and belief, true.

41. The notice of appointment was accompanied by copies of the Administrators' consents to act as required by rule 3.25(2)(c) of the Rules. Both Administrators certified that they were of the opinion that the purpose of administration was reasonably likely to be achieved. There was no confirmation of Mr Young's declaration that the Company was or was likely to be unable to pay its debts, but, as Mr Toone explained in his evidence, no such confirmation is required by the Rules and he relied on the directors' confirmation to that effect.

42. The following day, Eversheds Sutherland (International) LLP ("Eversheds"), solicitors instructed by Mr Kebbell, wrote to Ashfords making clear that it was not accepted that a valid resolution had been passed for the administration of the Company. They reserved Mr Kebbell's rights in relation to the shortness of notice (5 hours), but the focus of the letter was on the absence of sufficient evidence of the Company's insolvency. They said that there was insufficient information to enable the board to conclude that the Company was insolvent for a number of reasons including the fact that the Applicants were able to provide immediate funding to enable the Company to discharge the limited liabilities then outstanding or to become due in the immediate future. This funding offer was to pay all liabilities that were due and owing by the Company. There was, however, no evidence that an offer along these lines had been made before the Company entered administration, and at this stage it was put forward as something that Mr Kebbell was willing to do.

43. It was also said that those directors who voted in favour of the resolution (Mr Young and Mr Thoburn) gave no proper consideration to their duty to promote the success of the Company and failed to consider a number of alternative options as to the way forward. Eversheds sought an explanation as to how the chairman was acting in the best interests of the Company for the benefit of its members as a whole when the resolutions for the appointment of administrators were contrary to the interests of the two majority shareholders of the Company, by which they meant Mr Kebbell and Mr Kitchen. They drew attention to the duties referred to in sections 172, 173 and 174 of the Companies Act 2006 ("CA 2006"), although at this stage no mention was made of the duty that is now put at the forefront of the Applicants' submissions, i.e. the duty of directors pursuant to section 171(b) of CA 2006 only to exercise powers for the purposes for which they are conferred.

44. Eversheds then sought immediate confirmation that Mr Young and Mr Thoburn should immediately desist from taking any further action in relation to the appointment of the Administrators and proposed an urgent meeting for the purpose of approving "*the funding that will be advanced to the Company to address any cash flow insolvency risk*" (which they did not accept existed) and to consider the Company's future strategy. They concluded by reiterating that Mr Young was patently no longer acting in the best interests of the Company and that Mr Kebbell reserved the right to challenge any appointment of administrators on the basis of the invalid resolutions passed at the meeting of the board held on 19 December. From the way in which the Eversheds letter was drafted, it appears that they were not aware that a notice of appointment had already been filed.

Course of the administration

45. On 28 December Eversheds wrote to the Administrators by which time they knew that the appointment had taken effect. They made clear that the Mr Kebbell would like to work with them and sought information from the Administrators on the basis that Mr Kebbell was a majority shareholder and what they described as a significant creditor. They sought a meeting to fully understand the Administrators' strategy to rescue the Company as a going concern.

46. They also raised the validity of the Administrators' appointment, querying the notice that was given for the meeting and the failure to record the business to be considered and said that this was done to ambush certain members of the board (i.e. Mr Kitchen and Mr Kebbell). They stressed that the Company was not cash-flow insolvent and recorded that it was Mr Kebbell's view that the reason that Mr Young wanted the Company to enter administration was because he wanted to acquire the Property from the Administrators. This was part of what Mr Shaw in his submissions described as the furthering of their own position and the gaining of an advantage in their dispute with the majority shareholders. The letter was detailed but the following passage at the end summarised Mr Kebbell's position:

> *Our client would very much like to work in a collaborative way with the Joint Administrators. Whilst our client has genuine and serious reservations about the manner in which the Company was placed into administration, our client wishes to extend the opportunity to the Joint Administrators to work with our client. We are conscious that the Joint Administrators are officers of the Court and will wish to explore immediately any opportunity to rescue the Company to facilitate the primary statutory objective in accordance with your duty to creditors.*

47. Eversheds then reserved Mr Kebbell's right to apply to the court for relief as to the invalidity of the Administrators' appointment or under paragraphs 68, 74 and/or 75 of Schedule B1, in the event that the Administrators were unwilling to cooperate with him or they failed to explore the rescue of the Company as a going concern. The Administrators then sought advice from Ashfords and responded in a letter of 11 January by agreeing to a meeting. They made clear, however, that they saw no sustainable ground to impugn the validity of their appointment, and specifically requested that, if Mr Kebbell proposed to maintain this contention, they should be put in funds to apply to court to cover what they described as an all-parties directions application to enable the points made by Eversheds in their 28 December letter to be resolved. They said that this needed to be done before their proposals were sent out under paragraph 49 of Schedule B1.

48. In my view this was a sensible and reasonable position for the Administrators to adopt. There was no cash in the estate to fund such an application and the points made by Eversheds were not frivolous. It is obvious that their ability to carry out their role properly might be impaired if the validity of their appointment remained in doubt, with the distraction of a possible challenge being held over them as a constant threat.

49. Mr Toone said that at this stage he looked at the Company's financial position and analysed its cash flow. He saw that it had almost no cash and no current income but that it had current obligations which required to be paid. I think that it is clear that he was entitled to take the view, as he did, that the Company appeared then to be cash-flow insolvent. Whatever the position may have been before the administration, once

the Administrators had been appointed, the ability of the Company to raise funds on appropriate terms and then be able to discharge its current liabilities as they fell due was inherently more uncertain.

50. It was not possible to arrange a meeting between Mr Kebbell and the Administrators straightaway as Mr Kebbell was then abroad. Correspondence did however continue with Eversheds who made plain that, while a challenge to the validity of the Administrators' appointment remained an option for their client, that could lead to the wastage of a significant amount of time and cost. They therefore said that any meeting should concentrate on the other two options originally mooted in their letter of 28 December, i.e. the repayment of all creditors or the promulgation of a CVA, both of which they said meant that the Company could rapidly exit administration. To that end they sought information about the creditors as Mr Kebbell wished to consider repaying them in full or pursuing a CVA. They confirmed that Mr Kebbell was prepared to waive his claims against the Company but only as part of an arrangement to pay all of the creditors in full and in order to support the rescue of the Company as a going concern. They continued to reserve Mr Kebbell's rights to apply to court.

51. On 17 January the administrators had a meeting with Mr Young which was the second time they had met. The first was on 13 December, a meeting which I have already described. Mr Young explained the concerns he had that the Applicants had not been acting in the best interests of the Company and identified the possibility that there were claims the Company had against them arising out of that conduct. These claims came to be called the antecedent transaction claims. In my view the existence of these possible claims was a significant factor in the way in which both the Applicants and the minority have come to approach the conduct of the administration.

52. The meeting between the Administrators and Mr Kebbell and Mr Kitchen was eventually held on 24 January. Mr Kebbell again reiterated that he could make arrangements to pay all of the Company's liabilities in full. Mr Toone said that a CVA was the right way forward as an administration exit strategy. Mr Kebbell now says that he and Mr Kitchen thought that this was disproportionate, although the proposal for a CVA had originally been suggested by Eversheds in their 28 December letter as one of the available options. Mr Kebbell accepted that they did in any event allow the Administrators to proceed in preparing a strategy based on a CVA and to incur further costs in taking that course.

53. The notes disclosed that all present agreed that the Administrators should pursue the first statutory objective (rescue of the Company), and I did not understand Mr Kebbell to disagree that this was the case. Mr Toone said that it would be necessary for the Administrators to investigate the intercompany position between MSP and the Company in the event the debt due from MSP to the Company was not paid. He also said that Mr Kebbell should provide an explanation of his proposed business strategy for the Company going forward and made clear to Mr Kebbell that there would be a need to ensure the ongoing cash-flow position. Mr Kebbell said in his evidence that he did not remember any discussion about a business strategy going forward, but I am satisfied that there was. This was a consistent requirement so far as the Administrators were concerned.

54. This meeting was held at about the same time as MSP went into administration, following which MSP terminated what was no more than the tenancy at will it had over

the Property. It was Mr Kebbell's evidence that there was no reason why a new tenant could not have been found, although by March 2019, his solicitors (Eversheds) had also accepted that renovation works would be required before any re-letting could be achieved.

55. Mr Kebbell was asked in cross examination why it was that he and Mr Kitchen did not proceed with an application to challenge the validity of the Administrators' appointment at this stage or why he did not agree to fund an application by the Administrators themselves. He frankly accepted that this was because he did not think that it was appropriate to waste the court's time. I did not take that to mean that he was thereby accepting that any such application would have been hopeless. What he meant was that he and Mr Kitchen had made a considered decision that their interests would be better served by engaging with the Administrators and seeking to do what they could to protect their position through the medium of the administration, rather than by applying to have the whole process set aside.

56. There was disagreement at this meeting about the extent to which the Administrators owed any specific duty to the minority shareholders (i.e. those other than Mr Kebbell, members of his family and Mr Kitchen). Mr Kebbell reiterated a point that he had made on a number of occasions before the Administrators were appointed, to the effect that the shareholders of MSP and the Company were the same and that he considered that for that reason the driver should be to keep MSP afloat to protect all shareholders' investments. This was not the view of the minority (and Mr Young in particular) and I consider that Mr Kebbell's position on this point was misconceived. The Company and MSP were two quite separate entities and the stark differences in their financial positions, the nature of their assets and differences in the extent to which individual shareholders were also involved in the conduct of their respective activities meant that they could not simply be treated as if they were a single investment in which each shareholder had the same comparative ultimate interest.

57. From a very early stage in the administration, Mr Young made clear that he would oppose the Administrators simply handing the Company back to the control of the directors once the creditors had been paid in full. The attitude of the Administrators was that, so long as the creditors' claims were properly dealt with, they would act in accordance with the wishes of all of the shareholders, but that if there was no consensus they would proceed in accordance with what they perceived to be the interests of the Company's members as whole.

58. In that context the minutes of the meeting held on 24 January 2019 appeared to indicate that the Administrators regarded themselves as having a specific duty to minority shareholders. Mr Toone said that this was not his position. He took the view that he had a duty to the members as a whole, subsidiary of course to that of the creditors. The point that he was trying to get across was that the minority members were as much part of the membership as a whole as were the majority. I accept this evidence. In light of the attitude that the Applicants took both to the pre-eminence of their rights as majority shareholders of the Company and to the equivalence of interest between the membership of MSP and the membership of the Company, it is not surprising that the Administrators expressed themselves in the way that they did.

59. The Administrators' statutory proposals (prepared under paragraph 49 of Schedule B1) were sent to creditors and members on 12 February 2019, without the Applicants taking

any steps to challenge the validity of the Administrators' appointment. They proposed that the first statutory objective should be pursued and said that the Administrators were considering a CVA as an appropriate means for making a distribution to creditors and exiting from administration, a suggestion that had first been made in Eversheds' letter of 28 December 2018. They estimated fees costs and legal expenses at c.£125,000 and estimated preferential and unsecured liabilities of c.£218,000. Apart from the Property, the only asset was cash at bank of £2,490. In the event the proposals were deemed approved under rule 3.38(4) of the Rules.

60. It is clear that, in seeking to ascertain the right way forward the Administrators always proceeded on the basis that the minority shareholders could and would apply to court on the grounds that they were being unfairly prejudiced if their concerns were not taken into account. The significance of this to the Administrators' attitude to the conduct of the administration was recorded in the notes of a meeting held between (amongst others) Mr Toone and Mr Young on 15 February, i.e. shortly after the statutory proposals were sent out as follows:

> *[Mr Toone] explained that Eversheds had enquired as to whether the Company could be handed back to the Board of Directors if sufficient funds were paid into the estate. [Mr Toone] advised the meeting that this could not happen as the administrators had been put on notice that minority shareholders would deem this as unfair and would make an application under Paragraph 74 as discussed above*.

