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

No. 215 of 2018
Appeal ref: 9BS0103C

Neutral Citation Number: [2020] EWHC 3677 (Ch)

ON APPEAL FROM DISTRICT JUDGE WOODBURN SITTING IN THE COUNTY COURT AT BRISTOL

IN THE MATTER OF MICHAEL JOHN SCOTT-HAKE
AND IN THE MATTER OF JACQUELINE ANNE SCOTT-HAKE

AND IN THE MATTER OF THE INSOLVENCY ACT 1986
AND IN THE MATTER OF THE INSOLVENT PARTNERSHIPS ORDER 1994

Bristol Civil Justice Centre
2 Redcliff Street
Bristol
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Thursday, 30 January 2020

Before:
THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) Mr MICHAEL JOHN SCOTT-HAKE
(2) Mrs JACQUELINE ANNE SCOTT-HAKE
Appellants

-and-

(1) JEREMY CHARLES FROST
(2) STEPHEN PATRICK JENS WADSTEAD
(as Joint Liquidators of the Appellants t/as The Edwardian)
Respondents

Mr Samuel Parsons appeared for the Appellants
Mr Jonathan Wright appeared for the Respondents

Mr Justice Marcus Smith:

1. I have before me the appeal of an order made by District Judge Woodburn on 30 August 2018 (the "Woodburn Order"). The Appellants before me are the respondents named in that order, that is to say Mr Michael Scott-Hake and Ms Jacqueline Scott-Hake. I shall refer to them in the course of this judgment as the "Appellants" or the "Partners", for they were partners in a partnership that traded as "The Edwardian", which (as I understand it) was a bed and breakfast business in Exeter (the "Partnership").

2. The Partnership is insolvent and has liquidators appointed in relation to it. Mr Frost and Mr Wadstead, the applicants before District Judge Woodburn, are the joint liquidators of The Edwardian and they are the Respondents in this appeal. I shall refer to them either as the "Respondents" or as the "Liquidators".

3. This appeal turns upon an understanding of various provisions in the Insolvency Act 1986 (which I shall refer to as the "1986 Act"), the Insolvency (England and Wales) Rules 2016 (which I shall refer to as the "2016 Rules") and, finally, the Insolvent Partnerships Order 1994 (which I shall refer to as the "1994 Order").

4. Before embarking upon the substance of my ruling, I would like to pay tribute and express my thanks to both counsel in this appeal, Mr Parsons for the Appellants and Mr Wright for the Respondents. I have been enormously assisted by both in their submissions. They have been enormously helpful in clarifying to me what is by no means a straightforward set of provisions.

5. Permission to appeal the Woodburn Orderwas granted by His Honour Judge Paul Matthews on all grounds of the grounds of appeal. The grounds of appeal essentially say that the Woodburn Order was an abuse of process because it was made *ex parte* without notice to the Appellants and was irregular in various respects, including the amount in which the order expressed a call on the Partners.

6. I should, before going any further, explain the nature of the Woodburn Order. What that Order did was provide that the Liquidators might make a call on the Partners as contributories of the Partnership each in the sum of £292,820.00, that exactly representing 100% of the debts and liabilities of the Partnership, together with the expenses of the winding up. There were various other consequential provisions in that Order, but it is unnecessary for me to read those out.

7. The grounds of appeal might be said to be narrower than the submissions that Mr Parsons made on behalf of the Appellants in this appeal. Certainly, in the written submissions made by Mr Parsons, it was suggested that there was simply no jurisdiction to make the order. It may be that this ground falls within the first ground of appeal as framed by the Appellants. It may be that is not the case. It seems to me, however, that it is a necessary part of this appeal that I go through the provisions that underlie the Order made by District Judge Woodburn and that I must necessarily traverse the questions of how these provisions operate. It therefore seems to me that this is a question that I must consider, irrespective of the width of the grounds of appeal.

8. Mr Wright, for the Respondents, very frankly conceded that this was likely to be necessary. He has very helpfully addressed the point in a supplemental set of written submissions that I

received yesterday.

