Neutral Citation Number: [2019] EWHC 3455 (Ch)

Case No:CR-2019-MAN-000821

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

In the Matter of C A & T Developments Limited
And in the Matter of the Insolvency Act 1986

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

Date:11th December 2019

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

Tan Koon **Applicant**

- and –

(1) Tom Bowes
(2) Andrew David Rosler
(3) Christopher Parker

Respondents

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Mr Andrew Mace (instructed by **Wedlake Bell LLP**) for the **Applicant**
Mr Christopher Cook (instructed by **Freeths LLP**) for the **First and Second Respondents**
Ms Claire Bunbury (instructed by J**MW Solicitors LLP**) for the **Third Respondent**

Hearing date: 2nd December 2019

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APPROVED JUDGMENT

HHJ Halliwell:

(1) Introduction

1. The Applicant ("Mr Koon") is a creditor of C A & T Developments Limited ("the Company"). The Company went into administration when, on 15th August 2019, the Third Respondent ("Mr Parker") appointed the First and Second Respondents (together "the Administrators") as administrators under a debenture dated 25th July 2019 ("the Debenture").

2. Relying upon *Paragraph 81* of *Schedule B1* to the *Insolvency Act 1986*, Mr Koon seeks an order providing for the Administrators' appointment to cease to have effect. In the event I make such an order, he seeks an order winding up the Company under *Section 117(1)* and *122(1)(f)* of the *Insolvency Act 1986* on the basis that it is unable to pay its debts. Alternatively, he seeks an order replacing the Administrators under *Paragraph 88*.

3. The parties have each filed witness statements in support of their respective cases to which a substantial amount of documentation is appended. No directions have been made for oral evidence or cross examination. There are some issues of fact which cannot be resolved on the face of the witness statements without testing such evidence in cross examination. Notwithstanding the volume of appended documentation, there also remain some obscurities about the factual background. However, I am satisfied it is un-necessary for me to resolve these issues or clarify each obscurity to dispose of the Application fairly and in accordance with the applicable legal principles.

(2) Factual sequence

4. Mr Koon is a resident of Singapore. He became acquainted with Mr Anthony Stone ("Mr Stone") when Mr Stone also resided there. Mr Stone introduced him to Mr Parker and, together, they discussed the possibility of entering into a business venture involving the purchase and sale of development property in England. A measure of agreement was reached and, on 27th March 2015, the Company was formed as a vehicle for the proposed business.

5. At the outset, Mr Parker and Mr Stone were appointed as directors. The nominal share capital was £100. Mr Parker and Mr Stone were allotted 50 shares each. No shares were allotted to Mr Koon. It was not envisaged he would be entitled

to an interest in the shares. The scheme was apparently for him to advance loan monies to the Company on the understanding that the Company would be liable for repayment. Moreover, in the event that the monies were ultimately used to buy and develop property, he would be paid an amount equal to 60% of the net profits when the property was re-sold. These arrangements are partly reflected in an investment agreement dated 27th May 2016. I have only seen an un-signed copy of the agreement and it is expressly governed by the laws of Singapore. However, nothing turns on these obscurities since the Respondents accept that Mr Koon advanced monies to the Company on loan and is to be treated as a creditor.

6. Ultimately, on 9th February 2015 and 15th July 2015, Mr Koon transferred the sums of £35,000 and £25,000 to Mr Parker with the intention that they would be credited to the Company. Mr Parker duly transferred at least £42,500 to the Company's bank account in respect of these amounts. It is unclear what happened to the balance of £17,500. On 27th May 2016, Mr Koon transferred to the Company an additional sum of £249,976.24. By that stage, he had thus advanced some £309,976.24.

7. Utilising these funds, on 1st June 2016 the Company purchased development land at Lunsford Lane, Larkfield, Aylesford, Kent ("the Property") for a purchase price of £275,000. The Property comprised a vacant site with the benefit of planning permission for the construction of a single house.

8. Mr Parker maintains that, following the acquisition of the Property, he was engaged as an employee and the Company remunerated him at a monthly rate of £600. No steps were taken to implement the planning permission itself. However, he obtained reports and surveys and cleared the site of seven years' growth of vegetation to level it in readiness for the intended development work. Mr Parker also maintains that, by 1st November 2017, when he obtained Initial Notice of Building Regulation Approval, he had already "put in over 1,500 hours of [his] time to obtain the Initial Notice as well as around £72,000 of [his] own resources to support the venture".