61. The reference to "as discussed above" was to earlier parts of the Note in which it was recorded that, once the creditors had been provided for, the Administrators had responsibilities to all stakeholders including the minority shareholders. In that context it appears from Mr Toone's evidence that the Administrators were well aware that, in the absence of a complete consensus as to the way forward, they had to have regard to the interests of the members of the Company as a whole. It was not sufficient for them simply to do what the majority shareholders wished without regard to the implications which that may have had for the ability of the Company to trade on as a going concern. This also required the Administrators, before the Company exited from administration on payment of the debts and expenses in full, to be satisfied that the directors were bound to act in a way which gave adequate protection to all stakeholders. It seems that, in light of the history, they had been advised that if they did not have sufficient assurance that this was the case, they could not be satisfied that the Company had been rescued as a going concern; this could have been assured through the proposal to use a CVA.

62. Mr Shaw used the way in which this point was expressed in a number of parts of the evidence as the foundation of a submission that it showed that the Administrators were giving undue prominence to the interests of the minority in determining how to proceed. He also submitted that the notes of this meeting showed that the Administrators developed their strategy on the way forward having undue regard to the fact that Mr Young and the other minority shareholders had threatened unfair harm proceedings under paragraph 74 of Schedule B1 if they did not pay adequate regard to protecting their interests.

63. On 4 March, Eversheds wrote again to the Administrators explaining that Mr Kebbell was in funds to deliver the objective of rescuing the Company as a going concern. However, it was clear from this letter that it was not going to be straightforward to reach

agreement on the extent of the liabilities that were properly provable against the Company. It also seemed probable that there would be challenges to the costs and expenses that had already been and were likely to be incurred by the Administrators. On the one hand Eversheds criticised the Administrators for taking legal advice on what they described as the creditor position of the Company, while on the other hand they pointed out several inconsistencies on matters relating to creditor claims. To that extent it was immediately apparent that the discharge of the debts and expenses which everybody accepted would have to be paid prior to or as part of the formal exit route from administration might not prove to be easy.

64. Eversheds also made clear that they stood ready to consider a draft CVA proposal from the Administrators which they expected to receive shortly. As I have already explained, the proposal for a CVA as a means of exiting from the administration was something that had originally been suggested by Eversheds in their letter of 28 December.

65. In my view it is not at all surprising that the Administrators took a cautious approach on how to proceed. It had already become apparent to them that every aspect of the administration would be subject to detailed criticism from one faction or the other. In particular, the whole tone of the Eversheds letter reflected frustration with the speed with which matters were progressing, and they made clear that their client would be giving the closest scrutiny to the Administrators' conduct going forward.

66. However, although this letter made clear that Mr Kebbell reserved all his rights in relation to the conduct of the administration and the Administrators' remuneration and disbursements, there was no further mention of the invalidity of the original appointment. At this stage that complaint seemed to have fallen away. The Administrators were in any event entitled to assume that it had, because the Applicants appeared to have made a deliberate decision not to proceed with a challenge before the statutory proposals were sent out, notwithstanding what the Administrators had said needed to be done in their letter of 11 January.

67. It was also clear from everything that was said in Eversheds' letter of 4 March that the Applicants were urging the Administrators to achieve the first objective as soon as practicable ("*All parties will agree that it is in the best interests of the creditors and shareholders of the Company that a timely rescue of the business as a going concern is progressed without delay*"). This amounted to the clearest election by the Applicants to encourage the Administrators to achieve the purpose of administration as expeditiously as possible, including by proposing a CVA, all things which they could only do if they were validly appointed. In taking that course, the Applicants allowed the administration to proceed without taking any steps to challenge the original appointment. This was a further reason why the Administrators were entitled to proceed with the carrying out of their functions on the basis that no such challenge would in fact be made.

68. On the same day, but not in response to this letter, Ashfords wrote to Eversheds in response to what Eversheds had said about the purpose of administration. Ashfords made clear that the Administrators had to proceed in a manner that was fair to all stakeholders. To that end they indicated that they intended to conduct a prompt investigation into the circumstances in which the Company was permitted to become significantly exposed to MSP, whilst at the same time seeking all parties' agreement to the letting or to the redevelopment and sale of the Property.

69. This letter of 4 March was then followed three weeks later with a letter from the Applicants to the Administrators which contained what came to be called the Kebbell / Kitchen proposal. It sems to have been drafted by Mr Kitchen, but was also signed by Mr Kebbell. It is important in the sense that the Applicants have continued to maintain that the offer contained in that proposal is one which the Administrators should have accepted, while the Administrators have been consistent in their view that it is not a proposal which was capable of acceptance by them. As with the letter of 4 March it was put forward on the basis that the Administrators were properly in office and, although a very general reservation of rights was made, there was no mention that a challenge to the validity of their appointment might still be made.

70. The terms of the Kebbell / Kitchen Proposal were as follows:

> *We refer to the above-named company and your appointment as administrators on 19th December 2018 my fellow shareholder Martyn Kebbell and I wish to put on formal notice that:*
>
> *a. we have put our solicitors in cleared funds to discharge all **legitimate** liabilities of the company;*
>
> *b. We are happy to discharge these liabilities without insisting on any security against the assets of the company; and*
>
> *c. Having quantified the operating costs of the company for a 12-month period (on the assumption that there is no rental income) we are further content to provide sufficient funds to ensure the company's liquidity for the incoming year. Our provision of this liquid working capital will protect the company until a suitable tenant is found.*
>
> *Given the above, we would invite you to reflect on your position and take whatever steps are necessary to bring the administration to an end in a swift and cost-effective manner. We say this of course without prejudice to any other rights or remedies that we may have both on behalf of the company and ourselves as individuals and in that regard we continue to seek legal advice.*
>
> *If you require proof of funds, we shall of course be delighted to provide same, either directly or via communication from our solicitor.*

71. Mr Kebbell made clear in his evidence that the objective of the Kebbell / Kitchen Proposal was to ensure the rapid payment of all creditors, the provision of sufficient funds to keep the Company going until a new tenant was found and a freeze on further costs being incurred. It was also his view that it rendered the production of a CVA and a business plan unnecessary. He said that the overall purpose was to provide an income as soon as possible through re-letting the building.

72. At the same time the solicitors acting for the Applicants were in communication with those instructed by the Administrators in relation to an inspection of the Property and a further meeting to be held between the Administrators and Mr Kebbell, who was not immediately available for meetings as he had to travel from the middle-east where he was based.

73. The Kebbell / Kitchen proposal was then followed up by a letter from Eversheds which made several further points on administration strategy which continued to feature in the Applicants' complaints as to the Administrators' conduct. In particular they made clear that they did not understand who the stakeholders were to whom the Administrators owed duties apart from the Company's creditors, and that any proposal for a re-letting or redevelopment and sale of the Property would be inconsistent with the Administrators statutory proposals. They said that the Administrators had no specific statutory duty to shareholders notwithstanding the payment of creditors in full and complained that the Administrators should not be doing anything which delayed the payment of creditors in full on a timely basis.

74. This letter also confirmed that the Applicants were amenable to exploring options for the re-letting of the Property (MSP was now in administration), but that their own property advice confirmed that this was not feasible in the short term because of the renovation works that were required. They made quite clear that the Applicants' view was that any renovation, redevelopment or sale of the Property was something that should be done as a result of discussions between the directors and shareholders post-administration. They also confirmed that they were holding cleared funds to pay all outstanding creditor claims and to facilitate the rescue of the Company as a going concern but did not identify how much that was. They also asked again for a draft CVA.

75. Eversheds' description of the property advice received by the Applicants was confirmed by the valuers instructed by the Administrators (Allsop LLP). They reported on 17 April 2019 that the Property was generally in a fair to poor state of repair and needed refurbishment and redecoration prior to re-occupation. Their estimated refurbishment cost was £1.345 million, after which they advised that rent of £500,000 per annum was achievable. They also valued the Property without refurbishment at £8 million. Mr Toone was asked whether the Company could have raised funds for the refurbishment costs by taking out a loan on the security of the Property. He accepted that, if a loan were to be available, the Company might then have been able to continue as a going concern. He also accepted that, although he was not a banker, a loan could probably have been obtained.

76. In his evidence, Mr Kebbell did not accept that the refurbishment costs were necessarily as high as those estimated by Allsop and, subsequently, the Applicants have made clear that they do not accept that the Property was impossible to re-let without refurbishment. Mr Kitchen said that there had been some enquiries, but no details were given as to the identity or suitability of the enquirers and they do not seem to have been disclosed to Mr Young or Mr Thoburn. Mr Kebbell also gave evidence to the same effect, i.e. that there were prospective tenants who were interested in taking the Property without renovation but agreed that he had not given their details to the Administrators. He also agreed that, once MSP went into administration, the Company had no ongoing business until the Property had been re-let.

77. Eversheds also referred to what Ashfords had said about the Administrators' intention to conduct an investigation into the circumstances of the Company's exposure to MSP and reminded the Administrators of what they said were the "*common directorships and shareholdings across both entities*". This appeared to be in support of a suggestion that no such investigation was necessary, but was a surprising thing to say, both because

MSP was unlikely to make a return to members and because neither Mr Young nor Mr Thoburn were any longer directors.

78. On 1 May the Administrators wrote to all shareholders outlining the terms of the Kebbell / Kitchen Proposal and saying that they were seeking further clarification on the meaning of "legitimate" liabilities and the quantum of the funds actually held. They informed the shareholders that they had been told by at least one of their number (a reference to Mr Young) that if the Company ceased to be in an insolvency process and is handed back to the board this could amount to unfair harm to the minority. They asked for comments and whether they agreed to the Kebbell / Kitchen Proposal. They also explained that the reason for a concern about unfair harm "*arises from apparent attempts to leverage the Company for the benefit of [MSP], which had previously had the benefit of up to £600,000 of rent-free occupation of the Company's property*".

79. This elicited varying responses from the shareholders. They included letters from Mr Young, Mr Thoburn and at least one other minority shareholder, urging the Administrators to reject the Kebbell / Kitchen Proposal. It was said that the Property should be sold but that a return of the Company to the control of the board would enable Mr Kebbell and Mr Kitchen to continue to abuse the minority shareholders going forward. The opposite position was taken by Mr Kebbell's children, and in particular his son Geoffrey, who wrote at some length urging the Administrators to accept the Kebbell / Kitchen Proposal. This correspondence reflected the way in which the majority and the minority had responded to the administration from the outset.

80. In the course of this and subsequent correspondence it was made clear that Mr Young and the minority considered that the Company had claims against the Applicants arising out of the circumstances in which it came to be owed such significant sums of unpaid rent by MSP, which were now likely to be irrecoverable because of MSP's insolvency. They also referred to other claims against the Applicants for mismanagement of the Company's affairs and confirmed that a proposal to seek to use the Company's property as security for a loan for the benefit of MSP was the catalyst for the appointment of the Administrators in the first place. They expressed concern that this kind of conduct would be likely to continue if the Company were simply returned to the board (control of which would rapidly revert to the Applicants) on payment of the creditors in full.

81. The position of the Applicants (through Eversheds) was that there was no authority for the proposition that the Administrators owed duties to stakeholders other than creditors, that they appeared to be acting in the interests of the minority shareholders and that they had failed to provide any reason why a CVA was not being progressed. They also made clear that there was no reason for the Administrators to proceed with an investigation because there was no benefit for the creditors in proceedings with one as they were going to be paid in full in any event.

82. The position which the Administrators adopted in these circumstances was to see if it was possible to find a way through which was acceptable to both groups of warring shareholders. This was an obvious course for them to adopt because they had been threatened with unfair harm and other proceedings by both sides. The threat by Mr Young and the minority was articulated in a letter from their advisors (Commercial Contract Advisors ("CCA")) to the Administrators dated 23 May 2019, which was then discussed at a meeting the Administrators held with Mr Kebbell and Mr Kitchen on 14 June. By then the Administrators had agreed that they would suspend further work on

their investigation into the antecedent claims, pending discussions between the parties on a possible settlement of the dispute.