9. In these circumstances, I can see no prejudice to the Respondents in dealing with this point, which in any event I consider I must deal with in order properly to address the grounds of appeal that are in fact pleaded in the grounds of appeal. However, to be clear and for the avoidance of any doubt, I give permission to run this additional ground of appeal, if that is what it is.

10. The Appellants, as I have said, were Partners in The Edwardian. The property, that is to say the then bed and breakfast establishment itself, was a personal asset of the Appellants. Due to difficult trading conditions between around 2008 to 2009, the Partnership fell behind in meeting its liabilities to HMRC.

11. Auctioneers attended at the property in around 2009 to value the property, and furniture was distrained later in 2009 to meet the Partnership's liabilities to HMRC. HMRC itself presented a winding-up petition against the Partnership in 2012, and the Partnership entered into liquidation. Later on, in 2012, the Respondents were appointed as joint liquidators of the Partnership at separate times, Mr Frost in 2012 and Mr Wadstead in 2014.

12. During the course of this process, the Appellants entered into two "IVAs" (i.e., Individual Voluntary Arrangements). Certain steps were taken pursuant to those IVAs. However, it would appear that the IVAs were, at least allegedly, not complied with and they were not extended by the creditors of the Appellants and therefore those IVAs have lapsed.

13. At the time of the winding up order that was made, the Partnership's liabilities amounted to some £102,000.00, of which £85,000.00 odd was said to be owing to HMRC. The deficiency in the Partnership as matters now stand is significantly higher than this, standing at £293,191.00, which is the amount or almost the amount expressed in the Woodburn Order (which is £292,820.00). The point is made on behalf of the Appellants by Mr Parsons that this is a significant and dramatic increase over and above the state of the Partnership's liabilities at the time of the winding up order. That is a point that I shall be referring to in due course.

14. Having set out the background, it is now necessary to turn to the application made by the Liquidators, which resulted in the Woodburn Order. The application is unsurprisingly in the name of the Liquidators as applicants and identifies as respondents in that application both of the Partners.

15. Interestingly, the application states (in paragraph 3) that there are no respondents to this application and the application was made without notice. That is interesting because of course the respondents are identified as the Appellants in the application itself. However, it is made quite clear that the application is being proceeded with without notice to the Appellants and the basis for the application is stated to be section 226 of the 1986 Act as applied by articles 7 to 9 of the 1994 Order.

16. There was evidence, which I will not refer to, before the District Judge from the Liquidators. At the conclusion of the hearing, the District Judge made the Woodburn Order.

17. I turn then to the jurisdictional basis for the Woodburn Order. As stated in the application notice of the Liquidators, the starting point is section 226 of the 1986 Act. Section 226 of the

1986 Act forms part of Part V of the 1986 Act, which is entitled, "Winding up of unregistered companies" and one sees there the definition of an "unregistered company" in section 220. In section 226 of the 1986 Act, there is entitled a section, "Contributories in winding up of unregistered company".

18. Section 226(1) provides:

"In the event of an unregistered company being wound up, every person is deemed a contributory who is liable to pay or contribute to the payment of any debt or liability of the company or to pay and contribute to the payment of any sum for the adjustment of the rights of members amongst themselves, or to pay or contribute to the payment of the expenses of winding up the company."

19. Section 226(2) provides:

"Every contributory is liable to contribute to the company's assets all sums due from him in respect of any such liability as is mentioned above."

20. Part V of the 1986 Act is a very short Part. What occurs is that Part V, which relates to unregistered companies, piggybacks upon earlier sections of the Insolvency Act dealing with the winding up of registered companies. Section 229 of the 1986 Act makes very clear that there is a relationship between Part V and earlier parts of the 1986 Act. Section 229 is entitled "Provisions of this Part to be cumulative", and then Section 229(1) provides:

"The provisions of this Part with respect to unregistered companies are in addition to and not in restriction of any provisions in Part IV with respect to winding up companies by the court; and the court or liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies registered under the Companies Act 2006 in England and Wales or Scotland."

21. Therefore, what one has, as is very clear (for instance) from section 221 of the 1986 Act, is a certain transposition of provisions that apply in the case of registered companies to unregistered companies. There is, to an extent, a need to read-across the earlier provisions in Part IV into Part V.