9. By this time, Mr Parker had transferred his shares to his father, Mr Michael Parker, and resigned as a director. According to the entries at Companies

House, Mr Parker's shares were transferred on 1st January 2017 and he resigned as a director on 1st April 2017. On the date of his resignation, Mr Michael Parker was appointed as a director to replace him. Mr Parker's explanation for this is that he was applying for personal finance at the time and was advised that he would have better prospects if he was an employee rather than a director. By an email dated 1st September 2017, he advised Mr Koon that his father would hold his shares "for a few months whilst I apply to raise money from a bank". However, Mr Michael Parker remained in office as a director and retained his shares until the Company went into administration.

10. There is only limited available evidence about Mr Michael Parker's personal circumstances. It appears he is elderly. No evidence has been adduced to suggest he has significant experience in connection with the management of a company or the attendant legal formalities. Following the appointment of Mr Michael Parker as a director, Mr Koon contends that Mr Parker himself continued to act as *de facto* director or dictate the decision-making as a shadow director. In his own witness statements, Mr Parker does not specifically challenge these propositions. He states that "the change in directorship and shareholding has little, if any, bearing on this application and indeed [is] something that [Mr Koon] has never raised before" and, later, "I continued with my obligations to project manage the development as an employee. The Company's accountants made the appropriate filing at Companies House as they had done with all the Company's filings". No witness statement from Mr Michael Parker has been filed in these proceedings and Mr Michael Parker has not done anything else to explain the parameters of his role in the Company's affairs. More likely than not, following the appointment of Mr Michael Parker as a director, he played no more than a minimal role in the management of the Company's affairs and Mr Parker himself acted as a *de facto* director of the Company.

11. Mr Koon became increasingly concerned about the absence of progress in connection with the project. No doubt mindful that the planning permission was shortly due to lapse, Mr Parker suggested, in an email dated 8th January 2019, that they should submit a new application for planning permission for two houses and advised that, once constructed, such houses would sell "for a

combined £1,350" so that, after "build costs…of 600-650…a healthy profit is assured". In an email on the same day, Mr Koon advised Mr Parker that he was unlikely to remit further funds and suggested that Mr Parker should raise funds himself. No further steps were taken to pursue the development and the planning permission was allowed to lapse on 31st March 2019.

12. By this stage, Mr Stone was suffering from terminal pancreatic cancer having been diagnosed as such in November 2017. There is no evidence that he made any significant financial contribution to the project prior to his death on 30th June or 1st July 2019.

13. On 8th July 2019, Mr Parker emailed Mr Koon a manuscript balance sheet in relation to the project. This recorded that Mr Parker had himself personally made a contribution of £104,025 which was to be added, on the balance sheet, to Mr Koon's contribution. Although not stated expressly, it was implicit that the Company was indebted to Mr Parker in the sum of £104,025. No breakdown was provided with the email. However, it can be inferred that it was intended to encompass Mr Parker's personal contribution to expenditure on the project, for example on obtaining professional advice and services or in connection with clearance work on the site. To his second witness statement dated 25th November 2019, Mr Parker has exhibited personal bank statements to show that he has contributed some £87,488.40 in this way. He characterises this contribution as a loan to the Company. However, it is not possible to attribute transactions on the bank statement to items of expenditure on the project without explanatory evidence.

14. When, on 8th July 2019, Mr Parker emailed the manuscript balance sheet, he may have anticipated that Mr Koon could be persuaded to invest further in the project. However, once it became apparent to Mr Parker that this was unlikely, he embarked on a different strategy.

15. Later in July 2019, he instructed a professional firm, VZX, to provide him with advice. VZX provide financial advice and advice on matters such as funding, corporate restructuring and insolvency.

16. Mr Parker contends that, when he approached VZX, he "wanted to continue with the planning application as it [was] clearly in the Company's best interests"

and "did not want to be bullied out of the Company". He "was hopeful that if [he] could provide funding, [he] could progress the planning application and then…show tangible progress to the Applicant which would allow us to build the relationship again and continue with the development of the land". VZX advised him that "if [he] wished to continue to provide capital to the Company to protect [his] position [he] should secure all future funding. This could be done by way of a debenture over the Company's undertaking and legal charge over the land". Few, if any, material documents have been disclosed and no witness statement from Mr Parker's professional adviser or advisers have been filed.