83. Mr Kebbell said that the position of the Administrators was that they could not accept the Kebbell / Kitchen Proposal simply because they were concerned about the threat of action by Mr Young. In my view, this conclusion is not consistent with the notes of the meeting and is not a fair reflection of the Administrators' attitude at this stage. The Administrators' attitude was simply that the Kebbell / Kitchen Proposal was only capable of acceptance if it was agreed by all shareholders and that the threat of the minority to commence unfair harm proceedings demonstrated that it was not.

84. The culmination of these discussions was a meeting on 28 June 2019 at which Mr Toone conducted what can best be described as an informal mediation between Mr Kebbell and Mr Kitchen on the one hand and Mr Young and the other minority shareholders on the other. Several options were discussed for what could be done once the creditors had been paid in full. They were:

i) handing the Company back to its directors with sufficient controls in place to protect the minority;

ii) purchase by either the majority or the minority of the others' interests; and

iii) a disposal of the Property, followed by a distribution of its proceeds and the other assets to the shareholders through a voluntary liquidation.

85. During the course of these discussions Mr Toone made clear that the assets in the administration were the Property and the Company's claims arising out of the pre-administration conduct of its business. There was a debate as to the likely value of the Property and the parties were told by the Administrators that the creditors' claims were just in excess of £200,000, while the expenses had now reached approximately the same amount.

86. At first it appeared that a broad consensus as to the way forward had been reached at this meeting, although Mr Toone accepted that there was no final binding agreement. It involved a purchase of the minority's interest in the Company by the majority. The figure was to be based on the valuation of the Property by one of three valuers to be chosen by the Applicants. The Administrators would put in place a process for agreeing the liabilities and expenses of the administration while the antecedent claims against the majority and any claims against the minority for placing the Company in administration would be released.

87. The notes of the meeting which reflected an apparent consensus on these principles were subsequently agreed to be a fair reflection of the discussions by a Mr Daniel McAteer who attended the meeting as an advisor to the Applicants in their capacity as directors of the Company. Mr Kebbell also said that Mr McAteer was assisting on the feasibility of re-letting the building.

88. However, when the Administrators produced a draft memorandum to reflect these terms, which was signed and approved by at least Mr Thoburn, the Applicants responded to the effect that no agreement had been reached and they remained deeply concerned about a number of matters. These included a linkage of the exit from

administration to achieving a consensual agreement between all shareholders, the costs of the administration and the fact that it now appeared to them that the Administrators were not fully informed of the true financial condition of the Company (and its solvency) before their appointment.

89. The upshot of this was that the Applicants reverted to an insistence that the only way forward was the Kebbell / Kitchen Proposal. They categorically denied any wrongdoing in relation to the antecedent transactions and they asserted that the Company and its shareholder value had been damaged by the administration. Most materially they said that what they described as "shareholder dealing" was not the business of an administration and they believed that the threats against them had been used to force a shareholder deal. They said that they were taking advice to identify the most cost-effective way to bring the administration to an end.

90. If it had not been clear already, it was clear by this stage that the issue of principle which split the Applicants on the one hand and the Administrators and the minority on the other was whether, in a case in which the creditors were bound to be paid in full in any event at some stage, the Administrators owed any duty to consider the position of the shareholders inter se when determining how best to achieve the purpose of administration, and thereafter the Company's exit from administration. The Applicants made crystal clear that they considered on advice that it was no business of the Administrators to have any regard to those types of consideration, which were a matter for Companies Act remedies to be pursued by the minority if so advised once the Company exited from administration. They were referring to the unfair prejudice provisions contained in s.994 of CA 2006.

91. Although a number of the bases on which the Applicants contended that they could bring the administration to an end arose out of the conduct of the administration, they also said that they would rely on the fact that the Company was never insolvent and "*the administration process is unnecessary*". They did not, however, contend that the administration was invalid from the outset. Indeed their whole approach, which was explained in great detail in lengthy correspondence, presupposed that the appointment of the Administrators had been valid – what they now wanted was for the administration that remained extant to be brought to an immediate end in the most cost-effective way possible.

92. There was then further detailed correspondence, which included a refusal by the Applicants to agree to a proposal that the Administrators should raise money on the security of the Property in order to pay creditors, the costs of the administration and the minority shareholders' interest. This correspondence illustrated the difficult position that the Administrators found themselves in, because they were faced with a clear statement from the Applicants that (as Eversheds put it in their letter of 30 August) "*any attempt by the administrators to leverage finance as against the property is fundamentally flawed and will be resisted*". The Administrators therefore decided in September 2019 that they had no alternative but to market the Property and finalise their investigations into the Company's potential claims against the Applicants.

93. They informed Eversheds of their decision in a letter dated 19 September 2019 and made clear that the Kebbell / Kitchen Proposal was one which they considered would unfairly harm the minority. In my view the Administrators were not just responding to

a threat of litigation. They had formed the view that any litigation would have had a sound basis. This conclusion was expressed in the letter in the following terms:

> *The Administrators have carefully reviewed the above confirmation and consider there to be no alternative other than to immediately market and sell the Property and finalise investigations into potential claims against your clients, which you asked be stayed on or around 3 June (pending a consensual resolution between the parties). Whilst this conclusion might be undesirable to your clients and the Administrators (given their exhaustive attempts to find a consensual resolution), they cannot give credence to your clients' proposal, which would lead to the Minority Shareholders being unfairly harmed. In that regard, the Minority Shareholders' letter of 23 May raises numerous grounds of unfair harm and not just one based on the probative value of your clients' previous conduct. As such, we urge you to carefully reconsider its contents.*

94. Mr Toone said that his conclusion at this stage was that the Administrators were struggling with objective 1. It was therefore now appropriate for the Administrators to continue with their investigations into the antecedent transactions. When he was challenged by Mr Shaw that there was no benefit to the creditors in abandoning objective 1, Mr Toone responded that he had no alternative because he still had no guaranteed funding. The Kebbell / Kitchen Proposal only referred to £200,000, which would not cover the liabilities and the costs and was not in any event a guarantee. Raising money on the security of the Property was difficult because he had been put on notice by all groups of shareholders that he would be sued.

95. On 22 October, the Administrators provided Eversheds with details of a misfeasance claim which they were satisfied that the Company had against the Applicants. Within a month the Applicants had reacted by sending the Administrators a draft of the application which is now before me. The Administrators have not progressed the misfeasance application beyond the service of draft Points of Claim in May 2020. As with the marketing of the Property, they have taken no further substantive steps pending the resolution of these proceedings

96. Meanwhile, on 30 October 2019, the Administrators wrote to all creditors, including therefore Mr Kebbell, seeking their consent to a 12-month extension of the administration which was then due to terminate automatically on 18 December 2019. They explained that this was necessary because, during the period of the administration to date, they had been almost exclusively engaged with the Company's shareholders with the aim of returning the Company to them in a way which (as they put it) did not unfairly harm the interests of an individual or collective body of shareholders. Mr Kebbell voted in favour of the proposal for an extension, although Eversheds made clear in their covering letter enclosing his proof that he did so without prejudice to his rights in respect of the appointment of the Administrators and their conduct of the administration. He now says that he only voted in the way that he did because he was advised that if he did not do so the Company would have to go into immediate liquidation.

97. By the beginning of January 2020, the Applicants had decided to progress their application to court for the relief which is now sought by the application notice. This included a number of heads of relief including an order that the purported appointment of the Administrators was invalid as well as relief on the grounds of unfair prejudice.

As I have already mentioned, the basis of the allegation of invalidity was not identified. By this stage, the actual and anticipated costs of the administration had increased to over £500,000.

The Insolvency of the Company

98. Mr Shaw did not contend that the mere fact that, as he submitted, the Company was not insolvent as at 19 December 2018 meant that the appointment of the Administrators was invalid. Nor did he submit that any other direct consequences flowed from what he said was the inaccuracy of the declaration. His submission was that the fact that the Company was not insolvent was an important part of the reason why it should never have gone into administration in the first place. It also featured at the core of his submissions as to why I should infer that Mr Young and Mr Thoburn made their decision to appoint for an improper purpose. This is the context in which it is necessary to consider the evidence on whether the Company was unable to pay its debts on a cash-flow basis at the time that the Administrators were appointed.

99. In his opening, Mr Shaw did, however, accept that because Mr Young had not been made a party, it was not open to him on this application to say that the statutory declaration had not been properly made. He nonetheless submitted that I could conclude that the appointment was made for an improper purpose, even though the question of whether or not the Company was in fact cash-flow insolvent, together with the question of whether or not Mr Young and Mr Thoburn really thought that it was, were said to be central aspects of the impropriety. This illustrates in quite graphic form the unsatisfactory nature of the application with which the court is faced. Mr Shaw was however quite clear that the Applicants were well-aware of the consequences of the way in which the proceedings had been constituted and, like the Administrators, asked the court to proceed in any event.

100. On an application to the court for the appointment of an administrator under paragraph 12 of Schedule B1 the court may only make an administration order if it is satisfied that the company is or is likely to become unable to pay its debts (paragraph 11(a) of Schedule B1). On an appointment by a company's directors under paragraph 22(2) of Schedule B1, the question of the company's actual or prospective insolvency is dealt with differently. The prescribed form of appointment under paragraph 29 of Schedule B1 and rule 3.25 of the Rules requires the appointer to make a statutory declaration that the company is or is likely to become unable to pay its debts (paragraph 30(a) applying paragraph 27(2)(a) of Schedule B1).

101. It follows that, for out of court appointments by the directors, the question of whether a company is or is likely to become insolvent is a matter for the maker of the statutory declaration, who is required to have a conscientious belief in the truth of what he declares with the risk that he might commit perjury if he does not. It is not a necessary pre-requisite to the validity of the appointment that what the appointer declares to be the case is in fact correct.

102. For the purposes of Schedule B1, the phrase "*unable to pay its debts*" has the meaning given by s.123 of IA 1986 (see paragraph 111(1) of Schedule B1). Nobody has ever suggested that the Company was or was likely to become balance-sheet insolvent, in

the sense provided for by s.123(2) of IA 1986. It is clear that the value of its assets very significantly exceeded the amount of its liabilities. The question for the directors was whether it was or was likely to become cash-flow insolvent in the sense provided for by s.123(1)(e) of IA 1986 – i.e. was the Company unable to pay its debts as they fall due, or was that likely to become the case?

103. The use of the phrases cash-flow insolvency and balance-sheet insolvency is well-established and is helpful shorthand when construing and applying s.123. It should not, however, detract from the fact that the two tests stand side by side and feature as part of the single exercise of determining whether a company is unable to pay its debts: *Bucci v Carman (Liquidator of Casa Estates (UK) Ltd* [2014] BCC 269 at [29] per Lewison LJ.

104. It is also now well-established that the test for cash-flow insolvency is concerned with debts falling due from time to time in the reasonably near future. This is explained by Lord Walker in *BNY Corporate Trustee Service Ltd v Eurosail-UK-2007-3BL plc* [2013] 1 WLR 1408 at [37], a case about balance-sheet insolvency in the context of the conditions of certain notes. The discussion of cash-flow insolvency was to explain why the balance-sheet test was needed and why it, like the test for cash-flow insolvency, is very far from exact. As Lord Walker emphasised, application of the test now contained in s.123(1)(e) will depend on all the circumstances, but those circumstances will reflect the fact that, once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative.