22. So far, there is no mention of partnerships. That is where the provisions of the 1994 Order come in. The relevant provision, for present purposes, is article 7 of the 1994 Order, which provides in article 7(1):

"Subject to paragraph 2 below, the provisions of Part V of the Act shall apply in relation to the winding up of an insolvent partnership as an unregistered company on a petition of a liquidator within the meaning of Article 2(b) of the EC Regulation appointed in proceedings by virtue of article 3(1) of the EC Regulation of a temporary administrator within the meaning of article 38 of the EC Regulation of a responsible insolvency practitioner of the Secretary of State or of any other person other than a member where no insolvency petition is presented by the petitioner against a member or former member of that partnership in its capacity as such."

23. What one has therefore is a double read-across. First of all, one has Part V applying explicitly to unregistered companies and then one has the 1994 Order extending that read-across or

creating a double read-across in the case of partnerships. The problem, as I see it, is that partnerships are in themselves very different from companies, be they registered or unregistered.

24. The fact is that a company, it is trite, is its own legal person, whereas a partnership generally has no legal personality of its own, but instead operates as the vehicle (the "partnership") of the partners. One can see the difference in the liability of members or shareholders of companies in contrast to those of partners of partnerships. As is well-known, membership of a company brings with it rights and obligations which are defined and set out in the articles of association of the company in question. Generally speaking, the shareholders' rights and obligations are limited, in particular those obligations are limited in the extent to which a shareholder is obliged to contribute his or her assets in the insolvency of the company. In the case of most shareholders or members, being fully paid up members or shareholders, there is actually no liability in the insolvency of a company beyond what has already been paid into the company's equity capital.

25. By contrast, a partnership entails a personal liability on the part of its partners, which is defined by section 9 of the Partnership Act 1890. Section 9 provides:

> "Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts."

26. Provided the debts or obligations of the firm are incurred during the currency of a partner's partnership, the liability of the partner is an unlimited one. That is just one of the significant differences between companies and partnerships.

27. The result of this is that when one seeks to read into the provisions of the 1986 Act an application to a partnership, when the provisions are actually drafted with a company in mind, there is, to an extent that I will be describing in this judgment, sometimes a difficulty in working out what exactly the Act is getting at.

28. It is quite clear what the 1986 Act is providing for in relation to registered companies. It is a little less clear what the 1986 Act is providing for in the case of unregistered companies. It becomes harder, as I say, in the case of partnerships. It is this process of statutory construction – by way of "read-across" - that I must embark upon.

29. The first, and the most critical, question is the extent to which I am permissibly allowed to refer to provisions that are not in Part V of the 1986 Act at all, but which actually are to be found in earlier parts of the Act. It seems to me that it is impossible to read section 226, which is the relevant provision of the 1986 Act, in conjunction with article 7 of the 1994 Order, on its own.

30. One must read section 226, and in the case of partnerships, article 7 also, in light of the entirety of the 1986 Act. That, as it seems to me, is clear from the double read-across that is required by the provisions of the Insolvency Act 1996 and the 1994 Order, but is also made express by section 229(1), which I have already referred to.

31. This conclusion is also clear from other provisions in the 1994 Order. For example, the 1994 Order, which creates the read-across in the case of partnerships, has in Schedule 3 a series of modifications to parts of the 1986 Act which do not belong in Part V of that Act. That would therefore suggest, if Section 229(1) were not enough, that one must read section 226 in light of the entirety of the 1986 Act, and in particular in light of Part IV of that Act.

32. It therefore seems to me that, to the extent that it was suggested that I should not reach into the earlier provisions in Part IV of the 1986 Act, that is a submission that I must reject. I consider that I must read the Parts in conjunction with one another, but that I must adjust the provisions in Part IV, in particular those which relate to registered companies, so as to apply as though what was involved was a partnership, and not a company. That is the process which I now propose to do.

33. Section 226 of the 1986 Act, as I have described, concerns the requirement of contributions from contributories to the partnership. What, one must ask, is a contributory? A contributory in the Act is defined in Section 79. Section 79 says this:

> "In this Act the expression "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory."

34. I must adjust section 79 so as to delete the reference to a company and insert, I consider, the reference to a partner and adjust for instance reference to members in a like way.