17. In his witness statements, Mr Parker does not specifically state the capacity in which he instructed VZX. It would certainly appear that he instructed them in his personal capacity since, in Paragraph 66 of his first witness statement, he asserts, in terms, that "the advice given to me by VZX was that if I wished to continue to provide capital to the Company, to protect my position I should secure all future funding". However, elsewhere, he refers to the "advice which VZX provided as to the options for the Company". On Mr Parker's behalf, Ms Bunbury submitted that at least at this stage, Mr Parker was acting as a *de facto* director.

18. In my judgment, it is more likely than not that Mr Parker instructed VZX both in his personal capacity and as *de facto* director of the Company. In reality, his father never played an active role in the management or direction of the Company and, by then, Mr Stone was dead. It follows that Mr Parker was in full control of the Company's affairs. It is unclear whether Mr Parker or VZX gave any consideration to the possibility of a conflict between Mr Parker's interest as a creditor or a potential creditor and his duties as *de facto* director, if indeed they gave any consideration to the capacity in which Mr Parker was acting or purporting to act on behalf of the Company.

19. By the Debenture, the Company charged its assets to Mr Parker by way of fixed and floating charge. In the usual way, it encompassed a fixed charge over the Company's real property and a floating charge over the Company's "undertaking, property, assets and rights". These were charged "as a continuing security for the payment and discharge of the Secured Liabilities" and the

"Secured Liabilities" was defined widely so as to include "all present and future monies, obligations and liabilities owed by the [Company] to [Mr Parker], whether actual or contingent and whether owed jointly or severally, as principal or surety and/or in any capacity whatsoever, under or in connection with the Facility Agreement or this debenture…together with all interest (including, without limitation, default interest) accruing in respect of such monies or liabilities".

20. "Facility Agreement" was defined, in specific terms, so as to mean "the term loan facility agreement of even date between the Lender and the Borrower for the provision of loan facilities secured by this debenture". It can thus be treated as a reference to an agreement in writing dated 25th July 2019 ("the Facility Agreement") under which it was provided that Mr Parker had agreed "to provide [the Company] with a Loan under the terms of this agreement as set out in" an appended schedule. The schedule incorporated provision, in simple terms, that Mr Parker would "provide" the Company with "the sum of £7,500.00 within 7 days of entering this agreement" and "a further sum of £3,900.00 shall be provided within 14 days of entering into this agreement". However, it also provided that "any additional sum loaned by the lender shall be secured by this agreement".

21. An issue of construction arises as to whether "Secured Liabilities", as defined, is limited to the amounts advanced following the Facility Agreement or encompasses any amounts advanced by Mr Parker prior to the same. More likely than not, in my judgment it encompasses the amounts advanced by him prior to the Facility Agreement on the basis that, in addition to the sums of £7,500 and £3,900 to be advanced pursuant to the Facility Agreement, the security in respect of "any additional sum loaned by the lender…" is apt to include previous advances. Although, on construction, the formula could conceivably be limited to *future* loans only, it does not contain express words of limitation and, in the Debenture, the "Secured Liabilities" are defined so as to include "all *present* and future monies, obligations and liabilities owed by [the Company] to [Mr Parker]…"

22. On this basis, the Debenture charged the Company's assets as security for the repayment of the Company's indebtedness to Mr Parker, if any, prior to the Facility Agreement itself.

23. The Debenture and the Facility Agreement were each signed by Mr Michael Parker on behalf of the Company and Mr Parker on his own behalf. Mr Michael Parker apparently signed the Debenture after a meeting of the board of directors attended only by Mr Michael Parker himself. No point is taken in relation to the formalities of execution or the quorum requirements of the Articles.

24. Meanwhile, on 24th July 2019, documentation was filed for registration at Companies House including a document purporting to record the termination, on 23rd July of Mr Stone's office as a director and a confirmation statement dated 20th July 2019 recording that the aggregate nominal value of the share capital had been increased from £100 to £1000, following which Messrs Michael Parker and the late Mr Anthony Stone held 50 shares each and Mr Parker himself held 900 shares.

25. In his first witness statement, Mr Koon states that, most likely, the confirmation statement was made after Mr Stone's death "presumably at the direction of Michael Parker on the instructions of Mr Parker as shadow/de facto director". Mr Parker does not specifically take issue with these propositions. In Paragraphs 82-84 of his first witness statement, he observes that "the Company's accountants made the appropriate filing at Companies House", "the later change to the directorship after the death of Mr Stone was of purely administrative nature" and "the allotment of shares to me after Mr Stone's death was a further means to introduce funds into the Company and is a reflection of the much greater investment in the Company that I have made compared with Mr Stone".