105. Lord Walker also approved what Briggs J had said in *Re Cheyne Finance plc (No 2)* [2008] Bus LR 1562 about cash-flow insolvency. The "*commercial solvency test now in section 123(1)(e)*" replaced "*one futurity requirement, namely to include contingent and prospective liabilities with another more flexible and fact sensitive requirement encapsulated in the new phrase 'as they fall due'*". This approach is all the more applicable where the question is not just whether the Company is in fact unable to pay its debts but also whether it is likely that it will become so.

106. Mr Shaw submitted that a company will not necessarily be cash-flow insolvent simply because it does not have sufficient cash to meet all of its immediate liabilities (*In Re Capital Annuities Ltd* [1979] 1 WLR 170, 187/8), nor will it necessarily be cash-flow insolvent because it needs to borrow to pay its debts (*In re a Company* [1986] BCLC 261, 262d-e), both of which were the situation applicable to the Company on 19 December. These cases were decided before the enactment of s.123 of IA 1986 which made changes to the way in which the various forms of insolvency were explained in *Eurosail*. Nonetheless, they were both cited in *Eurosail* as cases which were helpful for an understanding as to the meaning of an inability to pay debts more generally. I agree that neither an insufficiency of cash to pay immediate liabilities nor a need to borrow to pay short term liabilities are necessarily an indication of a present inability to pay debts; all the circumstances of the case must be looked at.

107. The evidence is not consistent as to the precise extent of the Company's liabilities as at 19 December 2018. It shows that at the board meeting at which the directors resolved to appoint the Administrators liabilities totalling £182,538 were identified. They comprised amounts owed to employees, HMRC, legal advisers, the Company secretary, CCA and amounts payable in relation to works that need to be carried out on the Property.

108. The amount of those liabilities is not reflected by the proofs since received by the Administrators which total £201,289.30. That figure includes a claim from MSP for £87,750.42 as to which it seems probable that a set off would be available against the substantial sums then due and owing to the Company by way of arrears of rent. However, it does not seem to me that very much turns on the precise nature and extent of the Company's current liabilities, because it is clear that the Company had no liquid assets available to make immediate payment of all of them. The Company only had cash of £2,490, which on any view was insufficient for that purpose.

109. However, Mr Shaw submitted that, whatever the precise amount of these liabilities, the Company had a very substantial asset in the form of the Property worth several million pounds, and that these liabilities could not therefore be regarded as a pressing concern. He also pointed to the fact that there were no creditors pressing for payment of any of the liabilities and that, as recently as 24 October 2018, Mr Kebbell had confirmed to the Company's auditors that should it be necessary the directors of the Company would meet any corporation tax liability to HMRC for the year ending 31 March 2018.

110. He also relied on the fact that, as Mr Young confirmed in an e-mail of 3 December, he had told its bankers that the Company was not in need of external assistance and had received an offer of £230,000 to buy Clerkenwell Close, which he called a minor property asset, the proceeds of sale of which would be very useful in completing repairs to the remaining part of the Property.

111. More substantively, Mr Shaw submitted that, because Mr Kebbell had negotiated a £500,000 facility agreement with MTF to be secured over Abbots Court, it was clear that funds were available that would have been more than sufficient to discharge the liabilities disclosed at the 19 December meeting of the board. He also submitted that, in assessing the likelihood of the Company being able to raise sufficient funding from elsewhere to enable it to discharge its current liabilities, the very substantial excess of assets over liabilities pointed strongly against a finding that the Company was then unable to pay its debts.

112. In Mr Curl's submissions on insolvency, he emphasised that this was a matter for the board, and that the Applicants had to displace the fact that a resolution passed in accordance with the Company's articles had determined that administrators ought to be appointed. He pointed to the fact that a director (Mr Young) had made a statutory declaration that the Company was or was likely to become unable to pay its debts, and it was difficult if not impossible to go behind that declaration in circumstances in which the Applicants had chosen quite deliberately not to join Mr Young as a party to the proceedings.

113. He submitted that the question for Mr Young in making the statutory declaration (and for the directors in resolving to appoint the Administrators) was not whether the Company was at that precise moment unable to pay its debts, but whether it was likely to become unable to pay its debts. This was not what he called the "fall off a cliff event" under consideration in *Eurosail*, but rather was an evaluative exercise for the Company's directors, reflecting the fact that administration is a rescue procedure intended to be available where there is a serious question mark as to a company's solvency.

114. Mr Curl also submitted that the conclusion reached by the board (and Mr Young in particular) had to be set in the context of the obvious insolvency of MSP which was the only source of regular income available to the Company, but had failed to pay rent on the grounds of an inability to do so for the past 18 months. The fact that MSP was unable to pay was evidenced by the fact that it had already instructed Alvarez and Marsal, that it had failed to pay the rent which fell due on 25 December 2018 immediately after the Administrators' appointment and that it itself went into administration on 24 January 2019.

115. Mr Curl's analysis as to why the Company was in any event cash-flow insolvent as at 19 December 2018 emphasised that there was corporation tax to be paid in January 2019 and no cash to speak of from which it could be paid. He relied on the fact that Mr Kitchen accepted as he plainly did that "*in the first week of December 2018, the Company needed a modest injection of cash*" to enable the Company "*to pay its current debts and those that may fall due for payment within the following months*".

116. He then said that, instead of making an immediate injection of cash sufficient to solve the problem, the Applicants sought expensive bridging finance from MTF which was, of itself, a pointer towards cash-flow insolvency and a pointer against the Applicants' submission that the value of the Property meant that it had lots of fund-raising options. Mr Curl then submitted that in any event it was common ground that the Company did not receive an injection of cash in the first week of December, which was the time at which Mr Kitchen said that it was needed. He also said that little weight should be given to the Applicants' assertions about their ability or willingness to advance money to the Company, because they did not in fact do so and had not done so in the previous 2 years despite the pressing need for repairs to the buildings recorded in the minutes of directors' meetings over that period.

117. Finally, Mr Curl submitted that it was clear from the evidence that the Applicants' focus was on getting money out of the Company and into MSP, rather than on getting money into the Company. That was the basis on which all the discussions about fund raising had taken place in November and December 2018. This demonstrated that the funding proposals in the form advanced by the Applicants would in fact place the Company in a more precarious position, because they would have the effect of further encumbering its valuable assets without any assurance that any of the amounts borrowed and on-lent would find their way back to the Company to enable it to pay its own liabilities.

118. It is not in issue that the complete absence of liquid assets meant that the only way it could have discharged its current liabilities was by the raising of sufficient equity or loan finance to discharge them as they fell due. The reason for this is not only that the Company had no more than a very small cash balance (and it was clear from Mr Kitchen's evidence that this had been the case for some time), but also that what should have been a source of income from the letting of the Property was generating no return because of the insolvency of the tenant MSP.

119. In theory, it might have been the case that a rapid eviction of MSP would have enabled a re-letting to take place so as to generate the returns which would have enabled the Company to acquire the liquidity that it needed. However, that presupposed that it would be possible to re-let to another tenant without refurbishment which itself would have taken time and required an injection of cash. I am satisfied from the evidence that I have referred to earlier that there was at least very considerable doubt as to whether

such a course was practicable. In my view, the directors were entitled to proceed on the basis that an immediate re-letting, even if MSP went out of possession, was no more than a speculative possibility.

120. Given the value of the Property, and even in the absence of an income stream from a solvent tenant, it is at the very least surprising that there should have been any difficulty in raising sufficient on the security of the Property to fund the discharge of its current liabilities. If that were to be the case, it is difficult to see why the Company would not be in the position contemplated by Nourse J in *In re a Company* [1986] BCLC 261, 262d:

> "*I think that if a company can pay its debts only with the help of loans made by others, it is nevertheless prima face able to pay its debts for the purposes of that subsection*."

121. However, this presupposes that it was clear that loans made by others were available to the Company within a timescale and on terms that would have enabled it to discharge its current liabilities. In my view, if the circumstances were such that no such finance was immediately and demonstrably available on terms which the directors could properly procure the Company to accept while still complying with their duties under CA 2006, what Nourse J described as a prima facie ability to pay its debts would not be established. Merely because a particular form of funding would save a company from cash-flow insolvency does not of itself mean that the directors who procure it will be acting in the way they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole so as to comply with their duties under s.172(1) of CA 2006. All will depend on the terms which attach to the funding and how it is that the funding is thereafter to be used.

122. In most cases it would be surprising if funding which protected the company from the consequences of cash-flow insolvency were not to amount to compliance with a director's duties under s.172(1). But that will not always be the case, more particularly where it is self-evident that a company with acute cash-flow difficulties is substantially solvent on a balance-sheet basis. It will then be all the more important for the directors to have careful regard to the terms of the lending as part of the exercise of working out what is in the Company's best interests. In this regard, one of the most obvious circumstances in which administration may be appropriate is where a company with an immediate liquidity crisis needs a breathing space which is sufficient not just to enable it to raise funds but also to raise funds on terms which will maximise the prospects of the best return to both creditors and members.

123. The question of borrowing and the injection of new funding was much discussed in the run-up to the appointment of the Administrators. It was clear that it was going to be very difficult to reach a consensus on the terms by which it might be provided. The only proposals made by the Applicants involved raising money through the Company to enable it to be on-lent to MSP as a necessary part of any deal. As illustrated by the evidence in relation to the 15 August meeting, the fact that it might also enable the Company to discharge its own short-term liabilities to its own creditors appeared to be incidental at best. I am satisfied, as Mr Curl submitted, that the Applicants' unrelenting focus at this time was on getting any cash raised out of the Company and into MSP, rather than being available for the unrestricted use and benefit of the Company in what was its own best interests.

124. This was an approach with which Mr Young and the remaining minority shareholders fundamentally disagreed. In light of the fact that Mr Young and Mr Thoburn were not joined to the proceedings and did not give evidence, I am not in a position to make a formal finding that they considered that borrowing on those terms would not be in the Company's best interests. I do, however, think that everything which they did and said at the time was consistent with them being of that view.

125. In these circumstances the Applicants have not established that it would or even might have been obvious to Mr Young and Mr Thoburn that the Company was not insolvent on a cash-flow basis as at 19 December 2018. On the evidence adduced at the hearing, it is my view Mr Young and Mr Thoburn were entitled to take the view that the Company was or was likely to become unable to pay its debts. I must approach the allegation of improper purpose on the basis that there were solid grounds for thinking that the condition in which the Company found itself meant that it was (or at least was likely to become) unable to pay its debts and that it is not open to me to conclude that Mr Young did not believe that to be the case.

The Allegation of Improper purpose

126. The appointment in the present case was made by the Company's directors. The purpose for which the power to appoint administrators is conferred is relatively straightforward to identify. I did not understand either party to disagree that it must be exercised towards achievement of the purpose of administration as defined by paragraph 111(1) of Schedule B1, i.e. "*an objective specified in paragraph 3*", which provides as follows:

> *The administrator of a company must perform his functions with the objective of –*
>
> *a) rescuing the company as a going concern, or*
>
> *b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or*
>
> c) *realising property in order to make a distribution to one or more secured or preferential creditors.*

127. The directors were not unanimous in the present case. But it is not in issue that if any director was authorised to do everything required to effect the appointment by a resolution passed at a properly convened meeting of the board, that will be sufficient to authorise those steps to be taken under paragraph 22 of Schedule B1: *Minmar (929) Ltd v Khalatschi* [2012] 1 BCLC 798.

128. The present case is not one in which it is said that there was no resolution to appoint because of a failure to hold a valid meeting or otherwise to comply with the technical requirements of the Company's articles. Initially, it seemed that such an argument might be made on the basis that the notice for the 19 December 2018 board meeting was so short as to render the meeting and therefore the resolutions passed at it constitutionally invalid (see Eversheds' letter of 20 December 2019). However, no

such argument was advanced at the hearing and in the event, all four directors were notified of the meeting and were able to attend.