35. The definition of a contributory is also enhanced or embellished by section 74 of the 1986 Act. Section 74 describes the liability of contributories. Again, it is phrased in the language of members of registered companies and needs to be read differently in the light of partners in a partnership. What section 74(1) says, in its form as it appears in the Act, is this:

> "When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves."

36. What I have here, therefore, is a liability triggered by the insolvency of a company, which imposes a liability on the present and past members to contribute, not merely to the payment of the debts and liabilities of the company, but also to the expenses of the winding up and, to the extent there have been unfair contributions by members, to adjust the contributions between contributories, no doubt to ensure equality of contribution.

37. Section 74(2) contains a series of qualifications to this liability. As Mr Wright expressed it, section 74(1), which defines the liability to contribute, sets an absolute ceiling on what may be required by way of contribution, which is an amount sufficient for paying the debts and liabilities and expenses of winding up.

38. It is important to stress that this maximum is not a bright line, clear, maximum. What it is, is a provision that is intended to create a fund which is intended to be sufficient for the paying of the debts and liabilities and expenses of the winding up. It is trite that in the course of a winding up of a company, there will need to be assessments of what the liabilities of the company might be, which will turn at least in part on an assessment of what its assets are. It

may very well be that liquidators in the course of the winding up will have to make a judgement call or assessment as to the liabilities, the assets available to pay them, and the costs of getting the assets in. It will be the outcome of that consideration that constitutes the liability to contribute as defined in section 74(1).

39. That reading of section 74 is in my judgement consistent with a statement by Lord Neuberger in *Re Lehman Brothers International (Europe)(in administration)(No 4)*, [2017] UKSC 38. What Lord Neuberger said, in the course of a lengthy judgment, at [156] is that what a contribution does, what money is paid under section 74 is intended to do, is to create a statutory fund which can only come into existence once the company in question has gone into liquidation. That statutory fund is then distributed in accordance with the liabilities of the company and the expenses of the liquidation.

40. If the statutory fund is in a surplus, then there is provision in section 154 of the 1986 Act for the court to adjust both the rights of the contributories amongst themselves and to distribute any surplus amongst the persons entitled to it.

41. It is quite clear that section 74(1) envisages a fund that is calibrated towards the debts and liabilities and expenses of a winding up in the case of the company, but it is not absolutely at that level penny for penny. What one instead has is, as I say, a fund that is intended to be sufficient to discharge these liabilities, but it may well be in excess of that amount, albeit calibrated by reference to it. In short, there is the possibility of "overshoot", but that, as I say, constitutes the maximal liability to contribute under section 74.

42. Section 74(2) to contains a whole series of qualifications to that liability. Again, consistent with section 74(1), section 74(2) refers to members of the company and not to partners. So for instance, one sees in section 74(2)(b) that "a past member is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member".

43. Equally, where there is a company limited by shares, section 74(2)(d) provides that "no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member". Therefore, if one has, as is normally the case, a set of fully paid up shares, the owners of those shares are not obliged to make a contribution pursuant to section 74. That explains, in my judgement, how Norris J was able to conclude in *Burden Group Holdings Ltd v. Hunt*, [2018] EWHC 463 (Ch) that a contributory who was not liable to contribute was nevertheless a contributory. The fact is that that is made abundantly clear in my judgement by section 74(2)(d).

44. Given my holding as to how section 226 is to be construed, section 74 does define the liability of the contributory even in the context of a partnership. The question is how that provision applies. Clearly, it must be adjusted in order to reflect the differences between the liability of a partner and the liability of a member. Therefore, for instance, it seems to me that the provision in section 9 of the Partnership Act, that I have already referred to and which makes clear that a partner is only liable for all debts and obligations incurred whilst a partner, must require section 74(2)(b) to be read so that the limits on the liability of a partnership identified in section 9 are respected.

45. However, it does seem to me that Mr Wright was correct in asserting that the juridical basis for the liability of a contributory, including a partner, is not in fact section 9 of the Partnership Act, but section 74. That inevitably means that the liability of a partner extends beyond simply

the debts and obligations of the firm incurred whilst a partner, extending to the amounts needed to pay the expenses of the winding up.