26. In my judgment, it is to be inferred that the relevant documentation was filed on the instructions of Mr Parker himself as *de facto* director. It is unclear whether Mr Stone left a will or died intestate. It is also unclear whether and, if so, when a personal representative or representatives has been appointed. However, it is not suggested that Mr Parker sought or obtained the consent or approval of any representative of Mr Stone's estate, whether formally appointed or otherwise

and, in my judgment, it is thus likely that these steps were taken without obtaining such consent or approval.

27. Mr Parker's explanation for his unilateral action in connection with the allotment of shares is obviously unsatisfactory. Whilst the sum of £900 was raised, this cannot seriously be characterised as action to "introduce funds into the Company" if intended to make a substantial contribution to the Company's assets. Moreover, if Mr Parker was to remain entitled, as a creditor, to repayment of the monies he had already advanced, there is no good reason why this should separately be "reflected" in the issue of new shares. This is particularly the case if Mr Parker contemplated that he was to obtain security for the Company's indebtedness through the issue of a debenture.

28. On 26th July 2019, the Debenture was delivered to Companies House for registration and, on 29th July 2019, the certificate of registration was issued. This was immediately brought to the attention of Mr Koon who instructed his solicitors, Wedlake Bell LLP, to take action on his behalf. By letter dated 31st July 2019 to the Company and copied to Mr Parker, they deprecated "the attempt to divest our client of his interest through the grant of a purported fixed and floating charge" and demanded immediate repayment of the amounts that Mr Koon had advanced. They also threatened to wind up the Company in the event of non-payment, warning that Mr Koon would seek to ensure the liquidator investigated the conduct of the directors and bring such claims as appropriate, including claims for fraudulent trading under *Section 213* of the *Insolvency Act 1986* and a transaction to defraud creditors under *Section 423*. They challenged the enforceability of the Debenture and warned that, if it was validly entered into, the liquidator would be expected to take action to set it aside.

29. It can be seen from the Company's bank statements with Barclays Bank that, on 2nd August 2019, it made payments of £3,900 and £7,500 in respect of VZX's professional fees, amounting to some £11,400. On the same day, to ensure that there were sufficient funds to meet such payments, Mr Parker transferred the sums of £1,400 and £9,975 to the Company, amounting to some £11,375 and the same was credited to the Company's Bank account. It appears to be Mr

Parker's case that he was entitled to treat these amounts as a company debt, secured by the Debenture over the Company's assets.

30. On 5th August 2019, Mr Koon presented a winding up petition in respect of the Company at the High Court in London. Service was effected on 6th August 2019.

31. Mr Parker instructed JMW Solicitors LLP ("JMW") to act on his behalf. On 6th August 2019, they contacted the First Respondent ("Mr Bowes") to advise them Mr Parker was seeking to appoint an administrator or administrators under the Debenture and asked him to make contact with VZX. On 8th August 2019, Mr Bowes spoke to Mr Parker and requested documentation. He made inquiries about the value of the Property and advised Mr Parker that consent to act would be subject to confirmation that the Debenture was valid and enforceable. Having been provided with "comfort" that this was the case, the relevant paperwork for the appointment was prepared by JMW.

32. On 15th August 2019, Mr Parker formally appointed Mr Bowes and the Third Respondent ("Mr Rosler") as joint administrators under the Debenture. Notice of Appointment was filed under *Rule 3.17* of the *Insolvency (England and Wales) Rules 2016* supported by Mr Parker's statutory declaration confirming *inter alia* that he was the holder of a qualifying floating charge that was now enforceable. Following their appointment, Mr Koon's winding up petition was suspended under the provisions of *Paragraph 40(1)(b)* of *Schedule B1* to the *1986 Act.*

33. On 3rd September 2019, Mr Koon commenced the current proceedings for relief under *Paragraph 81* of *Schedule B1* to the *Insolvency Act 1986.*

34. In open correspondence, Wedlake Bell LLP offered, on behalf of Mr Koon, to pay the sum of £12,000 to Mr Parker in consideration of "the loans recently put into the Company by" him. No doubt, this was intended to comprehend the loans advanced after 25th July 2019. The offer was made on the basis that Mr Parker would permit Mr Koon to replace the administrators. This offer was promptly rejected by JMW Solicitors LLP, on behalf of Mr Parker.