129. It was submitted by the Applicants that the decision of the directors was invalid, and the appointment made in consequence of it was a nullity and of no effect, not because of non-compliance with the articles, but because they (or more specifically Mr Young and Mr Thoburn as the directors who voted in favour of the resolution) exercised the power to apply for the appointment of the Administrators for an improper purpose, i.e. not for the purpose identified above. This was said to be contrary to section 171(b) of CA 2006.

130. The Applicants' argument was explained slightly differently in different parts of their submissions, although the thrust of the complaint is clear. It was said that Mr Young and Mr Thoburn used the power that they had to control the board while Mr Young was chairman to put the Company into administration to further their interests as minority shareholders at the expense of the majority shareholders and in a manner that was not in the best interests of the Company itself. It was said that they acted in the way that they did so that they could continue to exercise the control over the Company that their combined shareholding would not permit, and thereby prevented the majority from exercising the control over the Company that their shareholding should have permitted them to exercise. The Applicants contend that this was an improper purpose.

131. In making his submission that the consequence of this impropriety was that the appointment itself was a nullity, Mr Shaw cited *Re Euromaster Ltd* [2012] BCC 754. This case examined the distinction between the situation in which defects in the appointment of administrators went to the heart of the power to appoint and the situation in which there has been a technical breach of some procedural requirement. In his judgment at [27]-[28]), Norris J said the following:

> "*… Schedule B1 contains a mixture of provisions, some of which are naturally read as defining the circumstances in which the power to appoint arises and some of which are naturally read as prescribing procedural requirements that must be fulfilled before the appointment is properly made. If an appointment is made in circumstances where there is no power to appoint then the purported appointment would naturally fall to be treated as a nullity. I will give two examples. In Re Minmar (929) Ltd [2011] EWHC 1159 (Ch) the appointment was a nullity because there was no quorate meeting of the directors, the board had never properly resolved to do anything and those who attended the meeting had no power to appoint. In Re Blights Builders [2006] EWHC 3549 the appointment was a nullity because the company had no power to appoint administrators by reason of the existence of an undisposed of winding up petition. If the appointment is made in breach of some other requirement more of a procedural nature then the purported appointment would naturally fall to be treated as irregular. That was the view taken by HHJ Purle QC of the "minor deficiencies" in Re Assured Logistics Solutions Ltd (supra) and by Arnold J in Re Ceart Risk Services (supra) of the requirement to obtain the consent of the FSA.*

> *I consider that this distinction is reflected in the terms of Schedule B1 itself as regards appointments by directors. Paragraphs 22 to 25 inclusive specify when it is that the directors or the company have the power to appoint administrators. Paragraphs 26 to 32 set out the procedural requirements for the exercise of the power. The structure of the Schedule suggests (albeit not strongly) that the court should treat non-compliance with the requirements set out in paragraph 28 as leading to an irregularity rather than the nullity*"

132. Building on what Norris J said in *Euromaster*, Mr Shaw submitted that the appointment of administrators by a company's directors will be invalid in any case where the directors who purport to act in that way do not have power to act on behalf of the company. The examples he gave were where a director who participated in the process is invalidly appointed (for which he cited *Re Sprout Land Holdings Ltd* [2019] EWHC 806 (Ch)) and where the directors' meeting was inquorate (for which he cited *Re Melodious Corpn* [2016] BCC 727). For an appointment of administrators to take effect under paragraph 22(2), there must be a determination by the directors to make the appointment. The consequence of what occurred in *Sprout* and *Melodius* (and indeed *Minmar*) was that the relevant meeting could not be said to have been an occasion on which the directors resolved to appoint administrators under paragraph 22 of Schedule B1.

133. Mr Shaw then submitted that a case in which the directors make an appointment for an improper purpose is to be treated as a case of nullity or invalidity for the same reasons. This is because there has not been a mere breach of a procedural requirement leading to an irregularity capable of being cured in the manner contemplated by Norris J. Rather, so he submitted, the decision made for an improper purpose is one which the directors had no power to make and was therefore to be treated as a nullity or invalid *ab initio*.

134. In support of his submission Mr Shaw said that, generally speaking, directors have authority to bind a company, but said that if the act in issue is for an improper purpose they no longer have express authority and any transaction to which they purport to commit the company will then be void. He cited the decision of Newey J in *GHLM Trading Ltd v Maroo* [2012] BCLC 369 at [171] which he said was authority for the proposition that where a director has caused a company to enter into a contract in pursuance of his own interests the contract is void rather than merely voidable.

135. Mr Shaw accepted that, where the relevant transaction was bilateral it was necessary for the other party to have notice of the improper purpose for the transaction to be wholly void. He was right to do so, because it appears from Newey J's judgment in *GHLM* that a counterparty's notice of the impropriety was an essential part of the analysis:

> "*The better view appears to be that, where a director has caused his company to enter into a contract in pursuit of his own interests, and not in the interests of the company, its members or (where appropriate) its creditors as a class, and the other contracting party had notice of that fact, the contract is void rather than voidable*."

But Mr Shaw went on to submit that, where the transaction is unilateral, which is the way that he characterised a decision to appoint administrators, notice is not necessary

and the decision made for an improper purpose (and therefore the consequential appointment) is void without more.

136. Mr Curl submitted that it would be curious if the appointment of administrators for an improper purpose were to be an absolute nullity both because of the unfortunate effect that it would have on administration practice and because of the provisions of paragraph 81 of Schedule B1, which provides that:

> *(1) On the application of a creditor of a company the court may provide for the appointment of an administrator of the company to cease to have effect at a specified time.*
>
> *(2) An application under this paragraph must allege an improper motive –*
>
> > *(a) in the case of an administrator appointed by administration order, on the part of the applicant for the order, or*
> >
> > *(b) in any other case, on the part of the person who appointed the administrator.*

137. He submitted that, if Mr Shaw were to be correct in his submissions, paragraph 81 would be redundant because the appointment would never have taken effect so there would be no appointment for the court to provide to cease to have effect. In other words, there would be no circumstances in which the discretion contemplated by the paragraph might be exercised – the same effect as cessation would have been achieved automatically. It is difficult to think of any circumstances where the exercise of the power to appoint or apply for an appointment for an improper motive would not also amount to a breach by the directors of their duty to exercise their powers only for the purposes for which they were conferred.

138. This is not a complete answer to Mr Shaw's submission because paragraph 81 of Schedule B1 also covers appointments and applications to appoint by persons other than directors to whom the provisions of s.171 of CA 2006 do not apply. It also does not give members (as opposed to creditors) the power to apply for an appointment to cease to have effect where an improper motive is alleged. Nonetheless, it is difficult to see why a member could allege automatic invalidity where there has been a breach of s.171(b), while a creditor's challenge on exactly the same basis gives the court the discretion contemplated by paragraph 81. In short the terms of paragraph 81 are a powerful indication that, where (as is the case with all appointments including those by directors) the source of the power is Schedule B1, it is to the terms of that statute that it is necessary to look for the consequences of the improper use of that power.

139. Mr Shaw cited no authority which justifies a conclusion that every decision made by directors in breach of s.171(b) of CA 2006 and every exercise of authority granted by such a decision is a nullity without regard to the source of the power, and I do not think that that is the case: see e.g. Palmer's Company Law at paragraph 8.2518: "*An exercise of power for improper purposes is voidable not void*"). See also Gore Browne On Companies at Ch 15 paragraph 9A. In my view, the correct approach, exemplified by cases such as *Howard Smith Ltd v. Ampol Ltd* [1974] AC 821, is to identify the source of the power which the directors are deciding to exercise and the context in which it is

being exercised. Then and only then is it possible to identify the consequences of it being exercised for a purpose other than the purpose for which it was conferred.

140. In cases like *GHLM* the proper purpose doctrine was concerned with powers which are given or delegated to the directors by a company's constitution: in that case the power to enter into a contract on its behalf. The defaulting directors will be liable to the company in damages for breach of the duty, but the company may or may not be bound by the exercise of the power, depending in large part on ordinary principles of agency.

141. The power in the present case is different. It is granted to the Company's directors by the terms of paragraph 22(2) of Schedule B1. True it is that the power to appoint can only be exercised if the directors have made a decision in accordance with the company's constitution, but the source of the power is the IA 1986. It is a power that is given to them as directors and by reason of their status as such, but it is separate from the power given to the company itself to seek the same relief which is granted by a different provision (paragraph 22(1) of Schedule B1). It is, therefore, only in a limited sense that they can be said to be acting on behalf of the company when they are deciding whether to exercise their power to make the appointment. It is different in quality from a power to do something on behalf of and as agents for the company so long as they comply with the terms of its constitution.

142. In my view the scheme of Schedule B1 contemplates that the court has a discretion as to how to proceed in circumstances in which the vitiating factor is said to be an improper purpose or motive at the time of appointment. Nothing in the statute provides, either expressly or impliedly, that the appointment is simply a nullity, and such indications as there are (including in particular paragraph 81 and the other provisions I shall mention shortly) point towards a conclusion that it does no more than provide grounds on which a court may remove an administrator or provide for his appointment to cease to have effect.

143. Thus, I agree with Mr Curl's submission that it was contemplated by the legislation that creditor challenges to appointments on the grounds of impropriety of purpose or motive are to be dealt with under paragraph 81. The fact that the circumstances also amount to a breach of s.171(b) of CA 2006 will doubtless strengthen an application under paragraph 81, but I do not consider that this means that the appointment was simply not made at all and is a nullity.

144. There are also other provisions in Schedule B1 which give the court a discretion to grant appropriate relief where a member or creditor wishes to contend for whatever reason (including impropriety of purpose) that a company ought never to have gone into administration in the first place. Thus, by paragraph 79(2)(b) of Schedule B1, an administrator is required to make an application for his appointment to cease to have effect if he thinks that the company should not have entered administration. In deciding whether he is bound to make such an application, he acts as an officer of the court (paragraph 5 of Schedule B1) and so can be expected to behave with the utmost probity when he does so. If he does not make such a decision when he should have done so, and a member or creditor suffers unfair harm as a result, the court can grant any appropriate relief under paragraph 74 of Schedule B1.

145. These alternative approaches to challenging an appointment on the grounds of improper purpose ensures that the court can take into account what has in fact occurred since the

appointment. It avoids the real practical difficulties which might arise if an appointment were to be held to be a nullity without more where the statutory power to appoint had otherwise arisen, but a purpose, which may or may not have been discernible by the administrators at the time of appointment, is subsequently found to be improper.

146. This is an important consideration given that administration is a class remedy which will often affect the interests of creditors and others who are not directly concerned in the dispute, all the more so where a considerable period of time passes before the challenge is launched. The steps which an administrator has taken without challenge can then be taken into account in determining whether or not the relief sought by the applicant shareholder ought to be granted. In the present case that is an important factor in light of the way in which the Applicants stood by and allowed the administration to proceed (and indeed actively engaged with the Administrators) for more than a year without mounting a challenge, having declined to make a challenge at the outset when invited to do so.

147. None of this is inconsistent with what Norris J said in *Euromaster* or the conclusions which were reached in *Sprout* or *Melodius*. *Euromaster* was concerned with matters of non-compliance with the terms of the IA 1986 itself because it could not be said that the directors as a body had actually made the decision or therefore the appointment. In my view the same cannot be said where a decision has undoubtedly been made by the directors as a body, but that decision is infected by an improper purpose.

148. Furthermore, it is easy enough to check whether a directors' meeting was quorate and properly summoned and the voting requirements under the company's articles were complied with. Likewise, the question of whether or not any of the restrictions on appointment provided for by paragraphs 6 to 9 of Schedule B1 or (in the case of an appointment by the company or its directors) paragraphs 23 to 25 of Schedule B1 were complied with. The question of whether the appointment was made for an improper purpose will always be a much more difficult question to ascertain, a factor that is recognised by the discretionary nature of the relief contemplated by paragraph 81 of Schedule B1. As administration is a procedure which is intended to be capable of rapid introduction and implementation, it would be surprising if the legislature intended any such appointment to be a nullity without more.