46. It also seems to me that the risk of double liability to a partner is not a real one. On the face of it, it appears that a partner contributory is liable both under section 74 and under section 9 of the 1986 Act and the 1890 Act respectively. However, it seems to me that one needs to read-across into the liability of the partner as contributory the provisions which prevent claims being made against an insolvent company for its own protection. Therefore, for example, section 228 of Part V provides that:

> "Where an order has been made for winding up an unregistered company, no action or proceeding shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the court, and subject to such terms as the court may impose."

47. Section 228 requires substantial adjustment in order to apply to the contributory as partner or partners' contributory, but it seems to me that is a fairly straightforward read-across. In addition, it seems to me that on the insolvency of a partnership a claim by a party pursuant to section 9 would not be precluded by this provision and, absent leave of a court, could not be either commenced or proceeded with. The primary source or basis of liability will be section 74.

48. So far then so good. We have the basis for the liability of contributories, and we have identified the liability of contributories as section 74.

49. Going back to section 226, section 226 simply provides for the liability of contributories, but it says nothing about process. The relevant provisions regarding process are not to be found in Part V but are found in the rather fuller Part IV.

50. In order to understand whether the order of District Judge Woodburn was or was not properly made, it is necessary in my judgement to track through exactly how the process of obtaining a contribution from a partner contributory works. I begin with section 150 of the 1986 Act. Section 150(1) of the 1986 Act provides that:

> "The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the company's assets, make calls on all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the court considers necessary to satisfy the company's debts and liabilities, and the expenses of winding up, and for the adjustment of the rights of the contributories among themselves, and make an order for payment of any calls so made."

51. One can immediately see the resonance in language between section 151 and section 74. However, Section 150 quite explicitly refers to the court making a call, and not the liquidator. As we have seen from the provisions of the order of District Judge Woodburn, what emphatically that order did not do was make a call by the court. Instead what was ordered was that the liquidators might make a call.

52. There was a dispute between the parties as to whether section 150(1) constituted the basis for this order, but in my judgment it does not, and I need to explain why. Section 160 of the 1986

Act is entitled "Delegation of powers to liquidate (England and Wales)". What section 160(1) does is make provision for subordinate legislation enabling certain powers and duties conferred and imposed on a court in England and Wales to be exercised and performed by the liquidator as an officer of the court. Section 160(1)(d) permits the making of such legislation in relation to the making of calls.

53. It is very important, in my judgment, to be clear about what Section 160(1) is doing. It is not by itself delegating anything by way of power to the liquidator. What it is doing is delegating to rule-makers the ability to make rules covering certain subject-matter areas, including the making of calls.

54. It follows that the answer as to what a liquidator may or may not do when making the call is not *ex hypothesi* to be found in the 1986 Act. The 1986 Act simply makes possible the making of calls by way of subordinate legislation. The relevant subordinate legislation is the 2016 Rules.

55. Chapter 11, beginning at rule 7.86, deals with calls on contributories. It is unnecessary to read out all of these provisions, but rule 7.86(1) provides:

"Subject as follows, the powers relating to the making of calls on contributories are exercisable by the liquidator as an officer of the court."

Therefore, it makes clear that the powers to exercise calls are exercised by the liquidator but "subject as follows", in other words one must read the subsequent provisions.

56. Rule 7.88 of the 2016 Rules deals with the application to court by a liquidator for permission to make a call. Section 7.88(1) says this:

"Where the liquidator proposes to make a call, the liquidator may apply to the court without notice to any other party for permission to make a call on any contributories of the company."

There then follow certain provisions dealing in some detail as to what the application must say and what it must be supported by in terms of a witness statement.

57. The point that I take from rule 7.88(1) is that it envisages an application without notice. Indeed, that is the title of this particular sub-rule and its terms say that the liquidator may apply to the court without notice. I am quite sure that it would not be improper for a liquidator to apply on notice: however, it is quite clear that the default that is anticipated by the 2016 Rules is that the matter be dealt with on an *ex parte* basis.

58. It seems to me therefore that the process before District Judge Woodburn was, in these circumstances, entirely proper.

59. The next question, however, is what exactly was the effect of that order? The effect was simply to give permission to the Liquidators to make a call.