35. On 20th September 2019, the administrators sent to the creditors, their proposals for achieving the purpose of administration. Following a description of the

background and events leading to the administration, the statutory purpose of the administration was confirmed and their management proposals explained. The Estimated Outcome Statement was incorporated in an appendix to the Proposals.

36. It can be seen that, in preparing their Proposals and the Estimated Outcome Statement, the Joint Administrators relied heavily on information provided by Mr Parker. In addition to Mr Koon, three creditors were identified namely Mr Parker himself, Mrs Ruth Parker and Mr Michael Parker, on the basis that they were respectively owed £89,744, £3,000 and £10,500. As a creditor in the sum of £309,956, Mr Koon was the majority creditor. However, it was recorded that Mr Parker was secured in the sum of "£11,828 + charge, £12,500". There was no detailed breakdown of these amounts. However, it can reasonably be inferred that the sum of £12,500 was substantially based on the amounts Mr Parker advanced to the Company after 25th July 2019, of which £11,375 was attributable to the amounts transferred to the Company's bank account to meet VZX's professional fees. Indeed, it has not been suggested otherwise.

37. In Paragraph 4.6 of the Proposals, it was recorded that "…based on the information currently available, the objective which the Joint Administrators are pursuing in this instance is achieving a better result for the creditors as a whole than would be likely to be achieved if the company were wound up (without first being in administration)."

38. At Paragraphs 5.7-5.8, the Administrators observed that, on the basis that the lapsed planning permission can be reinstated, the market value of the Property is £245,000 subject to a 365 day marketing period and £200,000 subject to a 90 day marketing period. However, one option was "to explore the possibility of trading the company during administration, securing planning permission and engaging with a developer for the construction of one or more properties on the site". In Paragraph 5.14, the Administrators confirmed that they had "…asked Mr…Parker whether he would be willing to make an offer to the Joint Administrators to acquire the [Property] or be involved in the development of the site. Mr…Parker has expressed an interest however it would be subject to obtaining funding". They had also "…asked whether or not Mr Koon would be

willing to make an offer for the Company's land. To date, no offer has been forthcoming".

39. With the Property valued in the Estimated Outcome Statement at £245,000, the sum of £232,500 was available after deducting the amount due to Mr Parker as "fixed charge holder". In addition to this sum, there were modest unencumbered assets (cash and tax refunds) amounting to £3,912 but after deducting administration expenses of £124,530 (including £79,011 in respect of administrators' fees and £39,659 in respect of solicitors' fees) and preferential creditor claims, no more than £109,976 would be available for the unsecured creditors leaving a deficit of £304,445.

40. By letter dated 24th September 2019, Wedlake Bell LLP rejected the administrators' proposals, on behalf of Mr Koon, expressing particular concerns about the level of fees and the possibility, canvassed in the proposals, that the land might be developed through a joint venture. Since Mr Koon is himself entitled to a majority, in value, of the creditors' voting rights by virtue of *Rule 15.31 of the Insolvency (England and Wales) Rules 2016*, and remains implacably opposed to proposals, the administrators realistically have little prospect of obtaining the approval of the requisite majority of creditors under *Rule 5.34*.

41. Pending the outcome of these proceedings, the administrators have taken no further steps to obtain the approval of the creditors, whether by submitting revised proposals or otherwise. Having failed to obtain creditors' approval, it is likely that the administrators would ultimately need to return to the Court for relief under *Paragraph 55(1)* of *Schedule B* to the *1986 Act* in the event Mr Koon's current application is unsuccessful. Upon the hearing of such an application, the Court would have jurisdiction to make an order providing for the appointment of the administrators to cease to have effect or to make an order on Mr Koon's winding up petition. Much of the relief available under *Paragraph 55(2)* is closely analogous to the relief available under *Paragraph 81(1)* and *(3) of Schedule B1*.

(3) *Statutory framework*

42. The statutory framework is now contained in *Schedule B1* to the *1986 Act.*

43. By *Paragraph 3(1)*, an administrator is required to 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 achieved 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."

44. These objects rank in priority in descending order. The administrator must thus perform his functions with the objective specified in sub-paragraph (a) unless it is not reasonably practicable to achieve that objective and the objective in sub-paragraph (b) would achieve a better result for the company's creditors as a whole. Similarly, the administrator may perform his functions with the objective specified in sub-paragraph (1)(c) only if he thinks that it is not reasonably practicable to achieve either of the objective specified in sub-paragraph (1)(a) and (b), and does not unnecessarily harm the interests of the creditors of the company as a whole.