149. I should add that if the directors exercise their power to make an appointment for a purpose other than the one for which the power was conferred, they may be acting in breach of s.171(b) of CA 2006 and may liable to the company in damages for that breach. This is one of the reasons why it is so unsatisfactory for the Applicants to be seeking relief in the form of a declaration of invalidity without joining Mr Young and Thoburn to the proceedings, being those directors who are said to have been acting for an improper purpose.

150. It follows that I consider that the scheme of the IA 1986 provides that, where the decision was made in breach of s.171(b), but the exercise of the power otherwise complies with the technical requirements of Schedule B1, the appointment will stand unless and until it is set aside in accordance with the provisions of Schedule B1. It follows that for that reason alone, I decline to grant the first declaration sought by the Applicants.

151. Paragraph 81 of Schedule B1 also has another relevance to these proceedings, because Mr Shaw advanced a very late additional argument that it was open to me to provide pursuant to this paragraph that the appointment of the Administrators should cease to have effect. He said that I could grant this relief because the Applicants alleged an improper motive on the part of Mr Young and Mr Thoburn. This way of putting the Applicants' case was only advanced after the hearing was underway. In these circumstances I asked for the parties' written submissions on the point, without prejudice to the question of whether or not it was appropriate for me to consider an application for that relief at such a late stage.

152. In his post-hearing written submission Mr Curl objected that it would be procedurally unfair for the Administrators to be required to deal with such an application for several reasons. He said that improper motive or purpose was not referred to in the application notice and that, even when it became apparent for the first time that improper motive or purpose was at the heart of the Applicants' case, which it only did on exchange of skeleton arguments, there was no mention of paragraph 81. He said that there was no proper particularisation of the allegations of motive or purpose and that the individuals said to be the main wrongdoers (Mr Young and Mr Thoburn) were not joined to the proceedings as they should have been. He reminded me that only a short time before the hearing commenced, the Applicants had resisted the suggestion that Mr Young and Mr Thoburn should be joined on the surprising basis that "*no relief is sought against anyone other than the Administrators*" and even objected to them being provided with the evidence.

153. More specifically, he submitted that paragraph 81(2) requires that "*an application under this paragraph must allege an improper motive … on the part of the person who appointed the administrator*." In this case the appointment was made by Mr Young pursuant to the authority he was granted by resolution of the Board. The application notice made no allegation of improper motive on the part of Mr Young and Mr Shaw did not seek to amend his application to clarify the motivation that he alleged.

154. Mr Shaw submitted that the facts were set out in the witness statements which were incorporated into the application notice by reference and submitted that that was good enough. I do not agree with that submission. An allegation of improper motive is a serious matter. Both common fairness and the terms of the legislation itself contemplate that it should be properly particularised and that the person or persons against whom it is alleged should be joined to the proceedings so that they can answer the charge. That may not be necessary if it is clear that no consequential relief will be sought against them, and that they will suffer no other prejudice if the allegation of impropriety is made out, but this is not such a case.

155. In these circumstances I agree with Mr Curl's submission that it would be quite wrong for me to make any finding under paragraph 81. For very similar reasons I think that it is wholly inappropriate for me to conclude that Mr Young and Mr Thoburn decided to exercise the power to appoint for an improper purpose. The Administrators had a little bit longer to consider the way in which the Applicants put their case under s.171(b) and to consider what if any evidence they might adduce, but all of the same considerations in relation to the Applicants' failure to join, serve or permit the provision of evidence to Mr Young and Mr Thoburn apply. Nonetheless I think that it is appropriate for me to make some limited findings on the facts because of the Applicants' alternative head of relief under paragraph 74.

156. As I have already explained, the Applicants contended that Mr Young and Mr Thoburn used the power that they had to control the board while Mr Young was chairman to put the Company into administration to further their interests as minority shareholders at the expense of the majority shareholders and in a manner that was not in the best interests of the Company itself. It was said that they acted in the way that they did so that they could continue to exercise the control over the Company that their combined shareholding would not permit, and thereby prevented the majority from exercising the control over the Company that their shareholding should have permitted them to exercise.

157. In support of these allegations, the Applicants submitted that it is clear from what occurred at the beginning of December that Mr Young himself wanted to advance the cash that the Company undoubtedly needed to pay its own current creditors on terms that were very different from those proposed by Mr Kebbell, involving as they did a bridging loan from MTF. When he was then told by Mr Kebbell that, because the terms that he advanced were clearly driven by his own personal interests, he must resign as chairman, he took steps to force the Company into administration.

158. It was said that the speed with which Mr Young called the two board meetings for 10 December and 19 December and the fact that Mr Young was not open with the Applicants on the agendas for those meetings were all indications that Mr Young was acting for an improper purpose. It all happened very quickly, with the knowledge that the Applicants had no real understanding as to what was going on. Although it was not said that Mr Young summoned or conducted the meeting in a manner which failed to comply with the terms of the Company's constitution, it was submitted that the speed with which everything happened and the failure to give proper forewarning to the Applicants of what was to be discussed, were all inconsistent with the way in which the affairs of the Company had been conducted in the past.

159. The Applicants also relied on deficiencies in the disclosures that were made to the Administrators when they had their meeting with Mr Young on 13 December. They invited the court to draw inferences of impropriety because Mr Young was not full and frank in the information about the Company's affairs that he gave. In particular they submitted that Mr Toone was not told that the Applicants were willing to fund the Company's short term liabilities, that as at 7 December Mr Young himself was also prepared to provide funds to the Company and that Mr Kebbell had obtained the £500,000 bridging loan from MTF.

160. It was clear from Mr Toone's evidence that very little of the paperwork produced in the period immediately prior to his meeting with Mr Young on 13 December was shown to him. The Applicants submitted that if Mr Toone had been shown more of this material he would have been on inquiry as to the Company's solvency and would have asked more questions in relation to it, which would have revealed that the Company was not (as Mr Young said was the case) cash-flow insolvent.

161. The Applicants then said that the only plausible reason why the disclosures that should have been made were not made was that Mr Young wished to conceal the Company's financial position from the Administrators, which was clear evidence that he was motivated by an improper purpose. They also relied on Mr Young's subsequent conduct as being consistent with the contention that he was motivated by an improper desire to control what was in substance a solvent company notwithstanding the fact that

he was only a minority shareholder and contrary to the wishes and desires of the majority.

162. The Applicants also relied on Mr Young's subsequent interest in understanding the extent to which creditors can determine whether an administration can be brought to an end and his threats of bringing proceedings for unfair harm against the Administrators. They said that these all pointed towards a minority shareholder seeking to use administration for the improper purpose of wresting control from the majority in what was in substance a shareholders' dispute.

163. Mr Curl submitted that it was accepted by Mr Kitchen when cross-examined that he was not saying that Mr Young and Mr Thoburn were in fact acting with an improper purpose when they voted to appoint the Administrators. He simply said that they may or may not have been acting improperly. He accepted that Mr Kebbell's position was less-clear cut, but he relied on the fact that, even Mr Kebbell accepted that his view on improper purpose was based on no more than a logical inference to be drawn from the way in which Mr Young and Mr Thoburn behaved. I do not accept Mr Curl's submission that on this ground alone it is not open to the Applicants to advance a case on improper purpose. The question for the court is what the evidence discloses, not exactly how it is that the Applicants expressed in their evidence their own views on the inferences that can or should be drawn.

164. On the substantive point as to impropriety, Mr Curl said that the likelihood was that the thinking of Mr Young and Mr Thoburn went along the following lines:

i) They had appreciated for some time that the Company was dependent on MSP for its income stream, but that MSP had not paid the rent for almost 2 years. They knew or certainly believed that MSP was insolvent and was about to enter an insolvency process itself and so any recoveries from that source were uncertain at best.

ii) Having neglected repairs by reason of financial pressures for the period during which the rent was not being paid (and possibly longer), the Property was not lettable to third parties. Neither Mr Kebbell, Mr Kitchen (nor indeed anybody else) had funded the Company during that period even to the extent of repairing the flank wall.

iii) As Mr Kitchen accepted in his evidence, by the first week in December 2018, the Company needed an injection of cash to pay its current creditors, including those which would fall due for payment in the coming months.

iv) Notwithstanding the existence of a significant cash shortfall, neither Mr Kebbell nor Mr Kitchen did in fact provide the cash that was required. Their only proposal, which was no more than a proposal was to put money into the Company, with the intention of passing it straight through to MSP which was insolvent.

v) Mr Young thought about funding the Company himself (he made his proposal on 7 December), but decided not to. He made that decision after receiving advice from Isadore Goldman. There was no evidence as to the nature of that advice, but the probabilities are that this was insolvency advice as there was no

dispute that the lawyer concerned specialises in corporate insolvency (amongst other areas of work).

vi) In light of the failure of the Applicants (or anyone else) to actually put money into the Company, together with the conduct of the Applicants over the previous 2 years, including the way in which they permitted the MSP indebtedness to grow, it was in the best interests of the Company (and its creditors and members as a whole) for an appropriate process for the rescue of the Company to be run by an independent practitioner than for it to be run by the existing management.

165. Mr Curl said that these were perfectly proper reasons for determining that the appointment of Administrators was the right way forward. I agree. It seems to me that they were perfectly entitled to take the view on the evidence available to them that such a course would be most likely to promote the success of the Company for the benefit of its members as a whole (s.172(1)). This was a fairly obvious conclusion, bearing in mind the duty that they also had to consider and act in the interests of the creditors of the Company (s.172(3)), in light of the basis on which I proceed, namely that they were also entitled to conclude that the Company was or was likely to become cash-flow insolvent.

166. But that does not fairly and squarely address the Applicants' contention that, in taking the approach that they did, Mr Young and Mr Thoburn were in fact proceeding with another purpose in mind, namely to further their interests as minority shareholders at the expense of the majority shareholders. It was said that what they sought was a continuation of their exercise of control over the Company that their combined shareholding would not permit, thereby preventing the majority from exercising the control over the Company that their shareholding should have permitted them to exercise.

167. I am sure that part of the purpose of Mr Young and Mr Thoburn was to prevent the majority from exercising control over the Company, and that was one of the reasons that they moved quickly to procure the appointment of the Administrators while Mr Young remained in post as chairman. But I do not accept that the evidence demonstrates, let alone makes it obvious, that it was any part of their purpose to further their interests as minority shareholders at the expense of the majority shareholders. Indeed quite the contrary, the evidence is much more consistent with a conclusion that they took the course that they did because, by causing the Company to enter administration, control would vest in the Administrators, rather than they themselves or indeed any other particular shareholder constituency.

168. There was every reason to think that the appointment of an independent office holder would ensure that, pending the taking of steps to rescue the Company as a going concern, its business and affairs would be conducted in a manner which had due regard to the interest of its members as a whole, and not just one or other of the two independent warring factions. The evidence simply does not justify a conclusion that Mr Young and Mr Thoburn thought that, by appointing the Administrators, they would have supine puppets in place, which would enable them to continue to control the Company. As that is the case, I do not consider that the Applicants have come anywhere near establishing that the power to appoint was not in fact exercised for a purpose for which it was conferred.

169. As I have already made clear, this is a most unusual case. It is unusual both because those whose shareholder votes entitled them to control of the board did not in fact have control of the board at the time the decision to seek the appointment of the Administrators was made and because the Company was on any view balance-sheet solvent. It is made all the more unusual by the fact that the Applicants decided not to challenge the decision-making process immediately after the relevant decisions were made, and when they did so quite deliberately decided not to join as respondents to the proceedings those individual directors whose motives they impugn.

170. What happened in the present case is that a minority, who took the view that the affairs of the Company had until very recently been being conducted in a manner that was unlikely to promote the success of the company for the benefit of the members as a whole, took advantage of what was likely to be their temporary control of the board to put the Company into administration. In doing so they took the view that the appointment of the Administrators would facilitate the rescue of the Company as a going concern, because an independent office-holder would be in control and the likelihood of cash-flow insolvency, caused by the way in which the Company's affairs had been conducted by the majority, would be mitigated.