60. Rule 7.89 of the 2016 Rules provides that the court may give an order giving the liquidator permission to make a call and it sets out what the order must say in order to be proper. There are also provisions in rule 7.89(2) regarding the direction as to how the notice of the order be delivered to the contributories concerned.

61. Therefore, what one has is a process whereby the order permitting the call to be made is sought and obtained *ex parte* and is then notified to the contributories in question pursuant to rule 7.89(2). It may well be that in the case of some calls, the contributory in question makes payment without more. In other cases, the call for payment will not be met by payment but by a refusal to pay.

62. What then happens? Again, the answer is to be found in the 2016 Rules. Rule 7.90 concerns the making and enforcement of calls. It begins with the obligation on the liquidator to deliver notice of the call to each contributory concerned and specifies what the notice should be. Then, rule 7.91(1) provides that the court may make an order to enforce payment of the amounts due from the contributory.

63. It is very clear from rule 7.91 that such an order must be preceded by an application. I derive that, for instance, from rule 7.91(2)(b), which obliges the order to state the identification and contact details for the liquidator who made the application. Similarly, rule 7.91(2)(i) refers to the order containing an order that the contributory pay the liquidator a stated sum in respect of the liquidator's costs of the application. Again, an application is clearly envisaged.

64. It seems to me obvious that this process, the enforcement process, must be conducted *inter partes* and not *ex parte*. An *ex parte* process requiring a person to pay is not merely an inefficient way of proceeding, but an unjust one. The fact is that a contributory may have perfectly good reasons for refusing to pay.

65. Bear in mind that under section 79(1) of the 1986 Act, a "contributory" includes an alleged contributory. Let us suppose that the liquidators, having obtained *ex parte* permission to make a call, have made a mistake. A mistake might be an error of judgment in terms of the amount of the fund that needs to be assembled in order to discharge the obligations of the insolvent partnership and the costs of winding up. However, the mistake may be more fundamental than that. It may be that the liquidator has identified the wrong party. It may be that the amounts sought to be called for pursuant to the notice are excessive given the liabilities of the partner. Bear in mind that the partner, by virtue of a combination of section 9 of the 1890 Partnership Act, and section 74 of the 1986 Act, is only liable for the debts and obligations of the firm incurred whilst a partner.

66. It is perfectly possible to envisage a liquidator by error seeking to recover debts and liabilities that are incurred either before or after the particular contributory's partnership, such that an attempt to recover such sums would be improper. The way, as I understand it, rule 7.91 of the 2016 Rules operates, is that at the enforcement stage these points, the process being *inter partes*, can quite appropriately be taken and dealt with by the contributory and the court will take them into account.

67. What then happens if the court considers that the call is justified and either in whole or in part ought to be met and paid? Obviously, the court will make an order to that effect. The jurisdictional basis for that, as it seems to me, is section 150(1) of the 1986 Act, which I read earlier in this ruling. Section 150(1) provides not merely for the power to make calls by the court, but also to make an order for payment of any call so made. It seems to me that the entirely likely outcome of a successful application to enforce a call by a liquidator will be an order made pursuant to section 150(1), which will either involve simply an order to pay or a call by the court in combination with an order to pay. That call or that order can then be enforced.

68. One of the interesting provisions in the 1986 Act is section 152(1). This provides that an order made by the court on a contributory is conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid, is due but subject to any right of appeal. What one has here is a statutory provision making clear that the court's order pursuant to section 150 is conclusive that the money there ordered is due.

69. Why, it must be asked, does this provision exist? It seems to me that section 152(1) is closely tied to the fact that what a call seeks to achieve is the establishment of, as I have termed it, a statutory fund. That fund may or may not be precisely sufficient to meet the liabilities and costs of the winding up of the insolvent entity.

70. If, as may well be arguable, the fund sought to be established is overly generous, that may be entirely appropriate. What section 152(1) seeks to head off is any kind of suggestion that the sum called for is not due because it is excessive. What section 152(1) that does, in my judgment, is to make clear that where the court has ordered a call in a particular amount that amount is due and it is not permissible for the contributory to seek to challenge in the course of enforcement proceedings the sum determined by the court, save in an appeal.