45. Under a significant change to the statutory regime, the holder of a qualifying floating charge is entitled to appoint an administrator under the provisions of *Paragraph 14(1).* The instrument containing the charge must satisfy the formalities in *Paragraph 14(2).* In addition to satisfying the statutory formalities, the charge must itself be enforceable. A floating charge is unenforceable if and to the extent that it is "invalid" under *Section 245(2)* on the basis that it was created within one year, if not two years, of the onset of insolvency save to the extent that consideration is furnished after the charge or so as subsequently to reduce or discharge the company's existing debts.

46. The notice of appointment must identify the administrator and be accompanied by a statement from the administrator confirming that he consents to the appointment and that the purpose of administration is likely to be achieved (*Paragraph 29(3)).*

47. The administrator has a range of statutory powers and functions, including the general power of management in *Paragraph 59(1)* and all the statutory powers

in *Schedule 1* of the *Act,* such as the power to bring or defend legal proceedings and do such things as might be necessary for the realisation of the company's property. He is also entitled to apply to the Court for relief in respect of transactions at an undervalue, preferences and transactions defrauding creditors under Sections *238, 239* and *423* of the *Insolvency Act.*

48. However, the administrator is under a duty to perform his functions in the interests of the creditors as a whole, *Schedule B1, Para 3(2).* By virtue of *Paragraphs 67 and 68(2),* he is also under a general duty to take custody and control of all property to which the company is entitled and comply with the Court's directions. Consistently with his statutory powers, he also has a duty to make a statement setting out his proposals for the purpose of administration (*Schedule B1 Para 49(1))* and to report the creditors' decision to the Court (*Schedule B1, Para 53(1)).*

49. Conversely, administrators do not owe a general common law duty to the unsecured creditors in the absence of a special relationship, *Charalambous v B& C Associates [2009] EWHC 2601 (Ch).*

(4) The statutory jurisdiction in Schedule B1, Para 81

50. *Paragraph 81* is in the following terms.

"81(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.

81(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.

81(3) On an application under this paragraph the court may-

(a) adjourn the hearing conditionally or unconditionally;

(b) dismiss the application;

(c) make an interim order;

(d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."

51. To engage the statutory jurisdiction, it is thus necessary to issue an application under *Paragraph 81(1)* alleging "an improper motive" on the part of the applicant or the person who appointed the administrator. Upon the substantive hearing of the application, a statutory discretion is conferred on the court to provide for the appointment "to cease to have effect" and grant such other relief, if any, as it thinks appropriate under *Paragraph 81(3)(a)-(d).* However, it is not expressly provided that the relief is conditional upon or, indeed, in any way related to a determination of the "improper motive" allegation. The "improper motive" allegation is essentially a gateway.

52. Where there is no administration order, the "improper motive" must be attributed to the person who made the appointment and, logically, it must pertain to his "motive" for making the appointment. In this respect, impropriety in his motive might comprehend fraud, dishonesty, bad faith or an intention to achieve a collateral purpose to the disadvantage of other creditors. It might also involve knowingly taking advantage of conduct that was actuated by such a motive.

53. Consistently with these propositions, in *Jackson v Thackrar [2007] EWHC 2173 (TCC),* HHJ Thornton QC concluded that the directors of a company had exercised their powers of appointment with an improper motive where they were exercised at the direction of a third party otherwise than in the interests of the company. Conversely, in *Curistan v Keenan [2011] NICh 23*, McCloskey J considered that a bank's motive in applying for an administration order to frustrate and obstruct litigation was not improper where perceived to be in harmony with the statutory purpose of administration in the analogous rules in Northern Ireland. In *Thomas v Frogmore Real Estate GP1 Ltd [2017] EWHC 25*, Philip Marshall QC reached a similar conclusion in a case in which Nationwide Building Society was alleged to have appointed administrators in order to stifle or impede litigation. However, in these cases, there was no suggestion that the appointment might have a material bearing on the administration itself.

54. No statutory limits are placed on the circumstances in which the court might exercise its discretion and nowhere in *Paragraph 81* or, indeed elsewhere in the *Act*, is it expressly provided that the allegation of "improper motive" must be substantiated in court. However, it is implicit that the allegation is advanced honestly and on reasonable grounds. It is thus unlikely that the courts will be persuaded to exercise their statutory discretion to grant relief under *Paragraph 81(1*), in cases where this is not the case.