171. I accept that, if the proceedings had been properly constituted, it is possible that the Applicants would have established that Mr Young had no genuine belief in the Company's actual or likely cash-flow insolvency. If they had done so they would have had a stronger argument that unfair prejudice proceedings were the right way forward and that none of the three statutory objectives of administration were likely to be achieved, not least because there was no genuine liquidity crisis from which the Company required to be rescued. However, that is not the way in which the case has proceeded, and in my judgment, the Applicants have not established that any relief flowing from the purpose or motives with which the directors made their decision to appoint the Administrators is justified.

172. I should add by way of postscript that the failure to advance a case on improper purpose until more than a year after the commencement of the administration gives rise to a final point on improper purpose. Even if I had been satisfied that the purpose for which Mr Young and Mr Thoburn exercised their power to appoint had been improper, the fact of the delay and that the Applicants engaged with the Administrators in the way that they did, would have been a highly relevant question on any relief that the court might otherwise have been minded to grant.

173. In answer to that point, Mr Shaw submitted that it could not be said that the Applicants acquiesced either in the invalidity of the original appointment or in the conduct of the administration thereafter. He said that the Applicants made very clear from the outset that they disputed the circumstances of the original appointment, but then took the pragmatic and sensible approach of engaging with the administration, which was met simply by the Administrators "showing a little bit of ankle" from time to time but in fact doing nothing. He accepted that, with the benefit of hindsight, the Applicants should have issued their application on invalidity earlier than they did but submitted that no conduct of the Administrators relied on any act of acquiescence by the Applicants.

174. I do not agree with that submission. In my view it is incumbent on those who wish to challenge the appointment of administrators to take steps to do so as soon as practicable.

In the present case the Applicants have known of the grounds they seek to advance from the very outset and I am satisfied that they should have mounted any challenge no later than the time at which the Administrators sent out their statutory proposals. As I have concluded that the court would have had a discretion on whether to set aside the Administrators' appointment if the grounds relied on had been established, the delay, combined with the nature of the Applicants' engagement with the Administrators and the steps which the Administrators have taken to progress the administration, incurring very substantial costs in doing so, would have counted against the grant of relief at this stage had I otherwise been minded to grant it.

Unfair Harm

175. Paragraph 74 of Schedule B1 provides as follows:

> *A creditor or member of a company in administration may apply to the court claiming that –*
>
> *a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or*
>
> b) *the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some other members or creditors).*

176. There was no real dispute as to what creditors or members must demonstrate on an application under paragraph 74. They must show:

i) that their interests as creditors or members are being unfairly harmed in their capacity as such;

ii) that if they sue as member, the company is solvent or would be solvent but for the act or omission of which complaint is made;

iii) that the act or omission of which complaint is made is causative of the harm suffered;

iv) that the harm suffered is unfair.

177. Mr Shaw submitted that what is unfair must be judged in the context of the administration and by reference to all the circumstances of the case, including the alternatives available to the administrators and the practical consequences of the court's decision to grant or withhold relief. I did not understand Mr Curl to disagree with that summary of the position.

178. In *Zenga III Holdings Inc* [2010] BPIR 277 at [20]-[22], Norris J explained that differential treatment of creditors does not compel the conclusion that one category or the other may have been unfairly harmed by the administrators. He reached this conclusion by reference to the administrator's statutory duty under paragraph 3(2) of Schedule B1 to perform his functions in the interests of the company's creditors as a

whole. The interests of the class as a whole is the driver which compels the way in which administrators are required to carry out their functions.

179. Mr Shaw also submitted that the duties owed by an administrator are relevant to the determination of whether the interests of a creditor or member have been harmed unfairly. He submitted that, if an administrator is acting contrary to his duties and in particular in a manner that is not in the interests of the class as a whole, his conduct will be unjustified and unfair. He relied in that context on the fact that an administrator's duties included a duty to exercise reasonable skill and care in the conduct of the administration, a duty to act in the interests of the company's creditors as a whole (paragraph 3(2) of schedule B1), a duty to select the objective by which the purpose of the administration will be achieved and a fiduciary duty to exercise independent judgment and not to surrender his discretion.

180. I agree that the extent to which any harm caused by administrators may be characterised as unfair will be affected by the nature of the administrators' duties, although it is important to bear in mind that unfair conduct is not the same as negligence. The principal duty is to carry out their functions with one of the objectives described in paragraph 3(1) of Schedule B1. Until September 2019, the Administrators said that they were pursuing their functions with the objective of rescuing the Company as a going concern in accordance with their statutory proposals.

181. Against that background, Mr Shaw submitted in his skeleton argument that the harm to the interests of the Applicants was the failure of the Administrators to take prompt steps to rescue the company as a going concern whether by proposing a CVA, accepting the repeated offers made by the Applicants to pay the Company's creditors, obtaining a new tenant for the Property or otherwise. The Applicants also relied on the Administrators' proposal to sell the Property as harm to them in their capacity as members by depriving the company of its principal asset and thereby stripping it of the rental income that would accrue from it.

182. In Mr Shaw's oral submissions, the Applicants put their case in a slightly different way. They contended that the cause of the harm was the fact that, although the Company had limited indebtedness, the administration had already taken over 18 months and the expenses were enormous, dwarfing the extent of the Company's pre-administration liabilities. They said that this could have been avoided if, once in office, the Administrators had simply applied to be discharged when they understood the true position, by which they meant the very substantial surplus of assets over liabilities and the fact that the Applicants had a funded proposal to provide for the liabilities in full.

183. The harm which Mr Shaw submitted that the Applicants have suffered was threefold:

i) The Applicants have been deprived of their rights as majority shareholders to exercise control over the Company's affairs. That harm would be mitigated if the Company were no longer to be in administration.

ii) The costs of the administration which are now very substantial will ultimately be borne by the members because they will have to be paid out of the assets before a distribution is made. He said that this harm would be mitigated if the administration were to end now.

iii) If the Property is sold, which is the proposal now made by the Administrators, the Applicants will lose the benefit of an asset that they wish to hold onto. They will also lose the benefit of shares in the Company with an income stream and rent – they will simply have shares in a company which holds a cash pot.

184. The Applicants said that it is unfair to them that the Company is still in administration with a proposal that the Property now be sold for a number of reasons. First, they contended that this would not have occurred if the Administrators had taken the steps that should have taken and made an application under paragraph 79 of Schedule B1 (a provision to which I have already referred) immediately after their appointment. They should, so it is alleged, have assessed whether the matters set out in Eversheds' letters of 20 December and 28 December 2019 were well-grounded. If they had carried out that exercise, it is contended that they would have concluded that the Company should never have gone into administration in the first place.

185. I do not accept that this is a legitimate criticism, more particularly because I do not accept that the Applicants have established that the Administrators did not give proper consideration to the complaints that were made. Indeed quite the contrary, it is clear to me that the Administrators did give careful consideration to the question of whether or not their appointment might have been invalid, and that was the reason why they invited the Applicants to fund an application to court for the determination of that issue if that was a matter which they wished to pursue. In any event, for the reasons that I have already explained, the Applicants have not established a case on improper purpose, and it is not apparent to me that any other ground would have had a good prospect of success had it been advanced earlier in the administration.

186. The complaint made by the Applicants also extended to the impropriety of a continuing administration in circumstances in which the company was solvent. I agree that, if the Administrators had reached the conclusion both that the company was balance-sheet solvent and that it had sufficient liquid assets readily available to make provision for the payment of its current liabilities, an application under paragraph 79 of Schedule B1 would have been an application to which serious consideration should have been given. However, I agree with Mr Curl's submission that this argument is without substance once the Company was in administration without a readily available source of cash. As I have already explained I accept Mr Toone's evidence that, having looked at the Company's financial position in January 2019 and analysed its cash flow, he saw that it had almost no cash and no current income but that it had current obligations which required to be paid. He took the view that, irrespective of the position on 19 December, the Company appeared then to be cash-flow insolvent.

187. I also agree with Mr Curl's submission that any proposal for the injection of funding made subsequent to the appointment of the Administrators may or may not have permitted the statutory purpose of rescue to be accomplished (depending on its terms), but that does not of itself mean that the Company was not unable to date pay its debts at the time the Administrators were appointed. Indeed, in that type of situation, the more likely conclusion is that the solvency was actually achieved by reason of the appointment of Administrators, and that is the context in which the statutory purpose is to be achieved. I also agree with Mr Curl's submission that the question for the Administrators is whether it enables them to achieve the statutory purpose; the question is not: does the offer enable the company to be restored to solvency? That is a point to which I will return.

188. Secondly, the Applicants submitted that, having correctly decided to pursue the first objective (i.e. rescue of the Company as a going concern), the Administrators wrongly concluded that it was not possible to rescue the company as a going concern until the Property was re-let. Mr Shaw submitted that it was unsustainable for the Administrators to contend that the Company was only carrying on business as a going concern when the property was re-let, and that until that time it could not be said to have been rescued. He also relied on the fact that Mr Toone in cross examination admitted that it was possible to borrow against the security of the Property in order to finance its refurbishment. He said that, so long as the Company was in a position where it could stand on its own two feet (as he put it), the decision as to when and how to re-let was a matter for management. He also submitted that it should have become apparent to the Administrators at a much earlier stage that the Company did not need to be rescued in the first place and its financial position only deteriorated as a result of the costs of the administration.

189. In support of that submission, Mr Shaw emphasised that the concept of rescue, introduced into the definition of the purpose of administration by the Enterprise Act 2002, focused on there being a good prospect that the Company would be able to conduct a viable business again. He said that this was the only question and stressed that it was not a sustainable position that a re-letting was necessary before it was possible for the Company to exit administration.

190. The Applicants also complained that the Administrators acted unfairly because, although there were a number of funding options on the table including the Kebbell / Kitchen Proposal, rather than pursuing that option they took the strange position of trying to get the agreement of all shareholders to the way forward. Mr Shaw characterised this attitude as surrendering to one group of stakeholders, and just acting in accordance with their interests. He submitted that what the Administrators were trying to do was broker a deal between shareholders, and that administration was not designed as a remedy to deal with a shareholder dispute. He said that it was unfair for the Administrators to try and act as mediators, more particularly where they were sometimes advocating for the position of the minority.

191. The substance of the Applicants' position on this point was that it is clear that the Administrators were simply scared of the threat that had been made by Mr Young and Mr Thoburn to take proceedings under paragraph 74 of Schedule B1, and were therefore overly concerned about the prospect of litigation. They should, so Mr Shaw submitted, have got on and engaged with the Kebbell / Kitchen Proposal, but instead of doing so they never properly tested it. In short, it was submitted that the Administrators simply abandoned their duty to act independently and succumbed to the pressure to which they were subjected by the minority.

192. The Applicants also said that the attitude adopted by the Administrators to the antecedent claims demonstrated that they were simply being used as a bargaining tool in an attempt to persuade the Applicants to agree to abandon the Kebbell / Kitchen Proposal, involving as it did the return of the Company to the control of the majority without regard to the question of the steps that the majority would then take to ensure the Company's proper governance in the future.

193. Mr Shaw also submitted that, if the Administrators had given proper consideration to the question of whether or not the Kebbell / Kitchen Proposal was any good, it was

always open to them simply to proceed to market and sell the Property. They could have started to do that some time ago, rather than just continuing with their ultimately futile attempts to broker a deal, which has led to no benefit for any stakeholder and simply led to an unwarranted increase in the costs and expenses of the administration.