71. This is not how Mr Wright submitted the provisions worked. I make it clear that I reject his construction of the 1986 Act, which was that when the court gave permission to a liquidator to make a call, that involved the exercise of a power under section 150. It seems to me that that is a misreading of the 1986 Act, for a number of reasons.

72. First of all, as it seems to me, it fails to take account of the fact that section 150 refers expressly to the court or not to the liquidator. It is no answer to say that one must read in place of "court" the word "liquidator" by virtue of section 160, because section 160 is a provision for delegating powers to a liquidator by way of rules, namely the Insolvency Rules 2016, that I have referred to. In short, what happens in the statutory scheme is that instead of using the powers under section 150, the powers are those created (pursuant to section 160) in the 2016 Rules. Therefore, we will never get to section 150, and it will never be necessary to delete in that section "court" and substitute "liquidator".

73. That brings me to the second reason why my reading, as opposed to Mr Wright's, of the 1986 Act must be right. It is a necessary consequence, if Mr Wright were correct, that a call by the liquidator would result in the conclusive establishment of what was due. That is fine if that is the consequence of an *inter partes* hearing after a court determination. It is emphatically not fine if section 152(1) is triggered by an *ex parte* application for permission to make a call made to the court.

74. The reason that this is – or would be - unsatisfactory is self-evident. It seems to me to be entirely wrong for the statute to impose upon a contributory, after an *ex parte* process, a conclusive finding that money is due which can only be challenged on an appeal. That, as it seems to me, would be unjust and wrong and is strongly suggestive in my judgment that the interpretation of the 1986 Act and the 2016 Rules that I have articulated is the correct one.

75. This reading, that is to say the fact that section 150 is not exercised when a call by a liquidator is permitted, resolves one of the issues and one of the problems that concerned His Honour Judge Matthews when he gave permission to appeal. The judge was concerned that it might be said that Mr Wright was correct and that the result of the Woodburn Order was to tie his hands in terms of enforcement as regards the amount in which the call should

be enforced. His thinking was that because the Woodburn Order had not been challenged and remained valid, he could not question the call of £292,820.00, and he must simply enforce in this amount.

76. For that reason, Judge Matthews stayed enforcement and gave permission out of time for the Woodburn Order to be appealed. I entirely understand why the learned judge took that course. However, for the reasons that I have given in this judgment, it seems to me that the concern, whilst understandable, was unfounded. The fact is that I do not consider that there is any form of conclusiveness arising out of the Woodburn Order and that any points that the partners wish to take in relation to enforcement, they are permitted to take.

77. Given that conclusion, it seems to me that it is probably unnecessary for me to set aside or even vary the Woodburn Order. I propose to hear the parties on that. It seems to me that I need to hear submissions as to what consequential orders I should make in light of my determination as to how the 1986 Act and the associated legislation works.

78. I should, before I invite submissions, however, make one point clear. It seems to me that there was common ground between the parties that the amounts that comprise the call authorised by the judge were, as events had least have turned out, not correct. Turning to the manner in which the sum of £290,000.00 odd was computed, it is quite clear that at least £17,000 of this (which represents a sum purportedly due HSBC Bank plc) is not in fact due. One might say that constitutes a material error in the Woodburn Order, but I doubt if that is correct. One cannot say, because of the way in which the contributory's liabilities are defined in section 74 of the 1986 Act that, on the face of it, the costs of the bankruptcy are improper. It seems to me that they fall naturally within the rubric of section 74.

79. If it were the case that the Woodburn Order went beyond simply giving permission to make a call, and contained an element of conclusiveness, then I absolutely would have set it aside so as to enable the Partners to make such points as they considered fit in relation to these amounts. However, it seems to me that if, as I have held, the only consequence of the Woodburn Order is simply to give permission to the Liquidators to make the call, it is probably unnecessary to do anything to the order because the amounts there set out can subsequently be challenged at the enforcement stage.

80. That is my view as to the significance of the amounts set out in the order. However, again, I will hear the parties as to whether they consider that there is any benefit in the adjustment or variation or setting aside of the Woodburn Order.

Transcript from a recording by Ubiqus
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