55. It is axiomatic that, in the absence of good reason, the court will not exercise its discretion to make such an order. In view of the fact that the Act does not specify the circumstances which would constitute good reason for relief, it is not for a court to take it upon itself to provide a general definition of such circumstances. However, where the appointment amounts to a serious abuse of the administration procedure or there is something in the circumstances of the appointment which is likely to undermine the administration or interfere with the administrator in the proper performance of his duties, these would be capable of amounting to good reason for an order.

(5) *Disposal*

56. Under my statutory jurisdiction in *Paragraph 81(1),* I shall make an order providing for the Administrators' appointment to cease to have effect.

57. Firstly, the Application contains, by reference, allegations that Mr Parker appointed the Administrators with an improper motive. In Paragraph 3 of the Application Notice itself, it is asserted that "the grounds upon which the Applicant claims to be entitled to the orders sought are contained in his witness statement made on 28th August 2019 filed herein".

58. In Paragraph 4.2 of his witness statement dated 28th August 2019, Mr Koon states that "…the motive behind the security and appointment of administrators" was to "prejudice my interests and the interests of the shareholders in relation to the Company and its assets". Later, in Paragraph 51, he referred to the concerns of Wedlake Bell LLP in their letter dated 19th August 2019 and, having referred to the *Sections 245* and 238 of the *1986 Act*, he stated that the appointment was "based on the *improper motive* of Mr Parker…" (My italics). In their letter dated 19th August 2019, they stated that "…the purported grant of

security was simply a tactic in order to place the Company into administration in order to defeat our client's interest and acquire the land". Finally, in Paragraph 57.3 of the witness statement, Mr Koon stated that "there is a clear and irreconcilable conflict of interest in the [Administrators] remaining in office due to the *improper motive* behind the appointment and the nature and validity of the security upon which the appointment is based" (My italics).

59. Whilst Mr Koon's witness statement is open to criticism on the basis that it does not provide comprehensive particulars of the "improper motive", it plainly contains more than one allegation that the appointment of Messrs Bowes and Rosler was attributable to an *improper motive* on the part of Mr Parker. It is also implicit that, as alleged, Mr Parker's improper motive was essentially to advance his own interests as a creditor at Mr Koon's expense, whether by enabling him to acquire the Property or by some other means. These allegations are to be viewed on the context of the correspondence that was exchanged between Wedlake Bell LLP and Mr Parker in the period leading up to the appointment in which they made a series of complaints about Mr Parker's conduct. These included complaints that he had failed to provide them with accurate information in relation to the site and the Company's affairs, failed to develop the Property and procured the grant of a fixed and floating charge over the same without providing any evidence that he had advanced any funds to the Company.

60. I am satisfied that, when making the application, Mr Koon honestly believed that, in appointing the administrators, Mr Parker was actuated by an improper motive. Moreover, there were and are reasonable grounds for that belief. In my judgment, the most likely explanation for Mr Parker's conduct is that he entered into the Debenture as a device to enable him to appoint his own nominees as administrators and thus improve his prospects of influencing the insolvency process. This would include the management and disposal of the Property and the handling of any complaints about the conduct of the directors. Ultimately, Messrs Bowes and Rosler were appointed as administrators as part of the same strategy.

61. I am thus satisfied that, under *Paragraph 81(1),* I have a discretion to make an order providing for the administrators' appointment to cease to have effect. I shall make such an order for the following reasons.

62. My first reason is, indeed, based on Mr Parker's motives in appointing the Administrators. Mr Parker caused the Company to enter into the Debenture and appointed the Administrators in the knowledge that (1) the Company was insolvent without the support of Mr Koon and (2) Mr Koon was entitled to a majority, in value of the creditors' voting rights. Mr Parker can be taken to have this knowledge following the advice given to him by VZX. He can also be taken to have acted in order to obtain a collateral advantage over Mr Koon and put himself in a better positon than otherwise so as to influence the insolvency procedure and the course of the administration. It is conceivable that, in doing so, Mr Parker believed he could procure a more advantageous outcome for the creditors as a whole. However, ultimately, this is a matter for commercial judgment. It is not self-evident that administration will achieve a better result for the creditors than liquidation if the Property is simply to be disposed of at a proper price taking into consideration all professional advice in connection with issues of marketing and the sale price. However, Mr Parker's motive was to obtain a collateral advantage in connection with this process to which he would not otherwise have been entitled. In the sense originally envisaged, this advantage was achieved.