194. In support of the submission that the Administrators did not give appropriate consideration to all of the funding options on the table, Mr Shaw submitted that Mr Toone appeared unfamiliar with the Kebbell / Kitchen Proposal, and I certainly agree that he did not have the detail at his fingertips. However, there is no reason to believe that at the time it was put forward, the Administrators were not well aware of what it involved. The evidence is consistent with the conclusion that one of the principal concerns they had with it was that there was no proposal for the mechanisms by which the legitimacy of the liabilities to be discharged pursuant to the proposal were to be ascertained and then paid. They were also concerned that it made no provision for a proper business plan and the proper governance of the Company going forward, a point to which I will return shortly.

195. The Administrators' response to the allegation of unfair harm focused on the matters which an administrator must take into account where a company is balance-sheet solvent. Mr Curl cited *Davey v Money* [2018] Bus LR at [283-4] in support of a submission that, even though the Company was balance-sheet solvent, the Administrators had to be satisfied that, if it exited administration, the Company would still be in a position to continue to trade properly as a going concern:

> *The concept of rescuing a company as a going concern is not achieved by successfully realising all of its assets so that distributions of surplus moneys can be made to shareholders after paying creditors in full. It connotes the retention of all or a material part of the business of the company together with the restoration of the solvency of the company so that the company can properly continue to trade as a going concern.*
>
> *AHDL was essentially a one-asset company, whose business entirely depended upon owning and managing Angel House. The concept of rescuing AHDL as a going concern would necessarily preclude selling Angel House. As a practical matter there was, moreover, simply no question of achieving Objective1by improving trading performance to such an extent that AHDL could generate sufficient cash internally to pay o› all its creditors (including Dunbar) or by persuading the creditors (including Dunbar) to agree to waive a substantial proportion of their debts so as to restore the company to solvency. The only way in which Objective 1 could have been achieved was by finding a person or persons willing to recapitalise or refinance AHDL with new money so as to enable the existing debt owed to Dunbar, administration expenses and the unsecured creditors to be paid without selling Angel House.*

196. Mr Curl also submitted, relying on *Davey v Money* at [290], that where the issue is whether a company can continue to trade as a going concern in the hands of its directors after the termination of the administration, it will be necessary for the administrator,

after consultation with the directors concerned to be satisfied as to the viability of its business for that post-administration period. The administrator must be so satisfied because he will be returning the control of the company to their hands. Mr Curl said that this meant that the Administrators could not properly restore the Company to the control of its directors without being satisfied as to the business plan going forward. He said that no such plan was ever provided and pointed out that the Kebbell / Kitchen Proposal made plain that the Applicants took the view that none was necessary. For this reason alone, it was never possible for the Administrators to take the view that they would be acting towards achievement of the first statutory objective if they were to accept the Kebbell / Kitchen Proposal.

197. Having submitted that the Kebbell / Kitchen Proposal did not provide a route to rescue of the Company as a going concern, the Administrators submitted that there was no reason to elevate the Kebbell / Kitchen proposal over other means of achieving the statutory purpose. Indeed, it would have been wrong to do so for precisely the reason that it would not have led to an objective 1 outcome, i.e. the rescue of the company as a going concern. This was said to be both because it was not accompanied by a proper plan as to how the Company's business would be conducted going forward and because it would or might reasonably have caused a breach of duty by the Administrators not to cause unfair harm to the members as a whole. The Administrators said that, having been put on notice of the antecedent claims (being claims which appeared to them to have substance) it would be wrong for them to take steps to return the Company to the control of the majority, which meant that those claims would never be pursued.

198. I think it is clear that the Applicants' attitude in the present case was driven by a belief that, because the Company was balance-sheet solvent, they only had to identify a process for ensuring that all creditors were paid, and as soon as that was achieved, the Company could be restored to the control of its directors. The consequence of that was that the Kebbell / Kitchen Proposal was formulated in a way which had no regard to what would happen once the creditors had been paid in full. This was the reason that the Kebbell / Kitchen Proposal never provided a business plan and Mr Kebbell confirmed in his evidence that he regarded such a plan as unnecessary.

199. I accept Mr Curl's submission that the form in which the Kebbell / Kitchen Proposal was advanced was not properly capable of acceptance in the form in which it was put forward. I also agree that, in the light of the failure of the informal mediation in June 2019, the Administrators were entitled to take the view that further iterations of the proposal in a form that might be acceptable were unlikely to be forthcoming.

200. I do not accept that it was inappropriate for the Administrators to engage in an attempt to broker a deal between the majority and the minority shareholders as they did at the June meeting. The criticism of their attempt to do so was based on too narrow an assessment of an administrators' duty. In my view, the facilitation of an agreement between two factions of shareholders of a company which is cash-flow insolvent but balance-sheet solvent, thereby enhancing the chances that the company will be rescued with more secure prospects of it continuing to function in the future as a going concern, is well within the range of actions which pursuit of the first statutory objective contemplates. I think that this is exactly what the Administrators were seeking to do in the present case, and that the Applicants' criticisms of them for taking that course were misconceived.

201. In my view, the need for a proper business plan going forward, with proper assurances given as to how the Company was to be run in a manner than had regard to the directors' duties provided for by s.172(1) and 172(3) of CA 2006 was a matter that the Administrators were entitled to regard as all the more important in light of the antecedent claims. The Administrators had already investigated these claims and formed the view that they had substance. I think that they were entitled to take the view, as plainly they did, that they would not be acting in furtherance of the rescue of the Company as a going concern if they were simply to have accepted the Kebbell / Kitchen Proposal without regard to the question of how the Company would be managed going forward.

202. The need for such a plan was all the more important in a case in which the essence of the Company's business (i.e. the going concern) was the letting of the Property. I accept Mr Shaw's submission that it is not wholly accurate to say that the Company is only carrying on business when the Property is let, but nonetheless it is reasonable for the Administrators to conclude that rescue as a going concern has not been achieved simply because the creditors have been or will be paid. In the present case, significant works are required to the Property, there is no income being derived from it, no tenant has been identified to the Administrators and there was no obvious means of obtaining one because of the advice they had received (with which Eversheds appeared to agree) that it could not be let without substantial renovation works being carried out.

203. In any event it was also clear that the Administrators did not consider that it was appropriate for them to agree to a proposal towards funding the payment of creditors in full (such as the Kebbell / Kitchen Proposal) which impaired the prospects of the Company proceeding with the antecedent claims, where it was not clear that the proposal would achieve the rescue of the Company as a going concern. The Applicants' reaction to this approach betrayed a misunderstanding of the extent of an administrator's duties. They consistently complained that the Administrators were acting unfairly because they had regard to the interests of the minority shareholders (i.e. those for whose benefit the antecedent claims might be pursued) and there was no authority that they owed duties to stakeholders other than the Company's creditors as a whole.

204. In my view, where a Company in administration is balance-sheet solvent, the Administrators have a duty to have regard to the interests of the Company's members as a whole when deciding on the appropriate course of action. Paragraph 74 of Schedule B1 itself makes this plain. It is drafted in a way that gives members a remedy where the acts of the administrators cause unfair harm to them and it contemplates that the interests of the members as a whole are central to the question of what if any relief should be granted. That duty will be particularly significant where the position of creditors is unaffected by the decision that they take. It follows that, if there is more than one alternative way forward, but there is no material difference between them in either achieving or failing to achieve the first statutory objective (paragraph 3(1)(a)), I think that administrators should normally adopt the course of action which is most likely to be in the interests of the members as a whole.

205. From time to time during the course of the administration, the Applicants and their solicitors placed great emphasis on what they said was the inappropriateness of the Administrators proceeding in a manner which did not give sufficient weight to the fact that they were the majority shareholders and were being deprived of their entitlement

to control the Company through that shareholding. In my view that was not the relevant question for the Administrators, because it was they, not the Applicants, who had the statutory duty to manage the affairs business and property of the Company towards achievement of the purpose of administration. It was all the more important that they should so in light of the fact that the Company appeared to have sustainable claims against the majority. It is self-evident that the Applicants' interests as putative defendants in those proceedings are collateral to and in direct conflict with the interests of the members of the Company as a whole.

206. In the present case, the evidence is consistent with the Administrators having given careful thought to their duties in this context, and I think that they were correct to conclude that they were required to have regard to the impact which their decision on how to proceed may have had on the antecedent claims. Their conclusion to that effect may have been strengthened by the threat of paragraph 74 proceedings by Mr Young and the other minority shareholders, but as I have already indicated, I am satisfied that they did not just roll over in the face of the threat. They took the view that any such application would have real substance. I think that they were entitled to take that view, in part because of the absence of a properly formulated proposal as to how the Company's affairs were to be conducted in the future as a going concern, but also because it would not be in the interests of the Company's members as a whole for the Administrators to take any steps which impaired the Company's ability to pursue those claims.

207. It follows that, in my judgment, the Administrators have not caused unfair harm to the Applicants as members in the way that they have approached a difficult administration. Their application for relief under paragraph 74 of Schedule B1 must be dismissed.

208. Likewise, I do not consider that the Applicants have made out a case that the Administrators have not carried out their functions as quickly and efficiently as is reasonably practicable (paragraph 4 of Schedule B1). This was mentioned as a separate complaint in the papers but was not developed at the hearing as a freestanding point. In my view it adds nothing to the questions which I have addressed on unfair harm. As I have already said on a number of occasions, this has been a difficult administration and I am not satisfied that any breach of paragraph 4 has been established.

209. I should also add that Mr Kebbell's claim as a creditor does not stand up to scrutiny either. Given the clear balance-sheet solvency of the Company it was not submitted that he was harmed in that capacity. He will be paid in full with interest in due course. To the extent that he has suffered harm qua creditor from any delay in payment, I do not consider that such harm was even arguably caused by the Administrators. If anything, it was caused by the Applicants themselves and their attitude to the resolution of what on any view was an unusual and difficult administration. Accordingly, his application for relief in that capacity must also be dismissed.

210. Finally, I should add this by way of postscript. Mr Curl said that it was not suggested that the Company would remain in administration to pursue the antecedent claims if the Property is sold. He submitted that the creditors would and could be paid out of the proceeds of sale of the Property, but thereafter the obvious course would be for the Company to go into liquidation, at which stage the antecedent claims could be pursued by liquidators or sold to a third party litigation funder or indeed sold to any one or more of the existing shareholders. He said that this was the obvious and appropriate way

forward. I understand why he made those submissions, and think that he was right to do so

211. However, it is not obvious to me why the Company should not go into liquidation before the Property is sold. The Administrators are under a duty to apply to the court under paragraph 79(2) of Schedule B1 where they think that the purpose of administration cannot be achieved in relation to the Company. It is of course their case that the first objective cannot be achieved, and I have held that they were justified in reaching that conclusion.

212. I am not asked to rule on whether it is open to the Administrators to think that the second or third objectives (paragraphs 3(1)(b) and 3(1)(c) of Schedule B1) are still capable of achievement, but, if they are not, I do not at the moment see why the duty under paragraph 79(2) will not arise. If such an application were to be made before the Property had been sold in order to raise funds to pay the creditors, it seems highly likely that the Company would end up going into liquidation, and the liquidators would then sell the Property and pursue or sell the claims. On the face of it, these are matters which more properly fall to be pursued by a liquidator rather than administrators who have been unable to achieve (despite their best efforts) the first statutory objective.

213. I should add that this last point was not argued at the hearing, doubtless because it was in neither party's interests to do so. It may be the case that the Administrators have satisfied themselves that the second statutory objective is still achievable. However, it is not a point on which it is appropriate for me to rule, not least because it was not advanced by the Applicants as an act or proposed act by the Administrators by which they have been unfairly harmed.

214. As I indicated at the beginning of this judgment, there were a number of other heads of relief sought in the application notice. In large part, they seem to have been included to facilitate the determination of the principal issues which were argued at the trial and with which this judgment is concerned. As they were not advanced at the hearing, I say no more about them. The parties should endeavour to agree an order to reflect the conclusions I have reached in this judgment. If that is not possible a further hearing can be arranged to deal with any consequentials in due course.