63. Secondly, Mr Parker caused the Company to enter into the Debenture by acting as a *de facto* director and committing breaches of his fiduciary duties to the Company. Following Mr Parker's resignation in on 1st April 2017, there was no resolution on the part of the directors or the members to re-appoint him as a director and, at no stage, was Companies House notified of any such appointment. However, Ms Bunbury accepted, on his behalf, that in causing the Company to enter into the Debenture, he must be taken to have assumed the duties of a director if, indeed, he was not already acting as a *de facto* director. In breach of his fiduciary duties, Mr Parker then caused the Company to assume liability for the entirety of VZX's fees notwithstanding that a significant part of their services must be taken to have been provided to Mr Parker in his capacity as a creditor. The indebtedness secured by the Debenture is essentially made

up of VZX's professional fees for their professional advice and services in connection with the debenture itself.

64. Thirdly, the Debenture is susceptible of challenge at the suit of the office holder for the time being and, in view of the fact, that they have themselves been appointed under the Debenture, the Administrators are thus potentially exposed to a potential conflict of interest and duty. *Sections 238* and *239* of the *Insolvency Act 1986* furnish them with grounds to challenge the Debenture and the underlying indebtedness in respect of VZX's fees on the grounds that, by assuming responsibility for their fees or preferring Mr Parker to the other creditors, the Company entered into a transaction at an under-value or by statutory preference. If the Administrators were to issue proceedings, the Court would have jurisdiction to make an order restoring the position to what it would have been if the Company had not entered into the relevant transactions or entered into the Debenture.

65. Similarly, *Section 245(2)* of the *1986 Act* provides that a *floating charge* is *invalid* except to the extent of the aggregate of the value of the consideration after the creation of the charge, the value of so much of that consideration as consists of the discharge or reduction at the same time or after the creation of the charge and the amount of contractual interest payable on such amounts. In *re Peak Hotels and Resorts Ltd; Crumpler v Candey [2019] EWCA Civ 345*, the Court of Appeal has recently confirmed that the value of services is to be assessed by considering that amounts that could reasonably have been charged for such services in the ordinary course of business. This raises obvious questions in the present case where the secured indebtedness can be taken to have incorporated, in part, an amount in respect of the advice given to Mr Parker in his personal capacity.

66. Conversely, there is no compelling reason why I should not make an order providing for the appointment of the administrators to cease. There seems little prospect of Mr Koon approving the Administrators' proposals and, whilst it would be open to the administration to return to the Court for relief under *Paragraph 55(1)* of *Schedule B1*, the administration is at an impasse. However, it is not a complex administration. It encompasses a single property and the main issue is as to how it should be dealt with and disposed of. Mindful of the

present dispute, the Administrators have sought to impose limitations on the administration pending resolution. In Paragraph 12.3 of his witness statement dated 25th November 2019, Mr Bowes has confirmed that "to date, time costs incurred by Mr Rosler and I acting as Administrators stand at approximately £23,000 for non-Mr Koon related matters", by which I take him to mean matters un-related to the dispute with Mr Koon.

67. I shall hear further from counsel in relation to the time and date on which the Administrators' appointment shall cease to have effect but I am currently minded to direct that this should be of immediate effect.

68. I am invited to make an order winding up the Company under *Section 81(3)(d)* of the *Insolvency Act 1986*. Consistently with the guidance of Neuberger J in *Lancefield v Lancefield [2002] BPIR 1108, HHJ Behrens in Re BTR (UK) Limited [2012] EWHC 2398* and *Norris J in Re Graico Property Company Limited (in administration) [2016] EWHC 2827(Ch),* I am satisfied that I have jurisdiction, by analogy, to make such an order on an application under *Paragraph 81(1) of Schedule B1*. However, once the Administrators' appointment ceases to have effect, the suspension of Mr Koon's winding up petition will also cease under *Paragraph 40(1)* of *Schedule B1* and, subject to any order that I make today, it would thus be open to Mr Koon to pursue his petition in the usual way. In my judgment, Mr Koon has a compelling case for an order winding up the Company but I shall hear further from counsel in relation to the most appropriate way of dealing with this aspect of the case.

69. Having determined to make an order providing for the Administrators' appointment to cease, it is un-necessary and inappropriate for me to grant relief on Mr Koon's alternative application for an order replacing the Administrators.